

#12

IN THE COURT OF APPEAL OF NEW ZEALAND

CA169/05

BETWEEN

SALEM LIMITED
Appellant

AND

TOP END HOMES LIMITED
Respondent

Hearing: 9 November 2005

Court: William Young P, O'Regan and Panckhurst JJ

Counsel: B P Rooney for Appellant
R M Bell and T L M Field for Respondent

Judgment: 4 April 2006

RECALL JUDGMENT OF THE COURT

A The judgment of the Court dated 12 December 2005 is recalled in relation to the costs award.

B Upon reconsideration, the appellant is ordered to pay costs of \$3000 with usual disbursements.

REASONS

(Given by Panckhurst J)

Introduction

[1] The award of costs in this case has a chequered history. An award of \$3,000 with usual disbursements was made in court at the conclusion of the hearing when it was announced that the appeal would be dismissed, with reasons to follow. Subsequently, we recalled that order and invited counsel to make submissions directed to s 23(2)(a)(ii) of the Construction Contracts Act 2002, whereby a payee who invokes the payment claim procedure under the Act may be awarded actual and reasonable costs.

[2] Memoranda were filed in which Mr Bell on behalf of Top End indeed sought actual costs and disbursements in the sum of \$10,308.50. Mr Rooney, however, contested that s 23(2)(a)(ii) applied in this Court. He drew attention to the definition of “court”, which is defined in s 2 of the Act to mean the High Court or District Court (whichever has jurisdiction in light of the amount of the claim). We accepted the submission ([30] of the substantive decision), holding that s23(2)(a)(ii) was specific and because it gave rise to a special entitlement that it should be construed on its terms. This paragraph of the decision began “Although we have not had the benefit of submissions from Mr Bell directed to (these) specific points ...”.

[3] Although we had not seen them, Mr Bell had in fact filed a reply to Mr Rooney’s submissions in which he challenged the suggestion that actual and reasonable costs were only to be awarded in the District or High Courts. Through oversight, such memorandum in reply had not been brought to our attention. In these circumstances we were requested to reconsider the matter with a view to the recall of the costs award contained in the reasons for judgment.

Decision

[4] Section 23 relevantly provides:

23 Consequences of not paying claimed amount where no payment schedule provided

- (1) The consequences specified in subsection (2) apply if the payer -
 - (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and

- (b) fails to pay the whole, or any part, of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
- (2) The consequences are that the payee -
 - (a) may recover from the payer, as a debt due to the payee, **in any court**, -
 - (i) the unpaid portion of the claimed amount; and
 - (ii) **the actual and reasonable costs of recovery awarded against the payer by that court**; and
 - (b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract. (emphasis added)

[5] Mr Bell submitted that the legislative intent behind s 23(2)(a)(ii) is clear, namely to provide that upon the timely recovery of payments due under a construction contract that actual and reasonable costs of recovery should follow the event. We agree.

[6] While accepting that on its terms s 23(2)(a)(ii) does not apply in this Court, Mr Bell sought to invoke separate parts of r 48 of the Court of Appeal (Civil) Rules 2005 being:

- (2) The Court has all the powers and duties of the court of the first instance court concerning procedure, including the amendment of pleadings,

and:

- (4) The Court may give any judgment and make any order which ought to have been given or made, or make further or other orders that the case may require.

Hence, it was said, if costs were viewed as procedural in nature r 48(2) could be invoked, failing which r 48(4) must apply. Thereby this Court was equally able to award actual and reasonable costs pursuant to the statutory provision.

[7] We do not accept this contention. Rule 48 is intended to place this Court in the same position as the court below in relation to procedural and discretionary powers, as is necessary given that appeals to this Court are generally by way of rehearing. But the present issue is not about remedying a procedural or substantive anomaly in the High Court, for example if actual and reasonable costs had not been

awarded in that court. Rather, the issue arises in this Court and relates to the appropriate award of costs in an appellate setting. Rule 48 is not in point.

[8] In the alternative Mr Bell submitted that if r 48 was not in point “the proper course was to remit the case to the High Court so that it can determine the costs of recovery”. We do not accept this contention either. The issue of costs on appeal is for this Court. It cannot abdicate that responsibility

[9] That said, we are in no doubt that this Court has jurisdiction to award actual and reasonable costs in the present circumstances. Rule 53(1) of the Court Rules contemplates the making of any order as to costs as the Court in its discretion considers just. Where, as here, a statutory cause of action is asserted and the statute expressly contemplates actual and reasonable costs in the courts of first instance, it is a short step to the proposition that this Court may do likewise in relation to appeal costs. That is to say that while on its terms s 23(2)(a)(ii) does not apply to this Court, the spirit of the provision may find expression through the breadth of the Court’s discretion as to costs.

Result

[10] In this case, however, we have reached the view that an award of \$3000 costs with usual disbursements is the appropriate award, in part on account of the history of the matter to which we have already referred. But it should not be taken that actual and reasonable costs of recovery will not be considered appropriate in future cases.

Solicitors:
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Webb Ross Johnson, Whangarei for Respondent