

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

**CIV-2011-404-5663
[2012] NZHC 937**

BETWEEN MCALPINE HUSSMANN LIMITED
 Applicant

AND COOKE INDUSTRIES LIMITED
 Respondent

(On the papers)

Counsel: JL Thomas for applicant
 E St John for respondent

Judgment: 7 May 2012

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

Solicitors: Schnauer & Co, PO Box 31 272, Auckland 0741
 Stafford Klaassen, PO Box 29 185, Auckland

[1] In my judgment of 16 March 2012 I dismissed the applicant's application to set aside the respondent's statutory demand. I reserved costs at counsel's request. I recorded that the hearing occupied a full ½-day hearing.

[2] Provision was made for memoranda and affidavits, if appropriate, to be filed in support, opposition and reply. Same were filed and served. I sought further clarification from counsel. Memoranda have now been received on the points raised.

[3] The applicant acknowledges that solicitor/client costs are appropriate having regard to s 79 of the Construction Contracts Act 2002. Accordingly, the sole issue for determination is: are the costs claimed objectively reasonable?

[4] The relevant principles were summarised by me in my judgment *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd*.¹ I made a copy of that judgment available to counsel with my minute of 24 April 2012 to assist counsel in any further submission that they wished to make. I do not intend to review, again, the considerations that are appropriate in determining objectively whether the costs claimed are reasonable because they are set out in the judgment to which I have made reference.

[5] Mr St John and his instructing solicitor, as counsel and solicitor for the respondent, seek the cost content only and not GST in respect of invoices dated respectively 2 September 2011, 14 March 2012 and 30 March 2012. The sum claimed, excluding GST and disbursements, is \$3,400 in respect of the 2 September 2011 invoice, \$6,000 in respect of the 14 March 2012 invoice and \$700 in respect of the 30 March 2012 invoice.

[6] Initially, counsel for the applicant disputed Mr St John's hourly rate of \$400. When questioned as to what was an appropriate alternative rate, counsel's response was that no further submissions would be made. I accept that \$400 is an appropriate hourly rate for Mr St John to charge in respect of the matters that were attended to in relation to this application.

¹ *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd* (2008) 19 PRNZ 591.

[7] The next matter that was raised by the respondent concerned attendances undertaken by Mr St John immediately before the disputed payment schedule was provided on 28 July 2011. Mr St John's time records show that this covered an attendance on the client, a review of the file and the preparation of an opinion for a total of \$1,840, based on his hourly charge-out rate of \$400. Mr Thomas submitted that this work would not be actual and reasonable costs of recovery because it involved steps that were incurred before the debt was due and owing. Whilst that point might be appropriate in certain instances, I am not prepared to rule out the particular attendances as being other than for the purposes of collecting the outstanding debt in this case. It, in fact, occurred within a reasonably short time before of the receipt of the applicant's disputed payment schedule. I infer the work was done as a result of an anticipated dispute.

[8] The total costs claimed by Mr St John and the instructing solicitor, excluding GST, and in respect of the three invoices mentioned is \$10,100.

[9] Mr St John has also provided me with a helpful summary of costs calculated on a 2B basis in respect of the application. That involved a consideration of Items 21, 26, 28, 29 and 30 of the Third Scheduled and provide a total of \$5,828.

[10] I have reviewed the time records provided by Mr St John. I have already made comment that I consider the attendances shortly before the disputed pay schedule are appropriate in this case. Taking all those matters into account, I am satisfied that the solicitor/client costs claimed, excluding GST, of \$10,100 is an objectively reasonable claim and is therefore appropriate in this case.

[11] Accordingly, I order that the applicant pay costs of \$10,100 to the respondent together with disbursements as fixed by the Registrar.

JA Faire
Associate Judge