IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-198

BETWEEN	PARAGON BUILDERS LIMITED Plaintiff
AND	HAWKINS CONSTRUCTION LIMITED Defendant

Judgment: 24 April 2009 at 4.00 pm

JUDGMENT AS TO COSTS
OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 24 April 2009 at 4.00 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] On 10 March 2009 I issued a minute making an order staying the proceeding filed by the plaintiff to arbitration by the consent of the parties. Costs, however, remained in issue. The parties were directed to file and serve memoranda on this issue of costs. This judgment addresses that outstanding costs issue.

Background Facts

[2] The defendant, Hawkins Construction Limited, is a construction contractor. In 2007 the defendant entered into a contract with Ecosse Afrique Enterprises Limited for construction work at 8 Cambridge Terrace and 19 Blair Street, Wellington. The plaintiff, Paragon Builders Limited, was subcontracted by the defendant in June 2007 to carry out carpentry labour work at the site.

[3] The plaintiff claims that the contract between itself and the defendant was wrongfully terminated by the defendant. On 4 April 2008 the plaintiff's representatives wrote to the defendant stating that the plaintiff sought damages for costs and lost profits incurred due to the suspension and termination of the contract, estimated at $200,214.00, and sought to initiate the arbitration provisions of the contract. An issue arose, however, over the extent of the sub-contracted work and the written contract between the parties. This 4 April 2008 letter stated:

> "Our client does not accept the statement in your 29 February letter that the fit-out works were performed in addition to the contracted scope of works and did not form part of Paragon's original obligations. We are advised that no written contract for the fit-out work was ever finalised, but instead the base build and fit-out work proceeded in tandem as part of the same contract."

[4] The defendant replied by letter dated 16 April 2008, stating:

> "Whilst we accept that your client was engaged to provide carpentry labour for the structural upgrade works ("base build") at 8 Cambridge Terrace, it is denied that it was ever engaged to provide carpentry labour for the fit-out works other than by the way of variation of its subcontract for the base build on an ad-hoc-basis. Consequently we do not accept that there was ever a contract for the fit-out works that was capable of being terminated, wrongfully or otherwise…
>
> We agree with your assertion that Paragon was engaged to carry out and complete the carpentry labour work comprised in the Head Contract. It is however irrefutable that the sub-contract was in respect of the base-build works only.
>
> It is denied that a sub-contract, written or otherwise, was ever entered into between Hawkins and Paragon in relation to the Cambridge Terrace fit-out works.
>
> …

> We trust that you have advised your client that in line with your assertion that there is no written contract there can be no arbitration agreement under which arbitration proceedings can be commenced."

[5] The plaintiff's representatives replied by letter dated 20 May 2008, stating that the defendant's contention that no contract existed for the fit out works was untenable, that the base-build and fit out works proceeded in tandem with each other, and that there is evidence of this contract. It further stated:

> *"Given your position on arbitration, in the absence of satisfactory resolution our client will be issuing proceedings in the High Court without delay."*

[6] The defendant replied on 23 May 2008 reiterating that they did not believe there was a contract between the parties for fit out works, that the plaintiff had not provided evidence of such a contract, and that it remained prepared to meet with the plaintiff to resolve matters.

[7] The plaintiff then issued proceedings in this Court for breach of contract. In the plaintiff's statement of claim dated 29 January 2009 it is apparent that the alleged agreement for the plaintiff to carry out fit out works proceeded as a variation to the original written contract regarding the base build.

[8] On 27 February 2009 the defendant filed an application for an order that the proceedings be stayed for arbitration, on the grounds that the contract or contracts concerned were subject to an arbitration agreement contained in clause 23(a) of the subcontract agreement.

[9] On 10 March 2009 I made an order staying these proceedings to arbitration with the consent of the parties.

Counsel's arguments and my decision

[10] In consenting to the stay of proceedings, Counsel for the plaintiff submitted:

> "The plaintiff initiated the dispute resolution clause including arbitration. The defendant denied the existence of the contract and dispute resolution mechanism making it appropriate for the plaintiff to file this proceeding in the Court. The defendant previously denied the contract and the dispute resolution mechanism. The defendant has now reversed its position and applied to stay to arbitration. Counsel submits that it is appropriate that costs be awarded against the defendant in respect of the stay application which has caused unnecessary costs and delay for both parties."

