IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-999
[2015] NZHC 140

BETWEEN	DHC ASSETS LIMITED A DULY INCORPORATED COMPANY HAVING ITS REGISTERED OFFICE AT LEVEL 20, PWC TOWER, 188 QUAY STREET, AUCKLAND, 1010, NEW ZEALAND Plaintiff
AND	VICTORIA TOON AS LIQUIDATOR OF VACO INVESTMENTS (LINCOLN ROAD) LIMITED Defendant

Hearing:	2 September 2015, 3 February 2016
Counsel:	L Turner for Plaintiff P Davey for Defendant
Judgment:	12 February 2016

JUDGMENT OF DUFFY J

This judgment was delivered by me on 12 February 2016 at 10 am pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors:
Duthie Whyte, Auckland
Christopher Taylor Lawyers, Auckland

Counsel:
Lewis Turner, Barrister, Auckland
Peter Davey, Barrister, Auckland

[1] The plaintiff DHC Assets Ltd (DHC) is a construction company. During 2012 it carried out significant building works for Vaco Investments (Lincoln Road) Ltd (Vaco) for the development of a commercial property at Lincoln Road, Henderson (the development works). DHC alleges that Vaco has failed to make the final payment under the contract for those works; Vaco disputes this. Vaco has now been placed in voluntary liquidation, and the liquidator appointed by Vaco's shareholder has rejected DHC's proof of debt. DHC has brought this proceeding seeking leave to commence adjudication proceedings against Vaco or in the alternative an order removing the liquidator. The liquidator opposes both applications.

[2] Vaco sold the Lincoln Rd property in November 2012 for $8.4 million after the completion of the development works. Sometime after the sale of the property DHC issued a final account for $553,095 plus GST, comprising claims for variations and additional costs under the contract with Vaco (the alleged debt). Vaco refused to pay this account on the grounds that there were no outstanding payments owed by it to DHC. DHC pressed Vaco for payment throughout 2013 and in 2014. In late June 2014 DHC advised that it would be commencing adjudication proceedings under the Construction Contracts Act 2004 against Vaco. Vaco was then placed in liquidation by its shareholder, Antony Arnerich. Mr Arnerich appointed the defendant Victoria Toon as liquidator.

[3] Ms Toon issued a first report stating that there were no assets and indicating that no creditors' meeting would be held. When DHC insisted on a meeting Ms Toon again indicated that there were no assets and that Vaco was a corporate trustee. Later she rejected DHC's proof of debt.

[4] DHC contends that before Vaco was placed into voluntary liquidation, Mr Arnerich removed an estimated $2 million profit from that company. Mr Arnerich disputes that this amount was removed, but acknowledges that a sum of approximately $800,000 was removed. Whether the amount removed exceeded $800,000 is of little importance here as even the lesser amount acknowledged to

have been removed by Mr Arnerich, if recovered, it would be sufficient to pay the alleged debt.

[5] DHC is in an invidious position. Now that Vaco is in liquidation, DHC cannot as of right utilise the usual legal remedies to prove that it is owed money by Vaco.[1] Further, whilst the alleged debt remains unproven DHC has insufficient legal interest in the affairs of Vaco for it to have legal standing to bring proceedings against Mr Arnerich to recover funds that were removed from Vaco. As a recognised creditor of Vaco, DHC would have standing to bring proceedings against Mr Arnerich as a director who was responsible for funds being wrongly removed from Vaco in circumstances that left Vaco unable to meet its debts. Such conduct, if proved, could amount to a breach of Mr Arnerich's duties as a director of Vaco, which could then give rise to a court ordered remedy that would see the funds returned to Vaco. Once that happened, Vaco would be in a position to pay DHC.[2]

[6] If Vaco had not been placed in liquidation, DHC would have been free to commence adjudication proceedings against Vaco under the Construction Contracts Act or to sue on the works contract. This would have given it the opportunity to prove whether or not it was owed the alleged debt. If DHC were successful in those proceedings it would have received judgment in its favour in the sum of $553,095 plus GST, or such lesser amount as was found to be owed to it. Without the benefit of a legal finding that Vaco owes the alleged debt, DHC is effectively blocked from taking any steps to recover payment of that debt.

[7] I am satisfied that DHC should be granted leave under s 248 of the Companies Act 1993 to pursue its claim for adjudication under the Construction Contracts Act.

