#102

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-29

	BETWEEN	DONOVAN DRAINAGE & EARTHMOVING LTD Appellant
	AND	HALLS EARTHWORKS LTD (IN LIQUIDATION) Respondent

Hearing: On the Papers

Counsel: T J Savage for Appellant
P J Dale for Respondent

Judgment: 3 May 2010

JUDGMENT OF COOPER J ON
APPELLANT'S APPLICATION FOR DIRECTIONS

This judgment was delivered by Justice Cooper on
3 May 2010 at 5.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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Introduction

[1] I conducted a case management conference in respect of this appeal on 30 March 2010. In my minute of that day I noted that the parties were in dispute about interlocutory orders that had been sought in an application dated 16 March 2010,[1] that there was no time available to allocate an oral hearing for the application before 13 May 2010, the date on which the appeal is to be heard and that both parties were in agreement that the Court should deal with the outstanding issues on the basis of written submissions. To that end I made time-table directions for the exchange of submissions.

[2] A number of issues were raised by the appellant's application, and affidavits have been filed and served by both parties. In the event, the main outstanding issue is whether the appellant should be entitled to adduce further evidence at the hearing of the appeal from Mr Gregory McLeod, who resides in Australia. A related issue was whether a subpoena should be issued to compel his attendance at the hearing. The appellant seeks further that there be substituted service of the subpoena at a post office box in Port Adelaide, South Australia, and on Mr McLeod's wife, Leonie McLeod, at her place of work.

[3] The parties have filed submissions, although not strictly in accordance with the sequence directed. There are submissions dated 31 March and 21 April from counsel for the appellant, and dated 27 April from counsel for the respondent. Mr Dale did not reply to the initial submissions of the appellant because of a prospect that all issues might be able to be agreed. Before dealing with the issues raised, it is appropriate to give a brief outline of the dispute that has given rise to the appeal.

The dispute

[4] The proceeding before the Court is an appeal from a decision of District Court Judge Sharp delivered on 1 December 2009. Prior to the proceeding in the

District Court the respondent, before being placed in liquidation, had obtained an adjudication in its favour under the Construction Contracts Act 2002, the adjudicator finding that the "parties entered into a contract for a fixed price of $550,070.50 plus GST … in December 2005". On 18 July 2007 Associate Judge Faire granted summary judgment to the respondent against the appellant in the sum of $122,680.26 plus interest at 7.5 per cent per annum from 28 February 2007. Subsequently, the appellant commenced an application for review concerning the earlier adjudication, but the application was abandoned.

[5] The judgment under appeal does not specifically address the plaintiff's statement of claim in the District Court. However, on what the Judge said was the respondent's "only remaining cause of action", she gave judgment for the respondent, and also gave judgment for the respondent on a counter claim in the sum of $122,679.79, together with interest in the sum of $10,029.70.

[6] The appellant is a contractor based in Whangarei. It agreed to carry out earthworks, drainage and other works related to the subdivision of land at Waikaraka, near Whangarei. The respondent was engaged as a sub-contractor. The appellant asserts that the contract with the respondent was a "measure and value contract", pursuant to which it was obliged to pay for the measured quantity of work carried out by the respondent at rates set out in the schedule of prices. However, the Judge found that the respondent had offered a lump sum price, which the appellant accepted.

[7] Mr Gregory McLeod, whom the appellant wishes to give evidence at the hearing of the appeal, had been involved on the respondent's behalf in formulating its offer. The appellant asserts that he incorrectly revised certain items of the draft contract schedule used for the purposes of negotiating the price. The appellant will argue on appeal that a figure of $550,070.50 (excluding GST) that appeared on the front page of the revised contract schedule was an incorrect addition of line items in the contract, overstating the amount by $108,688. However, that should not have mattered since the contract was properly to be treated as a "measure and value" one,

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[1] The minute wrongly stated the application had been made by the respondent; it was the appellant's application.

with the final contract price the result of applying the rates stipulated in the schedules.

[8] Judge Sharp did not accept the appellant's contentions. She observed, at [27]:

> [27] On the balance of probabilities I am satisfied that Halls quoted for a lump sum contract … I find that Donovans knew the basis upon which Halls had quoted (i.e. lump sum) and when ultimately the revised schedule with the revised contract sum on the top was proffered, Donovans was happy with the price because there was a profit in it for them. Donovans orally communicated its acceptance of Halls quoted lump sum contract price before the end of 2005 and all would have been well had not Donovans learned in July 2006 that the amounts columns did not add up to the price quoted at the top of the revised schedule.
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> [28] It is their realisation, I find, of a larger than expected profit margin to Halls that caused Donovans to take issue with Halls.

