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

**CIV 2007-485-1963  
CIV 2007-485-2104**

BETWEEN PARKER CONSTRUCTION  
MANAGEMENT (NZ) LIMITED (IN  
LIQUIDATION)  
Plaintiff

AND HORIZON INVESTMENTS LIMITED  
Defendant

Hearing: 18 February 2008

Appearances: R.B. Hucker - Plaintiff  
K. Johnston - Defendant

Judgment: 20 February 2008 at 4.00 pm

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**JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL**

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*This judgment was delivered by Associate Judge Gendall on 20 February 2008 at  
4.00 p.m. pursuant to r 540(4) of the High Court Rules 1985.*

Solicitors: Hucker & Associates, Barristers & Solicitors, PO Box 3843, Shortland Street,  
Auckland.  
Hazelton Law, PO Box 5639, Wellington

## Introduction

[1] Two proceedings are before the Court:

- a) Proceeding 2007-485-2104 (“the summary judgment proceeding”) under which on 7 February 2008 summary judgment was granted unopposed to the plaintiff against the defendant for the sum of \$251,652.52 together with interest at 7.5% per annum from 25 August 2007 down to the date of payment. This represented an amount accepted as due by the defendant under a determination by an adjudicator under the *Construction Contracts Act 2002* in respect of a Construction Contract for 5 apartments and 2 townhouses at Roseneath, Wellington constructed by the plaintiff for the defendants.
- b) Proceeding 2006-419-269 (“the liquidation proceeding”) being an application by the plaintiff to place the defendant company into liquidation on the basis that the defendant company is insolvent and unable to pay its debts as they fall due, as, in particular, the defendant has failed to pay the amount of \$251,652.52 plus interest pursuant to an adjudicator’s determination.

[2] The plaintiff has now sealed the judgment in the summary judgment proceeding. That judgment which was consented to on the part of the defendant was entered under the *Construction Contracts Act 2002*. It is clear that the policy behind ss. 3 and 79 of that Act is to require the immediate payment of those monies which are established as being due and payable under construction contracts. The intention of the *Construction Contracts Act 2002* is clearly to ensure that cash flow within the building industry and for all contractors and sub-contractors is maintained and arguably that any risk of non-payment is allocated away from contractors.

## **The Liquidation Proceeding**

[3] So far as the liquidation proceeding CIV 2007-485-1963 is concerned, before me, Mr Hucker for the judgment creditor suggested that this proceeding should now be struck out (or alternatively withdrawn) on the condition that a sum of money which I understand amounts to \$251,652.52 which has been held in an independent solicitors trust account be paid out to the judgment creditor.

[4] On this, Mr Johnston for the defendant contended that no order with respect to the monies retained in the independent solicitor's trust account should be made. So far as the liquidation proceeding is concerned, Mr Johnston argued that this should be simply withdrawn as the defendant through lodging the payment into the independent solicitor's trust account has been able to demonstrate that it is not insolvent.

[5] Mr Johnston went on to suggest that the plaintiff, in achieving summary judgment orders for the \$251,652.52 plus interest in the summary judgment proceeding, now has all the remedies open to a judgment creditor to pursue recovery of this sum. On this Mr Johnston noted that the plaintiff as judgment creditor is already pursuing this by its attempts to seek the issue of a separate Charging Order and Writ of Sale, matters which are before the Court and which I will mention shortly.

[6] In my view there is substance in these submissions advanced by Mr Johnston. The plaintiff wishes to withdraw the liquidation proceeding and presumably at this point accepts the contention that the defendant is solvent. As I see it, that is an end of the matter so far as the liquidation proceedings are concerned.

[7] That said, it is appropriate for an order to be made striking out the judgment creditor's liquidation proceedings without conditions. An order to this effect is now made.

[8] As I understand it there are no issues as to costs with respect to those proceedings.

## The Summary Judgment Proceedings

[9] Before the Court under these proceedings, CIV 2007-485-2104, the judgment creditor has applied for the issue of a Writ of Sale and a Charging Order absolute against the judgment debtor.

[10] Sections 58 and 59 *Construction Contracts Act 2002* confer on a party who is successful in an adjudication under the Act such as the plaintiff here, the right to pursue the determination or judgment as a debt due from the other party.

[11] In the present case, since the plaintiff's uncontested summary judgment application against the defendant, the plaintiff now has a sealed judgment of this Court for the amounts in question.

[12] Rule 568 *High Court Rules* provides:

*"568. Issue of Charging Order Without Leave After Judgment*

*After judgment has been sealed, a charging order may be issued without leave, at the request of the judgment creditor."*

[13] A charging order *nisi* is not a security but merely an order that serves to preserve or "hold" the judgment debtor's property until a judgment can be executed against that property. Under Rules 579 and 580 a charging order on property other than land is an order *nisi* in the first instance.

[14] Here the plaintiff requests the issue of a charging order. An order is appropriate and is to issue.

[15] So far as this order is concerned, however, the only question outstanding is whether that order ought to be made absolute. As I have already noted, Rules 579 and 580 require a charging order with respect to property other than land to be made as a charging order *nisi* in the first instance.

[16] Rule 585 however, provides that following the sealing of judgment, the Court may make a charging order absolute.

[17] This Rule 585 confers a discretion on the Court. *McGechan on Procedure* at paragraph HR585.01 notes:

*“HR585.01 The making of a charging order nisi absolute is discretionary: Rule 585(2).*

*However in clear cases where it is established that the property is exclusively the judgment debtor’s and no reasons are advanced why the charging order should not be made absolute, there is little or no room for any discretion to operate: Vergeest v Baldwin (1990) 6 FRNZ 284.”*

[18] The circumstances which justify refusing an application to make a charging order absolute are generally limited to cases where an order *nisi* ought not to have been made or possibly where priority would be unfairly conferred over other creditors or the execution process has not been properly completed.

[19] Counsel for the defendant made no submissions before me on any of these matters. In my view, in any event, none of these situations apply in the present case. As I understand the position, the funds held in the independent solicitor’s trust account are clearly funds of the judgment debtor and before me no reasons were advanced as to why any charging order made should not be made absolute immediately.

[20] An order is now made that the charging order sought by the plaintiff is to be issued and made absolute in terms of Rule 585 *High Court Rules*.

[21] So far as the judgment creditor’s request for a Writ of Sale is concerned, Rule 588 *High Court Rules* provides:

*“588. When Writ of Sale may be Issued*

*At any time after judgment for a sum of money has been sealed, the judgment creditor may issue a Writ of Sale."*

[22] In the present case judgment for the \$251,652.52 plus interest has been sealed and the judgment creditor is entitled to issue a Writ of Sale in terms of the rules. There has been no stay of the sealed judgment dated 15 February 2008 nor as I understand it do any of the matters outlined in Rule 556(4) for which an execution process can be challenged apply here.

[23] The Writ of Sale sought by the plaintiff is to issue.

[24] Costs are reserved. If there is any issue as to costs between the parties then counsel may file appropriate memoranda and I will decide the issue based upon the material before the Court.

**'Associate Judge D.I. Gendall'**