[8] Ms Toon argued that the claim for payment of the alleged debt lacked merit; was too late; and that in any event Vaco had no funds to pay any debts. I am satisfied that none of those arguments warrant me refusing leave under s 248.

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1 Section 248(1)(c) of the Companies Act 1993 provides that unless the liquidator agrees or the court orders otherwise no person may commence or continue with legal proceedings against a company once it is in liquidation.

2 It was common ground between the parties that Vaco has no other creditors that would be entitled to a share of those funds.

[9] I accept that as matters stand Vaco may have no funds to pay any debts that it might owe. On the other hand, DHC has said that it will fund Ms Toon taking steps to recover funds that Mr Arnerich removed from Vaco. DHC is also willing to fund its own proceeding to recover funds from Mr Arnerich. Ms Toon contends that proceedings against Mr Arnerich will be costly and complicated. However, if DHC is willing to fund those proceedings (either for its own account or through Vaco) I do not see why cost or any perceived complication should be seen to be a proper barrier to their commencement. I am aware of other proceedings where remedies have been obtained against directors of companies who have removed company funds to the prejudice of existing creditors. Vaco has no other creditors so it is not as if proceedings against Mr Arnerich will prejudice other creditors.

[10] I do not accept Ms Toon's arguments that DHC's claim against Vaco is weak. Her argument is based on the idea that DHC has failed to exercise its rights under the contract for the development works.

[11] The contract incorporated NZS3910:2003, the Conditions of Contract for Building and Civil Engineering Construction. Clause 6 of the NZS3910:2003 provides for the appointment of an engineer, which in this case was Davis Langdon (engineer). Clause 6 sets out the process for the appointment of the engineer as well as the powers and responsibilities of the engineer. In addition to those powers and responsibilities, the engineer has a role under the disputes provisions in cl 13 of NZ3910:2003. Clause 13.2 provides for an engineer's review.; cl 13.3 provides for the parties to go to mediation if one or both are not satisfied with the engineer's review; and clause 13.4 provides for arbitration in the same circumstances.

[12] In the present case the engineer provided a payment schedule that stated DHC was owed nothing under the contract. This was later amended to include a finding that DHC owed Vaco just under $100,000. DHC never invoked any of the dispute procedures in cl 13 to challenge the engineer's decision. Ms Toon argues that it follows from this that the engineer's payment schedule must stand and that it is now too late for DHC to make assertions that contradict the engineer's payment schedule. Her view is that DHC is now out of time in all respects to make any challenge to the payment schedule.

[13] DHC argues that the dispute provisions of cl 13 cannot curtail its rights under the Construction Contracts Act to challenge a payment schedule with which it disagrees.

[14] For the purpose of a leave application under s 248 it is not necessary for me to reach a definitive view on whether DHC is precluded from challenging the payment schedule. Instead I need to be satisfied that DHC has an arguable case to that effect. I am satisfied that DHC has such a case.

[15] Section 12 of the Construction Contracts Act prohibits any contracting out from the provisions of that Act. I cannot see, therefore, how the more restrictive time frames for bringing a dispute under cl 13 can be superimposed on DHC's rights under the Construction Contracts Act. To allow that to occur would be in effect to allow a contracting out of that Act's provisions insofar as they impose time limits for bringing a proceeding under that Act. In my view there is a sound argument that cl 13 does not detract from the other rights and legal remedies that DHC may have either under the Construction Contracts Act or the law of contract. In this regard I consider that the legal issue raised in the present case has similarities with that raised in *Blain v Evan Jones Construction Ltd* where the Court of Appeal found that the disputes resolution procedures in cl 13 of NZS319:2003 could not preclude a party to the contract from bringing proceedings in negligence for defective workmanship.[3] The Court of Appeal found that cl 13 was "an exclusive process only during the construction period" and therefore it could not preclude a party from suing for breach of contract after the end of the construction period.[4] It also concluded therefore that cl 13 could not preclude a claim based in tort after the construction period had ended.[5]

[16] Here the construction period has ended. Accordingly, there is no reason why DHC cannot invoke the rights and remedies available to it under the Construction Contracts Act or the law of contract.

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3. *Blain v Evan Jones Construction Ltd* [2013] NZCA 680.
4. At [61].
5. At [66].