[11] In response, counsel for the defendant contends that the plaintiff has misunderstood the defendant's position, and that it is the plaintiff, not the defendant, who has changed their stance. Counsel argues that the plaintiff originally asserted that the fit out works were under a separate contract, while the defendant has always maintained that the agreement regarding fit out works proceeded as a variation to the contract for the base build. In its statement of claim, it is said the plaintiff has changed its position to assert that the agreement for fit out works was a variation to the original contract. Furthermore, it is argued that there is no reason why the plaintiff could not have proceeded to commence arbitration rather than issuing proceedings in this court. Costs are therefore sought by the defendant based on the normal principle that costs should follow the event.

[12] In considering these arguments, I am satisfied it is apparent from the words used in the plaintiff's letter of 4 April 2008 – "*no written contract for the fit-out work was ever finalised, but instead the base build and fit-out work proceeded in tandem as part of the same contract*" – that the plaintiff viewed the agreement for fit out work as a variation on the written contract for the base build work. It cannot be said that the plaintiff ever asserted that there were two separate contracts.

[13] Counsel for the defendant argues that the words used in the defendant's letter of 16 April 2008 – "*We trust that you have advised your client that in line with your assertion that there is no written contract there can be no arbitration agreement under which arbitration proceedings can be commenced*" – was merely a statement about the absence of a separate written contract for the fit out work. However, given the preceding correspondence between the parties, in my view, the defendant should have appreciated that the plaintiff was referring to an oral variation of the written contract, not a completely separate oral contract. The defendant should have agreed to submit to arbitration on the basis that there was a variation to the written contract.

[14] Furthermore, the defendant alleges that their own consistent position has been that it was a variation on the same contract, in which case, from the defendant's perspective, the arbitration provisions in the written contract were applicable. In those circumstances the defendant's denial of the arbitration machinery was not

justifiable. In light of the defendant's denial of the contract and the arbitration machinery, the plaintiff's actions in commencing High Court proceedings were justifiable, to avoid the costs of enforcing the arbitration machinery.

[15] The starting point in any costs consideration is Rule 14.2 *High Court Rules* which provides as relevant:

> **"14.2 Principles applying to determination of costs**
> The following general principles apply to the determination of costs:
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:"

[16] As the defendant brought the application for a stay of this proceeding, it is, in a limited sense, the successful party to that interlocutory application. However, this principle cannot determine the situation where the defendant's application for stay represents an apparent change from its previous position, a position which, in my view, had resulted in the proceedings being properly brought. This would be inconsistent with other principles apparent in Part 14, of the *High Court Rules* such as rule 14.6:

> **"14.6 Increased costs and indemnity costs**
> …
> (3) The court may order a party to pay increased costs if—
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
> …
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
> (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; …"

[17] Here, I am satisfied that at the outset the defendant clearly did deny the arbitration agreement and this resulted in the present proceeding being brought by the plaintiff properly but quite unnecessarily.

[18] The proceedings and the stay application should never have been necessary if the defendant had agreed to submit the matter to arbitration as it was effectively invited to do in April 2008.

[19] Accordingly, I am satisfied that the plaintiff here is entitled to costs for the stay of proceedings and they are to be awarded on a category 2B basis. I understand they total $3,500.00.

[20] The plaintiff also seeks Category 2B scale costs of $4800.00 for its commencement of proceedings. As this relates to the substantive matter of breach of contract, which has yet to be determined in arbitration, I do not consider that it is appropriate to determine this matter now. Determination of liability for these costs is reserved for consideration if appropriate by the arbitrator. It is however necessary to award $1,100.00 as a disbursement to the plaintiff now for the High Court filing fee, as regardless of the ultimate outcome of the arbitration, in my view, this was an unnecessary and avoidable cost attributable to the defendant.

[21] Finally, Counsel for the defendant argued that if it was found that the plaintiff was entitled to costs, then no order should be made until the final determination of the dispute in arbitration. This is because it is alleged that the defendant made a "Calderbank Offer" in settlement of the plaintiff's claim, such that the plaintiff would only be entitled to recover the costs of the proceedings if it recovered a sum which exceeded the amount which was offered. However, the "Calderbank Offer" does not relate to an issue in the present application for a stay of the proceedings. It relates only to issues which may arise in the substantive proceedings*: High Court Rules*, rule 14.10(1)(b). The appropriate time to consider the "Calderbank Offer" is when costs on the substantive proceedings are determined.

Result

[22] For these reasons, an order is now made that the plaintiff is entitled to category 2B costs against the defendant on the stay application in the sum of $3,500.00 and disbursements of $1,100.00.

'Associate Judge D.I. Gendall'