

#35

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

CIV 2007-488-000144

BETWEEN HALLS EARTHWORKS LIMITED (IN
LIQUIDATION)
Plaintiff

AND DONOVAN DRAINAGE AND
EARTHMOVING LIMITED
Defendant

Hearing: 10 August 2007
(on the papers)

Counsel: D Grove for plaintiff
R Bowden for defendant

Judgment: 10 August 2007 at 14:30

**JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for costs]**

Solicitors: David Shanahan & Associates, PO Box 1801, Whangarei for plaintiff
Urlich McNab Kilpatrick, PO Box 633, Whangarei for defendant

[1] The plaintiff seeks an award of costs which are its actual and reasonable costs or, in the alternative, indemnity costs or increased costs, following my judgment granting the plaintiff summary judgment on 18 July 2007.

[2] The reasons for judgment do not require further expansion. For the purpose of this costs judgment it is appropriate that I record, however, that judgment was entered in a construction contracts case as a result of a failure to make payment when no payment schedule was provided.

[3] The jurisdiction for an award of actual and reasonable costs is created by s 23(2)(a)(ii) of the Construction Contracts Act 2002 where a party has not paid the claimed amount when no payment schedule is provided.

[4] The costs which are sought in this case are:

	\$
Solicitors' costs	1,133.57
Counsel's costs	22,106.25
Disbursements, being	
the expert's fee	6,659.29
the filing fee	1,100.00
the sealing fee	40.00

[5] Mr Bowden, in his memorandum in opposition, submits that costs should be fixed on a 2B basis and should simply be held in a solicitor's trust account, pending the outcome of judicial review proceedings, or agreement by counsel. The judicial review proceedings apparently are yet a further attempt by the defendant to show that the adjudicator's finding that the contract was a fixed price contract was wrong. It is appropriate that I record, again, that the particular determination of the adjudicator in this case was a determination pursuant s 48(1)(a) of the Construction Contracts Act 2002. It is further appropriate that I record that s 60 provides that an adjudicator's determination under s 48(1)(a) is binding on the parties to the adjudication and continues to be of full effect even though a party has applied for

judicial review of the determination, or other proceedings relating to the dispute between the parties have been commenced. I am not satisfied that there is any justification for making an order in the nature of an order for stay in this case.

[6] That leaves, then, the question of whether actual and reasonable costs in this case should be ordered. The quantum of the actual and reasonable costs are not specifically challenged by Mr Bowden in his memorandum. On my review of the invoices attached to counsel for the plaintiff's submissions it is not surprising that that quantum is not challenged, because they appear to be reasonable on that examination.

[7] In *Salem Ltd v Top End Homes Ltd* CA CA169/05 4 April 2006 the Court of Appeal had to consider the position of the recovery of actual and reasonable in a payment schedule situation. The Court noted the specific provision, namely s 23 which provides as follows:

23 Consequences of not paying claimed amount where no payment schedule provided

- (1) The consequences specified in subsection (2) apply if the payer—
 - (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
 - (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) The consequences are that the payee—
 - (a) may recover from the payer, as a debt due to the payee, in any court,—
 - (i) the unpaid portion of the claimed amount; and
 - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
 - (b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.
- (3) A notice referred to in subsection (2)(b) must state—

- (a) the ground or grounds on which the proposed suspension is based; and
 - (b) that the notice is given under this Act.
- (4) In any proceedings for the recovery of a debt under this section, the court must not enter judgment in favour of the payee unless it is satisfied that the circumstances referred to in subsection (1) exist.

[8] At [5] of the judgment the Court said:

Mr Bell submitted that the legislative intent behind s 23(2)(a)(ii) is clear, namely to provide that upon the timely recovery of payments due under a construction contract that actual and reasonable costs of recovery should follow the event. We agree.

The Court of Appeal had to consider, however, whether actual and reasonable costs were appropriate on the appeal. That issue does not arise before me.

[9] Nothing has been put before me to suggest that the legislative intent in this case should not be carried into effect. In short, in my view, this is clearly an appropriate case for the award of actual and reasonable costs.

[10] I have given specific consideration to the expert's fees. Experts expenses are disbursements in terms of r 48(h)(2)(a)(i): *Progressive Enterprises Ltd v North Shore City Council* (2005) 17 PRNZ 919. I am satisfied that the steps taken by Mr Sweeney were reasonable and, indeed, were required having regard to the defences adopted by the defendant. I see no reason, therefore, for not approving his costs as disbursements in terms of r 48(h)(2)(a)(i) and (b), (c) and (d).

[11] The filing fee and sealing fee claimed are the prescribed fees and are therefore appropriate disbursements.

Orders

[12] I order that the defendant pay costs of \$23,239.82 and disbursements of

[13] \$7,799.29.

JA Faire
Associate Judge