

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2013-404-426  
[2013] NZHC 483**

UNDER Part XVI of the Companies Act 1993

IN THE MATTER OF a proceeding to put DTB Construction Limited into liquidation

BETWEEN ANDREW NICHOLAS HOLDGATE (TRADING AS J R CONSTRUCTION) Plaintiff/Respondent

AND DTB CONSTRUCTION LIMITED Defendant/Applicant

Hearing: 8 March 2013

Appearances: M Powell for Applicant  
S Pearson for Respondent

Judgment: 8 March 2013

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**ORAL JUDGMENT OF ASSOCIATE JUDGE DOOGUE**

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**Counsel:**

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[1] The applicant who had been served with liquidation proceedings applied for a stay of those proceedings and a restraint of advertising them, pursuant to High Court Rules r 31.11. The respondent/creditor opposed the making of such an order. After hearing the parties on 19 February 2013, Justice Peters issued a judgment dismissing the application for a stay.

[2] The respondent/creditor, Mr Holdgate, now seeks to be paid his solicitor/client costs relating to the application. That step is opposed by the applicant/debtor.

[3] In her judgment Peters J concluded that the debt was covered by s 79 of the Construction Contracts Act.

[4] Essentially the applicant/defendant's ground for seeking the stay of the liquidation proceedings was that it was alleged that Mr Holdgate's work was unsatisfactory. The Judge concluded that such an approach was not open having regard to *Volcanic Investments Limited v Dempsey and Wood Civil Contractors Limited*.<sup>1</sup>

[5] The Judge dismissed the application for stay of proceedings and restraint of advertising and left costs to be determined. The parties have now sought the Court's decision on the question of costs.

[6] Mr Holdgate relies upon s 24 of the Construction Contracts Act 2002, ss 2 of which provides as follows:

**24 Consequences of not paying scheduled amount in manner indicated by payment schedule**

...

(2) The consequences are that the payee—

(a) may recover from the payer, as a debt due to the payee, in any court,—

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<sup>1</sup> *Volcanic Investments Limited v Dempsey and Wood Civil Contractors Limited* (2005) 2 NZCCLR 370 (HC).

- (i) the unpaid portion of the scheduled amount; and
  - (ii) the actual and reasonable costs of recovery awarded against the payer by that court; and
- (b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.

[7] Mr Pearson for the respondent submitted to me that that provision did not apply to the fixing of costs in an interlocutory application of the kind which Peters J dealt with. He said that the section only authorised recovery of the actual and reasonable costs of recovering “as a debt due to the payee” any sum that the payee was owed. The section in other words applied to proceedings for the recovery of the debt. It did not apply, in Mr Pearson’s submission, to interlocutory applications in liquidation proceedings.

[8] I consider that such an interpretation of s 24 is inconsistent with *Volcanic Investments* line of authority. The effectiveness of the provisions of the Construction Contracts Act 2002 would be undermined if the Court were to take a narrow view of what was embraced by the expression “proceedings for the recovery of a debt”. While there may be arguments that proceedings for the winding up of a company may be technically viewed as concerned with the Court exercising its jurisdiction over insolvent companies – rather than with recovery of debts of individual creditors – taking that approach could defeat the purposes of the Construction Contracts Act 2002.<sup>2</sup>

[9] If the provisions of the Act apply generally to construction contracts, it does not seem to me to be correct in principle that a subdivision of that Act, the provision dealing with the costs of enforcing claims, can be split off and treated differently. In my view therefore consistent with authority such as *Laywood*, s 24 of the Act establishes the entitlement of a payee to recover actual and reasonable costs in liquidation and bankruptcy proceedings as well as what might be more conventionally described as proceedings for the recovery of a debt, which usually take the form of general proceedings. If such proceedings are within the ambit of the Act, and if the costs are recoverable in relation to such proceedings, there is no justification in principle for drawing distinctions between the costs on substantive

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<sup>2</sup> *Laywood v Holmes Construction Wellington Limited* [2009] NZCA 35.

steps (for example obtaining a liquidation) as opposed to an interlocutory application in such proceedings for orders such as those which the applicants sought here to restrain advertising and stay the liquidation proceedings. For those reasons s 24 of the Act applies to the recovery of costs which the respondent incurred in opposing the applicant's applications.

[10] The quantum of the costs has yet to be established. I would suggest that the parties should be able to come to a practical and reasonable determination of what ought to be recoverable. To cover the eventuality that they are not able to agree, they are to file further synopses of submissions not exceeding five pages on each side within 21 days.

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J.P. Doogue  
Associate Judge