IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA322/2022
[2025] NZCA 104

BETWEEN	ANTONY IVO ARNERICH Appellant
AND	DHC ASSETS LIMITED Respondent

Hearing:	21 June 2023
Court:	Goddard, Brewer and Osborne JJ
Counsel:	R J Hollyman KC and J D Mcbride for Appellant F J Thorp and L J Turner for Respondent
Judgment:	9 April 2025 at 3.00 pm

JUDGMENT OF THE COURT

A **Mr Arnerich's appeal is allowed in part.**

B **DHC's cross-appeal is allowed in part.**

C **The order made by the High Court at [128](a)(iv) of the second High Court judgment is set aside, and replaced with an award of the amount of P&G costs actually recovered by Vaco from ASB by payment or credit, and not already paid to DHC or included in the amount awarded by the adjudicator, plus GST on that amount.**

D **The order made by the High Court at [128](a)(v) of the second High Court judgment is set aside, and replaced with an order that DHC is entitled to statutory interest on the amount referred to in the substituted order set out above from the date on which the relevant payment or credit was received by Vaco until the date of payment.**

E **The proceeding is remitted back to the High Court to determine the amounts payable pursuant to the substituted orders set out above.**

F **The order for costs in the High Court is set aside. Costs in that Court are to be determined by that Court in light of this judgment.**

G **Costs in this Court are reserved, and are to be determined in accordance with the process set out at [308] of this judgment.**

REASONS OF THE COURT

(Given by Goddard J)

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Introduction and summary

Background

[1] The respondent, DHC Assets Ltd (DHC), is a construction company. It is an unpaid creditor of Vaco Investments (Lincoln Road) Ltd (in liq) (Vaco). Vaco was put into voluntary liquidation on 1 July 2014. Mr Antony Arnerich, an experienced property developer, is the sole director of Vaco. Vaco was the vehicle through which Mr Arnerich carried out a property development at a site on Lincoln Road in Auckland.

[2] DHC claimed some $1,088,156plus interest from Vaco under the construction contract it entered into with Vaco to design and build a commercial building on the Lincoln Road property.[1] DHC was awarded $367,768.12 in an adjudication under the Construction Contracts Act 2002.[2] DHC pursued further claims against Vaco for additional amounts to which it says it is entitled. Vaco was unable to pay DHC any part of the sum awarded in the adjudication, or the further sums DHC claimed.

DHC's proceedings against Mr Arnerich

[3] DHC brought proceedings under s 301 of the Companies Act 1993 against Mr Arnerich, alleging Mr Arnerich had breached his duty to act in the best interests of Vaco (as required by s 131 of the Companies Act) by causing Vaco to make substantial distributions to the beneficiaries of a trading trust of which it was trustee (the Vaco Trust) before DHC's contractual claims had been ascertained and paid by Vaco. DHC sought an order under s 301 that Mr Arnerich pay the amount DHC was owed by Vaco direct to DHC.

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1 Vaco initially entered into the construction contract with Clearwater Construction Ltd. Clearwater Construction assigned its rights and interests under the contract to DHC by deed effective 1 April 2012 with Vaco's consent.

2 *DHC Assets Ltd t/a Clearwater Construction v Vaco Investments (Lincoln Road) Ltd (in liq)* BDT2016-08744, 5 October 2016 [adjudicator's determination]. This was the amount for which judgment was entered in the District Court.

[4] DHC's claim succeeded in part in the High Court.[3] Davison J found that Mr Arnerich had breached his duty to act in the best interests of Vaco.[4] He made orders requiring Mr Arnerich to pay DHC the sum of $367,768.12 awarded in the adjudication plus contractual interest.[5] But he declined to determine whether DHC was owed further amounts by Vaco, and declined to make any further orders against Mr Arnerich, on the basis that the construction contract required DHC's claims against Vaco to be determined by other mechanisms, and those claims had previously been referred to arbitration.[6]

[5] Mr Arnerich appealed to this Court against the orders made by the High Court requiring him to pay DHC the amount awarded in the adjudication plus interest on that sum at the rate prescribed in the construction contract. DHC cross-appealed, seeking orders that the High Court determine the full amount that was owed by Vaco, and that Mr Arnerich be required to pay the whole of that amount direct to DHC under s 301 of the Companies Act.

[6] In a judgment delivered in June 2021 this Court allowed Mr Arnerich's appeal in part, so far as it related to the interest awarded on the adjudication amount. DHC's cross-appeal was allowed, and the proceedings were remitted back to the High Court to determine the amount of any further claim DHC may have against Vaco under the construction contract, and, in light of that determination, to make such further orders against Mr Arnerich under s 301 of the Companies Act as may be appropriate.[7]

[7] A further hearing took place before Davison J in the High Court in December 2021. In a judgment delivered on 13 June 2022 the Judge made an order requiring Mr Arnerich to pay DHC the sum of $1,188,568.33. That sum included the amount awarded in the adjudication, interest on that amount, a further amount in respect of DHC's time-related costs in connection with its extension of time claims under the construction contract, and contractual interest on those time-related costs.[8]

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3 *DHC Assets Ltd v Arnerich* [2019] NZHC 1695 [first HC judgment].
4 At [345] and [352].
5 At [348]–[349] and [353].
6 At [269].
7 *Arnerich v DHC Assets Ltd* [2021] NZCA 225, [2021] NZCCLR 25 [CA 2021 judgment].
8 *DHC Assets Ltd v Arnerich* [2022] NZHC 1381 [second HC judgment] at [128].

That judgment was recalled and reissued on 4 April 2023 to amend the amount payable by Vaco to include GST on the sum awarded for time-related costs, resulting in a judgment for $1,217,276.38.

[8] The proceedings now return to this Court. Mr Arnerich appeals from the further orders made against him in the second High Court judgment. In particular, Mr Arnerich says the High Court erred in finding that Vaco was liable to DHC in respect of the time-related costs awarded. DHC cross-appeals against the High Court's failure to address certain other claims it was advancing in addition to the claim for time-related costs. It says the High Court should have addressed those claims, including a claim for certain "preliminary and general" (P&G) costs, and should have determined those claims in DHC's favour.

Summary

[9] We agree with the Judge that — contrary to the position advanced by Mr Arnerich — it was open to DHC to seek extensions of time under the construction contract. We uphold the Judge's finding that DHC was entitled to extensions of time totalling 147 days.[9]

[10] However we consider that the express terms of the construction contract, as proposed by DHC and accepted by Vaco, clearly precluded claims by DHC for time-related costs and other P&G costs. The Judge was wrong to find that a "purposive interpretation" is available which would lead to a different result.[10]

[11] We find that Mr Arnerich had agreed that (despite those contractual provisions) DHC could make claims for P&G costs in relation to variations requested by the intended tenant for the building, ASB Bank Ltd (ASB). He was willing to pass on those claims to ASB. Provided ASB paid them, he was happy for Vaco to pay DHC. But we think it was clear that Mr Arnerich did not agree to Vaco assuming responsibility for P&G costs that were not actually recovered by it from ASB.

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9 At [117].
10 At [108].

[12] Mr Arnerich's appeal therefore succeeds in relation to the Judge's finding that DHC was entitled to recover time-related costs from Vaco, and that Mr Arnerich should pay those amounts to DHC under s 301 of the Companies Act.[11] But DHC's cross-appeal, claiming that Vaco was estopped from relying on the contractual prohibition on recovery of P&G costs, also succeeds so far as amounts actually recovered by Vaco from ASB are concerned.

[13] In light of this outcome we have adjusted the awards of interest made in the High Court, and set aside the costs award made in the High Court. Costs will need to be considered in light of the outcome in this Court, and other relevant matters.

[14] Our reasons for these conclusions are set out below.

Background

[15] The background to this dispute is set out in considerable detail in the first High Court judgment, the second High Court judgment, and the 2021 judgment of this Court. The basis on which Mr Arnerich is liable to DHC for certain sums owed by Vaco was determined in the previous judgment of this Court: we need not set out the factual foundation for that liability.[12] Rather, for the purposes of this appeal, we focus on matters relevant to the sums that DHC says it is owed by Vaco.

The Lincoln Road project and the construction contract

[16] In November 2010 a related company of Vaco entered into a conditional agreement to purchase a property on Lincoln Road for the sum of $1.4 million. In April 2011 Mr Arnerich incorporated Vaco as his vehicle to carry out the proposed development at that property. The purchase settled on 17 November 2011.

[17] Mr Arnerich identified ASB as the principal tenant for a two-storey commercial building that he proposed to build on the Lincoln Road site.[13] An agreement was entered into under which ASB would lease retail commercial banking premises to be

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11 At [118] and [127].

12 CA 2021 judgment, above n 7, at [162]–[174] and [177]–[180].

13 An agreement to lease for a smaller tenancy on the ground floor of the building was entered into with The Coffee Club Properties (NZ) Ltd.

constructed onsite. The building would be constructed to meet ASB's requirements as provided to Vaco. ASB was entitled to require variations to the building, subject to an obligation to meet the differential cost of any such variations.

[18] On 18 October 2011 Vaco and DHC entered into a fixed price lump sum design and build contract which provided for DHC to carry out the construction work on the development for the sum of $2,129,838. The construction contract included terms that significantly limited the scope for claims by DHC for extensions of time, and for additional payment for variations. The construction contract also set out detailed procedures to be followed in relation to variations and extensions of time. These terms — which had been proposed by DHC — were intended to give Vaco a high degree of confidence that the construction work would be completed by the agreed date of 27 July 2012, with liquidated damages of $600 per calendar day excluding GST payable from that date until practical completion. They were also intended to minimise the risk to Vaco of additional costs in excess of the agreed lump sum.[14]

[19] The construction contract contained detailed provisions in relation to determination of disputes between the parties. The dispute resolution mechanisms contemplated by the contract included formal engineer's reviews, mediation, and arbitration. The contract also recognised the ability of the parties to refer disputes to adjudication under the Construction Contracts Act. These were set out in the general conditions of contract, NZS 3910:2003, a lengthy standard form contract that is widely used in the construction industry.[15]

[20] With those arrangements in place, Vaco was able to obtain financing for the project from ANZ National Bank Ltd (ANZ). On 10 February 2012 Vaco entered into a facility agreement for $5,155,000 with ANZ. The facility was intended to fund the purchase of the property, and the amount payable to DHC under the construction contract.

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[14] There was an agreed exception in relation to foundations, as geotechnical assessments had not been completed at the date the contract was entered into. Vaco assumed the risk that this geotechnical work would identify a need for foundations in excess of what was provided for in the construction contract.

[15] New Zealand Standard: Conditions of contract for building and civil engineering construction.

[21] Mr Scott Beagley of Davis Langdon New Zealand Ltd (Davis Langdon) was appointed as the engineer under the construction contract. The contract described the role of the engineer as follows:

> **6.2 Role of Engineer**
>
> **6.2.1** The dual role of the Engineer in the administration of the contract is:
>
> (a) As expert adviser to and representative of the Principal, giving directions to the Contractor on behalf of the Principal and issuing Payment Schedules on behalf of the Principal at due times; and
>
> (b) Independently of either contracting party, fairly and impartially to make the decisions entrusted to him or her under the Contract Documents, to value the work and to issue certificates.
>
> …

[22] Mr Beagley was also appointed by ANZ as the bank's quantity surveyor for the purposes of payment arrangements in relation to the construction work.

