

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

**CIV-2010-404-4874
CIV-2010-404-7132**

BETWEEN WAIPIPI SCHOOL BOARD OF
 TRUSTEES
 Applicant

AND XTREMEBUILD LIMITED (IN LIQ)
 Respondent

Hearing: 30 June 2011 (On the papers)

Counsel: C J R Baird for Applicant
 No appearance for Official Assignee

Judgment: 1 July 2011

COSTS JUDGMENT OF ASSOCIATE JUDGE BELL

*This judgment was delivered by me on 1 July 2011 at .. 11:00am
pursuant to Rule 11.5 of the High Court Rules.*

.....
Registrar/Deputy Registrar

Solicitors/Counsel:
Insight Legal (G O'Brien), PO Box 72153, Papakura
Inder Lynch, PO Box 72045, Papakura
Official Assignee, Private Bag 4714, Christchurch

CJR Baird, PO Box 5444, Auckland
E St John, PO Box 105 270, Auckland

[1] This decision is about costs. There are two proceedings. In CIV-2010-404-004874, the Waipipi School Board of Trustees is the defendant and judgment debtor. It applied for a stay of execution while it brought its own proceeding against Xtremebuild Ltd. In CIV-2010-404-7132, the Waipipi School Board of Trustees applied to set aside a statutory demand served on it by Xtremebuild Ltd (In Liq). Both cases were called before me on 10 November 2010. I directed that they were to be heard on 28 February 2011 for a half-day. Before then, on 18 February 2011, Xtremebuild Ltd was ordered to be put into liquidation. The Official Assignee is the liquidator.

[2] On 23 February 2011, Lang J made orders staying the proceedings pending the liquidator giving consent or the Court ordering the proceeding to be continued, vacating the fixture on 28 February, and directing the applicant to file a memorandum as to costs. The applicant has filed a memorandum seeking costs. On 21 June 2011, the Official Assignee advised that, having considered the memorandum, the Official Assignee does not propose to make representations as to costs. The Official Assignee will abide the Court's decision. It is unfortunate that the applicant has been kept waiting for its costs decision.

[3] Xtremebuild Ltd had a contract with the Waipipi School Board of Trustees to erect a multi-purpose building. The man behind Xtremebuild Ltd was Mr Robert Wray. At the time, he was an undischarged bankrupt. His wife was a director of the company but Mr Wray had held himself out to some people as director.

[4] From the school's point of view, the contract did not go well. It has a large number of complaints about the company's performance under the building contract and issued its own proceeding against the company. However, Xtremebuild Ltd got the better of the board of trustees under the Construction Contracts Act 2002. It gave payment claims under the Construction Contracts Act directly to the school, rather than to the project manager the school had engaged. The school did not reply with payment schedules in time and this entitled Xtremebuild Ltd to payment under the payment claims. It brought an application for summary judgment and obtained

judgment against the board of trustees on 9 September 2010 for \$210,195.75. Shortly after judgment was given, the board of trustees issued its own proceeding against Xtremebuild Ltd claiming about \$484,000.

[5] When Xtremebuild Ltd served a statutory demand for payment of the judgment sum, the board brought the present applications. It claims costs up to and including preparation for hearing of its applications, including the sealing of an order. Costs on a 2B basis would be \$6,768 based on 3.6 days. In addition, the applicant seeks disbursements totalling \$10,714.45. Most of the disbursements claimed are normal but they do include private investigator's invoices of \$6,086.81 and \$2,056.78, totalling \$8,143.59.

[6] The board's applications were difficult ones to bring. Generally, to succeed, the applicant would have to show a real risk that any interim payments made to Xtremebuild Ltd would become final payments and that it had a good arguable case that its own claims against Xtremebuild Ltd would exceed any amounts Xtremebuild Ltd was entitled to recover from it.¹ These applications are difficult to bring because of the strong policy under the Construction Contracts Act of requiring payers to pay first and run their arguments for counterclaims at a later date. The applicant's arguments would require the court to depart from that general policy under the Construction Contracts Act.

[7] The board put considerable effort into putting forward as strong a case as it could. It filed 10 affidavits in support of its application. There was evidence not only from the school and its project manager, but also from other contractors. It also provided evidence about other projects in the Tuakau/Waiuku area which Xtremebuild Ltd had carried out unsatisfactorily.

[8] The applicant has been vindicated by the later liquidation of Xtremebuild Ltd. It is entitled to costs on its applications.

¹ *Kariiti Ltd v Donovan Drainage & Earthmoving Ltd* HC Whangarei CIV-2010-488-613, 19 November 2010.

[9] The applicant seeks costs on the 2C band for all steps, or, in the alternative, a 100% uplift if costs are fixed on the 2B basis.

[10] This is a category 2 case. I allow costs on the C band for preparing and filing the application to set aside the statutory demand. Band C is appropriate because a comparatively large amount of time was required for this particular step. Some legal research would be required. But I also take into account that extensive preparation of many affidavits was reasonably required.

[11] The applicant has claimed .5 of a day for preparation for the hearing of the application to set aside and a further .5 of a day for preparation for the hearing of the application for stay of execution. In fact, the same preparation was involved for both applications, so there should not be separate costs awards. In the circumstances of this case, I am satisfied that one day is a proper allowance for preparation for the hearing on 28 February 2011. That is, I allow for one day for preparation under r 14.6(3)(a) because that amount of time was reasonably required and is not given under band C.

[12] For the other steps claimed by the applicant, the B band is appropriate. The preparation of the application for stay of execution is largely subsumed under the work for preparing the application to set aside the statutory demand.

[13] Accordingly, my calculation of the steps taken by the applicant is:

Preparing and filing originating application and supporting affidavit (item 25):	4.8
Preparing and filing interlocutory application and supporting affidavits (item 4.12):	.6
Appearance at mentions hearing (item 4.17):	.2
Preparation for hearing of both applications:	1.0
Sealing of orders:	<u>.2</u>
	<u>6.8</u> days

Costs on 6.8 days @ \$1,880 per day is \$12,784.

[14] The applicant ran arguments for increased costs based on Xtremebuild Ltd's alleged unmeritorious opposition. I do not address these arguments at length, because even if I accepted them, I would not give the applicant higher costs. Xtremebuild Ltd's opposition appears to have been ineffectual, rather than unmeritorious. I am not persuaded that that gives proper grounds for increasing costs under r 14.6.

[15] In the circumstances of this case, I also accept that it was proper to engage investigators to obtain the information for the affidavits. Accordingly, I approve all the disbursements claimed by the applicant.

[16] In summary, on both applications, the applicant is awarded costs of \$12,784 and disbursements of \$10,714.45, totalling \$23,498.45.

R M Bell
Associate Judge