#79

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-1563

IN THE MATTER OF	the District Courts Act 1947
AND	
IN THE MATTER OF	the Construction Contracts Act 2002
BETWEEN	DONALD JOHN MACRITCHIE Appellant
AND	TRUSTEES EXECUTORS LIMITED Respondent

Hearing: 24 August 2009

Appearances: J J Cleary for the appellant
H M M Northover for the respondent

Judgment: 26 August 2009

JUDGMENT OF CLIFFORD J
(ON PLAINTIFF'S APPLICATION FOR WAIVER OF REQUIREMENT TO PAY SECURITY FOR COSTS)

Introduction

[1] Mr MacRitchie is appealing against a decision of Judge Harrop in the District Court at Wellington. In that decision, Judge Harrop declined Mr MacRitchie's application for summary judgment with respect to an amount ($78,000 approximately) for which Mr MacRitchie had, under the procedures set out in the Construction Contracts Act 2002, served a payment claim on the respondent, Trustees Executors, and in respect of which Mr MacRitchie argued that Trustees Executors had not provided a payment schedule.

[2] In a joint memorandum filed in relation to yesterday morning's initial case management conference, the parties agreed on all aspects of the standard directions for appeals raised by Schedule 6 of the High Court Rules, save for the question of security for costs.

[3] Rule 20.13 would require Mr MacRitchie, on the basis of the parties' agreement that one half day would be adequate for the hearing of Mr MacRitchie's appeal, to pay $800.00 security for costs. Mr MacRitchie applies for a waiver from that obligation.

Discussion

[4] Rule 20.13(2) requires a Judge to fix security for costs at the case management conference relating to the appeal, unless the Judge considers that in the interests of justice no security is required. It is generally accepted that special or exceptional circumstances will be required for there to be a waiver of the requirement to pay security for costs, on the basis of the interests of justice. The mere fact of impecuniosity is not sufficient by itself to justify a waiver. In *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 138 Laurenson J commented that "[t]he exceptional circumstance justifying dispensation from providing security, might perhaps be described in broad terms as some factor which justifies the withdrawal of protection from an ordinary successful litigant, namely the respondent" (at [33]).

[5] Mr Cleary did not rely on Mr MacRitchie's impecuniosity as such, nor did he suggest that the requirement to pay security for costs would prevent this matter proceeding. Rather, he argued that the exceptional circumstances here were found in a combination of the scheme of the Construction Contracts Act and Mr MacRitchie's position.

[6] In the decision under appeal, the District Court Judge held that the contractual arrangements were a construction contract, so that Mr MacRitchie was entitled to serve a payment claim on the respondent. The Judge further held, however, that the respondent's response was an effective payment schedule under the requirements of the Construction Contracts Act, so that Mr MacRitchie's options were to accept the reasons given for non-payment of the disputed amount, and

abandon his claim, or to accept the response as a bona fide notice of dispute, with sufficient identification of the grounds to refer the matter to adjudication. What Mr MacRitchie was not entitled to do, but the course of action he in fact adopted, was to treat the payment schedule as invalid or defective and to apply for summary judgment.

[7] Mr Cleary put his argument in support of a waiver of security for costs on the basis that Mr MacRitchie sought relief under the Construction Contracts Act, which was designed to provide a speedy method for the resolution of disputes between contractors and, in effect, owners of properties. Given the failure of the respondent to pay him the money claimed, Mr MacRitchie had to borrow money to maintain his business. Given that the respondent had acknowledged a possible liability for some amount, its payment schedule – which at that point refused to make any payment – could not be a proper payment schedule.

[8] In those circumstances, Mr Cleary says it was wrong to place any impediment in the way of an appellant, for example by way of requiring security for costs. That impediment was, in effect, contrary to the spirit and purpose of the Construction Contracts Act. Mr Cleary said this was particularly the case given the provisions of s 17(4) of that Act and the strength of Mr MacRitchie's claim. In that regard, he referred me to the cases of *Bernard v Space 2000 Ltd* and *Chatha v Wanganui Gas Ltd* (2004) 17 PRNZ 736. Mr Cleary submitted that both these decisions were ones where the strength of an appellant's case had been a factor which had influenced the Court's decision to waive the requirement for that appellant to provide security for costs.