DHC carries out the construction work — disputes develop

[23] DHC proceeded to carry out the construction work at the Lincoln Road property. Mr Arnerich was closely involved in the construction process, as were representatives of ASB. At an early stage of the construction work, ASB notified its requirements for a number of variations from the original drawings for the building, on the basis of which DHC had priced the building work, and which had been submitted for building consent. In the course of the construction project, ASB required approximately 18 contract variations, some of which were significant and resulted in additional planning, construction work, and time for DHC.

[24] The project encountered a number of delays as a result of the ASB variations, changes at the front end of the project affecting design work, ground conditions which required piling work that had not been contemplated by the construction contract, and a number of other matters. Towards the end of the project, DHC submitted four formal extension of time claims to the engineer under the contract. Vaco disputed DHC's entitlement to claim extensions of time under the construction contract.

[25] Some of the contract variation instructions were dealt with in the formal manner contemplated by the construction contract. However in many other instances the variation requests were made in a less formal manner, with Vaco forwarding requests from ASB on to DHC by email. In some instances, the variation requests were made by Mr Arnerich orally to DHC's site manager, during visits by Mr Arnerich to the site, or by telephone to the DHC project manager. These variation requests were usually confirmed by DHC in an email to Vaco. Variations and their statuses were noted in construction reports prepared and distributed by DHC for the regular project control group meetings attended by DHC, Vaco and Davis Langdon.

[26] As the construction work progressed, DHC made monthly payment claims in accordance with the procedure contemplated by the construction contract. DHC submitted its payment claim to Vaco and to the engineer. The engineer then assessed the claim and issued a provisional Progress Payment Schedule to Vaco, copied to DHC. Vaco had three working days to notify the engineer of any amendments or deductions that it required. The engineer, acting as Vaco's agent, would then issue a Progress Payment Schedule (PPS) showing the sum certified by the engineer under the contract as the value of DHC's payment claim, taking into account Vaco's amendments.

[27] As discussed in more detail below, the construction contract expressly provided that no further allowance would be made for P&G costs, which were deemed to be included in the original contract price. Mr Andrew Moore of DHC gave evidence that early in the life of the project DHC inquired whether it could include P&G amounts in payment claims in relation to ASB-initiated variations. He said that Mr Beagley and Vaco agreed that DHC's payment claims in relation to ASB variations could include P&G amounts, which Vaco would then pass on to ASB. ASB paid Vaco in full or in part in respect of a number of these claims for P&G costs associated with ASB variations, and Vaco in turn paid DHC. The implications of this approach to P&G costs in relation to ASB variations, which are central to DHC's estoppel argument, are explored below.

[28] By September 2012, the construction work was nearing completion. ASB took possession of its tenancy area in the building to begin its fitout work on 7 September

2012. This was later than the date contemplated by the construction contract which, as noted above, was 27 July 2012. In his email to ASB confirming that date, Mr Arnerich said:

> As discussed in our recent telephone conversation regarding the handover date I have a confirmed date [from DHC] of 7 September 2012. We have collectively tried very hard to keep as close as possible to the end of August. [DHC] realise the importance of this handover date and really put in the extra effort to make this happen.

[29] By this stage of the project, disagreements had arisen between DHC and Vaco in relation to DHC's claims for variation costs and for extensions of time.

[30] On 20 September 2012, Mr Beagley issued PPS 11, noting the value of the work completed to 31 August 2012 was $2,134,743 (excluding GST) and certifying the value of payment under PPS 11 at $307,665.44 (excluding GST). Mr Beagley then issued a drawdown valuation and payment schedule to ANZ to enable a drawdown of $265,439 (excluding GST) to be made on the Vaco project finance facility.

[31] On 30 September 2012, DHC issued Payment Claim 12 for $528,807.87 (excluding GST). The payment claim was addressed to Vaco and copied to Mr Beagley. The payment claim was to be reviewed and assessed by Mr Beagley in accordance with the terms of the construction contract. On 2 October 2012, Mr Arnerich sent an email to Mr Beagley attaching a copy of Payment Claim 12 on which he had crossed out the amount claimed and written: "Crap! … We need to go through this — fine tooth comb!" Mr Arnerich had made a series of handwritten comments on the payment claim indicating which of the variations Vaco accepted or rejected, querying the claimed amounts, and commenting that there was a need for a number of items to be substantiated. In his email to Mr Beagley, Mr Arnerich said:

> Hi Scott
>
> I have attached my comments on [DHC's] claim for you to review and have copied in Anthony Parkin though I am not sure if he will be assisting you on this?
>
> In any event I think we are getting very close to the point of having to take these guys to task on [a lot] of these additional variations which are clearly not approved or warranted.

> I will be away from Friday 5th till Monday 15th and will be available by phone or email if you need to contact me to discuss. In terms of the ASB variations some of these have almost doubled again which they will no doubt flip out over so any correspondence I receive to that regard I will copy you into. This time round the points I think need to be covered off are the Liquidated damages which currently stand at $39,000 Plus Gst and the rejection of all of the [extension of time claims] based on the email below which outlines our contractual position on [extensions of time] for weather and time. I know that you though[t] it might be antagonistic last time but I think it needs to be done now.
>
> Also I think it is important that you reiterate your comments to the contractor regarding the ground risk conditions they accepted as part of the initial review. This is getting really ridiculous now again more than doubling!!
>
> Apart from these minor technicalities the site is looking better now every day and the ASB are [making] good progress on their fitout….and we should have our subdivision consent [out] next week.
>
> Thanks
>
> Antony Arnerich

[32] On 11 October 2012, Mr Beagley issued provisional PPS 12. The value of payment certified for was $114,187.50 (excluding GST) compared with the sum of $528,807.87 (excluding GST) sought by DHC in Payment Claim 12. In his covering email sending the provisional PPS to Vaco and DHC, Mr Beagley said that the ASB variation payment values had not been included in the schedule, and that they would be included once confirmation was received of agreed progress payment values by Vaco, ASB, and DHC. The provisional PPS noted a number of other items claimed that had not been certified for payment.

[33] Mr Moore of DHC responded in an email sent to Mr Beagley and Mr Arnerich on 16 October 2012:

> Scott [and] Antony
>
> Please be advised that we are in disagreement to the attached Payment Schedule and wish to arrange a[n] urgent meeting to discuss. In particular we refer you to our emails (5 October) attached that addressed our concerns to the Provisional Payment Schedule to which we have had no response or correspondence in an attempt to address. We find this situation very disappointing considering we have made concerted efforts to provide as much information as possible to our entitlements with the claims we have made and all we have received in return is a Payment Schedule with minimal response to what we believe to be demonstrated entitlements.

> Given the difference in claim and certification I would have thought some urgency would have been put into meeting to discuss in an attempt to at least understand all parties[’] positions and viewpoints. This level of difference is untenable and we kindly request a[n] urgent meeting before the certificate is issued.
>
> Please advise your availability.
>
> Regards
>
> Andy

[34] Mr Beagley summarised the situation as regards completion of the works and the outstanding DHC payment claims and extension of time claims in a letter to ANZ on 26 October 2012, reporting the status of the funding facility for the project for the period ending 30 September 2012. In his letter, Mr Beagley confirmed that handover of the premises to the ASB to commence its fitout had occurred on 7 September 2012, and DHC had applied for practical completion on 15 October 2012 subject to connection of the electric power supply (which was connected on 16 October 2012).

[35] DHC issued Payment Claim 13 on 31 October 2012, in which it claimed $425,917.77 (excluding GST). In a covering email, DHC advised that substantiation for any new variations or increases to existing variations would follow shortly. Mr Arnerich responded requesting invoices and information for “each and every variation” requested by ASB and Vaco. On 2 November 2012, Mr Eugene Reyneke of ASB sent an email to Mr Arnerich commenting on the variation claim, which had been received by ASB the previous day. Mr Reyneke said that ASB considered the costs to be extremely high. He set out a list of information the bank required regarding completion of items on ASB’s defects list and other items that were yet to be completed or attended to. On 15 November 2012, Mr Beagley issued PPS 13 for an amount of $269.20 (excluding GST).

[36] On 10 November 2012, prior to practical completion having been certified and without DHC’s consent, Vaco took possession of the premises other than the ASB tenancy area. Almost a year later, on 4 October 2013, Davis Langdon, on behalf of the engineer to the contract, issued a certificate dated 28 June 2013 that the contract works had reached a state of practical completion on 21 November 2012.

Further payment claims and disputes

[37] DHC issued Payment Claim 14 on 30 November 2012 seeking payment of $429,193.96 (excluding GST). On 18 December 2012, Mr Beagley prepared provisional PPS 14 in which he calculated that DHC owed Vaco $35,037 (excluding GST). In this schedule, Mr Beagley disallowed the DHC variation claims for the extensions of time and for the soft spots in the basement area, as well as disallowing the majority of DHC's claims for variations, noting in each case that Vaco had assessed there to be no entitlement until the variation costs were substantiated. In relation to one variation claim, in which DHC claimed time-related costs of $75,000, Mr Beagley's schedule reads:

> No Entitlement, [Extension of time] Claim (received 17Sept12) has been referred to the Engineer for review. Details of $40k claim value (time?) increase in the period to be provided by [DHC]. Time related costs to date are deemed to have been included within the P&G costs associated with the respective variations. Further request for information required.

[38] DHC responded to provisional PPS 14 in an email sent to Davis Langdon and Mr Arnerich on 27 December 2012:

> Antony [and] Scott
>
> We acknowledge receipt of your Progress Payment Certificate No.14 and the content and comments made, however despite our best efforts in both meetings, discussions and correspondence to provide additional information and substantiation to the significant differences between claims made and certification it appears we are no nearer in reaching any agreement. This situation and difference has now been ongoing for some months now and has become untenable from our perspective as we believe the negotiable approach is not being reciprocated by all parties concerned.
>
> Based on the Progress Payment Certificate issued by The Engineer under Clause 12.2 we wish to further formally record that we are in disagreement and see no further reason to proceed with the disputed amounts pursuant to Clause 13.2 (Engineer's Review) as The Engineer has been involved in the initial meetings, discussions and correspondence and has issued the Payment Schedule continuing to agree with the disputed items, noting a "formal decision" has not been stated. We therefore wish to notify of our intention to seek reimbursement of the disputed items pursuant to either Clause 13.3 (Mediation) or 13.4 (Arbitration) of the Conditions of Contract.
>
> To reiterate, these disputes have been ongoing sometime now with our belief that no real or reasonable consideration or urgency has been shown to resolve considering the significant amounts involved, therefore leaving us no other option than to pursue the items and amounts through the disputes provision of the Contract.

> It should also be noted that we do not consider the ASB Payment Schedule (review of our variations) to be a document that can be relied on as a true review [of] our claims pursuant to Clause 9 of the Conditions of Contract. We have no contractual relationship with the ASB (being the Principal['s] Tenant), therefore any review of our variation claims should be carried out and issued under Clause 9.3, at this moment "Assessed in accordance with ASB Payment Claim attached" is contrary to the provision of the Contract.
>
> I trust you will understand our position here and advise we will be in contact in order to commence proceedings as soon as possible, noting any response from yourselves in respect of this notification will be considered and reviewed.
>
> Regards
>
> Andy

[39] DHC issued Payment Claim 15 on 31 December 2012, seeking payment of $388,246.96 (excluding GST). Mr Beagley issued provisional PPS 15 on 7 January 2013 in which the value of the payment was negative $12,070 (excluding GST).

