JUDGMENT OF DUFFY J HIGH COURT OF NEW ZEALAND AUCKLAND REGISTRY 11 December 2007

[1] This is an appeal against part of a judgment of the District Court at Auckland delivered on 27 August 2007. The part appealed against is an order that the defendant (now the respondent in this Court) pay the plaintiff (now the appellant in this Court) costs in respect of District Court proceedings in the sum of $1,862, including disbursements and GST. The appellant contends that it is entitled to a higher award of costs than that amount. It seeks an award of $6,608 plus disbursements of $465; these amounts being the actual costs it has incurred in pursuing the summary judgment. The appeal is opposed.

Background

[2] The appellant was successful in obtaining summary judgment against the respondent for non-payment of a debt of $1,625. The claim for repayment of the debt and for an award of costs was made under the Construction Contracts Act 2002.

[3] The appellant was a sub-contractor to the respondent, who was the contractor of a building project at 12A Seacliffe Avenue. The appellant had provided services to the respondent for the supply and laying of waterproof membrane to the decks of the building at this address. Those services came within the scope of the Construction Contracts Act.

[4] A written quotation of the appellant dated 5 October 2006 set out the price for the appellant's waterproofing work, being $5,000 plus GST, and the requirements upon which this work would be done. Those requirements included:

a) Construction Contracts Act 2002 and associated regulations to apply;
b) Payment for work completed to be 20th month following invoice unless noted; and
c) Producer statements and warranties available on written request. No producer statements or warranties will be issued unless full payment received.

[5] Producer statements are required in order for a building owner to obtain certificates of compliance from the relevant territorial authority.

[6] There was some dispute, in the evidence before the District Court, about the terms of the contract in regard to the issuing of producer statements. At paragraph 5 of his affidavit, Bruce Johans Kneght, a director of the appellant, deposed that the terms of the agreement between the appellant and the respondent were set out in the written quotation of 5 October 2006. The respondent's evidence, (affidavit of Timothy Peter Sullivan at paragraph 6), was that there was only a verbal agreement between the parties that the appellant "*would provide producer statements for the work it did upon it being paid for the work it completed on a staged basis*".

[7] The affidavit evidence suggests the dispute over the producer statements was around whether they were to be issued on receipt of full payment, or on a staged basis after payments for each stage of the work had been received. The respondent, as the contractor of the works, would have wanted to ensure the construction work qualified for certificates of compliance. Hence, the respondent would have needed producer statements from the appellant. Both parties needed certainty on this issue.

[8] It is apparent from the agreed chronology that it was not until after the time for payment had passed that the dispute over the timing of the issue of producer statements became a justification for non-payment. A final invoice for the work, for the sum of $5,625, was issued on 23 October 2006. Payment was due on 30 October 2006. But it was not until 23 December 2006 that the respondent made a part payment of $4,000 and refused to pay the balance of $1,625.

[9] On 3 May 2007 the appellant wrote to the respondent informing it: that the statutory time limit the Act imposed for disputing the existence of a debt had passed; and that the $1,625 was due and payable. The respondent was given a final opportunity to pay this debt by no later than 11 May 2007 and warned that failure to do so would result in the issuing of legal proceedings with costs being sought on a solicitor/client basis.

[10] On 16 May 2007 (outside the extended timeframe for payment and some six months after the original payment date) the respondent emailed the appellant:

I have a cheque for you, we just require the producer statement for the works you have completed at 12A Seacliffe Avenue all as discussed previously. The information you may require is Lot 2 DP 26033, building consent BP 1220411.

[11] The appellant responded with an email dated 17 May 2007:

You now advise a cheque is available but I have to issue producer statements first. Tony, we discussed this producer statement/payment option some time back and I advised that if the money was paid I would issue the required paperwork. You have only now forwarded details required for this paperwork, but no cheque. I now extend my deadline of payment by bank cheque for due debt of $1,625 to 4.00 pm Friday 2007 to my registered office. This is your last available time. If this payment is not received by this time, I will be start proceedings to recover debt, with all costs recovered on a solicitor/client basis. On receipt of due debt, appropriate paperwork will be forwarded.

