

#109

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

**CIV 2009-470-889**

UNDER Section 59 of the Construction Contracts  
Act 2002

BETWEEN MOYLE CONSTRUCTION LIMITED  
Plaintiff

AND ANTHONY ROSS GLEN STOLLERY,  
HALINA TERESA STOLLERY AND  
JOHN BERWICK NICHOLLS OF  
TAURANGA, TRUSTEES OF THE  
STOLLERY FAMILY TRUST  
Defendants

Hearing: 12 August 2010

Appearances: Mr Nabney for Plaintiff  
Mr M Ward-Johnson for Defendants

Judgment: 12 August 2010

---

**ORAL JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE**

---

**Counsel:**  
Mr B Nabney, Barrister, Tauranga  
Mr M Ward-Johnson, Barrister, Tauranga

[1] The summary judgment proceedings were commenced 6 October 2009 to cover money which the plaintiffs said was owing under a determination made by an adjudicator pursuant to s 25 of the Construction Contracts 2002. The adjudicator had directed that the defendants pay a sum of \$380,088.43. Included in the amount of the determination was \$25,000, reflecting interest calculated on the contractual basis up to 19 September 2009.

[2] There can be no argument about the amount of \$380,088.43 being owing because there have been no attempts to set aside the adjudicator's decision. However no amount under the determination was actually paid until August of this year. The summary judgment proceeding seeking to recover the amount secured by the determination was opposed and was due to come to fixture this week, however the \$380,088.43 has been paid, but there remains a dispute as to interest and costs. Interest is claimed by the plaintiff from the effective date of the determination of 19 September 2009 down to the present time on a contractual basis. The plaintiff also claims actual and reasonable costs pursuant to the Construction Contracts Act 2002.

[3] Dealing first with costs. There are several obstacles in the plaintiff's way to a claim for costs. The charging provision is not in evidence. There is no evidence of what is actual and reasonable and one of the invoices which it is sought to recover on is directed to a company with a different name to the plaintiff.

[4] Mr Ward-Johnson also submits that costs should not be permitted on an alternative basis because there is discretionary reasons why I should decline to order costs in this proceeding and also should decline to permit interest.

[5] Subject to the general discretionary issue which I will mention briefly shortly when I deal with interest, I consider that the plaintiff is entitled to costs and that they should be fixed on a 2B basis. I should also mention that Mr Ward-Johnson questioned whether a 2B calculation was apt or whether costs should be fixed on a 1A basis. But in my view it is quite clear that these were proceedings requiring counsel of average competence and in seniority in the High Court and there is no reason why I should depart from 2B.

[6] I deal next with interest. The plaintiff claims that the entitlement to interest contained in its contract means that it should have an award of interest which broadly speaking is calculated as 1 ¼ times the average bank charges which the plaintiff has to meet. The defendant says there is no claim for contractual interest on that basis in the statement of claim and there is no evidence to establish a foundation for the claim in the affidavits (the actual interest charging provisions are not in evidence). There may also be an issue about whether the contractual entitlement to interest merged in the adjudicator's decision and there is no evidence as there should have been, from an accountant on the quantum issue.

[7] The defendant also submits that there are discretionary reasons why interest should not be awarded and these are the same matters that I referred to when discussing costs. The argument, in summary, is that on 26 April 2010 the defendants offered to pay to the plaintiff the sum of \$380,088.43 which was the amount of the adjudicator's determination. The defendants had made arrangements for that sum to be placed in a solicitor's trust account where it was held subject to suitable undertakings which were available from the solicitor. The defendant says the plaintiff wrongly declined to accept payment.

[8] Mr Nabney in reply says that the offer to pay that money was irrelevant, the plaintiff did not actually get the amount into its possession and as a result it was still out of pocket for its money and has had no compensation for it.

[9] The offer of \$380,088.43, I understand from what counsel tells me, was not an unconditional offer. It was linked to other negotiations between the parties but more importantly the \$380,088.43 would not have included anything for costs on the summary judgment proceedings and nor would it recognise an entitlement to interest that had accrued since September 2009 when the adjudicator's determination was made. In my view the plaintiff was being asked to accept less than its entitlement when that amount was proffered. It was open to the plaintiff to accept that if it thought that was a commercially wise decision, but if it did not, I see no reason why its refusal to accept an amount that appeared to be less than its full and strict entitlement should disqualify it from being awarded costs and interest.

[10] However when it comes to the matter of the basis upon which interest should be awarded I accept that the plaintiff has not made out its entitlement to interest broadly on the basis of the points that Mr Ward-Johnson has made. But the plaintiff is clearly entitled, in my view, to Judicature Act interest. Interest on that basis would be calculated as payable for 311 days at a daily rate of \$87.47.

[11] In summary, the plaintiff will have costs on a 2B basis. There was a point of difference between the parties as to how many days that should be for – the plaintiff contending 4.7 days and the defendants 4.1; but I am confident that counsel between themselves will be able to resolve which is the appropriate number. No other orders are required from the Court to enable the matter of costs to be calculated. The plaintiff is also entitled to disbursements as fixed by the Registrar. As to interest the formula for calculating that has already been set out in the judgment and it is not necessary for me to do the detailed calculation.

---

J P Doogue  
Associate Judge