[40] DHC issued Payment Claim 16 on 31 January 2013, seeking payment of $392,582.41 (excluding GST).

[41] On 4 February 2013, Mr Arnerich forwarded to Mr Beagley and Mr Anthony Parkin of Davis Langdon a marked up copy of DHC's Payment Claim 16 on which he had made handwritten comments relating to a number of contract variations for which payment was claimed. For example, his comment in relation to 14 of the claims was simply: "No". Other claim items were noted: "$0 refer to Eng[ineer]". In some instances, Mr Arnerich wrote, "ASB", indicating that he considered that ASB was responsible for that claim. In his covering email Mr Arnerich said:

> Hi Scott and Anthony
>
> Please see my marked up version of the claim.
>
> Please accept this as notification that under no circumstances are you to release any part of the retentions as claimed. The contractor has not made any progress as to making good works [on] site which are substandard most particular the faulty drainage resulting in water egress [through] the block walls and piles etc.
>
> There has been no one on site for a long time.
>
> Antony Arnerich

[42] On 13 February 2013, Davis Langdon sent Mr Arnerich provisional PPS 16 in which Mr Beagley certified the value of payment as $0.00. In the covering email, Davis Langdon advised Mr Arnerich that as principal to the contract, Vaco had two working days after receipt of the PPS to notify the contract engineer of any amendments or deductions that it required to be made from the sum certified by the contract engineer. The schedule prepared by Mr Beagley listed some 80 variations for which payment was claimed by DHC. In the "Comments/Reasons" column were notations which directly correlated to Mr Arnerich's handwritten comments as previously provided to Davis Langdon. Where Mr Arnerich had noted "No" in his handwritten note, Mr Beagley's schedule states: "Vaco do not agree with this cost."

[43] On 5 March 2013, Mr Beagley sent Drawdown Valuation 15 to ANZ, copied to Mr Arnerich. Mr Beagley noted that practical completion had been effectively achieved on 28 November 2012 with the code compliance certificate being issued by Auckland Council, although the practical completion certification was yet to be obtained. He said:

> ….
>
> We note as previously report[ed] that significant construction variation claims/risk ($567,000 claimed vs. cost liability provisioning of $363,000 included in the current cost to complete assessment) remain, with the major disputed claims having been recently referred for a formal Engineer's Review.
>
> …
>
> **VARIATIONS**
>
> Construction variations (actual and potential, although excluding ASB and Coffee Club changes) identified to date remain provisionally assessed at approximately **$160,000**.
>
> We note that [DHC] have identified variation claims to date in the total amount of approximately $629,000 (including credits for works not completed and including unsubstantiated [extensions of time] and soft-spot claims etc.) for which liability of $363,000 ($174,109 paid) has been included within the current budget and cost to complete provision as summarised below:
>
> …
>
> Vaco / [DHC] continue to negotiate variation claims and incomplete/defect works with a view to conclude a Final Account value. We note (as above) that variation claims totalling $320,000 have recently been referred for a[n] Engineer's Review in accordance [with] the conditions of contract.

ASB tenant variations (identified and noted for separate payment to Vaco from [ASB]) remain assessed in the order of **$205,000**.

Extension of time claims (EOT), variation claims relating to "soft spots" in the basement, time related construction expenses and credits for contract works not completed remain identified as the remaining significant variation cost risk at this stage of the project.

…

CONTINGENCY

…

There is effectively **no remaining unallocated contingency** for the project. Which whilst not ideal, we note that with the project having achieved both Practical Completion and [Code Compliance Certificate] and subject now only to sale (waiting for settlement), we do not anticipate any further significant cost to complete requirements. We do however note that there remains significant construction variation/final account agreement risk that identifies a potential shortfall, that would require additional equity/funding to be contributed should [DHC] be awarded variation values as currently claimed.

Negotiation and settlement of the construction variation claims, associated Final Construction Account agreement and incidental consultant and holding costs associated with a protracted development period are identified as the significant remaining contingent cost risk at this stage of the project.

…

[44] Mr Arnerich sent an email to Mr Stephen Irvine of ANZ on the same day, recording that he disputed the DHC claims:

Hi Mr I[rvine]

By all means give me a call to reconfirm that most of if not all of the [contractor's] claims are fanciful and not worth printing out and are comprised of items clearly outside the [contract]...Also I not[e] there is no mention of the pending $72,000 + GST liquidated damages that are yet to be applied.

I am very confident regarding the entitlement to these…and [i]n any event this will drag on way past settlement of the property and will in effect become solely my problem as the bank will not have any exposure.

I have forwarded you a copy of the instruction to Davis Langdon to review these outrageous claims.

…

Speak to you tomorrow

Thanks

Antony Arnerich

DHC's letter to Mr Beagley (6 March 2013) enclosing extension of time related materials and submissions

[45] On 6 March 2013, Mr Stuart McClatchy of DHC sent an email and letter to Mr Beagley responding to requests for information to support DHC's claims for variations and extensions of time. The email and its attachments, which included detailed marked-up project programme schedules, were also copied to Mr Arnerich. In the letter, Mr McClatchy set out a summary of the circumstances which had given rise to the project time delays and the grounds upon which three extension of time claims were based. Mr McClatchy advised that DHC would welcome the opportunity to meet with Mr Beagley to clarify any other items that he might require and to discuss the claims in more depth.

[46] On 12 March 2013, Mr Parkin sent DHC a list of the variation claims that "[they were] currently reviewing". He asked if the list was complete. DHC replied with comments on each of the claims to be reviewed. Davis Langdon forwarded DHC's email to Mr Arnerich.

DHC's Final Payment Claim — Payment Claim 17

[47] On 15 March 2013, DHC submitted their final account, Payment Claim 17, which was sent to Vaco and copied to Davis Langdon. The payment claim was for $553,095.10 (excluding GST), which was the total calculated pursuant to the variation schedule listing each of the claimed contract variations. As at that date Mr Beagley was yet to issue his further formal review decision.

[48] Upon receipt of Payment Claim 17, Mr Arnerich sent an email to Mr Beagley:

> Hi Scott
>
> Please refer to the final account from [DHC]. There seem to be new items in this claim please review and add those to the Engineers reviews that are currently underway.
>
> Also after receipt of this claim it seems an appropriate time to review and re-evaluate where everything sits.
>
> I still do not have the required documentation to get a practical completion certificate so will need to review and re-evaluate the date of when this finally

> gets resolved as clearly it isn't. Also as part of this process works to be completed to my satisfaction on site will need to be taken into account.
>
> Thanks
>
> AA

[49] On 15 March 2013, Mr Arnerich sent an email to Mr Beagley and Mr Parkin, attaching a copy of Payment Claim 17 on which he had entered either "X" against those items that he did not accept, or "ASB" against those items which he considered were ASB's responsibility. Apart from marking the items in that way, he did not provide any other comments. In his email to Mr Beagley and Mr Parkin, Mr Arnerich said:

> Hi Scott/Anthony
>
> Looking at the final claim [from] [DHC] there seems to be more wild movements in items [from] claim to claim. I have marked up the variation schedule as attached noting items to look at.
>
> In terms of the [practical completion] date they are now technically as at today 231 day[s] late or $138,600 plus GST. As mentioned in my previous correspondence based on the information contained in the claim I will now re-look at the date for [practical completion] when we get all the required information …

[50] On 18 March 2013, following a meeting between Mr Tim Fraser of DHC and Mr Parkin to discuss the variation claims, Mr Fraser sent Mr Parkin an email addressing each of the claims which were to be reviewed by Davis Langdon. Mr Parkin referred Mr Fraser's email to Mr Arnerich, who then forwarded some further comments to Mr Parkin and Mr Beagley regarding the variations which he disputed.

[51] On 28 March 2013, Mr Parkin sent an email to Mr Arnerich in which he set out his assessment of the DHC variation claims. Mr Parkin explained that he was still working on three of the variation claims and that his assessment did not cover all of them. In a schedule he had prepared, Mr Parkin noted the differences in the amounts claimed by DHC compared to the Davis Langdon assessment. The schedule recorded that several of the items listed were being reviewed. Mr Arnerich said in his evidence that having regard to this assessment and to DHC's late extension of time claims which had only been substantiated by DHC's further materials provided in March 2013, he

considered at that time that there was no prospect of any further payments to DHC being certified by Davis Langdon.

[52] On 3 April 2013, Mr McClatchy sent an email to Mr Beagley in which he said he wanted to get an update from him as to where he understood everything was at regarding the ASB project. Mr McClatchy said that DHC was keen to get some sort of movement on the matter, have a payment certificate issued and any outstanding money due to DHC paid. On the afternoon of 4 April 2013, Mr Arnerich sent an email to Mr McClatchy inquiring about when some remaining work at the building would be done. Mr McClatchy responded the same day. He said that he had been trying to contact Mr Beagley to find out how long it would take him to provide a response to DHC on all the matters that had been referred to him for determination, and he asked Mr Arnerich whether he had received any updated information on the matter.

Vaco sale of Lincoln Road property

[53] Meanwhile, on 7 November 2012, Vaco had entered into an agreement to sell the Lincoln Road property for $8.4 million, with settlement in April 2013. DHC was not notified of this sale.

[54] In an email dated 27 March 2013, ANZ advised Vaco's solicitors of the amount required to discharge the bank's mortgage over the property that secured the project finance facility. In addition to the amount required to repay the principal and accrued interest of the project finance facility, ANZ stipulated that it would retain a total sum of $641,674 to be held on term deposit, to cover retentions and the outstanding costs of completion of the project. Of that amount, $515,076 was to be retained to cover the construction costs to complete, and $80,559 would be retained as contractor retentions.

[55] The Lincoln Road property sale settled on 3 April 2013.

Payments made by Vaco following sale of Lincoln Road property

[56] The Lincoln Road proceeds of sale of $8.4 million were applied to repay the ANZ facility, which then totalled some $5,507,700. In addition, ANZ retained

$561,115 to cover costs to complete, as contemplated by its 27 March 2013 email. The sum of $80,559 which ANZ had said would be held to cover contractor retentions was not however retained by ANZ. Instead it was paid direct to Vaco's ANZ bank account. The reason for this departure from ANZ's earlier indication is unclear.

[57] Over the following days, the bulk of the balance of $2,312,761 was distributed to Mr Arnerich himself, to his family members, and to related business interests.

[58] Over the period May 2013 to October 2013, Mr Arnerich made, or authorised, a number of payments from Vaco's bank account to creditors of Vaco out of the "cost to complete" provision. In particular, Mr Arnerich paid ASB an agreed amount for fitout credits of $363,838.50 (excluding GST).

[59] Mr Arnerich also authorised some further payments to his family and business interests out of the funds in Vaco's bank account.