[9] Earlier in the judgment, at [26], Judge Sharp wrote:

> … I found it of no assistance that the plaintiff's witnesses attempted to take the Court on a lengthy and complicated arithmetical analysis of Halls' schedules in order to prove its premise that the Preliminary and General and profit figure was not that but merely a mistake of calculation. They could not prove such a thing since they did not create the calculation, were not present at the time that the relevant schedules and workings were composed, nor was their author (Greg McLeod) present to be cross-exclaimed [sic]. Thus the plaintiff's premise was nothing more than supposition which could not be proved on the balance of probabilities.

The application for directions

[10] The appellant now wishes to call Mr McLeod at the hearing of the appeal, and seeks the Court's permission under r 20.16 to do so. It explains that he was not called in the District Court because his whereabouts were unknown, while asserting that counsel for the respondents knew where he was and in fact had instructed him not to co-operate with the appellant.

[11] In the circumstances, the appellant is not able to give a definite account of the evidence that Mr McLeod could give. However, in an affidavit sworn in support of the present application, Mr Peter Donovan stated, at paragraph 31:

31. I expect that Mr McLeod would be able to say:

a. That he completed the addition of the draft contract schedule; and

b. That the hand written figures on the draft contract schedule evidence his attempts to add up the figures.

c. That the figures of $557,811.58 and $550,070.50 written at the head of the draft and revised contract schedules respectively, are intended to be the sum of the line items in each schedule.

d. That there was no item for "preliminary and general and profit margin" in the draft contract schedule.

e. That the difference between the arithmetical total of the sum of the line items in the draft contract schedule and the amount of $557,811.58 written at the head of the document represents Mr McLeod's mistake of $81,087.50.

f. Consequently the amount of $557.811.58 written at the top of the draft contract schedule did not represent a lump sum price but the sum of the line items in a measure and value contract.

g. That the letter authored by myself and dated 21 December 2005 asked him to adjust the rates attached to the line items in the draft contract schedule.

h. That he did revise the rates in the schedule in accordance with the letter and produced the revised contract schedule in January 2006.

i. That the figure of $550,070.50 written at the head of the revised contract schedule is intended to be the sum of the line items in that schedule.

j. Consequently the amount of $550,070.50 written at the top of the revised contract schedule did not represent a lump sum price but the sum of the line items in a measure and value contract.

k. That there was no line item for "preliminary and general and profit margin" in the revised contract schedule.

l. That the difference between the arithmetical total of the sum of the line items in the revised contract schedule and the amount of $550,070.50 written at the head of the document is a mistake of $108,688.87.

m. Consequently the amount of $557,811.58 written at the top of the draft contract schedule did not represent a lump sum price but the sum of the line items.

This fits neatly the appellant's theory of this case, rejected in the District Court.

[12] Mr Donovan also stated that prior to the hearing efforts had been made to find Mr McLeod. Contact had been made with his brother and a telephone number

had been obtained. However, attempts to telephone him were unsuccessful and his address could not be found. Mr Donovan said that it was common ground at the hearing that he could not be found, and that the respondent's counsel, Mr Grove, had advised the Court that "Mr McLeod could not be found and was unavailable for the hearing", that being then the joint position of the parties.

[13] The appellant also relies on an affidavit sworn on 15 March 2010 by a private investigator, Mr Payne, who referred to steps he has taken to try to locate Mr McLeod since being instructed on 11 December 2009. In that affidavit he referred to discussions he had with Mr Peter McLeod, who is Gregory McLeod's father. He said that Peter McLeod, "elected to be unhelpful, and to distance his son from ne". Despite that, Peter McLeod gave him an Australian telephone number at which to call his son. However, he was unable to make contact. Mr Payne also purported to give evidence, hearsay in nature (at least three people were apparently involved in the chain leading to Mr Payne) that Gregory McLeod had been instructed by the respondent's solicitors not to communicate with the appellant's solicitors or their agents. Mr Payne did not purport to say when such an instruction might have been given.

[14] Mr Daniel Grove was counsel for the respondent in the District Court. In view of the present and other issues raised in the appellant's interlocutory application concerning actions by Mr Grove, he swore an affidavit on 19 March 2010. In his affidavit he noted that its contents concerned privileged matters, and that the liquidator had authorised him to waive privilege only in respect of the information and documents referred to in the affidavit.

[15] It was Mr Grove's evidence that he had, before the hearing in the District Court, attempted to ascertain from Mr McLeod whether or not he could give relevant evidence and that he had spoken to him on two occasions. The first was on 6 August 2007. According to his file note, Mr McLeod was then in "the outback of South Australia". He had his telephone number. The file note continued:

> I explained to him who I was and my role in the proceedings against Donovan. He said Roger Bowden[2] had left a telephone message for him. I said to him he did not need to telephone Roger back.
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> I discussed briefly the issues in the proceedings. Greg said immediately that this was what he called a lump sum contract, and that the handwritten figures on the schedule included a mark up. He said he could not say how he calculated the mark up as he did not have the papers.

