

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN : High Court of New Zealand. Dunedin Registry. 3rd July 2007

- [1] The plaintiff (Bluemover) has discontinued its proceeding. An issue remains as to costs. Bluemover seeks costs in a Category 2B basis. The first defendant (Breen Construction) contends that costs should lie where they fall. The issue as to costs concerns no other party.
- [2] The case is an unusual one. On 30 November 2006 Breen Construction purported to issue a notice of adjudication pursuant to s 28 of the Construction Contracts Act 2002 (the Act). Following a request by Breen Construction the second defendant, by notice of nomination of adjudicator dated 12 December 2006, purported to nominate the third defendant as adjudicator for a construction dispute between Bluemover and Breen Construction under s 33 of the Construction Contracts Act 2002.
- [3] On 18 December 2006 Bluemover filed proceedings for an order declaring invalid, or setting aside, the notice of adjudication and the notice of nomination of adjudicator. At the same time, it applied, ex parte, for an injunction restraining the third defendant from adjudicating. The ex parte order was granted on 20 December 2006.
- [4] In the outcome, the Breen Construction agreed to withdraw the notice of adjudication as part of a bargain by which Bluemover agreed Breen Construction should take its dispute to the District Court. Subsequently, Judge Doogue directed the issue of costs in the High Court proceeding ought to be determined upon receipt of memoranda from counsel.

Breen Construction's claim that costs should lie where they fall

- [5] Breen Construction accept the question of costs is one for the Court's discretion, i.e., that the usual rule that costs are generally payable by a plaintiff on a discontinuance, does not apply.
- [6] Mr Cunliffe directs the Court to the purpose of the Act, and the provisions relevant which were undertaken by Breen Construction pursuant to the Act. As he notes, one of the stated purposes of the Act is to provide a speedy resolution of disputes, and this can be achieved by reference to an adjudication process. By s 48 of the Act an adjudicator is empowered, and required, to determine whether or not any of the parties to the adjudication are liable, or will be liable, if certain conditions are met, to make a payment under a construction contract, and as well any questions in dispute about the rights and obligations of the parties under that contract.
- [7] The process does not finally determine the substantive rights, obligations and liabilities under a construction contract. Any decision of an adjudicator is provisional and will be binding on the parties until the dispute is finally determined by either arbitration or by Court proceedings.
- [8] Mr Cunliffe submits an adjudicator appointed under the Act has jurisdiction to determine whether a contract subsists, or whether the contract is a construction contract (where one party accepts the contract subsists but alleges it is not a construction contract, as in this case).
- [9] Section 74 of the Act allows proceedings to enforce an adjudicator's determination to be opposed on only three grounds, one of which is that: The contract to which the adjudicator's determination relates is not a construction contract to which this Act applies.
- [10] Mr Cunliffe submits the section contemplates that an adjudicator will determine the issue of whether a construction contract subsists and may make determinations where a construction contract is alleged not to exist. Accordingly, the Act provides a process to oppose the enforcement of an adjudicator's determination where one party contends the adjudicator's determination relates to a contract which is not a construction contract.
- [11] It follows, submits Mr Cunliffe, that Bluemover had no requirement to obtain an injunction, or seek judicial review of the appointment of the adjudicator in order to protect its position based on its claim that no construction contract existed.
- [12] Breen Construction complains that had it known of Bluemover's intention to take the High Court action it: ...may well have reached the conclusion to withdraw its notice and seek determination of the parties' substantive rights and liabilities in the District Court at that time. It was never given that option.
- [13] Finally, Mr Cunliffe submits that the strength, or otherwise, of Bluemover's claim that there was no construction contract is irrelevant to the issue of costs.

Considerations

- [14] Although the purpose of the adjudication is to provide a prompt resolution of matters in dispute, it is quite clear the exercise by an adjudicator of his/her powers is predicated upon the existence of a construction contract. It is not a process which contemplates the appointment of lawyers as arbitrators, hence the legal issues relating to the existence or otherwise of a construction contract are preserved until the adjudication process has been completed. It is apparent from the provisions of the Act which prescribe an adjudicator's duties and powers that it may engage disputant parties in significant costs and effort by their participation.
- [15] Against that background, it seems to me that he who seeks to invoke the adjudication process assumes some responsibility that its actions are properly based upon a claim of a subsisting construction contract. The question of whether or not a construction contract subsists is inevitably a legal question. I cannot accept that where there is a real issue, as here, about the existence of same that question cannot be tested at an early opportunity through the Court process. Whatever the merits of Breen Construction's claim for monies due, that claim is no longer being pursued on the basis of the existence of a construction contract.

[16] Further, and because of the timing of Breen Construction's initiation of the adjudication process (just before Christmas) Bluemover had little option but to act pre-emptively. Also it is usually the case that a construction contract is in writing, but in this case it appears that writing is absent. Further, Breen Construction were always aware there was a live issue regarding the existence of a construction contract.

[17] Although Breen Construction acted promptly to withdraw its notice under the Act, I accept that until then Bluemover had acted appropriately in filing the proceeding it has.

Judgment

[18] In my judgment, the plaintiff is entitled to costs on a Category 2B basis. Accordingly, the first defendant will pay the plaintiff's costs in the sum of \$7,200, together with disbursements of \$105.04.

L. Andersen for Plaintiff instructed by Bodkins, Alexandra

R. Cunliffe for Defendants instructed by Macalister Todd Phillips, Queenstown