Final Payment Schedule 17

[60] In February 2013 Vaco requested an engineer's review in relation to a number of DHC's claims for variation costs. A letter headed "Engineer's Review – No. 2" bearing the date 24 April 2013 was prepared by the engineer. However the letter does not appear to have been sent to DHC until January 2014. This review also failed to take into account the extensive information provided by DHC on 6 March 2013 in relation to the applications for extensions of time, noting beside each such claim "[i]nsufficient detail provided to assess the claim refer to Davis Langdon letter dated 20 November 2012".

[61] On 1 May 2013, Davis Langdon issued Final Payment Schedule 17. The value assigned to the payment amount certified was $0.00, and the schedule stated that the net position was that the principal's deductions totalling $95,728 (excluding GST) were payable by DHC to Vaco. Attached to the Certificate of Payment was a schedule in which each of the DHC variation claims was listed, accompanied by a brief note setting out the reason or reasons why the variation was disallowed. In many instances the reason given was: "Vaco do not agree …".

[62] Although it was described as a "final" payment schedule, in relation to DHC's extension of time claim for $182,462 the schedule noted:

> No Entitlement, [extension of time] Claim referred to the Engineer for review. Details of claim value to be provided by [DHC]. Time related costs to date are deemed to have been included within the P&G costs associated with the respective variations. Further request for information submitted.

[63] It appears that in preparing Final Payment Schedule 17, Davis Langdon had overlooked the letter from DHC to Mr Beagley dated 6 March 2013 which provided additional information requested by Mr Beagley in relation to the variation and extension of time claims. DHC says that this letter contained much of the information that Final Payment Schedule 17 treated as outstanding, and as preventing certification of further claims.

[64] In his evidence, Mr Arnerich said that as he heard nothing from DHC following receipt of Final Payment Schedule 17, he concluded that DHC had finally accepted that they had no further claims against Vaco given their delay achieving practical completion and their consequential exposure to significant liquidated damages.

[65] However, on 6 May 2013, Mr McClatchy sent an email to Mr Beagley which was copied to Mr Arnerich. He wrote:

> Scott
>
> Further to our conversation last week and all my previous emails can you please advise where we stand with the [practical completion] documentation for this project.
>
> In the latest schedule the client has made a deduction of 118 days for [liquidated damages] that given the fact a [practical completion] date hasn't been finalised and that all of the [extensions of time] have not been responded to and also deducted off the schedule seems extremely harsh. Hence we would like to have some direction on where the [practical completion] sits and also if we would have a response on the [extension of time] situation.
>
> Regards
>
> Stuart McClatchy

[66] On 13 May 2013, Mr Fraser sent an email to Mr Parkin and copied it to Mr Beagley. In his email Mr Fraser advised that DHC did not agree with the assessments which had been made in Final Payment Schedule 17. He addressed

a number of the variation claims in detail, referring to the supporting documentation that had previously been provided by DHC.

DHC's follow-up email on 8 August 2013

[67] On 8 August 2013, Mr McClatchy sent an email to Mr Arnerich to inquire about the final account. He noted that DHC had not heard anything from Davis Langdon for a "very long time". He said that DHC was not prepared to waste any more time with Davis Langdon and would prefer to deal directly with Mr Arnerich over the final account, if he was willing to do so. He asked if a meeting could be arranged. Mr McClatchy received an automated reply advising that Mr Arnerich was out of his office for an extended period and would be returning to New Zealand in mid-September 2013. The automated message advised that any queries should be referred to relevant staff or to Mr Arnerich's solicitor.

[68] Mr Arnerich said in evidence that he was "shocked" when he received Mr McClatchy's 8 August 2013 email, and he immediately sent an email to Mr Parkin which read:

> …
>
> I have had an email from Stuart McClatchy saying they haven't heard anything [from Davis Langdon] for a long time? He also says that he wants to sort out the final account? I thought it was sorted in that they owe us almost $100k?
>
> You think they are fishing?
>
> AA

[69] Mr Parkin responded to Mr Arnerich by email that evening. He said:

> I wasn't aware we needed to [contact DHC], I understand we are still waiting on outstanding documentation in order to issue [practical completion]? Final account I am not sure where we got to. I will follow up with [Mr Beagley] but to the best of my knowledge we had communicated our stance on the outstanding issues.

[70] Mr Arnerich replied:

> Yes I thought so. Can you please check but I thought we issued the final account as at minus $99k ish.

If you could see where we are at with this and let me know?

Once we know I will suggest to [Mr McClatchy] he contact you for an update.

[71] On 19 September 2013, Mr Arnerich sent an email to Mr Beagley attaching a copy of Progress Claim No 17. He said:

> Hi Scott
>
> Yes they did issue their final claim….I will forward the final progress valuation to them that [Davis Langdon] sent. If you can review with Mr Parkin on Monday that would be good….Looking at this though it is pretty clear what the position is ie we are owed plenty.
>
> Thanks
>
> AA

[72] Shortly following this email, Mr Arnerich sent another email to Mr Beagley attaching Final Payment Schedule 17 and commenting: "This was the final progress valuation/payment made to them. Let's talk Monday…"

[73] On 24 September 2013, Mr McClatchy telephoned Mr Arnerich and asked for a meeting with him. Mr Arnerich said he would be unable to meet until after he had seen the engineer's decision on the variations.

[74] On 4 October 2013, Mr McClatchy followed up his telephone conversation by email to Mr Arnerich asking if he could advise when he would be available to meet in order to finalise the account. Later that same day, Mr Parkin sent an email to Mr McClatchy that he copied to Mr Arnerich and Mr Beagley, attaching the certificate of practical completion for the project. The certificate was dated 28 June 2013, and certified that practical completion was achieved on Wednesday 21 November 2012.

[75] By 4 October 2013, Vaco had ceased trading. The only remaining asset of the company at that time was a credit balance of $6,440.25 in its ANZ cheque account.

Liquidation of Vaco

[76] On 1 July 2014, Mr Arnerich, acting in his capacity as the sole director of Vaco, passed a shareholder's resolution appointing Victoria Toon, a chartered accountant, as

liquidator of Vaco. In his evidence, Mr Arnerich said that by that point he had had enough. The Vaco Trust had been wound up, and Vaco had no assets.

[77] On 2 July 2014, a lawyer acting for DHC sent an email to Mr Arnerich, attaching by way of service a notice of adjudication.

[78] On 4 July 2014, DHC lodged a proof of debt with the liquidator claiming that as at the date Vaco was placed into liquidation it was indebted to DHC in the sum of $703,731.65 (including GST and interest).

[79] On 10 July 2014, DHC filed an amended proof of debt in which the debt claimed was increased to $809,291.40 (including interest).

[80] By notice of rejection dated 31 July 2015, the liquidator rejected DHC's claim to be a creditor on the basis that the DHC debt included claims for variations to the building contract which had been the subject of formal reviews by the engineer, and the decisions made by the engineer had not been challenged under the disputes procedure in the contract. The liquidator's notice of rejection stated that the engineer had decided in Final Payment Schedule 17 that DHC was not a creditor of Vaco, but a debtor owing the company $95,728 (excluding GST), and Davis Langdon had advised that the time limit for challenging the engineer's decisions under the disputes procedure in the contract had expired.

[81] At a meeting of creditors on 1 August 2014, the liquidator informed the creditors that Vaco was a corporate trustee which had no assets and which had held the land at Lincoln Road as a trustee only.

Adjudication proceedings

[82] In early 2015, DHC, through its solicitors, requested the liquidator to take steps to investigate the distribution of funds by Vaco following the sale of the Lincoln Road property in April 2013, and to pursue recovery of those funds. DHC contended that the distributions were effected by Mr Arnerich in breach of his duties as a director, as he was aware of DHC's claim to be a creditor of Vaco at the time he arranged the distributions. In its correspondence with the liquidator, DHC also maintained that the

engineer's review was fundamentally flawed and could not be relied upon. DHC asked the liquidator to ascertain the value of DHC's claim by either consenting to proceedings being commenced by DHC against Vaco, or directing the engineer or another expert to consider and advise on the claim. However, the liquidator responded that she was not prepared to have the validity and quantum of DHC's claim against Vaco determined by means of an adjudication.

[83] In May 2015, DHC applied to the High Court for an order granting it leave to commence adjudication proceedings against Vaco (in liquidation). The application was opposed by the liquidator on several grounds. Duffy J heard the application on 2 September 2015 and 3 February 2016. In a judgment delivered on 12 February 2016, Duffy J granted leave to DHC under s 248(1)(c)(i) of the Companies Act to commence adjudication proceedings under the Construction Contracts Act against Vaco.[16]

[84] After leave had been granted by the High Court, DHC commenced the adjudication proceedings. Although he was not a party to the adjudication, Mr Arnerich participated in the proceedings. He funded the liquidator's participation in the adjudication, and also made his own submissions.

[85] The adjudicator's determination was dated 5 October 2016, and was released to the parties on 12 October 2016.[17] The adjudicator, Mr John Green, recorded that DHC sought the following determinations:

> a [Vaco] is liable to pay [DHC] the sum of $686,208.11 including GST or any other sum the Adjudicator may determine; and
>
> b [Vaco] is liable to pay interest on the above sum at the contractual rate of 12.4%;
>
> c [Vaco] is liable to pay [DHC]'s legal costs;
>
> d [Vaco] is liable to pay the whole of the adjudicator's fees and expenses in accordance with section 57 of the [Construction Contracts] Act;
>
> e a determination in respect of [DHC]'s entitlement to an extension of time under the Contract; and
>
> f a determination regarding the release of the Performance Bond.

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16 *DHC Assets Ltd v Toon* [2016] NZHC 140 at [35].
17 Adjudicator's determination, above n 2.

[86] The adjudicator rejected Vaco's submission that the engineer's review decisions were an effective bar to the DHC claims because those claims were made out of time. He noted that under the relevant clauses of NZS 3910:2003, any decision by the engineer to reject a late claim is discretionary, as there may be valid reasons for delay and the lateness may not prevent a proper investigation.[18] He further noted that the relevant guideline in the construction contract provides that an engineer should not refuse to grant an extension of time on the ground of late application unless the lateness is such as to cause real difficulty in making a proper assessment. He concluded:

> 64 Contrary to Vaco's submission, it is clear that under the Contract, an Engineer, in the proper exercise of his or her duties under the Contract, should investigate, and where appropriate, grant an extension of time where the Contractor is properly entitled to the same in circumstances where the contractor fails to give adequate and timely notice in terms of [General Conditions of Contract clause] 10.3.1, unless the lateness is such as to cause real difficulty in the making of a proper assessment.
>
> 65 There is no evidence in this case that the lateness of [DHC]'s applications for [extensions of time] caused the Engineer any difficulty investigating and assessing those claims. In fact, by letter dated 20 December 2012, the Engineer expressly invited [DHC] to provide further information in support of claims for [Extensions of Time] 1, 2 and 3. [DHC] responded substantively by letter dated 6 March 2013. The Engineer then dallied and delayed for some seven months before ruling on [DHC]'s [extension of time] claims, even if his assertion that he made and posted his Engineer[']s Review 2 on [21] October 2013 were accepted, which it is not.
>
> 66 Rather, I have found it more likely that the Engineer's Review 2 was provided to [DHC] on 20 January 2014 for the first time, irrespective of when it was actually made, and that such review did not take into account the further information provided by [DHC] on 6 March 2013 when rejecting [DHC]'s [extension of time] claims.
>
> 67 Taken overall, I reject any suggestion by Vaco that delay on the part of [DHC] making applications for [extension of time] caused any difficulty for the Engineer in making a proper assessment of those claims, such that the Engineer had any basis for rejecting the applications on that ground alone.