[17] Ms Toon argued that s 26(3) of the Construction Contracts Act was relevant. This subsection provides that in any adjudication process under that Act an adjudicator must terminate that process if the dispute is determined under another dispute resolution process before a determination is made by the adjudicator. Here Ms Toon sought to argue that the unchallenged issuing of a payment schedule by the engineer amounted to a determination of the dispute between DHC and Vaco by another dispute resolution process. I do not accept that s 26(3) can apply here in a way that weakens DHC's case for payment.

[18] The engineer's review in cl 13 cannot qualify as an alternative dispute resolution process under s 26(3). I accept DHC's argument that when s 26 is read in its entirety it contemplates alternative dispute processes that are in the nature of a court process, a tribunal process or mediation to which a party has submitted a dispute. This view of s 26(3) is consistent with the language of s 26(1) which reads:

> (1) To avoid doubt, nothing in this Part prevents the parties to a construction contract from submitting a dispute to another dispute resolution procedure (for example, to a court or tribunal, or to mediation), whether or not the proceedings for the other dispute resolution procedure take place concurrently with an adjudication.

[19] The engineer's review in cl 13 bears no similarity to a court, a tribunal or mediation. Whilst the reference in s 26(1) to those processes is not exhaustive, I consider that any other qualifying dispute resolution process should be of a similar kind. The issuing of the payment schedule by the engineer rejecting DHC's claim for the alleged debt involves no element of the parties submitting a dispute to him for resolution.

[20] Further, in *Blain* the Court of Appeal rejected the idea that the presence of a dispute process under the Construction Contracts Act could "foreclose orthodox court action as determinative."[6] The Court considered that the Construction Contracts Act was did no more than provide a process for enforcing existing substantive rights and that ss 26 and 27 of that Act "expressly leave it open to the parties to bring a civil suit in court."[7]

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6 *Blain*, above n 3, at [65] to [66].
7 Ibid at [65].

[21] The findings by the Court of Appeal in *Blain* that neither cl 13 of NZS3910:2003 nor s 26 of the Construction Contracts Act could prevent an ordinary civil suit for defective workmanship suggests to me that Vaco cannot use cl 13 to shelter it from a claim for money owing under the contract.

[22] Ms Toon also argued that DHC could not recover the alleged debt because it was for additional work and variations to the contract. She relied upon a term of the contract that provided that DHC was to perform the works as a fixed price contract and that additions and variations were to be kept to a minimum. Nonetheless, the contract did expressly allow for additions and variations, provided that the contractual process for those was followed. No-one suggested that the subject additions and variations were not done in compliance with that process. Provided that the process for additions and variations was properly followed and the items are properly identifiable as additions and variations, I cannot see how Vaco can dispute being liable for them. Whether the additions and variations satisfy those conditions seems to me to be something that cannot be determined without careful scrutiny of the evidence to support DHC's claim, which is something outside the bounds of this application.

[23] It follows, therefore, that I find DHC has an arguable case for recovering the alleged debt.

[24] The final ground on which Ms Toon opposed leave being granted was delay by DHC in seeking leave.

[25] Regarding delay, in my view the relevant time frame is determined by the steps that were taken after Vaco was placed in liquidation. In any event I do not consider that the events which occurred prior to Vaco being placed in liquidation constitute delay on the part of DHC. It issued the final payment claim on 15 March 2013. Davis Langdon issued Final Payment Schedule No 17 on 1 May 2013, in which it rejected DHC's claim for payment and found that DHC owed Vaco $95,728. On 13 May 2013 DHC disputed the final payment schedule. Nothing eventuated from Davis Langdon until 4 October 2013 when it provided the certificate of practical completion. Vaco refused to respond to DHC's payment claim until Davis

Langdon had issued a decision on DHC's claim for payment. On 20 January 2014 Davis Langdon issued a document dated 24 April 2013. DHC contends it had never seen the document until it was received on 20 January 2014. This document records that DHC has not provided Davis Langdon with the information it required, which DHC disputes. DHC responded to Davis Langdon in February 2014. Throughout March to June 2014 the parties exchanged communications regarding DHC's claim. This culminated in Vaco going into voluntary liquidation on 1 July 2014 and DHC issuing proceedings under the Construction Contracts Act on 2 July 2014, such proceedings having been threatened by DHC during their recent exchanges.

[26] Given the evidence available to me I cannot resolve the dispute as to when DHC first received the document dated 24 April 2013 from Davis Langdon. However, I do not consider that DHC can be said to have delayed exercising its rights against Vaco prior to that company going into liquidation, even if it had knowledge of the 24 April 2013 document prior to its receipt on 20 January 2014. It is to be expected that a contractor in DHC's position would try to resolve a dispute without resorting too readily to the dispute processes available to it, all of which are costly and time consuming.

