

JUDGMENT NO. 2 OF ASSOCIATE JUDGE J P DOOGUE [re. Costs] : High Court of New Zealand. Auckland Registry. 29th March 2006.

- [1] Counsel have both filed helpful memoranda concerning this matter, Ms Wickes on the 17th March 2006 and Mr McMillan 23 March 2006.
- [2] Ms Wickes has approached the matter of costs on the basis that the application to set aside the statutory demand involved consideration what, if any, part of the initial amount claimed, \$205,782.32 was properly payable. At the hearing she attacked the respondent's claim that such an amount was owing because the payment claim under the Construction Contracts Act 2002 which the respondent had served on the applicant included matters which should not have been in that notice. Those items were claims for down time and loss of profits. In addition, deduction needed to be made from the amount claimed of \$8,468.85 because a payment in that sum had been paid prior to the applicant filing the application to set aside statutory demand.
- [3] She pointed out that she had persuaded the Court that the greater part of what the respondent claimed to be owing and therefore to support the statutory demand was not so owing. The Court concluded that a sum of \$48,252.53 was owing (para [52] of judgment dated 16 February 2006).
- [4] Ms Wickes therefore submitted that the applicant had enjoyed substantial success at the hearing and ought to have costs.
- [5] Mr McMillan in his memorandum submitted that the proper approach was that costs should follow the event. He said that the applicant had not relevantly been the successful party. In order to succeed, he submitted, Jian Hua needed to set aside the entire demand by demonstrating that it owed less than \$1,000 to Freemont. It attempted to do so, but failed in that attempt.
- [6] He therefore said that Jian Hua, having so failed, the respondent was the successful party and was entitled to costs.
- [7] In my view the propositions put forward by the respondent are the correct ones. Jian Hua cannot be regarded as the successful party. Freemont won the contest and should have costs.
- [8] My original order for costs contained in my judgment 6 March 2006 will therefore stand.

Ms J A Wickes for applicant instructed by Loo & Koo, PO Box 99687, Newmarket, Auckland
Mr McMillan for respondent instructed by Chapman Tripp, PO Box 2206, Auckland