[87] The adjudicator upheld all four of DHC's extension of time claims totalling 147 calendar days.[19] As a consequence, the adjudicator also upheld DHC's claim that Vaco was wrong to deduct $70,800 from the Final Payment Schedule as

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18 At [63].
19 At [107].

liquidated damages for a period of 118 days from 28 July 2012 to the date of practical completion on 21 November 2012.[20]

[88] The adjudicator also determined that Vaco was required to pay DHC the sum of $300,763.12 together with interest at a daily rate until payment. Included within that sum was an amount of $131,909.15 for contract variations.[21]

[89] However, the adjudicator disallowed DHC's claim for time-related costs related to extensions of time to the due date for completion totalling $182,462.[22] The adjudicator found that the insuperable difficulty for DHC was that the time-related costs it had claimed fell within the category of P&G costs, which were precluded by the terms of cl 4.4 of the contract performance agreement.[23]

[90] The adjudicator considered that the merits of the parties' cases should be reflected in the costs awards. He said:

> 278 [DHC] has clearly been the successful party in this adjudication. Each party took the risk that its stance on the matters at issue would be vindicated in an adjudication and, on that point, it is [DHC]'s view as to its entitlement to extensions of time, release of the bond, and payment for improper deductions in respect of liquidated damages, variations and Principal's deductions that has prevailed substantially.

[91] The adjudicator allocated responsibility for paying his fees and expenses between DHC and Vaco at 25 per cent and 75 per cent respectively. He directed that Vaco pay 75 per cent of DHC's costs and expenses, and directed Vaco to pay costs to DHC of $27,775 together with a further $7,590 as part reimbursement for the payment DHC had made of $20,000 as security for the adjudicator's fees and expenses.[24] The adjudicator also directed that DHC was entitled to release of the performance bond it had provided under the terms of the contract.[25]

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20 At [108]–[110].
21 At [268].
22 At [176]–[180].
23 At [142]–[146] and [179]–[180].
24 At [282]–[286].
25 At [262] and [292(b)].

DHC refers its claims to arbitration

[92] Following receipt of the adjudicator's determination on 12 October 2016, DHC sought the liquidator's consent to refer the DHC claims which the adjudicator had disallowed to arbitration pursuant to cl 13.4.2 of NZS 3910:2003. The liquidator declined to consent to the commencement of arbitration proceedings.

[93] On 15 March 2017, following a formal proof hearing in the High Court, Lang J made orders granting DHC leave under s 248(1)(c)(i) of the Companies Act to commence arbitration proceedings against Vaco, and to apply to the District Court pursuant to s 73(2) of the Construction Contracts Act for the adjudicator's determination to be enforced by entry as a judgment.[26] On 26 April 2017, DHC applied to the District Court at North Shore for the adjudicator's determination dated 5 October 2016 to be enforced by entry as a judgment. Vaco was served but took no steps. On 11 May 2017, the District Court entered the determination as a judgment of the District Court in favour of DHC against Vaco in the sum of $367,768.12 (including GST) plus interest.[27]

[94] DHC then proceeded to refer to arbitration the claims in relation to time-related costs and P&G costs that had been disallowed by the adjudicator. Mr John Walton was appointed as the arbitrator.

[95] In August 2017, Mr Arnerich commenced a separate proceeding in the High Court against Vaco, the liquidator, and DHC, seeking orders directing the liquidator to bring a counterclaim in the arbitration, or in the alternative that he be given leave pursuant to s 165 of the Companies Act to bring a counterclaim in Vaco's name in the arbitration as a derivative action. All three respondents opposed Mr Arnerich's application. On 28 March 2018, Associate Judge Sargisson declined to grant Mr Arnerich leave to seek an order that the liquidator be directed to file a counterclaim in the arbitration.[28] Mr Arnerich's application to rescind that order was

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26 *DHC Assets Ltd v Vaco Investments (Lincoln Road) Ltd (in liq)* [2017] NZHC 454.

27 *DHC Assets Ltd v Vaco Investments (Lincoln Road) Ltd (in liq)* DC North Shore CIV-2017-044-546, 11 May 2017.

28 *Arnerich v Vaco Investments (Lincoln Road) Ltd (in liq)* [2018] NZHC 560 at [22(d)].

dismissed by the Judge on 3 August 2018.[29] The application for leave to bring a derivative action was subsequently discontinued.

[96] The arbitration has not proceeded to a hearing. It appears the parties saw it as superseded by the proceedings brought by DHC against Mr Arnerich which are the subject of this appeal.

DHC's proceedings against Mr Arnerich

[97] In March 2017, DHC brought proceedings in the High Court against Mr Arnerich under s 301 of the Companies Act. DHC applied for summary judgment. The application was unsuccessful.[30]

[98] Following the refusal of summary judgment, DHC repleaded its claim and proposed that the liquidator be joined as a party in the proceeding. However that application was made at a late stage, and by minute dated 26 July 2018 Associate Judge Bell ruled that the proceeding should continue without the liquidator being joined, on the basis that any judgment would be binding on both DHC and Mr Arnerich in relation to the standing of DHC as a creditor of Vaco, and in relation to the amount of any liability of Vaco to DHC. In response to that minute, the liquidator filed a memorandum dated 17 August 2018 in which she noted, among other things, that the liquidator had previously advised the Court by memorandum dated 3 November 2017 that she was willing to abide the decision of the Court on the amount that is found to be due under the construction contract in the proceedings between DHC and Mr Arnerich, and that remained her position.

[99] From this point onwards all parties proceeded on the basis that the amount (if any) owed by Vaco to DHC, over and above the amount awarded in the adjudication, would be determined in these proceedings. Hence their decision not to progress the arbitration before Mr Walton.

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29 *Arnerich v Vaco Investments (Lincoln Road) Ltd (in liq)* [2018] NZHC 1974 at [40]–[43].
30 *DHC Assets Ltd v Arnerich* [2017] NZHC 1460.

DHC's allegations against Mr Arnerich

[100] The proceedings went to trial on the basis of DHC's third amended statement of claim, in which DHC pleaded two causes of action against Vaco under the construction contract. The pleading alleged that with full knowledge of those outstanding claims by DHC as a creditor of Vaco, Mr Arnerich procured Vaco to make distributions out of the proceeds of sale of the Lincoln Road property to himself and his family interests.

[101] The first cause of action alleged that by distributing Vaco's assets to himself and his family interests, Mr Arnerich had breached his fiduciary duties and his duty under s 131 of the Companies Act. DHC sought orders under s 301 of the Companies Act that Mr Arnerich pay DHC $1,088,156.17 plus contractual interest. Alternatively, DHC sought an order requiring Mr Arnerich to contribute such sum to the assets of Vaco by way of compensation as would serve to cover all monies owing by Vaco to DHC, including GST and contractual interest, taking into account any liquidator's fees and any claims that might be lodged by other creditors.

[102] The second cause of action was concerned with alleged misapplication of the retention monies. It is not relevant for present purposes.[31]

Mr Arnerich's defence

[103] Mr Arnerich denied that he had breached s 131 of the Companies Act. In his defence to the third amended statement of claim, he denied that any further sums were owed by Vaco to DHC. He denied that DHC was entitled to payment of the retentions under the construction contract. He said that while he was aware that DHC was unhappy with some of the engineer's decisions under the construction contract, DHC never took any steps to formally challenge those decisions within the timeframes required by the construction contract. At the time he authorised distributions to himself and his interests from Vaco's ANZ bank account, DHC had taken no steps to formally challenge any of the engineer's decisions, and had not commenced or threatened to commence any mediation or arbitration process. He had proceeded on

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31 See CA 2021 judgment, above n 7, at [189].

the basis that DHC had no valid claims against Vaco, and DHC was not taking any formal steps to pursue the claims it had raised in correspondence.

[104] Mr Arnerich pleaded by way of affirmative defence that no further monies were owing to DHC under the construction contract. As a second affirmative defence, he pleaded that he had relied on the advice given by Mr Beagley to ANZ about the appropriate amounts to be retained on term deposit to meet the forecast cost to complete the development, including an allowance for possible claims for additional variations by DHC. He had acted in good faith and reasonably in relying on that advice.

First High Court judgment

[105] The trial took place before Davison J. It ran for nine days in late 2018 and two further days in March 2019. Davison J delivered his judgment on 27 September 2019. The judgment was reissued on 2 October 2019.[32]

[106] As already mentioned, DHC's claim against Mr Arnerich was brought under s 131 of the Companies Act. The Judge proceeded on the basis that it was open to him to award compensation direct to DHC under s 301(1)(c), if a breach of s 131 was established.[33]

[107] The Judge considered that there was a preliminary question as to whether he was able to determine the liability of Vaco to DHC for the purpose of assessing the compensation that might be awarded against Mr Arnerich, independently of the adjudicator's determination and in spite of the contractual disputes procedure set out in the construction contract.[34]

[108] The Judge concluded that the High Court did not have jurisdiction to determine Vaco's contractual liability to DHC.[35] He considered that the contractual dispute procedure agreed by DHC and Vaco required disputes under the construction contract

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32 First HC judgment, above n 3.
33 At [249], quoting *Sanders v Flay* (2005) 9 NZCLC 263,906 (HC) at [18]–[19].
34 At [256].
35 At [259].

to be addressed by prescribed processes, which could include adjudication, formal review by the engineer, mediation and arbitration.[36] The contract did not anticipate either party bringing court proceedings in relation to a dispute arising under the contract.[37]

[109] The Judge considered that in the proceedings before him, Mr Arnerich could not challenge the existence of the debt found owing by Vaco to DHC by the adjudicator. Accordingly, the Judge proceeded on the basis that DHC had established the debt owed to it by Vaco as determined by the adjudicator.[38]

[110] However, as regards the parts of DHC's contractual claim that had been disallowed by the adjudicator, and subsequently referred to arbitration, the Judge found that the dispute provisions of the contract were engaged and underway, but were yet to be completed. The Judge could not determine whether Vaco was liable to meet the DHC claims that had been rejected by the adjudicator. The process for determining those issues under the contract was by arbitration.[39]

Breach of s 131 of the Companies Act

[111] The Judge was satisfied that throughout the relevant period, Mr Arnerich did not genuinely believe that DHC had abandoned its claims.[40] He found that DHC was asserting itself as a creditor, and Mr Arnerich was aware there was a real dispute between the parties. The Judge found that Mr Arnerich did not believe that DHC's claims had been finally determined by Final Payment Schedule 17.[41]

[112] The Judge then went on to consider whether Mr Arnerich had breached his duties under s 131 of the Companies Act when he authorised the payments to himself and his family interests.

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36 At [260].
37 At [261].
38 At [268].
39 At [269].
40 At [320].
41 At [327].