[27] Vaco went into liquidation on 1 July 2014. Ms Toon did not take any definitive steps in regard to DHC's claim until 31 July 2015, when she formally rejected DHC's claim. She had earlier stated in a second liquidator's report dated 13 February 2015 that in order to minimise her fees she would not be formally accepting or rejecting creditors' claims until such time as there were funds to pay a distribution. This report recorded Vaco as having no assets, which suggested that no formal ruling on DHC's claim was likely to be forthcoming.

[28] On 7 May 2015 DHC commenced proceedings under s 286 of the Companies Act seeking an order directing Ms Toon to accept DHC's claim or to allow the quantum of the claim to be determined by adjudication under the Construction Contracts Act. Later in August 2015, after Ms Toon had formally rejected DHC's claim, it amended the Statement of Claim to include seeking an order under s 284 of the Companies Act. The proceeding then came on for hearing on 2 September 2015,

at which time it was adjourned part heard to allow DHC to make a further amendment seeking an order under s 248 of the Companies Act.

[29] The application for an order under s 248 of the Companies Act was made in the Second Amended Statement of Claim filed on 21 October 2015. Ms Toon consented to leave being granted to DHC to file this amended pleading.

[30] Whilst Ms Toon did not formally reject DHC's claim until 31 July 2015, the evidence shows that before then she had spent some time considering the claim. At the hearing on 2 September 2015 in re-examination she described the claim as being "extraordinarily complex" and her answer suggested that she thought it was something that was better left to the Court or such like body to determine:

> Q. So, in terms of your assessment of the various claims and counterclaims that were being made by DHC and the engineer on the other hand, where did you get to then in terms of your assessment of this payment claim?
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> A. I thought it was extraordinarily complex. I wondered, I specifically thought that it was something that the Court should decide on. Whether you know, under section 248 there should be a claim for proceeding with these proceedings.

[31] In the arguments opposing leave Ms Toon made much of the fact that early on when Vaco went into liquidation, DHC's then counsel had stated that an application would be made under s 248 of the Companies Act for leave to proceed with the adjudication proceedings. In fact, notice of those proceedings was not issued until 2 July 2015, I accept that DHC gave prompt notice that it would pursue an application under s 248 of the Companies Act and then failed to do so promptly. However, the proceeding it commenced on 7 May 2015 was a way of challenging Ms Toon's rejection of the alleged debt. Since then the Court has been seized of the matter and Ms Toon has been aware that DHC has been taking steps that if successful would result in it being able to claim for repayment of the alleged debt. In the present case there are no other creditors who will be prejudiced by any such delay. I do not consider that Vaco or Mr Arnerich will be prejudiced if the liquidation proceedings remain on hold while DHC pursues an adjudication under the Construction Contracts Act against Vaco.

[32] I am satisfied therefore that there is no basis for refusing leave under s 248 and I consider this to be a case where it is appropriate that such leave is granted. The adjudication process provided under the Construction Contracts Act is a cost and time efficient process for resolving disputes like the present.

[33] I am satisfied that the nature of the claim DHC makes against Vaco and the rebuttals made by Davis Langdon merit the strengths and weaknesses of DHC's claim being subject to an adjudication process. I do not consider that a liquidator, be it Ms Toon or someone else, is appropriately qualified to determine the legal and factual arguments that the dispute raises. For that reason I do not consider it appropriate to make orders under s 284. The order sought under s 286 has been overtaken by Ms Toon's decision formally rejecting DHC's claim.

[34] The test for an order under s 284 is whether the actions of the liquidator were wrong or unreasonable.[8] I accept Ms Toon's evidence that she found the claims and counterclaims being made by DHC and Davis Langdon to be extraordinarily complex. In such circumstances I consider it was reasonable for her not to attempt to determine those claims herself. I do find it surprising that she opposed leave being granted under s 248 when she had already expressed a view under re-examination that the claims were something that might best be decided by a court and therefore that an order under s 248 could be appropriate here.

Result

[35] Leave is granted to DHC under s 284 of the Companies Act to commence adjudication proceedings against Vaco (in liquidation) under the Construction Contracts Act. The parties are granted leave to file memoranda on costs.

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8 *Registrar of Companies v Body Corporate 307730* [2013] NZCA 659 at [25].