[16] Mr Grove then noted two addresses at which he could send documents to Mr McLeod.

[17] Mr Grove denied that he had advised Mr McLeod "not to accept contact from Donovans or their agents" as asserted by the appellant.

[18] Also on 6 August Mr Grove wrote to Mr McLeod at the two addresses that he had been given. Having referred to the telephone discussion and given a brief reference to the dispute that had arisen, Mr Grove noted that the contract had been agreed on the basis of two schedules that Mr McLeod had prepared, in November 2005 and at the beginning of 2006. He attached the schedules, summarised the respondent's case and sought Mr McLeod's comments in relation to the formation of the contract. In particular, he sought his advice as to whether it had been a lump sum contract and if so, who he had discussed that issue with. He also sought an explanation, if one could be provided, about Mr McLeod's handwritten calculations. He asked for an urgent response.

[19] Mr Grove deposed that he had not received a response to his correspondence and assumed that Mr McLeod was not prepared to assist. Nevertheless, in August 2008 he had again been able to make contact with Mr McLeod and further discussed the case with him. On that occasion, Mr McLeod once more confirmed that his understanding throughout was that the contract was for a lump sum. As a result, Mr Grove prepared a draft witness statement for Mr McLeod and sent it to him on 8 August. He did not receive a response. Once again, he assumed that Mr McLeod was not prepared to co-operate and give evidence. However, it was plain from the discussions that any evidence that Mr McLeod could give would be consistent with the respondent's case.

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[2] Mr Bowden was then acting for the appellant.

[20] With respect to Mr Donovan's assertion that Mr Grove told the District Court that Mr McLeod could not be found, Mr Grove referred to a transcript of the proceedings in the District Court. What he said was:

> Mr McLeod is not available, despite extensive efforts by myself and I understand the plaintiffs as well.

[21] The latter observation was made by Mr Grove on the basis of what Mr Bowden had said to the Court during his opening for the appellant. At that stage, having referred to Mr McLeod, Mr Bowden said:

> He is now in the furthest part of Australia and has shown no inclination when he has been able to be spoken to on a cell phone at the top of a crane, to come anywhere near New Zealand, or participate in the matter whatever. He won't be a witness in this matter.

[22] Mr Grove in his affidavit assumed that it was Mr Bowden who had spoken to Mr McLeod. However, as Mr Donovan explained in a further affidavit sworn on 25 March 2010, the appellant had in fact been able to make contact with Mr McLeod through the services of his brother Steven McLeod. According to Mr Donovan, Steven had contacted Gregory McLeod "on our behalf", and had given the appellant a cell phone number. The latter, however, had not been answered, and no message could be left.

[23] Mr Savage, who himself swore an affidavit, and has nevertheless filed submissions in respect of the matter[3] contends that by advising Mr McLeod that he did not need to return Mr Bowden's call, Mr Grove had adversely affected the ability of the appellant to locate and subpoena Mr McLeod. I note however that that was on 6 August 2007. It also appears plain that had he given evidence in the District Court in accordance with the brief that Mr Grove prepared following his discussions with him, Mr McLeod would have given evidence that supported the respondent's position, not that of the appellant. Further, it is to be noted that the trial did not take place until August 2009. In the meantime, Mr Grove's correspondence had gone unanswered, but the appellant had, through Steven McLeod, been able to make

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[3] I granted leave to both Mr Grove and Mr Savage to appear in the 30 March 2010 conference, despite the fact that both had sworn affidavits. I did not expressly extend that to future events although I accept that may be an implication of the references to counsel filing submissions at [4] of my minute.

contact with Mr McLeod and knew before the hearing in the District Court that he would need to be compelled if he was to appear in the Court as a witness.

[24] Subsequently, through the efforts of a private investigator, the appellant has been able to ascertain places where substituted service of a subpoena could be made. It is not clear to me why the appellant could not have taken similar steps prior to the hearing in the District Court.

[25] I do not consider that criticism can properly be levelled at Mr Grove for his advice to Mr McLeod that he did not need to ring Mr Bowden back. At the time he was intending to call Mr McLeod as a witness, and the appellant would have been able to cross-examine him. But it seems clear that Mr McLeod's evidence would have advanced the respondent's case, not the appellants, in any event.

[26] Rule 20.16(2) of the High Court Rules provides that a party to an appeal may adduce further evidence only with the leave of the Court. Rule 20.16(3) provides:

> The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.

