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

CIV 2009-404-001052

UNDER the District Courts Act 1947

BETWEEN SOLUTION TEXTURES LIMITED
Appellant

AND PETER MARTIN EDWIN COLEMAN
AND JUSTINE KAY COLEMAN
Respondents

Hearing: 23 April 2009

Counsel: J M Airey for the appellant
P M E Coleman in person

Judgment: 23 April 2009

(ORAL) INTERIM JUDGMENT OF POTTER J

Solicitors: Inder Lynch, P O Box 76-745, Manukau, Auckland

Copy to: P M E Coleman, P O Box 4107, Shortland Street, Auckland 1140
P M E Coleman, 2160 Hunua Road, Hunua, RD, Papakura, Auckland 2210

Introduction

[1] This is an appeal from that part of the judgment of Judge Adams in the District Court at Papakura on 30 January 2009 in which he made an order for costs of \$5,000 together with disbursements as fixed by the Registrar in favour of the appellant.

[2] The appellant seeks that the order as to costs be set aside and the appellant be awarded its actual and reasonable costs incurred in the District Court proceedings. The appellant also seeks its actual and reasonable costs on this appeal.

[3] I propose to issue this as an interim judgment for reasons that will become apparent later in the judgment. Essentially I need further information to assess in terms of s 23(2) of the Construction Contracts Act 2002 (“the Act”) the actual and reasonable costs of recovery pursuant to s 23(2)(a)(ii).

Background

[4] The District Court proceeding arose out of a construction contract in terms of the Act between the appellant and the respondents (respectively the plaintiff and the defendants in the District Court). Judge Adams in his judgment of 30 January 2009 entered summary judgment for the amount of the appellant’s “payment claim” of \$26,649.39 plus interest of \$1608.18, costs of \$5,000 and disbursements of \$562.25. He held that the respondents’ documents did not meet the requirements to comprise a “payment schedule” under s 21 of the Act. That part of the judgment is not challenged by the appellant, nor has any cross-appeal been filed.

Judgment as to costs in the District Court

[5] The appellant sought actual and reasonable costs of some \$13,000 plus the costs of preparing for and appearing at the summary judgment hearing. The Judge referred to s 23(2)(a)(ii) of the Act which provides:

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.

[6] The Judge said at [20]-[22] of his judgment:

[20] In the *Auckland Waterproofing Limited v TPS Consulting Limited* case, the costs awarded at the District Court level and the claim was for \$1,625 and costs \$6,680 plus disbursements of \$465.00.

[21] In the present case the claim is for \$26,649.39, but although I accept that the costs amounting to something like \$16,000 or more may well be the actual costs incurred by carefully prepared professionals, I cannot accept that they would be reasonable in the sense of reasonable proportionality. When one thinks that a High Court proceeding in similar matters can be disposed of for a significantly lesser sum, I am obliged to trim the claim in terms of reasonableness.

[22] Accordingly, I award \$5,000 costs and disbursement as fixed by the Registrar. Interest will run from 20 days after service of the payment of claim at 7.5%.

Submissions

[7] The appellant submits that the Judge was wrong to assess the reasonableness of the appellant's costs with respect to the amount claimed. That approach, it is submitted, is not in accordance with s 23(2) of the Act which expressly provides for the payer (the appellant in this case) to recover from the payee (the respondents in this case) its actual and reasonable costs on recovery.

[8] The appellant further submits that under s 23 the assessment of reasonableness can only apply to the quantum of costs incurred for obtaining the summary judgment. To establish the quantum the appellant has filed two affidavits of Ian Frederick Twist, dated 14 January 2009 and 1 April 2009. To each of these are attached the relevant invoices of the appellant's solicitors, Inder Lynch, itemising their attendance fees and disbursements in relation to recovery of the amount of the appellant's claim. The total amount of the pre-hearing invoices referred to in the 14

January 2009 affidavit is \$13,694.25 inclusive of GST and disbursements. The affidavit of 1 April 2009 has been filed in the appeal to include the costs incurred for the preparation and appearance at the hearing of the summary judgment in the District Court.

