

#59

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV 2008-404-004398
CIV 2008-404-4977**

BETWEEN HEB CONTRACTORS LIMITED
 Plaintiff / Respondent

AND REDHILL DEVELOPMENT(NZ)
 LIMITED
 Defendant / Applicant

Hearing: 7 November 2008

Appearances: Mr Taylor (Heb Contractors Ltd) for plaintiff
 Mr Jones for Redhill Development (NZ) Limited

Judgment: 7 November 2008

ORAL JUDGMENT OF ASSOCIATE JUDGE DOOGUE

Solicitors:

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MinterEllison Rudd Watts, P O Box 3798, Auckland

[1] HEB Contractors Limited (HEB) as the plaintiff in proceedings which included a summary judgment application. It is also the respondent to an application to set aside statutory demand which Redhill Developments NZ Limited (Redhill) filed and served. HEB sued for a sum in excess of \$2,000,000. This money was allegedly owing under a payment claim made pursuant to the Construction Contracts Act. Redhill opposed the application for summary judgment and filed a notice of opposition on 22 September 2008. Essentially Redhill said that there was a substantial and genuine dispute as to whether the amounts in the statement of claim were owing. As I understand it, the essence of the defence was that that HEB had brought a claim based upon non-response or no proper response to a payment claim but the time that Redhill had to respond to those claims with a payment schedule had not elapsed as HEB asserted. Affidavits were filed each way on the question of just what the contractual arrangements provided for as to the making of payment claims and the service of payment schedules. In the end HEB elected to give up its summary judgment proceedings and indeed to discontinue the substantive proceedings. In the meantime a statutory demand had been served on Redhill which had applied to set aside. HEB withdrew its opposition to that application after a factual dispute emerged in like terms to that which arose in the substantive proceedings.

[2] Redhill now seeks costs on a 2B basis. HEB opposes that. In my view the position is quite clear and that is that HEB has to pay costs. Rule 476C applies explicitly to a discontinuance. Rules 467C has also been applied analogously to other proceedings. The law as correctly set out in my view and the commentary in McGechan at HR 476C.02 'Principles'. The second proposition set out in McGechan is that the Court will not speculate on the merits of a case it never heard and only in the exceptional case when the merits are clear will they influence the Court's costs decision upon a discontinuance.

[3] There is no basis upon which I can go into the merits of the case and I decline to do so. That being so there is no basis upon which I can depart from the 'default' position. In 476C which is that unless 'the Court otherwise orders' a plaintiff who discontinues a proceeding against a defendant must pay costs.

[4] By analogy I consider that costs on the application to set aside the statutory demand fall to be decided in the same way.

[5] Mr Taylor made vigorous attempts to have me consider the course of dealings between the parties and the merits of HEB's claim. He tells me that the claim is now going to be resolved by arbitration or a similar process but that of course simply tells me that the substantive issues in the case have still not been agreed upon or resolved in any way which reinforces the view that I take of the case.

[6] HEB is to pay costs on a 2B basis in both sets of proceedings together with disbursements as fixed by the Registrar.

J.P. Doogue
Associate Judge