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IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2009-470-283

BETWEEN	ANTHONY ROSS GLEN STOLLERY, HALINA TERESA STOLLERY AND JOHN BERWICK NICHOLLS , TRUSTEES OF THE STOLLERY FAMILY TRUST Plaintiff
AND	FRUIT 2GO LIMITED (FORMERLY MOYLE CONSTRUCTION LIMITED) Defendant
AND	SHANNON REX MOYLE Counterclaim defendant

Hearing: 28 February 2011

Appearances: Mr M Ward-Johnson for Plaintiff
Mr W Nabney for Defendants

Judgment: 10 March 2011

JUDGMENT OF ASSOCIATE JUDGE DOOGUE
[on Costs]

This judgment was delivered by me on ***10.03.11 at 2 pm****, pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date……………

Counsel:

M Ward-Johnson, Tauranga

Mr W Nabney, Tauranga

[1] These proceedings were filed by Moyle Construction Limited ("the Company") against the Stollery Trust ("the Trust") in April 2009. The company brought a claim arising out of a construction contract that it had entered into with the Trust. That contract was entered into in 2006. The company sought to enforce payment claims that had had been certified by the project engineer which with the addition of interest and after crediting summary payments lead to a claim against the Trust of $819,630.08.

[2] Subsequently the engineer purported to reconsider and withdraw his certification. The dispute was then dealt with as to part by an adjudication under the Construction Contracts Act decision which was issued in September 2009 and an amount of $380,000. A further adjudication took place which was conducted by Mr T Kennedy-Grant QC in which he certified that retentions of $160,000 were owing. This decision too was given in 2009.

[3] There are still further disputes between the parties at least which will require resolution and it is quite likely, counsel told me, that this will require resort to further litigation.

[4] A significant feature of the proceedings was that the Trust filed a counter-claim for defects in construction, overcharging and other matters.

[5] The company discontinued its proceeding on 1 December 2009. The counter-claim continued in existence until November 2010 when the trust discontinued it. A counter-claim had been brought against the company and a director of it, Mr S R Moyle.

[6] Both parties now seek costs.

[7] The Trust says that it discontinued because after it received discovery it discovered that most of the significant overcharges that it alleged had been made had been "uncovered" to use Mr Ward-Johnsons terminology and that it would be possible to obtain any necessary redress out of the defects retention sum that

remains. It further considered that the most effective and expeditious forum for concluding issues between the parties would be a further adjudication. I should also mention that at some point in the proceedings the Trust says that its position was vindicated because the company admitted overcharges of $176,000.

[8] There have been other proceedings filed as well. A summary judgment proceeding in the High Court was filed to enforce the adjudicators' determinations. As well proceedings were commenced in the District Court relating to essentially the same subject matter as the dispute that was brought before the Court by means of these proceedings.

[9] The position is essentially that both the Company and the Trust have discontinued their claims. Rule 15.23 applies which provides as follows:

> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[10] The presumption is that both sides should be entitled to costs. In that situation, if such costs were awarded, rule 14.17 would apply which provides as follows:

> **14.17 Set-off if costs allowed to both parties**
>
> If opposite parties are awarded costs against each other, their respective costs must be set off and the lesser sum must be deducted from the greater, unless the court otherwise directs.

[11] Both counsel submitted to me their clients positions were such that as to take them outside the terms of the rule. Mr Nabney pointed out that the Company had legitimately commenced the proceedings because of the fact that it held two affirmative adjudications from the project engineer certifying to its entitlements under the contract. Further, when the adjudications were completed it discontinued the proceeding.

[12] Mr Ward-Johnson drew my attention to the fact that the Trust had already obtained a concession that there had been overcharging to the extent of $176,000 and

that the core amounts in which the company was entitled to under the adjudication had been paid.

[13] As to the measure of costs, Mr Nabney submitted that this was a case where solicitor/client costs should be awarded to his client. He said that there were two main grounds. First, the Trust had required the company to go to the effort and expense of making discovery which was an onerous task in this case. In excess of 3,000 documents had to be discovered by the company. Notwithstanding that, the Trust never called for inspection of those documents. Secondly, he said that the pleading as against the company director, Mr S R Moyle was based upon misleading conduct under the Fair Trading Act. He said this was tantamount to a pleading of fraud as were the allegations of overcharging etc. This justified the costs scales being departed from, he submitted.

[14] Mr Ward-Johnson submitted that there was no substance to the submissions. He said that the Trust was fully entitled to see the extent of the documents in the possession of the company which it did by reviewing the affidavit of documents. It was not necessary for it to go on and inspect the documents. As to the other points, Mr Ward-Johnson was doubtful that allegations of overcharging and Fair Trading Act matters were the equivalent of alleging fraud. He also pointed out that based upon his review of the invoices which had been submitted by counsel for the company and Mr Moyle that Mr Moyle had never been charged any costs anyway.

[15] This case if anything shows the very good reason why in general where parties discontinue there is a need for a certain and predictable rule governing costs. If the Court is not, notwithstanding a discontinuance, required to go into the merits of each sides position two things will follow. First, any enquiry will necessarily be based upon incomplete information. Secondly, airing the dispute over costs will undo at least part of the costs savings which the parties might otherwise achieve. An enquiry into the merits of the case is only to be undertaken in exceptional circumstances. In my view this is not one of them. This is a case where the present proceeding and the satellite litigation arose from a substantial and extensively litigated dispute which has been going on for a number of years between the parties. The trend of the adjudicators' decision so far, not surprisingly, has been to steer a

middle line between the positions taken by each party. I have no reason to doubt that that is reflective of the merits of their cases in any event. But there is simply no satisfactory basis anyway upon which the Court could usefully form a view as to who was right and who was wrong.

[16] In my view this is a case where each party should have costs under the scales. I do not accept that an award of solicitor/client costs is justified. The case is for costs purposes, is to be categorised as one where fraud has been raised where there has been a pleading of actual and knowing dishonesty and or illegal conduct on the part of the defendant. A pleading under the Fair Trading Act falls well short of that position. Likewise an allegation that the company has claimed more that it is entitled to.

[17] The order that I make is that each side is to pay costs as a defendant to the claim that has been brought against it on a 2B basis. Costs are to be set-off as rule 14.17 contemplates.

[18] I would expect that counsel, who may I say both made competent and sensible submissions, should be able to resolve any outstanding issues and obtain instructions on them. Against the unlikely contingency that a further direction from the Court will be required, leave is reserved.

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J.P. Doogue
Associate Judge