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

CIV 2009-404-001052

BETWEEN SOLUTION TEXTURES LIMITED
Appellant

AND PETER MARTIN EDWIN COLEMAN
AND JUSTINE KAY COLEMAN
Respondents

Judgment: 1 July 2009 at 9.30 a.m.

**JUDGMENT OF POTTER J
Re costs appeal**

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 9.30 a.m. on 1 July 2009.

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[1] The interim judgment of 23 April 2009 allowed the appellant's appeal against costs of \$5,000 plus disbursements awarded in the District Court. I held the appellant is entitled to its actual and reasonable costs in relation to these proceedings pursuant to s 23(2)(a)(ii) of the Construction Contracts Act 2002. This provides that the payee (in this case the appellant) may recover from the payer (in this case the respondents) "the actual and reasonable costs of recovery awarded against the payer" in any Court.

[2] The appeal related solely to the issue of costs. I required the appellant to file itemised bills of cost so I could determine whether the costs claimed are actual and reasonable. The appellant filed a memorandum dated 4 May 2009, with fully itemised bills of cost attached. I directed at [19] of the judgment of 23 April 2009, that copies of this material should be served on Mr and Mrs Coleman, which has been done. Although Mr Coleman advised a member of the Registry staff by telephone that he proposed to file a memorandum in reply, he has not filed any such memorandum.

[3] I have considered the itemised bills of cost which relate to the hearing in the District Court and the appeal in this Court.

[4] Costs claimed in relation to the District Court proceedings are \$14,945 plus GST and disbursements. The breakdowns provided of the various accounts generally support the appellant's contention that these accounts are reasonable, save that I consider the amount of time claimed in relation to submissions to be on the high side. The amount of time claimed for the preparation, checking and finalising of submissions in the accounts dated 7 October 2008, 16 January 2009 and 2 February 2009 (I have apportioned an estimated half hour from the attendances on 29 January 2009 to submissions as well as the half hour recorded on 30 January 2009) totals nine hours. This, I consider exceeds what is reasonable to address what was essentially a fairly confined point in the District Court. An assessment of what are reasonable costs can only be within a range. I allow costs in the round sum of \$14,000 plus GST and disbursements in respect of the District Court proceedings.

[5] In relation to the appeal, the sum claimed is \$9,600 plus GST and disbursements. However, at paragraph 7 of Mr Airey's memorandum of 4 May 2009 he seems to accept that \$265 included in the account for \$2,750 plus GST and disbursements, dated 18 March 2009 relates to attendances which are not recoverable under s 23 of the Act.

[6] Again, in relation to submissions I find the claim for approximately five hours detailed in the breakdowns of accounts dated 7 April 2009 and 1 May 2009, to be on the high side. Allowing for the reduction of \$265 referred to above and a reduction in respect of time spent on submissions, I would allow costs of \$9,000 plus GST and disbursements in relation to the appeal.

[7] However, I also disallow costs involved in preparing itemised accounts. These attendances relate to post-hearing matters not directly associated with recovery of the claimed amount. They are in the nature of account recovery attendances. I do not doubt the time recorded as involved in preparing this information, but I do not consider it is a cost the payer should meet.

[8] I accept and allow for the taking of further instructions in relation to the appeal costs as required by [18] of the interim judgment. But, I note there appears to be duplication in the entry of \$105 for drafting the memorandum shown on both 28 April and 30 April 2009. I reduce the costs on appeal by a further \$500 on account of the itemised accounts.

[9] The outcome of the application of s 23(2)(a)(ii) of the Act which authorises the recovery of actual and reasonable costs, can readily result in a disproportionate outcome for the payers, the respondents in this case. In this case, the costs incurred will approximate the amount of the "payment claim" for which summary judgment was entered in the District Court. This is a factor potential payers need to bear clearly in mind when faced with a payment claim under the Act.

Result

[10] Costs are awarded to the appellant in the total sum of \$22,500 plus GST, and disbursements as approved by the Registrar.