[12] The respondent replied on 21 May 2007; it refused to pay the balance owed until the required documentation (which I take to be the producer statements) was supplied.

[13] On 23 May 2007 the appellant commenced its summary judgment proceedings. On 7 June 2007 the respondent wrote to the appellant denying the claim came within the Construction Contracts Act and repeating the request for the producer statements before payment would be made.

[14] The agreed chronology then shows further correspondence between the parties and threats from the respondent to file a defence and a counterclaim. A notice of opposition was filed on 22 June 2007. When the summary judgment application was first called in the District Court the respondent sought and was granted an adjournment to enable it to file further affidavits, and its own application for summary judgment and counterclaim.

[15] On 3 July 2007 producer statements for earlier invoices were sent to the respondent. The final producer statement was still outstanding. Nonetheless, on 10 July 2007 the respondent sent a cheque for $1,625 as full and final payment of all money owing between the parties. This was not accepted. On 19 July 2007 the respondent advised the appellant $1,625 had been paid by direct debit to the appellant's bank account as a full and final payment of all money then owing between them. The appellant refused to accept this payment as a full and final payment. By then it wanted payment for the costs it had incurred in pursuing payment of the debt as well as interest.

[16] The dispute ended with the appellant succeeding in its summary judgment application; being awarded interest and costs. However, the costs award was below the level sought by the appellant. Hence this appeal.

The District Court judgment

[17] By the time the summary judgment application was before the District Court for hearing it was clear that the Construction Contracts Act applied and that there could be no defence to the appellant's claim. This is because under s 22 of the Act once the party seeking payment (called a payee under the Act) issues a claim for payment, the recipient (called a payer under the Act) has a limited time in which to dispute liability to pay. Once the specified time limit in s 22 has expired, the claim becomes a provable and recoverable debt under s 23. Once this point is reached, any dispute the payer may have about liability to pay can only be resolved by the payer issuing separate legal proceedings based on whatever cause of action it considers it can establish against the payee. Any money awarded under this cause of action would then be available to the payer and would go to offset the debt it had been obliged to pay pursuant to the Construction Contracts Act.

[18] The District Court Judge recognised that once the appellant had issued its invoice for $5,625, on 23 October 2006, time began to run under the Construction Contracts Act. If the respondent wanted to dispute the debt it had to issue what is known under the Act as a "payment schedule" within the timeframe provided in s 22, which in this case would have been within 20 working days after receipt of the appellant's invoice. No payment schedule was issued.

[19] The Judge quite properly found at [17] that the respondent's imposition of a precondition to payment (the issue of producer statements) was improper. The respondent's failure to institute the dispute process under the Construction Contracts Act meant that it could not impose preconditions to making payment. The Judge recognised that there was a due and payable debt of $1,625 to the plaintiff and gave judgment accordingly.

[20] The appellant sought an award of costs that reflected the actual solicitor/client costs it had incurred in obtaining its judgment. The Construction Contracts Act expressly provides for payees to be able to recover actual and reasonable costs of recovery as awarded by the Court against a payer: see s 23(2)(ii).

[21] The Judge, however, decided that the appellant was not entitled to actual solicitor/client costs. Two factors caused him to reach this view. First, he considered that issuing summary judgment proceedings to recover the sum of $1,625 was an expensive and inappropriate response by the appellant: see [18]. In this regard the Judge took the view that other cheaper forms of payment recovery were preferable: see [19]. However he did not identify what those forms were. Secondly, the Judge considered that the appellant could easily have avoided the delays in payment by taking the pragmatic approach of making the producer statements available: see [18]. The Judge took the second consideration into account even though he had earlier found the respondent's request for the producer statements to be improper. The Judge was, nonetheless, critical of the appellant for not adopting a pragmatic approach to the problem of non-payment.

