

#40

IN THE COURT OF APPEAL OF NEW ZEALAND

CA463/07  
[2008] NZCA 135

BETWEEN

DONOVAN DRAINAGE AND  
EARTHMOVING LIMITED  
Applicant

AND

HALLS EARTHWORKS LIMITED (IN  
LIQUIDATION)  
Respondent

Hearing: 19 May 2008

Court: William Young P, Glazebrook and Baragwanath JJ

Counsel: R J Bowden for Applicant  
D W Grove for Respondent

Judgment: 23 May 2008 at 10 am

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**JUDGMENT OF THE COURT**

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- A** We extend until 31 August 2008 the time for filing the case on appeal and applying for the allocation of a fixture.
- B** We reserve costs.
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**REASONS OF THE COURT**

(Given by William Young P)

[1] Halls Earthworks Limited (in Liquidation) obtained summary judgment from Associate Judge Faire against Donovan Drainage and Earthmoving Ltd for

\$122,680.26 together with interest. The claim was based on the service of a payment schedule under s 20 of the Construction Contracts Act 2002 and the failure of Donovan Drainage to respond appropriately under s 21. Subsequently the Associate Judge ordered Donovan Drainage to pay costs of \$23,239.82 and disbursements of \$7,799.29. Donovan Drainage has appealed against the award of costs.

[2] The fundamental dispute between the parties relates to the nature of the contract between them. Donovan Drainage maintains that it retained Halls Earthworks on a measure and value basis with the critical element of the contract being the rates provided for in the schedule. On the contract as entered into, dollar values at the contractual rates were applied to the quantities as assumed. These figures were added up to produce a grand total to which GST was added. Donovan Drainage contend that the grand total was out by approximately \$81,000 because of arithmetical errors and that this problem compounded when the schedule of quantities was later revised, resulting in a total error of approximately \$109,000. It is that figure together with GST that makes up the amount for which summary judgment was obtained.

[3] Halls Earthworks, on the other hand, maintains that there is no error but rather that the \$109,000 was in effect an additional margin.

[4] This dispute (or something like it) has already been the subject of an adjudication (under Part 3 of the Construction Contracts Act) with the adjudicator holding against Donovan Drainage. It is also currently the subject of District Court proceedings in which Donovan Drainage is seeking to recover the amount in issue and other money. The parties agree that neither the adjudication nor the summary judgment provides an estoppel or other res judicata defence. These proceedings have been set down for hearing in the District Court at Auckland on 11 August this year.

[5] In the District Court proceedings, Donovan Drainage will be seeking to show that Halls Earthworks took advantage of what its (then) director knew to be arithmetical errors. If successful, it wishes to be in a position to challenge in this Court the award of costs made on the summary judgment application. It therefore

wishes to defer the hearing of the appeal (and the associated requirements to lodge a case on appeal and pay a setting down fee) until after the District Court proceedings have been determined.

[6] The case comes before us on an application under r 43 of the Court of Appeal (Civil) Rules 2005, which relevantly provides:

**43 Appeal abandoned if not pursued**

(1) An appeal is to be treated as having been abandoned if the appellant does not apply for the allocation of a hearing date and file the case on appeal within 6 months after the appeal is brought.

(2) The Court, on application, may—

(a) grant an extension of the period referred to in subclause (1);  
and

(b) grant 1 or more further extensions of any extended period.

(3) An application for the grant of an extension may be made before the expiry of the period to which the application relates or within 3 months after that expiry; but no extension may be granted on an application that is made later than 3 months after that expiry.

...

The application was made within the six month period referred to in r 43(1) but that period has now expired.

[7] It is fair to say that the appeal faces some difficulties. Donovan Drainage defended the summary judgment proceedings on grounds which were, in the end, held to be unsound. In those circumstances, it might be thought to be liable to pay costs on those proceedings irrespective of whether or not it succeeds in the District Court.

[8] On the other hand:

(a) The case involves unusual circumstances, the permutations of which were not capable of being easily worked through in the short hearing which is available for applications of this sort.

- (b) Because Halls Earthworks is not trading, there are not the usual cash flow implications which arise in cases under the Construction Contracts Act.
- (c) Given that the application was made within the prescribed period of six months we could hardly dismiss it (and thus the appeal) without giving Donovan Drainage a short time, say a week, to complete the case on appeal and pay the setting down fee.
- (d) It is not particularly likely that the appeal could be heard before the District Court proceedings.

[9] We therefore extend until 31 August 2008 the period for filing the case on appeal and applying for the allocation of a fixture. Given our reservations about the merits of the appeal, we reserve costs.

Solicitors:  
Ulrich McNab Kilpatrick for Applicant  
David Shanahan & Associates for Respondent