IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2011-441-500
[2012] NZHC 758

BETWEEN	HERBERT CONSTRUCTION COMPANY LIMITED Plaintiff
AND	P I ALEXANDER, B E ALEXANDER, M J MOLLIER AND MP WARD Defendants

(Heard at Napier)

Judgment: 29 February 2012

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment of Associate Judge Gendall is delivered on 29 February 2012 at 3.00 pm under r 11.5 of the High Court Rules.

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Introduction

[1] On 21 October 2011 I gave judgment in this matter awarding summary judgment to the plaintiff Herbert Construction Company Limited against the defendants with respect to two outstanding payment claims under a building contract.

[2] In that judgment I reserved both costs and the plaintiff's interest claim but directed that the parties were to file memoranda on these issues to be referred to me for a final decision.

[3] Counsel for the plaintiff has now filed memoranda on the question of costs and interest dated 4 November 2011 and 18 November 2011.

[4] Counsel for the defendants in turn has filed his memorandum on the costs and interest question dated 17 November 2011.

[5] I have considered those memoranda and the other material provided and now give my decision on these issues.

Interest

[6] Here the plaintiff seeks interest on the revised payment claims totalling $40,975.68 served on 28 June 2011 in accordance with clause 14.7 of the Construction Contract.

[7] That clause 14.7 states:

> **14.7 Principal Must Pay**
>
> 14.7.2 If the Principal fails to pay on time, the Principal must pay interest compounding monthly. The interest rate is the Contractor's average Trading Bank overdraft rate payable, which would be payable, by the Contractor over the period during which the amount was outstanding multiplied by 1.25. The Principal must pay the accruing interest with the scheduled amount whether the Contractor is in overdraft or not.

[8] Counsel for the plaintiff has provided bank statements to show that the plaintiff's average trading bank overdraft rate at the appropriate time was 17.8% per annum. This is not seriously contested by the defendant by the provision of any evidence in contradiction, and I have no alternative but to proceed using this interest rate as a starting point under cl 14.7.2 of the contract.

[9] The claimed amount of $40,975.68 was outstanding as at 26 July 2011 being 20 working days after the revised payment claims were served.

[10] Accordingly the plaintiff now claims in terms of clause 14.7 of the Construction Contracts Act interest totalling $2,211.57. This is interest calculated at a rate of 22.25% per annum (being 17.8% per annum x 1.25 in terms of clause 14.7.2). The daily interest rate of 22.25% per annum on $40,975.68 is $24.98. This interest amount totals $774.33 for the period from 27 July 2011 to 26 August 2011.

[11] Compounding (monthly) this interest amount of $774.33 with the amount due under the contract of $40,975.68 gives a total amount due of $41,750.01 as at 26 August 2011. Interest on this sum at 22.25% per annum provides a daily rate of $25.45 and a total interest bill of $788.96 for the period 27 August 2011 to 26 September 2011.

[12] Again compounding this $788.96 with the $41,750.01 due as at 26 August 2011 provides a new amount due as at 26 September 2011 of $42,538.97. The daily interest rate on this amount at 22.25% per annum is $25.93 and the total interest amount from 27 September 2011 to 21 October 2011 is $648.28.

[13] Compounding this $648.28 with the total amount due as at 26 September 2011 leaves a total progress payment claim sum and interest due as at 21 October 2011 of $43,187.25. This is the date of my earlier judgment.

[14] This $43,187.25 is sought by way of summary judgment here (it including total interest to that date of $2,211.57). In addition the plaintiff seeks interest from the time judgment was given being 21 October 2011 until the total debt is satisfied pursuant to clause 14.7 of the contract as noted above.

[15] In my view interest is payable in terms of the contract. That is precisely what the parties here agreed to. And although the interest amount at 22.25% per annum appears high, it is not excessive for what is effectively a contractual default in payment. And in my view the imposition of a significant rate of default interest to compensate for defaulted contractual payments is clearly consistent with the policy and purpose of the Construction Contracts Act 2002, which was to rectify real and growing problems for building contractors and subcontractors arising from delays in payment.

[16] Although the plaintiff argued in the alternative for interest under the Judicature Act 1908 if contractual interest was not to be awarded, in my view it is clear the parties agreed contractually to this default interest rate, default under the contract has occurred, and thus the agreed default interest should be applied.

[17] Accordingly a further order is now made by way of summary judgment as follows:

(a) That, in addition to the original grant of summary judgment in favour of the plaintiff in my 21 October 2011 judgment for the revised payment claims totalling $40,975.68, the defendants are to pay interest on this sum on a compounding basis for the period 27 July 2011 to 21 October 2011 totalling $2,211.57.