[22] The Judge was influenced in reaching his findings on the appropriate award of costs by two judgments of this Court that dealt with costs awards under the High Court Rules. The first judgment was Curly Limited v Harvey Norman Stores HC AK M29/IM02 24 May 2002 in which Chambers J found that costs must always be in proportion to the issues at stake. The second was another judgment of Chambers J of similar effect: ***Crichton v Bank of New Zealand*** HC AK AP 128/SW00 12 February 2001. In that case, Chambers J found that even when a Court decides to award full solicitor/client costs to a party, the amount of the costs claimed by the successful party's legal advisers must always be reasonable, having regard to the nature of the proceeding.

[23] The Judge did not refer to any judgments on costs awards under s 23 (2) (ii) of the Construction Contracts Act. Nor did he stop to consider if an award under s 23 required considerations that differed from those in regard to awards made under the procedural rules of the District and High Courts. He did refer to the appellant's submission that:

... small claims made under the Construction Contracts Act should not be inhibited by an inability to recover appropriate costs.

[24] Nonetheless, the Judge concluded at [21]:

... any costs claimed must be reasonable in the circumstances. In this case, the costs are unreasonable because:

(a) they bear no proportion to the amount claimed;

(b) whilst the summary judgment procedure can be used in claims under the Construction Contracts Act 2002, generally, in respect of small claims, it is an inappropriate and very expensive procedure; and

(c) in this case if the plaintiff had exercised a modicum of common sense it could easily have avoided the necessity to issue proceedings by making the producer statements available as requested.

The result was a costs award of $1,862, including disbursements and GST.

Appellant's submissions

[25] The appellant submits that the Judge erred in finding that the claimed costs were unreasonable. It developed this submission with reference to the following points:

- The respondent had no defence, had numerous chances to pay and was fully aware of the likelihood of summary judgment proceedings if it continued not to pay;
- The respondent should never have taken steps to oppose summary judgment when it had no grounds to do so; it had received legal advice yet it chose to oppose the summary judgment initially; only when the hearing of the summary judgment application was nigh did the respondent concede the position.

[26] The appellant further submitted that:

- It has done no more than rely on its rights under the Construction Contracts Act;
- The purpose of the ability to recover "actual and reasonable costs" under the Act is to ensure that plaintiffs attempting to recover small debts did not have the amount claimed eroded by the costs of recovery; and
- The reasonableness of the quantum of the appellant's legal costs is not in dispute.

Respondent's submissions

[27] The respondent submits that the Judge took the correct approach in assessing the reasonableness of the costs claimed by the appellant and that the decision reached was one that was open to the Judge. The respondent emphasised the element of judicial discretion exercised in the judgment and referred to the narrow basis available for challenging the exercise of a judicial discretion: see **May v May** (1982) 1 NZFLR 165 (CA); and **Glaister v Amalgamated Dairies Ltd** [2004] 2 NZLR 606.

Law

[28] There is no doubt that in an appeal from the exercise of a judicial discretion, an appellate Court can only intervene if the Judge at first instance has erred in the sense outlined in May v May. That is, he or she:

a) acted on a wrong principle; or
b) failed to take into account some relevant matter; or
c) took account of some irrelevant matter; or
d) was plainly wrong.

[29] An appeal in relation to a decision on the reasonableness of an award of costs is an appeal against the exercise of a discretion. The appellant must establish that there has been an error of the type that permits appellate intervention. It is not for this Court to reach an original conclusion on the matter.

Discussion

[30] Has the Judge erred in law in his approach to an award of costs under s 23? The answer to this question involves ascertaining Parliament's intent when it made provision for the recovery of "actual and reasonable costs" in s 23. In particular, it requires an assessment of whether Parliament intended that the costs incurred in recovering payment of indisputable statutory debts (which is what a debt under s 23 is) should be subjected to the same approach as an award of costs under the procedural rules of the Courts.

[31] The first step is to consider the purpose and policy of the Act. The Act's purposes are set out in s 3:

The purpose of this Act is to reform the law relating to construction contracts and, in particular, -

(a) to facilitate regular and timely payments between the parties to a construction contract; and

(b) to provide for speedy resolution of disputes arising under a construction contract; and

(c) to provide remedies for the recovery of payments under a construction contract.