[9] Leave is sought pursuant to r 20.16 of the High Court Rules for the filing of this updating affidavit. I grant leave. Again invoices from Inder Lynch are attached to the affidavit. These further costs bring the total costs claimed by the appellant to \$17,983.94 inclusive of GST and disbursements.

[10] Mr Coleman submits the award of costs of \$5,000 made by Judge Adams was a considered decision on his part. He said from the perspective of himself and his wife, the substance of this dispute has been overlooked. But he accepts Judge Adams “may have got it right” in dealing with the issues of the “payment claim” and “payment schedules” under the Act. He queried how the fees and costs of the appellant could be justified for what he described as a simple District Court hearing which really turned on the technicality of a form, from which I infer he was referring to the payment schedules found by Judge Adams not to be in compliance with the Act.

[11] Mr Coleman submits that the costs incurred by the appellant are completely unreasonable. He challenged the number of hours upon which the costs claimed were based. His assessment was that the time claimed amounted to a full month’s work which he considered was inconsistent with the matter that fell for determination in the District Court.

Discussion and conclusions

[12] I accept the appellant’s submission that the Judge erred in the way he approached the application of s 23(2) in this case. There is now a clear line of authority as to the meaning and application of s 23(2) of the Act. The cases referred to by the Judge provided that authority, they being *Auckland Waterproofing Limited v TPS Consulting Limited* HC AK CIV 2007-404-005890 11 December 2007 Duffy J, *Suanui v Hi-Qual Builders Limited* HC AK CIV 2008-404-001576 26 June

2008 Wylie J and the observations of the Court of Appeal in *Salem Limited v Top End Homes Limited* CA 169/05 4 April 2006.

[13] However, Judge Adams misapplied those authorities and failed to apply s 23(2) when he assessed and awarded costs. As Duffy J said in the *Auckland Waterproofing* case at [70]:

When I take into account the Act's policy and purpose, I am driven to conclude that Parliament intended all payees to be able to pursue recovery of s 23 debts through court process and, provided the quantum of those costs was reasonable and not excessively high, to obtain the actual cost of doing so. It follows that "reasonable" in s 23 can only relate to an assessment of the quantum of the legal fees incurred in obtaining summary judgment for the purpose of seeing if they are within the range of fees that are reasonably charged for work of that type. Once the recovery costs are seen to come within the range of amounts usually charged for work of that type they are recoverable under s 23.

[14] It is immediately apparent from this analysis that reasonableness of costs actually incurred cannot properly be related to the amount claimed on some sort of proportionality basis. Indeed, *Auckland Waterproofing* provides an example of this; the amount of the claim in issue was sum \$1600 and the amount of costs awarded was some \$6,800.

[15] Because Judge Adams was plainly wrong in the way he approached the assessment of costs under s 23 it is appropriate and necessary for this Court to intervene on appeal in accordance with the principles in *May v May* (1982) 1 NZFLR 165 (CA), notwithstanding that there was an element of discretion in the award of costs. The figure reached by the District Court Judge was not an assessment of the actual and reasonable costs but was a figure he selected by "trimming" the costs claimed on a proportionality basis, which was not the correct approach.

[16] I have discussed with Mr Airey today that in order to determine the quantum of costs that are reasonable in this case I require further details of the costs claimed. I have referred him particularly to reference to global figures for costs on a time basis. I need to see details of time spent, the activity to which that time related, the author of the work and the charge-out rate that applied. Mr Airey will be well familiar with the nature of the information required in such a situation. Once I

receive that further information I will enter upon a determination as to the reasonableness of the costs in terms of s 23(2). Once I have determined the actual and reasonable costs, I will issue a final judgment.

Result

[17] The appeal is allowed. The appellant's actual and reasonable costs are to be determined by the High Court.

Costs on the appeal

[18] The appellant seeks costs on the appeal under s 23(2). I have invited Mr Airey to take further instructions on this matter. On this aspect he has indicated that he will file a memorandum along with the further information I require as to costs.

Timetable orders

[19] The further information and the further memorandum are to be provided within 14 days. Copies should be served on Mr and Mrs Coleman at P O Box 4107, Shortland Street, Auckland (as advised by Mr Coleman in Court today).