JUDGMENT ON COSTS : McDOUGALL J : Supreme Court New South Wales, Equity Div. T&C List. 9th May 2008

1 The issues in these proceedings were whether:

(1) the *Building and Construction Industry Security of Payment Act* 1999 ("the Act") applied to a deed made on 2 March 2006 between the plaintiffs (the Owners) and the first defendant (Coastivity);

(2) whether the decision of an adjudicator upon a payment claim made by Coastivity was valid or void; and

(3) whether, if the Owners made out their case that the determination was void, relief should be refused on discretionary grounds.

2 I decided that the Act did not apply to the deed and that the adjudicator's decision was void: [2008] NSWSC 313. Accordingly, I granted declaratory and injunctive relief, and indicated that I would hear the parties on costs.

3 The Owners seek their costs. Coastivity says that there should be no order as to costs. Having regard to a number of factors, including that the Owners are presently without legal representation, the amount at issue in the proceedings is relatively small (the adjudicated amount including adjudication fees was less than $50,000.00) and that Coastivity has retained solicitors who have a practice near Newcastle, the parties agreed that I would consider Coastivity's written submissions and decide, on the basis of those submissions, whether I needed to hear from the Owners before dealing with the question of costs. Having considered those submissions, I conclude that there is no need to call on the Owners to put submissions.

4 The submissions for Coastivity assert in paragraph 6 that Coastivity "sought to use its statutory right under the" Act to have the dispute between itself and the Owners adjudicated. Thus, the submissions proceed on a basis entirely inconsistent with my conclusions. At [34] to [45], I concluded that Coastivity did not undertake to provide related goods and services nor to carry out construction work. At [59] to [71], I concluded that the consideration payable to Coastivity for any services provided by it pursuant to the deed was not calculated by reference to the value of those services.

5 In other words, on two independent bases, I concluded that the Act did not apply to the deed. Coastivity's submissions, that it had and had exercised an available statutory right, fails to take account of that conclusion.

6 Coastivity's submissions point to the amount at issue, and to two "*Calderbank*" letters. Coastivity submits that it was the only party attempting to resolve the matter, that the Owners frustrated its attempts to do so, and that Coastivity had no alternative but to defend the proceedings notwithstanding the "small amount of money" at stake.

7 In order to understand the letters, some background is necessary. Coastivity had obtained an adjudication certificate and had filed this certificate in the Local Court at Tweed Heads. Accordingly, Coastivity recovered a judgment against the Owners in the sum of $49,470.86. The Owners succeeded in having that judgment stayed, but upon condition that they pay the amount of the judgment into the Local Court (this was done). In addition, Coastivity commenced bankruptcy proceedings against the Owners in the Federal Magistrates' Court. I understand that the bankruptcy proceedings were stayed pending the outcome of the proceedings in this Court.

8 On 15 August 2007, Coastivity's then solicitors wrote to the Owners' then solicitors. They pointed out that Coastivity claimed an amount in excess of $73,000.00 as the total owing to it pursuant to the deed. They referred to an "attached summary of Coastivity's attempts to negotiate and settle" – that summary was not put before me. They then stated that Coastivity would be prepared to resolve the matter on the basis that the amount held in Local Court be paid out to it and that each party bear their own costs. The letter then said: "this letter should be treated as an offer pursuant to *Calderbank v Calderbank* that in the event that the Supreme Court upholds the Adjudicator's decision, then we shall be using this correspondence with respect to making an Application for indemnity costs."

9 The other letter relied upon was written by Coastivity's current solicitors to the Owners' former solicitors. The writer stated that "*[w]e have reviewed the Adjudicator's Determination… and considered the case law… [w]ith respect, it is our view that your clients' application will fail.*" A number of reasons were given. One is that the Owners' contention, that Coastivity did not undertake either to carry out construction work or to supply related goods and services, "cannot be sustained". As will be seen from what I have said above, that contention was sustained.

10 The letter also referred to the contention that the consideration for the services to be provided by Coastivity under the deed was calculated otherwise then by reference to the value of those services, and said in effect that the contention was wrong. Again, it will be seen, I upheld that contention.

11 The letter proposed an offer of settlement involving firstly the release to Coastivity of the amount held in the Local Court and secondly that the Owners pay Coastivity's costs of the proceedings in this Court. The letter then stated then:

"*This letter is an offer pursuant to the principals [sic] enunciated in* ***Calderbank v Calderbank****. In the event that our client is successful, in the proceedings, we reserve the right to rely upon this letter on the question of costs seeking indemnity costs from your client.*"

12 It will be seen that the outcome that the Owners have achieved – in effect, complete success – is substantially more favourable to them than the outcomes offered on 15 August 2007 or 4 February 2008. On that basis, I have some difficulty in seeing how the letters in question really assist Coastivity on the question of costs. I do accept that, on the material put before me, it was Coastivity that was seeking to compromise the matter. I do

accept that compromise is desirable: particularly when the amounts of money that are at stake may well be less than the costs to be incurred. I do however note that I have heard only one side's version of the attempts to negotiate a compromise.

13 Thus, of the two grounds advanced by Coastivity in support of its application that each party bear their own costs, the first – that it had a statutory right to do what it did – cannot be sustained having regard to my findings; and the second – that it sought to achieve a compromise – does not help it in circumstances where on any view the Owners bettered (in the case of the second offer, comfortably bettered) the compromise that was put forward.

14 Coastivity's submissions did not deal with the third issue raised in the proceedings, which was that as a matter of discretion, and even if I were satisfied that the determination was void, I should refuse declaratory and injunctive relief on discretionary grounds. I dealt with that issue at [75] to [92], and concluded that, to the extent that discretionary considerations were relevant, there were none that would justify the withholding of the relief claimed.

15 It followed that each of the three issues identified and decided was decided in favour of the Owners and against Coastivity. In those circumstances, the guiding principle is that costs should follow the event. For the reasons that I have indicated, I do not see in the circumstances advanced by Coastivity any reason to deflect the application of that general rule.

16 Accordingly, I make the following orders as to costs:

(1) Order the first defendant to pay the plaintiffs' costs of the proceedings.

(2) Otherwise, make no order as to costs.

C Jennings (Plaintiffs)
R Scruby (Defendants) instructed by Gillis Delaney Lawyers