[32] An overview of the Act's provisions is set out in s 4. Of relevance to this case are the provisions for recovering progress payments and disputing liability to pay such payments: ss 19-24. Also of interest are s 79 which, with a very limited exception, excludes counterclaims, set-offs or cross demands when debts are being recovered under s 23, and Part 3 of the Act which establishes a fast track dispute resolution process that can be invoked by any party as of right.

[33] Under the statutory scheme, a payee commences the process for recovering payment for services rendered by serving a payment claim on the payer: see s 20. If liability to pay the payment claim is disputed, the payer is given the opportunity, under s 21, to respond by issuing what is called a payment schedule.

[34] The payment schedule must be in writing, identify the payment claim to which it relates and indicate a scheduled amount. If the scheduled amount is less than the amount claimed, the payment schedule must:

a) indicate the manner in which the lesser payment has been calculated;
b) the reasons for the difference between the scheduled amount and the claimed amount; and

c) in a case where the payer is withholding payment on any basis, the reason for withholding payment.

[35] Section 22 imposes a rigid timeframe on the payer for disputing liability by serving a payment schedule. Providing a payer acts within this timeframe, liability to pay the claim is open to dispute.

[36] But if the Act's process for disputing liability to pay a payment claim is not triggered within the specified timeframe, the payment claim automatically becomes a debt that is due and payable: see s 23. In such circumstances s 23 empowers the payee to recover from the payer, as a debt due in any Court:

i) The unpaid portion of the claimed amount; and

ii) The actual and reasonable costs of recovery awarded against the payer by that Court.

[37] Section 23 also authorises payees to suspend further work provided they give notice of this event in accordance with the section: see: s 23(2)(b).

[38] The Act defines "Court" in s 5 to mean the High Court or a District Court in any proceeding in which the amount claimed or in issue does not exceed the amount to which the jurisdiction of the District Court is limited in civil cases.

[39] Sections 25-71 provide an alternative fast track dispute resolution process for resolving disputed payment claims. This process is available at the election of any party to a contract covered by the Act and it can be invoked even though the dispute is the subject of court proceedings between the same parties: see 25(1). The Act's dispute resolution process is only brought to a halt by court proceedings when the court proceedings determine the dispute before the adjudicator does: see s 26(3).

[40] The clear impression to be obtained from the Construction Contracts Act is that it is reforming and remedial legislation that was passed in order to rectify problems contractors and sub-contractors, in the construction industry, face in obtaining payment for their work.

[41] The repeal of the Wages Protection & Contractors Liens Act 1939 in 1988 removed the special protection that Act gave to contractors and sub-contractors in the construction industry. After the repeal of that Act and before the passing of the Construction Contracts Act, contractors and sub-contractors could only look to the Contractual Remedies Act 1979 as well as the general law of contract and debt to provide them with remedies for non-payment for their services. Sub-contractors were in a particularly difficult position because they had no direct contractual link and, therefore, no right of claim against the property owner and ultimate beneficiary of their work.

[42] With the Construction Contracts Act, Parliament has sought to provide contractors and sub-contractors with greater remedies and, therefore, greater protection than is available to creditors under the general law. For example, subcontractor claimants under the Act can now, in certain circumstances, obtain charging orders against the construction site even where the owner is not a party to the contract: s 30.

[43] The Act creates its own statutory scheme for payment of claims under construction contracts. Its purpose was described by the Court of Appeal in **George Developments Ltd v Canam Construction Ltd** [2006] 1 NZLR 177 at [41] as being:

... *"to facilitate regular and timely payments between the parties to a construction contract". The importance of such regular and timely payments is well recognised. Lord Denning MR (quoted in* ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*** *[1973] 3 All ER 195 (HL) at p 214 per Lord Diplock) said: "There must be a `cash flow' in the building trade. It is the very life blood of the enterprise."*

The creation of this statutory scheme clearly signals Parliament's intent to ensure that sub-contractors have a speedy and effective remedy for non-payment of their claims.