[113] The Judge held that at the time Mr Arnerich made those distributions, he was not acting in good faith, as he failed to have sufficient regard to the interests of DHC as an unpaid creditor of Vaco.[42]

Relief under s 301 of the Companies Act

[114] The Judge considered that this was a case where it was appropriate for Mr Arnerich to compensate DHC directly under s 301(1)(c) of the Companies Act.[43] He directed Mr Arnerich to pay DHC the amount found owing in the adjudication: $367,768.12.[44] The Judge considered that DHC was entitled to interest on that sum from the date of the adjudicator's determination at the contractual rate of 12.4 per cent compounding monthly.[45]

[115] The Judge said that because the final amount of Vaco's indebtedness to DHC was yet to be determined, and could not be determined other than by means of the arbitration which was adjourned, DHC could not recover any further sum found owing by Vaco directly from Mr Arnerich under s 301 of the Companies Act other than by means of a further proceeding. The Judge considered that this situation was unfortunate, but was the consequence of DHC having chosen to pursue the s 301 proceeding before concluding the arbitration with Vaco.[46]

Court of Appeal 2021 judgment

[116] This Court upheld the High Court Judge's finding that Mr Arnerich had breached s 131 of the Companies Act, and was required to pay DHC the amount awarded by the adjudicator: $367,768.12, plus interest.[47] Mr Arnerich's appeal was allowed in part, in relation to the calculation of interest on the adjudication award.[48]

[117] This Court also held that the High Court Judge erred in declining to determine the amount of DHC's claim against Vaco. This Court accepted DHC's submission that

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42 At [345].
43 At [347].
44 At [348]–[349].
45 At [350].
46 At [351].
47 CA 2021 judgment, above n 7, at [8]–[9].
48 At [190].

the proceeding should be remitted back to the High Court to determine the question of what, if anything, Vaco owed to DHC over and above the amount determined by the adjudication process.[49]

[118] The formal order made by this Court in relation to DHC's cross-appeal was as follows:

> [191] DHC's cross-appeal is allowed. The proceedings are remitted back to the High Court to determine the amount of any further claim DHC may have against Vaco under the construction contract and, in light of that determination, to make such further orders against Mr Arnerich under s 301 of the Companies Act as may be appropriate.

Second High Court judgment

[119] A two-day hearing of the matters referred back to the High Court took place in December 2021.[50] No further evidence was called: the parties agreed that the reference back to the High Court should be determined on the basis of the evidence that was before the High Court in the initial hearing in 2018/2019.

DHC's claims at the second hearing

[120] As the Judge recorded, DHC's claim for amounts disallowed by the adjudicator which it had referred to arbitration, and then pursued in the High Court proceeding, was for:[51]

(a) time-related costs arising out of its entitlement to extensions of time totalling 147 days;

(b) further claims for P&G costs associated with ASB-generated variations; and

(c) GST and, where appropriate, interest on those amounts at the contractual rate on a monthly compounding basis from 4 May 2013 until the date of payment.

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49 At [151] and [187]–[188].
50 Second HC judgment, above n 8.
51 At [9].

[121] DHC argued that because Vaco had not challenged any part of the adjudicator's determination by referring the matters determined to arbitration, the key rulings made by the adjudicator had become final and binding on the parties and could not be challenged by Mr Arnerich.[52]

[122] However DHC had taken steps to challenge the adjudicator's interpretation of the construction contract in relation to its entitlement to time-related costs and P&G costs by referring these matters to arbitration. DHC submitted that the adjudicator erred in finding that DHC's time-related costs claims were defeated by the provisions of the construction contract, and in finding that DHC could not recover P&G costs in respect of contract variations generated by ASB that were disallowed by the adjudicator.[53] DHC argued that the construction contract, properly interpreted, permitted it to recover these amounts.

[123] Alternatively, DHC submitted that Mr Arnerich was estopped from denying DHC's entitlement to claim time-related costs because of the manner in which Vaco (through Mr Arnerich) repeatedly requested variations to the building with the result that DHC incurred considerable time-related costs.[54]

[124] DHC relied on the adjudicator's determination that DHC was entitled to extensions of time totalling 147 calendar days. In the alternative, DHC submitted that it had proved its entitlement to the extensions of time and to time-related costs based on the evidence it called at the original hearing before the High Court.[55] DHC had called expert evidence on these issues.

[125] Mr Raymond Bryant, DHC's expert on programming of construction contracts, gave evidence that as a result of the analysis he had undertaken he had concluded that "the critical path of the original tender and contract programmes was extended as a result of variations to the original contract by a period of 21 calendar weeks".[56]

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52 At [56].
53 At [38]–[46].
54 At [47].
55 At [48].
56 At [48] and [91].

[126] DHC submitted that Mr Arnerich had not called any expert evidence to rebut Mr Bryant's evidence. The expert called by Mr Arnerich, Mr John Ewen, accepted under cross-examination that he did not have any relevant experience of contract programming.[57]

[127] DHC also called expert evidence from a quantity surveyor, Mr Daniel Johnson, about the quantum of the time-related costs that DHC had incurred. DHC claimed time-related costs of either $191,386.98 or $159,423.25 depending on whether or not it was entitled under the construction contract to time-related costs incurred outside the period of delay to the contract works as a whole. As Mr Johnson acknowledged in his evidence, that is a question of contract interpretation on which he could not express a view.[58]

[128] DHC claimed interest under the contract on the basis that its claims for time-related costs had been unreasonably deducted from its payment claim.[59]

Mr Arnerich's response at the second hearing

[129] Mr Arnerich submitted that the construction contract contains an unambiguous provision prohibiting DHC from making claims for time-related costs, as these are P&G costs that were incurred as a consequence of variations extending the contract programme. He noted that these claims were rejected by the adjudicator based on the language of the construction contract.[60]

[130] Mr Arnerich acknowledged that any variations that were required by ASB, and which had been agreed with Vaco in advance of being undertaken, would be an exception to the prohibition on extensions of time and claims for variations. If there were variations instigated by ASB, then ASB would ultimately pay the additional cost of the variations as Vaco would pass the cost onto ASB. However this depended on DHC following the process prescribed by the construction contract, including valuing any variations before they were undertaken.[61]

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57 At [48].
58 At [86]–[87].
59 At [52]–[53].
60 At [57].
61 At [62].

[131] Mr Arnerich disputed DHC's argument that the adjudicator's determination is final and binding and gives rise to issue estoppels in respect of findings made by the adjudicator.[62]

[132] Mr Arnerich also disputed DHC's claims to interest.[63]

The Judge's decision

[133] The Judge set out in considerable detail the manner in which DHC and Vaco dealt with variations to the contract works, and the correspondence between the parties in relation to DHC's intention to make extension of time claims.[64]

[134] The Judge summarised the evidence of Mr Johnson in relation to the fair and reasonable costs claimable by a contractor relating to the extensions of time awarded by the adjudicator.[65] The Judge noted that Mr Johnson's report was admitted by consent and he was not cross-examined.[66] The Judge also summarised the evidence of Mr Bryant in relation to the period by which the critical path for the contract programme was extended as a result of variations.[67]

[135] The Judge set out the relevant (and in certain respects, inconsistent) provisions of the contract documents concerning payment for variations.[68] The Judge considered that those provisions were properly to be interpreted as expressing the clear intention of the parties that DHC would be entitled to claim: variation costs arising from ASB-initiated variations; extensions of time to the contract completion date caused by these variations; and time-related costs which result from the variations.[69]

[136] The Judge did not consider the provisions, which on their face precluded claims for time-related costs, had that effect when read in context. Rather, it was clear from the contract provisions that Vaco and Mr Arnerich were concerned to ensure that

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62 At [66].
63 At [67]–[71].
64 At [75]–[81].
65 At [84]–[87].
66 At [83].
67 At [88]–[91].
68 At [97]–[106].
69 At [107].

Vaco was not itself confronted with claims for increased costs that it would be responsible for and that it could not pass on to ASB. Vaco was not however concerned to prevent any claims for variation costs arising from changes to the contract works required by ASB.[70]

[137] The Judge disagreed with the conclusion reached by the adjudicator that certain provisions of the construction contract presented an insuperable barrier to DHC's ability to claim and recover time-related costs resulting from the ASB variations.[71]

[138] However the Judge treated the adjudicator's findings allowing the four extension of time claims as not open to challenge by Mr Arnerich. He said:

> [116] However, the Adjudicator's findings allowing the four extension of time claims and his determination of the amounts which [DHC] is entitled to recover from Vaco are not susceptible to challenge by Mr Arnerich in the context of this hearing. As I noted at the outset of this judgment, the scope of this hearing is that stated by the Court of Appeal when remitting the matter back to this Court for determination of what, if anything, Vaco owes to DHC over and above the amount determined by the Adjudication process, if that issue is relevant to the award of relief under s 301 of the Companies Act in this proceeding.

[139] The Judge concluded that DHC was entitled to make the claims it made for four extensions of time. He added:[72]

> I further find that the total amount claimed of 147 calendar days was reasonable and substantiated by the evidence of DHC's witnesses, particularly Mr McClatchy, and Messrs Johnson and Bryant.

[140] The Judge also found that DHC was entitled to claim and recover the time-related costs incurred by reason of the net effect of the ASB variations. He said:[73]

> I find that Mr Johnson's calculation of the extension of time costs in respect of all four extension of time claims, in the sum of $191,368.98 being the sum he calculated in relation to the time-related costs incurred over a greater period than the delay to the contract works as a whole, is justifiable and reasonable. And I accordingly find that DHC is entitled to recover that sum from Vaco plus GST.

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70 At [109]–[110].
71 At [115].
72 At [117].
73 At [118].

[141] The Judge did not discuss DHC's claims to P&G costs other than time-related costs.

[142] The Judge went on to consider interest claimed by DHC. He considered that the deduction by Vaco of the amounts claimed from the final payment claim (Payment Claim 17) was clearly unreasonable, with the result that DHC was entitled to interest on those amounts at the contractual rate of 12.4 per cent compounding monthly.[74]

[143] The Judge also upheld DHC's claims to contract interest on the sum of $151,928.80 awarded by the adjudicator, being the amount payable to DHC in relation to Payment Claim 17, and to interest at the rate of five per cent per annum on the other component of the amount awarded by the adjudicator.[75]

[144] The Judge found that DHC was entitled to recover from Vaco:[76]

(a) the sum of $367,768.12 being the amount awarded to DHC by the adjudicator in his determination dated 5 October 2016;

(b) further contractual interest accruing on the sum of $151,928.80 from 5 October 2016 to the date of payment, but which as at 4 February 2022 was $220,372.46 and which shall continue to accrue until payment;

(c) interest on the sum of $136,115.72 at the rate of five per cent per annum from 11 May 2017 until payment is made, which DHC calculates as at 10 November 2021 to be $30,626.03, and which shall continue to accrue at five per cent per annum until payment;

(d) time-related costs of $191,386.98 plus GST; and

(e) contractual interest on the time-related costs of $378,414.74 as at 4 February 2022 and which shall continue to accrue until payment.

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74 At [121]–[122].

75 At [124]–[125]. The amount on which an interest rate of five per cent per annum was awarded included the sum for retentions, GST, adjudication costs and fees, and security for adjudication fees.