[9] For Trustees Executors, Ms Northover's submissions were simply that nothing in what Mr MacRitchie had said met the requirement for exceptional circumstances. She acknowledged that the strength of an appellant's case may be a factor which a Court will take account of in determining whether to waive the requirement for security for costs. That, however, was only a step along the way. Any such applicant still needed to establish special or exceptional circumstances, which Mr MacRitchie had not done.

[10] Mr Cleary accepted that the obligation to pay $800.00 security was not such as would prevent Mr MacRitchie from pursuing his claim. I do not consider, therefore, that Mr MacRitchie's financial position can be regarded as constituting exceptional circumstances.

[11] I therefore turn to Mr Cleary's argument, based on the statutory scheme provided by the Constructions Contracts Act, that those circumstances are to be found in a combination of Mr MacRitchie's financial position and the scheme of the Construction Contracts Act. I am not persuaded that those considerations constitute special or exceptional circumstances either. I accept that, in terms of the disputed amount, Mr MacRitchie regards himself as being out of pocket, and therefore having to borrow and otherwise fund the expenditure he made for which, in his view, Trustees Executors has not paid him what is due. By the same token, Mr MacRitchie's application for summary judgment depended on his assertion that Trustees Executors had not provided a payment schedule to him as required by s 22 of the Construction Contracts Act.

[12] Judge Harrop found that the payment schedule provided by Trustees Executors in response to Mr MacRitchie's payment claim was effective. The Judge found Mr MacRitchie could, at that point, have taken his dispute with Trustees Executors to adjudication and thus taken advantage of the procedures provided by the Construction Contracts Act for the prompt settlement of disputes. Rather, Mr MacRitchie chose to appeal the decision of the District Court. I do not think Mr MacRitchie can now argue that the requirement for security for costs is so at odds with the scheme of the Construction Contracts Act as to mean that, when combined with the inevitable circumstance that, where there is a dispute as to payment, the contractor is likely to regard him or herself as being out of pocket, it becomes an exceptional circumstance.

[13] Nor am I persuaded by the reliance Mr Cleary sought to put on each of *Bernard v Space 2000* and *Chatha v Wanganui Gas*, together with the provisions of s 17(4) of the Construction Contracts Act. In each of those cases it was a combination of the financial difficulties faced by the appellant, together with the apparent strength of their claim, that was considered by the Judge to be relevant when dispensing with the requirement for security for costs. I have already

commented on Mr MacRitchie's financial position. As regards s 17(4), I am not persuaded that it so obviously points to Mr MacRitchie's prospects of success as to create exceptional circumstances in this instance.

[14] Therefore, I decline Mr MacRitchie's application for waiver of security for costs.

[15] On that basis, the following directions are made:

a) The parties are to liaise with the Registrar for the allocation of a date for the hearing of this appeal, a half day being allowed.

b) This appeal is categorised as Category 2 for the purposes of r 14.3.

c) Mr MacRitchie is to pay $800.00 by way of security for costs.

d) The parties are to comply with standard Schedule 6 directions with respect to the date that the hearing is set down for.

[16] Finally, the joint memorandum provided by the parties indicated that Mr MacRitchie considered that at least two Judges should hear this appeal, because the appellant has submitted a decision of this Court ought not to be followed. In the District Court, the Judge followed the decision of Rodney Hansen J in *Westnorth Labour Hire Ltd v SB Properties Ltd* HC AK CIV-2006-404-1858 19 December 2006 in finding that Trustees Executors' response to Mr MacRitchie's payment claim was a valid payment schedule under the Construction Contracts Act. In my view, a Court of two Judges is not required. Judges of the High Court are not, generally, bound by other decisions of the High Court. Where a decision is of long standing, and is generally accepted authority, a Court of two Judges may be appropriate to consider a challenge to the decision. The Construction Contracts Act is relatively new legislation for New Zealand. This matter can be properly dealt with by a Judge sitting alone.

"Clifford J"

Solicitors: Macalister Mazengarb, Wellington, for the appellant (counsel: JJ Cleary)
Chapman Tripp, Wellington for the respondent (hannah.northover@chapmantripp.com)