

IN THE DISTRICT COURT
AT ROTORUA

CIV-2010-063-000299

BETWEEN TREVOR OGILVIE
 GWENDOLYNNE ANNE OGILVIE
 Plaintiffs

AND L STEVENS BUILDERS LIMITED
 Defendant Company

Hearing: 16 December 2010

Appearances: V Whitfield for the Plaintiffs
 A Webb for the Defendant Company

Judgment: 18 February 2011

JUDGMENT OF JUDGE C J McGUIRE
[AS TO COSTS]

The application

[1] Counsel for the plaintiffs and defendant have filed written submissions on the issue of costs. The plaintiffs seek costs pursuant to s 59(2)(a)(ii) Construction Contracts Act 2002.

Background

[2] The plaintiffs and defendant were parties to a building contract. The plaintiffs allege overcharging and defective work by the defendant builder and they were successful in obtaining two adjudicator's determinations against the defendant under s 48 Construction Contracts Act. The plaintiffs endeavoured to obtain payment of these determinations initially via a statutory demand under the Companies Act as a precursor to winding up the defendant. This was later abandoned in favour of proceedings issued in this Court to enforce payment arising from the adjudicator's determination. Meanwhile, unhappy with the adjudication

determinations, the defendant elected to initiate arbitration proceedings. It would appear that in what is described as the 'first partial award' released by the arbitrator on 12 November 2010, issues of liability were resolved completely in favour of the plaintiffs.

Discussion

[3] The present position between the parties, as I understand it, is that subject to resolution of this costs issue, the matters between the parties will be at an end.

[4] Section 59 declares that the successful party under the adjudicator's determination may recover from the party who is liable to make payment the actual and reasonable costs of recovery awarded against that party by a Court.

[5] The defendant challenges this and by its solicitor, seeks to recover costs against the plaintiffs. The defendant's counsel submits that the plaintiffs filed the proceeding in the District Court knowing that it had absolutely no purpose to it; that the proceeding has now been abandoned without the plaintiffs achieving any result that was not already available to them by the arbitral process; and that the defendant has been put to unnecessary costs.

[6] When the adjudicator's determination was made, the amounts awarded to the plaintiffs by the adjudicator were due and owing. However, it appears as at 15 April 2010, the amounts contained in the adjudicator's determinations were not paid and the plaintiffs' solicitor advised the defendant's solicitor that her instructions were to issue proceedings to liquidate the defendant.

[7] The prompted the defendant's solicitor to email a letter to the plaintiffs' solicitor on 15 April 2010 asserting that the defendant was solvent, but also asserting that there was a real risk that if the defendant paid the statutory demand to the plaintiffs at that point, it would be unable to recover from them if District Court proceedings or the arbitration were resolved in the defendant's favour.

[8] Instead, the defendant's solicitor advised that the amount due was paid into a different solicitor's trust account to be disbursed to the plaintiffs within two days of a sealed order of the District Court or arbitration being served on the stakeholders.

[9] The plaintiffs' solicitor responded, giving conditional agreement to the proposal subject to inter alia immediate payment of \$10,591.88 costs relating to the adjudication.

[10] Essentially the defendant argues that the position it has taken has been a justifiable one throughout. Furthermore, there is High Court authority in *Yun Construction Ltd v YQT Ltd (formerly Canam Construction 1995 Ltd)* (HC Auckland, CIV-2009-404-0076546, 25 January 2010, Associate Judge Abbott) where the "pay now argue later" philosophy of the Construction Contracts Act was nevertheless not to be rigidly enforced in the way the case of *Gill Construction Co Ltd v Butler* [2010] 2 NZLR 229 had suggested. Indeed, Associate Judge Abbott concluded that the Court is able to provide relief in clear circumstances of irretrievable prejudice.

[11] It needs to be remembered, however, in that case the Associate Judge made a specific finding that the plaintiff was unlikely to be able to repay the money ordered by the adjudicator if it were subsequently found on arbitration not to have been entitled to it.

[12] Counsel for the defendant alleges that the plaintiffs are in a similar position in this case. I disagree. In contrast to *Yun's* case, what the plaintiffs achieved at the first adjudication was the repayment to them by the defendant of monies that the adjudicator found the defendant had overcharged them in the amount of \$23,323.95. The adjudicator also awarded \$6,091.88 legal costs and on the second adjudication, the sum of \$6,362.50 for defective roofing works. We therefore have a situation where two-thirds of the total sums awarded by the adjudicator consisted of monies already paid by the plaintiffs to the defendant.

[13] The defendant says that the plaintiffs always asserted they had extremely limited funds; that they had secured bank finance to make payments under contract;

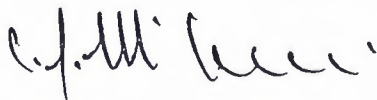
that as they were nearing retirement age, there was no prospect of them being able to dramatically enhance their financial position; that their equity position was unknown, nor was it known whether the property was owned by a trust; and that there were no other sources of funding available to the plaintiffs.

Decision

[14] In my view, that precis of circumstances pertaining to the plaintiffs, even if accepted in its entirety, is unremarkable. It would apply to large numbers of home renovators who I am sure were not intended to be excluded from the protective provisions of the Act, and it could not possibly meet the test in *Yun's* case. It could not amount to "clear circumstances of irretrievable prejudice" towards the defendant that would require interim relief.

[15] The plaintiffs at all times were entitled to pursue costs in the way s 59 provides, a right not fettered by referral of the matter to arbitration. Had the arbitration reversed the adjudication, which it has not, then the defendant likewise would have been entitled to pursue the issue of costs under s 59 and in that event, costs to the defendant would take account of costs earlier awarded to the plaintiff.

[16] Accordingly, I find that the plaintiffs are entitled to costs in terms of s 59 Construction Contracts Act in the sum of \$6,570 plus disbursements of \$906.67.



C J McGuire
District Court Judge