76 At [126].

[145] Having determined the amounts that DHC was entitled to recover from Vaco, the Judge found that DHC was entitled to recover the full amount as compensation directly from Mr Arnerich pursuant to s 301(1)(c) of the Companies Act.[77]

[146] The Judge awarded costs to DHC.[78]

Issues on appeal

[147] The parties were unable to agree on a list of issues on appeal. They each filed separate lists which reflected their different perspectives on the appeal.

[148] The practical result of the adjudicator's determination, and the judgments of the High Court and this Court requiring Mr Arnerich to pay DHC the amount awarded in that determination, is that DHC has succeeded in its claims for the costs associated with variations requested by Vaco except for:

(a) claims for time-related costs; and

(b) claims for (relatively modest) amounts of P&G costs other than time-related costs which it claimed from Vaco, but was not paid. In particular, DHC says that some of these costs were claimed by Vaco from ASB, and paid by ASB, but Vaco did not make the corresponding payments to DHC.

[149] The second High Court judgment found that DHC was entitled to recover from Vaco, and in turn from Mr Arnerich, the full amount that DHC claimed for time-related costs.[79] That finding is the main focus of Mr Arnerich's appeal. That judgment did not address DHC's claim for other P&G costs: that is one of the main issues raised by DHC's cross-appeal. But the appeal and cross-appeal also raise a number of additional issues.

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77 At [127].
78 At [129].
79 At [118].

[150] The most significant issue raised by DHC's cross-appeal is DHC's claim to recover variation costs based on estoppel arguments. DHC pleaded estoppel arguments which were not determined by the High Court, and which DHC now relies on before this Court both as an alternative basis for upholding the award of time-related costs, and as an alternative basis for its claim in respect of other P&G costs.

[151] We consider that the issues raised by the appeal and cross-appeal can most efficiently be addressed under the following headings:

(a) Does the adjudicator's determination conclusively determine certain issues?

(b) Did the construction contract permit DHC to claim extensions of time for delays caused by variations?

(c) Has DHC established an entitlement to extension(s) of time?

(d) Did the construction contract provide for DHC to recover costs associated with variations?

(e) Were certain categories of variation costs unrecoverable under the construction contract?

(f) Was Vaco estopped from relying on any contractual limits on recovery of variation costs?

(g) What amount (if any) is DHC entitled to claim from Vaco in respect of time-related costs or other P&G amounts?

(h) What interest is recoverable by DHC from Mr Arnerich?

(i) Should leave be reserved to DHC to make a further claim against Mr Arnerich in respect of any costs that may be awarded in the dormant arbitration?

(j) What orders should be made in this Court?

[152] Before addressing each of those issues, it is necessary to set out the relevant provisions of the construction contract.

The construction contract

[153] The construction contract between Vaco and DHC was described as a "design build lump sum contract". It consisted of seven contract documents:

(a) the contract performance agreement (CPA);

(b) a "second schedule";

(c) DHC's tender and scope documents;

(d) Vaco's notification of acceptance of tender;

(e) a first schedule containing special conditions of contract;

(f) sundry documents (drawings, ASB pre-launch checklist, lease agreements); and

(g) the general conditions of contract NZS 3910:2003.

[154] The second schedule listed the contract documents. It recorded that DHC would carry out the obligations imposed on it by the contract documents, and that Vaco would pay DHC the sum of $2,129,838 "or such greater or less sum as shall become payable under the Contract Documents together with Goods and Services Tax at the times and in the manner provided in the Contract Documents".

[155] The CPA set out the scope of work and "overriding basis of agreement". Under the heading "scope of work" the CPA provided:

> The Contractor is obliged to undertake the scope of work summarised in this section for the Contract Price to the intent that no work which is necessary to achieve the outcomes described in this section shall justify extra payment even if a Variation to the specification & drawings is necessary to achieve these outcomes, (non compensatable variations).

[156] The design and construction work for the Lincoln Road project was then summarised in general terms.

[157] The allocation of risk to DHC for design and construction of the proposed building was expressly recorded in the section on "overriding basis of agreement":

> The emphasis on the project is on "end results" obligations and it must be clearly understood that it is the responsibility of the Contractor to include within the Contract Price all of its compensation entitlement for achieving those end results on time.
>
> Having regard to the design build nature of this Contract, it is intended that compensatable variations shall be kept to an absolute minimum and that no compensatable variation shall be recognized unless it is instigated by the Principal and the Contractor has fully complied with the VPR procedures set out in the Contract.
>
> …

[158] Section 2 of the CPA was headed "general notes for pricing". It reinforced the emphasis on allocation of risk to DHC in relation to the design and construction of the building:[80]

> **2.1 DESIGN BUILD LUMP SUM CONTRACT**
>
> Because of the wide experience of the Contractor in commercial projects, and its wide experience with design build contracts, the Contractor hereby guarantees that for the agreed lump sum fixed price, it will meet all of the requirements of this Contract Performance Agreement, the scope of works, the specifications, the drawings, and all of the other Contract Documents including the obtaining of the Building Consents and the Code Compliance Certificate(s) and commission, handover and deliver a fully functioning completed building ready to occupy and fit for the intended purposes.
>
> The Contractor shall absorb within the lump sum fixed price, the cost of all works (not necessarily addressed within the Contract Documents) which an experienced Contractor could reasonably be expected to have foreseen in a

[80] Emphasis added.

project of this nature. *There shall be no extra payment and no compensatable Variations other than tenants' Variations, or changes in scope requested by the Principal which are significant and would not be reasonably foreseen by an experienced Contractor.*

[159] Section 4 of the CPA was concerned with variations. Because this part of the CPA is central to the issues raised by this appeal, it is necessary to set it out in full:

> **4. VARIATIONS**
>
> **4.1 VARIATIONS TO THE CONTRACT WORKS**
>
> The Principal or the Principals Representative shall be entitled to direct the Contractor to carry out Variations. No Variation shall vitiate the Contract and the Contractor shall carry out all Variations. Work executed by the Contractor without direction or authority from the Principal or the Principals Agent shall constitute a Variation only if subsequently sanctioned as such in writing by the Principal.
>
> Where any compensatable Variation is directed by the Principal or the Principals Representative, its value shall be agreed in writing before work is commenced.
>
> **4.2 CLAIM FOR VARIATION**
>
> Where a direction is given by the Principal which is not expressly stated to be a compensatable variation but which the Contractor considers to involve a variation at a cost above the lump sum, the Contractor shall within ten (10) working days of receiving the direction, and before proceeding with the work, notify the Principals Representative that the direction involves a variation not within the lump sum. Within ten (10) working days, the Principals Representative shall notify the Contractor whether or not the direction constitutes a compensatable Variation.
>
> **4.3 VARIATION PROCEDURE**
>
> The procedure for valuing compensatable Variations in accordance with the General Conditions shall be as follows. In ordering a Variation the Principals Representative shall issue a sequentially numbered instruction. Where the instruction requests quotation (*VPR*) from the Contractor, it shall be in accordance with the requirements noted below:
>
> **Variation Price Request:**
>
> a) To be submitted by the date stated,
>
> b) To be submitted in duplicate on VPR form to the Principals representative and the Principals Agent (to be supplied and agreed),
>
> c) Where quotation is for work and in lieu both additional and omitted work is to be priced,
>
> d) Each quotation is to be fully amplified indicating all quantities, rates, costs, fees, etc,

e) Where applicable, copies of the subcontractor's quotation are to accompany the VPR,

f) VPR's are to be fixed price.

g) Identify the final possible date the VPR approval can be provided by the Principals Representative to ensure there is no delay to the overall practical completion date.

h) VPR's are to note any time consequences, should the VPR approval be provided by the Principals Representative and become a compensatable Variation, that may affect the overall practical completion date.

4.4 VALUING VARIATIONS

Each compensatable Variation shall be valued by agreement if agreement can be reached. In the absence of agreement it shall be valued by the Principals Representative having regard to the following basic principles:

- The valuation is to be on a fair and reasonable basis;
- All processing costs shall be deemed to be included in the original Contract Price and therefore no further allowance will be made;
- All Preliminary and General costs and expenses relating to any changes shall be deemed included in the original Contract Price and therefore no further allowance will be made;
- No costs will be considered unless the original invoices relating to such costs are produced to the Principals Representative for inspection.

[160] DHC's tender dated 29 July 2011 recorded that it was based on the contract documents, including certain drawings prepared by architects for the proposed building.

[161] The tender letter identified certain matters that had not been allowed for in the price tendered by DHC. In particular, the letter recorded that DHC had made no allowance for any piling. Geotechnical investigations were still being undertaken by Vaco at that stage to determine whether the type of foundations specified in DHC's tender would be sufficient for the site.

[162] Vaco's notification of acceptance of tender dated 23 September 2011 accepted DHC's tender, but added a number of special conditions including the following (which DHC expressly accepted by signing the Vaco document):

> **Special Conditions**
>
> 1. $600.00 per calendar day excluding G.S.T. Liquidated Damages to commence from 27 July 2012 until practical completion.
>
> …
>
> 8. No extensions of time for inclement weather.
>
> …
>
> 13. No cost fluctuations at all.
>
> …
>
> 17. All Contract Documents are of equal status. If an item is specified but not drawn, or drawn but not specified, it shall be deemed both drawn and specified. If a discrepancy exists then the Contractor shall cost the most expensive item, system or installation and the Principal or Principal's Representative will determine the correct item. All such items will be clearly scheduled by the Contractor. All items specified are "or similar" on approval of the Principal or the Principal's Representative.

[163] Under the heading "General" in Vaco's notification of acceptance of tender there also appeared the following:

> It is the Contractor's responsibility to assess the extent of the work to be completed.
>
> No claim for variations or extra time will be entered into.

[164] The special conditions of contract were in a standard form that referred to specific clauses of NZS 3910:2003 and identified how those clauses applied and/or modified those clauses. In relation to cl 12.8.2, which provided for certain cost fluctuation adjustments, the special conditions of contract provided that such adjustments "shall not be paid". No other provisions of the special conditions of contract are directly relevant to the issues on appeal.

[165] The sections of NZS 3910:2003 of particular relevance for present purposes are section 9 in relation to variations, section 10 in relation to time for completion, section 12 in relation to payments and section 13 in relation to disputes.

[166] As already mentioned, cl 6.2 of NZS 3910:2003 provides for the principal to appoint an engineer who acts as the principal's representative for most purposes, but must act independently when making certain formal decisions under the contract.

[167] Clause 9.1 of NZS 3910:2003 provides that the engineer may order variations to the contract works. The contractor is required to carry out and comply with any variation ordered under cl 9.1. Clause 9.1.5 provides that the value of variations "shall be added to or deducted from the Contract Price".

[168] Clause 9.2 provides that the contractor must not vary the contract works without an order in writing from the engineer. However, recognising the practical realities of many construction projects, it goes on to provide that where an instruction is given by the engineer which is not in writing or expressly stated to be a variation, and the contractor considers that the instruction involves a variation, the contractor must within one month or as soon as practicable thereafter given written notice to the engineer to that effect. Unless the engineer by notice in writing within a reasonable time rejects the contractor's claim, the instruction is treated as if it was a variation. Clause 9.2.4 also provides that oral notice which is recorded in written records such as site minutes, correspondence or memoranda held by the contractor and by the engineer or principal is treated as written notice of a variation.