[44] Under the statutory scheme the combined effect of ss 22 and 23 enables payment disputes to be processed promptly and undisputed payment claims to be readily enforced. The purpose of ss 22 and 23 was discussed in ***Marsden Villas Ltd v Wooding Construction Ltd*** [2007] 1 NZLR 807 Asher J at [11] where there is reference to the Law Commission Paper which led to the legislation. This Paper states:

The basic intention is that instead of the cash flow being held up for weeks, months and years, pending a final solution, a decision, described as being "quick and dirty" will be given to resolve the cash flow situation, leaving a final determination of financial rights and obligations to be arrived at later.

[45] Of course that final determination of financial rights and obligations can only be arrived at when a payer has invoked the statutory dispute rights by issuing a payment schedule within the specified time for doing so. Where no payment schedule is issued, the opportunity for a final determination of financial rights and obligations is lost and the payer is left with the "quick and dirty" solution. In **Marsden Villas Ltd** the Court described the consequences of a failure to issue a payment schedule in this way:

The non-provision of the payment schedule is one of the crucial hinges of the Act. The structure appears to be that there will be absolute and irreversible consequences resulting from the non-provision of such a payment schedule. This appears to be consistent with the purpose of the Act to facilitate regular and timely payments, and the approach of the Court of Appeal in **Canam.** In **Canam** the focus was on the provision of the progress payment claim, rather than the provision of payment schedules. However, it appears to have been the assumption that the severe consequences of the non-provision of a payment schedule in time were absolute

[46] Parliament has provided that payees may recover unpaid payment claims that come within s 23 in any court and can recover the actual and reasonable costs of recovery awarded by the court hearing the recovery process: s 23(2)(a)(ii). The Act does not make provision for recovery of s 23 debts in any other fashion. Why then should payees be discouraged from commencing legal proceedings in a court to recover the payments they are owed under s 23?

[47] The District Court Judge based his costs award on a view that it was unreasonable for the appellant to use the summary judgment process to recover a debt of $1,625. No view is recorded in the judgment on the reasonableness of the quantum of the costs incurred in obtaining the summary judgment.

[48] Before this Court no issue was taken with the quantum of the fees incurred. When it was put to the respondent that the sum of $6,608 plus disbursements of $465 did not seem out of the ordinary for a summary judgment application, the respondent did not demur. It needs to be remembered that there was initial opposition to the summary judgment application and this would have impacted on the quantum of the appellant's fees.

[49] The notion that the cost of a chosen court procedure should be in proportion to the amount ultimately recovered has developed under the procedural rules in the High Court and the District Court: **Glaister v Amalgamated Dairies Ltd** (supra); **Curly Limited v Harvey Norman Stores** (supra) and **Crichton v Bank of New Zealand** (supra). The procedural rules of both courts are much the same in this regard.

[50] The use of the word "reasonable" in s 23(2)(a)(ii) has provided the opportunity to read the subsection as if it were a provision in the procedural rules relating to costs awards. But to read the subsection in this way would see costs awards following the principles applied under those rules. This would make recovery of small claims uneconomic. The present case is a good example of that consequence. The recovery cost of the payment claim far exceeded the s 23 debt. In such circumstances, unless actual costs incurred in recovering payment are themselves recoverable there is no benefit in pursuing payment.

[51] The present case is also a good example of how contractors can delay paying their sub-contractors. In this case the payment claim was due for payment on 30 October 2006. Part payment was not made until 23 December 2006 and even then the balance of $1,625 remained outstanding until the summary judgment proceedings were in progress. The appellant had to wait until 10 July 2007 before any attempt at repaying the balance was made. Were it not for the commencement of the summary judgment proceedings the balance might still be outstanding. These events are precisely what Parliament wanted to prevent.