[27] Rule 20.16(4) states that further evidence permitted under the rule must be given by affidavit, unless the Court otherwise directs.

[28] Cases decided under the rule indicate that evidence sought to be adduced at the hearing of the appeal should be cogent and likely to be material. Mr *Comalco NZ v TVNZ*,[4] referring to the present rules predecessor, Gallen J said:

> Rule 718 of the High Court Rules provides in subcl (4), that in respect of a general appeal, the Court has full discretionary powers to hear and receive further evidence. Nevertheless, there are limitations on the introduction of fresh evidence on an appeal, limitations set out by Barker J In *Power NZ ltd v Mercury Energy Ltd* [1996] 1 NZLR 106 adopting comments of Wylie J in *NZ Co-op Dairy Co Ltd v Commerce Commission* (1991) 3 PRNZ 262. It is unnecessary to set out those comments. I accept that the jurisdiction is to be exercised sparingly and the cogency, relevance and possible effect of the evidence on the result, must be taken into account. Generally speaking, the appeal should not be turned into a new case. It is also important that the

[4] *Comalco NZ v TVNZ* 10 PRNZ 573 at 579.

> evidence should not have been available at the earlier hearing by the exercise of reasonable diligence. I accept also however, that the test should not be put so high as to require the circumstances to be wholly exceptional. Every case must be considered in relation to its own circumstances.

[29] A similar approach has generally been followed in cases decided under r 20.14.[5]

[30] Here it can be said that evidence of Mr McLeod, if in the form which Mr Donovan suggested it would be, would be relevant. However, on the basis of Mr Grove's evidence Mr McLeod would not give that evidence. Rather, he would give an account supportive of the respondent's position in the District Court, and in accordance with the determinations made by the Judge. That would mean that it would simply support the result already achieved, and so it cannot be claimed that it would be influential on the outcome of the appeal.

[31] Perhaps recognising that, Mr Savage submitted that the Court should order that Mr McLeod be summonsed so that he could be cross-examined, with a view to putting the appellant's version of events to him. I consider it would be wrong in principle to proceed on that basis. A party may not call a witness knowing from the outset that the witness will be hostile. Mr Savage has referred to no authority in which a witness has been summonsed to give evidence in such circumstances.

[32] Finally, I record that I am not satisfied that Mr McLeod's evidence could not have been obtained with reasonable diligence before the hearing in the District Court. It seems likely that a subpoena would have been necessary but that is the basis on which the appellant wishes to proceed now, in any event. That said, I see no reason why the steps that the appellant has instructed Mr Payne to take after the District Court judgment was delivered could not have been taken prior to the District Court hearing. Mr Payne was able to ascertain sufficient information to proffer two addresses where it is said substituted service of a subpoena could appropriately be made. There is no reason why that could not have been done prior to the hearing, especially given the co-operation of Steven McLeod at that stage.

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[5] See e.g. *Carr v Ambler Homes Ltd* (2009) 19 PRNZ 422, *Culverden Retirement Village Ltd v McLuckie* HC Auckland CIV-2007-404-750, 18 September 2007.

[33] For all these reasons I have concluded that the application for leave to adduce further evidence at the hearing of the appeal ought not to be granted, and leave is declined. It follows that Mr McLeod should not therefore be summonsed as a witness.

Other issues

[34] Other issues raised on the appellant's application for directions appear to have been able to be agreed by discussion between counsel. In particular, Exhibits C and D to Mr Montgomerie's affidavit of 19 March 2010, 12 invoices rendered by Mr Sweeney, and an e-mail to Mr Grove to Mr Montgomerie about the "undisclosed success fee" (produced as Exhibit "A" to Mr Savage's affidavit of 12 March 2010) are to be taken in as evidence on the appeal, by consent.

[35] I note that Mr Savage continues to raise issues concerning the conduct of Mr Grove. To that end, he submits (paragraph 26 of his submissions of 21 April) that Mr Grove's affidavit of 19 March 2010, and those of Mr Donovan and Mr Payne dated 16 March should be admitted as evidence on the appeal. Mr Dale submits that if those affidavits are admitted as evidence, then the affidavits of Mr Sweeney and Mr Montgomerie, filed by the respondent, should also be admitted.

[36] I do not intend to make a ruling on these matters at this stage. I observe, however, that there are significant portions of Mr Payne's affidavit which are hearsay in any event. Apart from that issue, I simply record my view that the question of whether the affidavits sworn in respect of the application for direction should be admitted as evidence on the appeal are properly matters for determination by the Judge who is to deal with the substantive appeal.

Costs

[37] The respondent is entitled to its costs on the present application to be paid in any event. They should be fixed on the basis of Category 2 Band B.