#47

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2007-404-5774

	BETWEEN	PAGE & MACRAE LIMITED Plaintiff
	AND	REAL COOL LIMITED AND REAL COOL HOLDINGS LIMITED Defendants

Hearing: 29 April 2008

Counsel: A J Bush for Plaintiff
No appearance by or on behalf of Defendants

Judgment: 29 April 2008

(ORAL) JUDGMENT OF HEATH J

Solicitors:
AJ Bush & CJ Forbes, PO Box 526, Wellington

[1] On 5 September 2007, an Adjudicator made a determination under the Construction Contracts Act 2002 in favour of Page & Macrae Ltd. The sum in which the determination was made was $279,964.66 plus interest. The Adjudicator gave permission to issue a charging order under s 49 of the Act.

[2] Subsequently, judgment was entered in this Court, on the basis of the Adjudicator's determination, and a charging order over the relevant land was issued out of this Court on 29 October 2007. On 18 December 2007, a charging order *nisi* was issued in respect of money standing to the credit of Real Cool Holdings Ltd in an account it had with the Taranaki Savings Bank.

[3] Since those orders were made Mr Bush has discovered the existence of a decision of Asher J in *Laywood and Rees v Holmes Construction Wellington Ltd* (High Court Auckland, CIV 2006-404-4152, 13 December 2007). In that judgment, Asher J found that only the District Court had jurisdiction to enter judgment in consequence of a determination made by an Adjudicator under the Act. I refer, in particular, to paras [18]-[25] of the judgment.

[4] Subsequently, I have ascertained that Asher J gave leave to appeal to the Court of Appeal against his judgment of 13 December 2007. Leave was granted in a judgment given on 15 February 2008. No date of hearing has yet been allocated, to my knowledge.

[5] Mr Bush has responsibly drawn these issues to the Court's attention. He seeks an *ex parte* order removing the judgment entered on 29 October 2007 to the District Court at Tauranga. An order is also sought that the charging order over the land stand and be maintained as if it had issued out of the District Court. The applications are made on the basis that enforcement proceedings were taken in this Court in error, but nevertheless in good faith.

[6] None of the High Court Rules to which Mr Bush has expressly referred me deal specifically with the type of issue arising in this case. On the face of it r 9 (which deals with cases not provided for by the Rules) might provide a source of

jurisdiction but, recently, r 9 has been confined in its scope to orders that do not conflict with the underlying philosophy of particular legislative provisions. Generally, see *Smith v Covington Spencer Ltd* [2008] 1 NZLR 75 (CA) at [37]:

> ...
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> [37] Again it is necessary to go back to first principles. Rule 9 enables a court to fill a gap in the rules. It does not enable the court to contravene the rules. As this Court said in *Donselaar v Mosen* [1976] 2 NZLR 191 at p 192, the High Court "has inherent jurisdiction to make any order necessary to enable it to act effectively even in respect of matters regulated by the Rules of Court, so long as it does not contravene those rules". What Heath J has done in the present case is to create an alternative mechanism to that contained in the rules for dealing with security for costs in multi-plaintiff proceedings. That alternative mechanism is based on a different philosophy from that underlying r 60. In particular, it requires plaintiffs who do not qualify in terms of r 60 to provide security for costs, simply because they have participated in a multi-plaintiff claim in conjunction with plaintiffs who do qualify. We consider that the Judge's use of the Court's inherent jurisdiction in this way cannot be justified because it is based on an underlying philosophy that is directly counter to that reflected in r 60.

[7] A decision of the High Court, as a Court of unlimited jurisdiction, remains valid until such time as it is set aside by a Court of competent jurisdiction: see *Isaacs v Robertson* [1984] 3 All ER 140 (PC) at 143.

[8] No application has been made to set aside the orders made by the Court. Nor has any appeal been brought by the parties against whom the orders were made to challenge the orders on that basis. In the absence of such an application, I am minded to keep the existing orders in place. They will be regarded as valid orders unless and until they are set aside.

[9] That will give time to Mr Bush to seek orders in the District Court reflecting the orders his client currently has and any further enforcement orders required to realise the property attached through the execution mechanisms. I would have thought that, given the fact that this Court has seen fit to make orders of the type sought, that a District Court would follow suit relatively promptly. However, the procedure to be adopted in that Court will be a matter for the presiding Judge.

[10] It will also be a question for the District Court as to whether service of any application to obtain orders reflecting those currently existing in this Court needs to be made on notice.

[11] In my view, the mechanism I have chosen to deal with the issues will preserve the position of all parties, particularly as Asher J's judgment is going on appeal.

[12] The final point I would make is that if Mr Bush were minded to seek orders in the District Court reflecting those currently in force from this Court, it would need to be on the basis that there was an undertaking from the plaintiff to seek vacation of the High Court orders once replacement orders had been made.

[13] For the reasons given, I have no jurisdiction to make the orders sought by Mr Bush. His application is formally dismissed. However, the observations I have made today should assist in prompt resolution of the issues arising out of the adjudication.

P R Heath J