(b) The defendants in addition are to pay to the plaintiff interest on this amount due totalling $43,187.25 as at 21 October 2011 on a (monthly) compounding basis at the rate of 22.25 per cent per annum from 21 October 2011 until the total amount due is finally satisfied.

Costs

[18] Here the plaintiff also seeks its actual legal costs on its successful summary judgment incurred in accordance with s 23 Construction Contracts Act 2002.

[19] Section 23 Construction Contracts Act 2002 provides:

> **23 Consequences of Not Paying Claimed Amount When No Payment Schedule Provided**
>
> (1) The consequences specified in sub-section (2) apply if the payer –
>
> (a) becomes liable to pay the claimed amount to the payee under s 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by s 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.

[20] The principles for recovery of costs under the Construction Contracts Act 2002 were addressed in *Auckland Waterproofing Limited v TPS Consulting Limited* HC, Auckland, 11 December 2007, Duffy J, CIV-2007-404-5890 as follows:

> [52] If payees have to weigh up the economic benefits of using legal process to pursue claims under s23, claims such as the present might become unrecoverable. Payers might begin to withhold payment of a percentage of a claim on the basis they knew it would cost the payee more to recover the withheld amount than it would to write it off. If this occurred the effective speedy payment recovery scheme Parliament intended to provide under the Act would be weakened. Such an outcome would thwart Parliament's intent; it would be contrary to the purpose and policy of the Act.
>
> [53] If on the other hand payees could always obtain costs awards for actual costs, that were reasonable, in terms of the cost of the service, they would always be able to obtain payment of their claims. Payers would be at no disadvantage because they would have statutory notice that should they fail to pay claims that were properly due under the Act they would have to pay the actual costs of recovery as well. They could avoid this outcome simply by ensuing they paid on time. Payers who genuinely disputed liability would be unaffected because they could effect the process for disputing liability under s 21. Such outcomes are consistent with the Act's policy and purpose.
>
> [54] Payees seeking recovery under s23 are in a different position from ordinary litigants. Payees are seeking to recover indisputable debts that by Act of Parliament are ascertained both as to liability and quantum. In that sense they are similar to persons seeking to enforce a judgment debt. The

outcome of any recovery process, in terms of obtaining a judgment that the claim is to be paid, will be certain ...

[56] When the possible consequences are considered, it seems no harm would be done by reading s23 as permitting recovery of costs that were reasonable in terms of time spent in providing the service provided. However, if s23 is to be read as excluding costs awards where the very choice of service is seen to be unreasonable, once measured against the benefit of the amount recovered, there is no doubt that payees owed small amounts of money will suffer. The seriousness of Parliament's intent to rectify the problems created by delays in payment is evidenced by the extent to which it was prepared to alter the law.

[69] When I take into account the Act's policy and purpose, I am driven to conclude that Parliament intended all payees to be able to pursue recovery of s23 debts through Court process and, provided the quantum of those costs was reasonable and not excessively high, to obtain the actual costs for doing so. It follows that "reasonable" in s23 can only relate to an assessment of the quantum of the legal fees incurred in obtaining summary judgment for the purpose of seeing if they are within the range of fees that are reasonably charged for work of that type. Once the recovery costs are seen to come within the range of amounts usually charged for work of that type they are recoverable under s23.

[21] In the present case the plaintiff seeks to recover actual legal costs incurred totalling $24,046.65 set out in various invoices numbers 124, 129, 132, 139 and 106. These are attached to the memorandum from counsel for the plaintiff dated 4 November 2011 together with an account for instructing solicitor's costs of $884.50.

[22] In response Mr Webster counsel for the defendants, in his 17 November 2011 memorandum to the Court, suggests that these claims are excessive and that in any event simple scale costs (which calculated on a 2B basis he says would come only to $7,708.00) should be awarded here.

[23] In his submissions Mr Webster confirms that the defendants' position on costs here is as follows:

(a) Their primary position is that costs should be reserved.

(b) If they cannot be reserved then they should be fixed now but not be payable until the defendants' counterclaim has been resolved (bearing in mind that this counterclaim it is said exceeds the amount of the plaintiff's substantive claim and costs).

(c) If costs are fixed this should be at a fair and reasonable amount as opposed to the actual costs the plaintiff indicates it has incurred here. In this regard Mr Webster contends that the Court should take into account what he says were errors in the payment claims served on the defendants in 2010, the need for supplementary affidavits in the plaintiff's summary judgment application to correct errors made in the original affidavits in support and lastly issues concerning service of the documents on the defendants.

[24] Mr Webster for the defendants went on to suggest that nothing in s 23 Construction Contracts Act 2002 should be taken as requiring the Court to make an award of costs in its discretion if it is unreasonable to do so. Further, he noted that where costs in excess of scale were to be considered this was to occur only in a situation where they were nevertheless "reasonable".