[52] If payees have to weigh up the economic benefits of using legal process to pursue claims under s 23, claims such as the present might become unrecoverable. Payers might begin to withhold payment of a percentage of a claim on the basis they knew it would cost the payee more to recover the withheld amount than it would to write it off. If this occurred the effective speedy payment recovery scheme Parliament intended to provide under the Act would be weakened. Such an outcome would thwart Parliament's intent; it would be contrary to the purpose and policy of the Act.

[53] If on the other hand payees could always obtain costs awards for actual costs, that were reasonable, in terms of the cost of the service, they would always be able to obtain payment of their claims. Payers would be at no disadvantage because they would have statutory notice that should they fail to pay claims that were properly due under the Act they would have to pay the actual costs of recovery as well. They could avoid this outcome simply by ensuring they paid on time. Payers who genuinely disputed liability would be unaffected because they could effect the process for disputing liability under s 21. Such outcomes are consistent with the Act's policy and purpose.

[54] Payees seeking recovery under s 23 are in a different position from ordinary litigants. Payees are seeking to recover indisputable debts that by Act of Parliament are ascertained both as to liability and quantum. In that sense they are similar to persons seeking to enforce a judgment debt. The outcome of any recovery process, in terms of obtaining a judgment that the claim is to be paid, will be certain.

[55] Ordinary litigants on the other hand are often in genuine dispute over both liability and quantum. The uncertainties of ordinary litigation are such that outcomes are not always predictable. The general approach to costs has always been that courts hold back from actual solicitor/client costs awards. A public policy choice is made that sets a balance between not deterring access to the courts unduly and compensating the successful party for the costs of its litigation. For a discussion on the public policy choices various jurisdictions have made when it comes to the quantum of court costs awarded, see: Glaister v Amalgamated Dairies Ltd (supra) at [9].

[56] When the possible consequences are considered it seems that no harm would be done by reading s 23 as permitting recovery of costs that were reasonable in terms of time spent in providing the service provided. However, if s 23 is to be read as excluding costs awards where the very choice of service is seen to be unreasonable, once measured against the benefit of the amount recovered, there is no doubt that payees owed small amounts of money will suffer. The seriousness of Parliament's intent to rectify the problems created by delays in payment is evidenced by the extent to which it was prepared to alter the law: see ***Marsden Villas Ltd*** at [14]:

"In enacting such legislation, the Legislature set aside the long-established conservative contractual approach to construction contracts which emphasised freedom of contract."

[57] The view I take of s 23 is consistent with that adopted in Bayley and Kennedy-Grant A Guide To The Construction Contracts Act. At p 174 the authors state that s 23 differs from the costs regimes applying in both the High Court

and the District Courts and may justify, and require, higher awards of costs ("*actual and reasonable*" rather than the formulistic regime of the courts) than would normally be made in the courts. Such an interpretation is consistent with both the language and the purpose of the Act.

[58] It is also one that was followed by this Court in ***Halls Earthworks Limited (In Liquidation) v Donovan Drainage and Earthmoving Limited*** HC AK CIV 2007-488000144 10 August 2007 Associate Judge Faire, though in that case the Court was not faced with the circumstance where the actual costs of recovering the debt exceeded the amount of the debt.

[59] It is important for courts faced with reforming remedial legislation not to thwart the intent of Parliament by reading such legislation through a lens that is coloured by principles taken from a non-related area of the law. To do so can result in the legislation being misinterpreted or irrelevant considerations being taken into account. I consider that is what has occurred here.

[60] The Judge has erred in interpreting s 23(2)(a)(ii). When the subsection is interpreted correctly, I do not think it permits a court to take into account the reasonableness of the choice of legal process to recover a debt due under s 23.

[61] The subsection refers to the payee recovering the debt due from the payer "in any court". This indicates that Parliament expected that payees would be using court process to recover the debts they were owed under the Act. To read s 23 as if the expense of court process could on occasion render the cost of that process unreasonable would be to remove the Act's protection from payees whose debts came within that occasion. Those payees in this group would be returned to the time before the Act was passed; their cash flow could be held up for weeks or months with impunity.

[62] It is all very well to say there are other less expensive options for debt recovery, but what are they? Summary judgment has always been recognised as the most speedy and effective way to obtain a judgment when there is no defence to a claim: see ***Pemberton v Chappell*** [1987] 1 NZLR 1.

[63] An ordinary District Court proceeding can be commenced more cheaply, in that all that is required to initiate the process is a notice of proceeding and a statement of claim. But it is also a slower process, especially once a statement of defence is filed, and defendants can delay its progress. In ordinary proceedings the pleading in a statement of claim that the debt is indisputable, because the time for serving a payment schedule has expired, is no more than an allegation. Until the allegation is proved through evidence it can be disputed, whereas summary judgment allows a plaintiff to put before the Court not only allegations but also the evidence to prove the allegations.

[64] Rule 463 of the District Court Rules provides an alternative and speedy process in the District Court, but it only applies where there is a liquidated demand and the defendant does not file a statement of defence. If a statement of defence is filed the proceeding progresses in the ordinary way.

[65] I do not think it is realistic to for payees to consider adopting a process which would see them commence an ordinary proceeding in the hope that no defence will be filed and that r 463 can be relied upon. The ability to file a defence may cause defendant/payers to avail themselves of this opportunity to delay payment. It has to be remembered that the reason for the legal process in the first place is because the payer has failed to pay what is an indisputable debt. Furthermore, once a plaintiff commences an ordinary proceeding, leave is required to bring a summary judgment. A payee plaintiff, faced with a payer looking to delay the time for payment by filing a defence, cannot then easily turn to using summary judgment to quickly dispose of the unmeritorious defence. What at the outset may appear to be a cheap alternative to summary judgment could in the long run be more time consuming and costly.

[66] In this case the respondent actively opposed the summary judgment in its early stages. So it is difficult to imagine how the commencement of an ordinary proceeding could have assisted the appellant achieve a speedy result. There is nothing unreasonable about the appellant's choice of court process.

[67] The respondent referred in its submissions to the Disputes Resolution Tribunal, however, this Tribunal is not a court for the purpose of s 23 and its jurisdiction does not extend to recovery of indisputable debts. The respondent also referred to the use of debt collecting agencies as a cheaper means of recovering small debts. Once again these fall outside s 23 and the basis on which such agencies collect debts is not in evidence before this Court. If recovery of some debts is too uneconomic for a payee to pursue through the courts, matters would be unlikely to be any different for a debt collection agency.

[68] If Parliament had considered that recovery of some payee's debts could not justify the cost of court process, I would expect Parliament to have made provision for some alternative, cheaper means of recovery in the Act. It has certainly made such provision in regard to the adjudication of disputes under the Act.

[69] When I take into account the Act's policy and purpose, I am driven to conclude that Parliament intended all payees to be able to pursue recovery of s 23 debts through court process and, provided the quantum of those costs was reasonable and not excessively high, to obtain the actual cost of doing so. It follows that "reasonable" in s 23 can only relate to an assessment of the quantum of the legal fees incurred in obtaining summary judgment for the purpose of seeing if they are within the range of fees that are reasonably charged for work of that type. Once the recovery costs are seen to come within the range of amounts usually charged for work of that type they are recoverable under s 23.

[70] The Judge has failed to interpret s 23 correctly and, therefore, has erred in law. He has also taken into account an irrelevant consideration: namely, the principles applied to awards of costs under the procedural rules of court. This is a case which falls within the May v May principles permitting intervention by an appellate court; accordingly it is appropriate for me to substitute my interpretation of s 23(2)(a)(ii) for that of the District Court. For the reasons I have already outlined, my view is that the appellant is entitled to the actual costs it incurred in pursuing recovery of its debt against the respondent.

Result

[71] The appeal is allowed and the judgment of the District Court is set aside. The appellant is entitled to costs in the District Court in the sum of $6,608 plus disbursements of $465.

[72] The parties have 10 days from the date of this judgment to file memoranda on costs.

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