[25] Here the defendants note that their purported counterclaim exceeds the amount for which judgment was obtained by the plaintiff. Mr Webster states that is significant, it distinguishes this case from the *Auckland Waterproofing Limited* case and supports the contention that costs here should be reserved until a substantive hearing of all issues is concluded.

[26] In the present case the defendants also dispute a number of aspects of the plaintiff's invoices which have been placed before the Court. Further, they suggest that, when compared with scale costs here, the "actual" costs claimed by the plaintiff are far in excess of what might be considered reasonable given particularly the amounts at issue.

[27] On all these aspects, Mr O'Connor for the plaintiff rejects the contentions advanced for the defendants that costs at this point should be reserved or if fixed not be payable until later, or indeed that any of the actual costs claimed here in any event were excessive under all the circumstances. He noted that the summary judgment application before the Court was not a straight forward matter as the defendants had raised various arguments in opposition as well as in their counterclaim.

[28] He draws attention to the fact that the defendants argued the payment claims in question were "defective" because the claims were not addressed to the payer, or provided to the architect, and that both the architect was not served and Mr Alexander the first-named plaintiff did "not recall being served", notwithstanding that it seems Mr Alexander was personally served with the claims and they were also faxed and emailed to him and the architect.

[29] Mr O'Connor also notes that the defendants unsuccessfully raised an alternative argument that they had issued valid payment schedules in reply to the payment claims.

[30] He emphasises too that the plaintiff filed five separate affidavits in support of the summary judgment application and in reply to matters raised by the defendants.

[31] In this case summary judgment was awarded to the plaintiff on its claim against the defendants and in my view to properly conclude this matter, costs should be awarded now to the successful plaintiff. The plaintiff has substantially if not totally succeeded in its summary judgment application here, and the authorities clearly suggest that it should not have to wait before a costs award is made – *Air New Zealand Limited v Air Niugini* Ltd, HC, Auckland, CIV-2009-404-3460, 17/2/2011 at [20] and see *McGechan on Procedure* HR 12.12.08(5). The plaintiff as I see it is entitled to recover actual and reasonable costs from the defendants in terms of s 23(2)(a)(ii) Construction Contracts Act 2002 and these are clearly claimable in the present summary judgment application just as if there was a contractual obligation between the parties to indemnify the plaintiff's costs – *Westpac Banking Corporation v Topless* (1992) 6 PRNZ 424.

[32] The only substantive issue before me is whether or not the costs claimed by the plaintiff are "actual and reasonable costs of recovery".

[33] On this, Duffy J in the *Auckland Waterproofing Limited* case at [69] noted in part:

> ... Parliament intended all payees to be able to pursue recovery of s 23 debts through Court process and, provided the quantum of those costs was reasonable and not

> excessively high, to obtain the actual costs for doing so. It follows that "reasonable" in s 23 can only relate to an assessment of the quantum of the legal fees incurred in obtaining summary judgment for the purpose of seeing if they are within the range of fees that are reasonably charged for work of that type.

[34] In the present case Mr Webster for the defendants complains first, as to specific items claimed by the plaintiff in the invoices which are before the Court, but also generally as to the total costs amount sought ($24,046.65) when the amounts claimed under the plaintiff's revised payment claims for which summary judgment was awarded was only a little over $40,000.00.

[35] This Court must be satisfied that costs claimed by a plaintiff have been properly incurred. Often it is difficult for a Court to be satisfied of that on the basis of the material put before it. Under all the circumstances prevailing in this case, and given time constraints and questions as to the amounts at issue, I do not intend to endeavour to embark here on a detailed analysis of the work which the plaintiff indicates it was necessarily engaged in as a result of the defendants' actions in opposing this summary judgment application. What I will say, however, is that given some proportionality is always required, in my view the $24,046.65 actual costs claimed here by the plaintiff could not be said to be within the range of fees that are reasonably charged for summary judgment work of this type, given that the amount at issue in the plaintiff's payment claim was only a little over $40,000.00. I do not suggest for one moment that the work for which the plaintiff was charged in the attached invoices did not take place here. I simply note that the fees claimed here in my view are not entirely "reasonable" in a technical sense in being within the range of fees which are usually and reasonably charged for summary judgment work of this type. As the Court noted in *Westpac Banking Corporation v Topless* at p 429, on a costs consideration, important aspects to be taken into account must always be the size and nature of the claim in question.

[36] In my view an amount which would be considered "reasonable" here in terms of the test outlined above at [33] would be no more than $15,000.00 together with the further $884.50 claimed for instructing solicitor's costs.

[37] I therefore award costs to the plaintiff against the defendants on the plaintiff's successful summary judgment application totalling $15,000.00 together with the

further $884.50 claimed for instructing solicitor's costs and such amount for disbursements as may be approved by the Registrar.

'Associate Judge D.I. Gendall'