[169] Clause 9.3 provides for valuation of variations. As relevant, it provides:

> **9.3 Valuation of Variations**
>
> **9.3.1** The value if any of each Variation shall as far as possible be determined by agreement between the Contractor and the Engineer. Failing agreement the value shall be determined by the Engineer in accordance with this clause 9.3.
>
> **9.3.2** Wherever practicable all Variations shall be valued before the work involved is commenced, but any failure to do so shall not invalidate the Variation.
>
> …
>
> **9.3.10**
>
> (a) Where the Contractor is entitled to an extension of time by reason of the net effect of any Variation, the Contractor shall be entitled to compensation for the time related Cost incurred in relation to that extension together with an allowance for profit. To the extent that

such Cost has not been compensated in arriving at the Base Value of the Variation, or under the following provisions of this clause 9.3.10, it shall be determined in accordance with 9.3.4, 9.3.5 and 9.3.6 and included in the Base Value.

(b) Where the Conditions of Tendering provide for a rate per Working Day to be nominated in the tender then such rate shall be deemed to provide for time related On-Site Overheads, Off-Site Overheads and Profit and shall be used to determine the amount to which the Contractor is entitled for time related On-Site Overheads, Off-Site Overheads and Profit.

(c) Where the Conditions of Tendering do not provide such a rate, the Contractor shall be entitled to reasonable compensation for time related On-Site Overheads, Off-Site Overheads and Profit.

(d) In assessing compensation for Cost and profit under paragraphs (b) or (c) of this subclause 9.3.10 there shall be taken into account any allowance for time related Cost and profit included in the prices and rates where the Base Value has been determined under 9.3.4 or 9.3.5 or included in the evaluation of overheads and profit under 9.3.8 and 9.3.9.

…

9.3.13 Where a part of the Contract Works is delayed by reason of a Variation for a greater period than the delay if any to the Contract Works as a whole, and the Contractor thereby incurs time related Cost, the Contractor shall be entitled to reasonable compensation for such time related Cost and profit after taking into account any allowance for time related Costs included in the prices and rates where the Base Value has been determined under 9.3.4 or 9.3.5 or in the evaluation of overheads and profit in 9.3.8 and 9.3.9.

…

9.3.16 The value of each Variation when determined shall be confirmed or notified to the Contractor in writing. Where the value as determined differs from that proposed by the Contractor, the notice shall include the Engineer's reasons for his or her valuation.

[170] Section 10 of NZS 3910:2003 provides for the due date for completion of the contract works. The original due date for completion of the Lincoln Road project by DHC was in effect 27 July 2012, as this was the date from which liquidated damages ran under the special conditions set out in Vaco's notification of acceptance of tender.

[171] Clause 10.2 provides that the due date for completion of the contract works is to be calculated by adding to the date of commencement of the contract period the period provided in the special conditions for completion of the contract works and all extensions of time, if any, awarded under cl 10.3.

[172] Clause 10.3 makes provision for extensions of time:

> **10.3 Extension of time**
>
> **10.3.1** The Engineer shall grant an extension of the time for completion of the Contract Works or for any Separable Portion if the Contractor is fairly entitled to an extension by reason of:
>
> (a) The net effect of any Variation; or
>
> (b) Weather sufficiently inclement to interfere with the progress of the works; or
>
> (c) Any strike, lockout or other industrial action; or
>
> (d) Loss or damage to the Contract Works or Materials; or
>
> (e) Flood, volcanic or seismic events; or
>
> (f) Any circumstances not reasonably foreseeable by an experienced contractor at the time of tendering and not due to the fault of the Contractor.
>
> **10.3.2** The Engineer shall not be bound to grant an extension unless:
>
> (a) The Contractor notifies the Engineer that it claims an extension and states the grounds for the extension;
>
> (b) The notice is given within 20 Working Days after the circumstances arise which are relied on as the grounds for extension, or as soon as practicable thereafter;
>
> (c) The notice either gives details of the period of extension sought or is followed within a reasonable time by a further notice giving such details.
>
> …
>
> **10.3.4** Upon receipt of notice of a claim for extension of time the Engineer shall investigate the claim. The Engineer shall within 20 Working Days or as soon as practicable thereafter determine whether or not the Contractor is fairly entitled to an extension and shall notify the Contractor of his or her decision.
>
> **10.3.5** Upon receipt of details of the period of extension sought by the Contractor the Engineer shall, if he or she has determined that the Contractor is fairly entitled to an extension, then determine the period of the extension and notify the Contractor of his or her decision as soon as practicable.
>
> …
>
> **10.3.7** The Contractor shall not be entitled to compensation for time related Costs where an extension of time is granted on grounds other than the net effect of a Variation.

[173] Section 12 of NZS 3910:2003 provides for interim and final payments under the construction contract. It sets out an elaborate mechanism for submission of payment claims, payments, retentions and the making of a final payment claim following the expiry of the period of defects. Clause 12.7 provides for compound interest to be paid on certain amounts, including amounts that are unreasonably deducted from a payment claim and subsequently paid or found by an adjudicator to be payable:

> **12.7.3** In the event of unreasonable deduction of any amount from any Contractor's payment claim or final payment claim being made in any Payment Schedule, and where such amount is later paid by the Principal or found by an adjudicator to be payable by the Principal, the Contractor shall be entitled to interest compounding Monthly on that amount from the date on which it would have been payable if the unreasonable deduction had not occurred down to the date of payment.
>
> **12.7.4** The rate of interest shall be equal to one and a quarter times the average Monthly interest rate as certified by a chartered accountant or trading bank manager, which is currently payable or which would be payable by the Contractor for overdraft facilities.

[174] Section 13 of NZS 3910:2003 provides for the resolution of disputes. There is a strong emphasis on finality. Clause 13.1.1 provides:

> **13.1.1** No decision, valuation, or certificate of the Engineer shall be questioned or challenged more than three Months after it has been given or more than one Month after the date on which any relevant Adjudicator's Determination is given to the parties, whichever is the later, unless notice has been given to the Engineer within that time. This subclause 13.1.1 shall not apply to a Progress Payment Schedule.

[175] In the first instance, every dispute or difference must be referred to the engineer for formal review. The engineer is required to act independently in issuing a "formal decision" in relation to the dispute. A formal decision by the engineer is final and binding subject to the provisions in s 13 providing for mediation and arbitration, or any adjudication proceedings. Strict time limits are prescribed for referring formal decisions of the engineer to mediation or arbitration. Time for referring a decision to mediation or arbitration runs from the date of the decision, or from the date on which such a decision was due if it was not given by the engineer within the prescribed time.

[176] If a dispute is referred to arbitration, the arbitrator has jurisdiction to inquire into and determine that dispute unfettered by any prior dispute resolution process that

may have been undertaken. Clause 13.4.4 expressly provides that adjudication determinations do not preclude a fresh inquiry into the question before the arbitrator:

> **13.4.4** The arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, direction, certificate, valuation of the Engineer or any Payment Schedule and to award upon all questions referred to him or her. Neither party to the arbitration shall be limited to the evidence or arguments put before the Engineer for his or her review or put before a mediator or adjudicator or included in any payment claim or Payment Schedule.

[177] Clause 13.4.7 provides that the arbitrator's award is final and binding on the parties.

Does the adjudicator's determination conclusively determine certain issues?

The issue

[178] The Judge proceeded on the basis that the adjudicator's findings allowing the four extension of time claims, and his determination of the amounts which DHC was entitled to recover from Vaco, were not open to challenge by Mr Arnerich in the context of the second High Court hearing.[81] Mr Arnerich challenges that approach.

Submissions

[179] Mr Arnerich says that a determination by an adjudicator under the Construction Contracts Act does not finally determine the rights of the parties to the dispute. As this Court observed in *Laywood v Holmes Construction Wellington Ltd*:[82]

> An adjudicator's award is not intended to be a final determination of all issues between the disputing parties. Rather, it attempts to provide a speedy mechanism by which a person providing construction services can obtain payment and ensure some cashflow before final resolution of all issues between the parties.

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81 Second HC judgment, above n 8, at [116].

82 *Laywood v Holmes Construction Wellington Ltd* [2009] NZCA 35, [2009] 2 NZLR 243 at [46]. See also *Body Corporate 200012 v Keene* [2017] NZHC 2953, [2018] NZAR 120 at [48].

[180] Mr Arnerich says that the essentially interim nature of an adjudication determination is expressly confirmed by s 27 of the Construction Contracts Act, which provides:

> **27 Effect of Part on civil proceedings**
>
> (1) Except as provided in this section, nothing done under, or for the purposes of, this Part affects any civil proceedings arising under a construction contract.
>
> (2) In any proceedings before a court or tribunal, or before a member under the Weathertight Homes Resolution Services Act 2006, in relation to any matter arising under a construction contract, the court or tribunal or member—
>
> (a) must allow for any amount paid to a party to the contract under, or for the purposes of, this Part in any order or award the court, tribunal, or member makes in those proceedings; and
>
> (b) may make any orders that the court, tribunal, or member considers appropriate, having regard to any steps taken by a party to the contract in good faith and in reliance on an adjudicator's determination under this Part (including an order requiring a party to the contract to pay for goods and services supplied by another party to that contract in good faith and in reliance on an adjudicator's determination).

[181] DHC did not contend before us that adjudication determinations are, in and of themselves, final determinations of the disputes between principal and contractor with which they are concerned. Mr Thorp, who appeared for DHC, accepted that the Construction Contracts Act provides for adjudicator's determinations to be interim in nature. However Mr Thorp submitted that in this case the effect of the construction contract was that Vaco was precluded from re-opening any issue determined against it by the adjudicator which it had not referred to arbitration within the timeframes specified in section 13 of NZS 3910:2003. So, Mr Thorp submitted, the adjudicator's determination gave rise to issue estoppels on questions such as DHC's entitlement to extensions of time of 147 days, and DHC's entitlement to be paid the amounts awarded to DHC by the adjudicator.

Discussion

[182] We accept Mr Arnerich's submission that an adjudicator's determination is provisional only. The adjudication process follows an abbreviated procedure that is

not designed to finally resolve any issues. In the construction context, the adjudication process is designed to deliver a prompt preliminary determination which ensures that work continues and payments are made on an explicitly provisional basis. Section 27 of the Construction Contracts Act makes it clear that nothing done in a determination affects any civil proceedings under a construction contract, whether before the courts or in an arbitration. In civil proceedings following an adjudication, parties are free to raise additional issues, pursue additional arguments, and call further evidence. Parties know this when they go into an adjudication. They can take a pragmatic approach, knowing that this does not limit their ability to advance further evidence and arguments in subsequent litigation should that prove necessary.

[183] As Mr Thorp was constrained to accept, it is well established that a determination by an adjudicator does not create an issue estoppel or bring into play the doctrine of res judicata.[83] That is an inevitable concomitant of the nature of the adjudication process, and the constraints on that process (including strict time limits) prescribed by the legislation.

[184] We do not accept DHC's submission that the terms of the construction contract produce a different result in the present case. Nothing in NZS 3910:2003, or in any other provision of the construction contract, had the effect of rendering the adjudicator's determination final in respect of any issue that might be relevant to subsequent civil proceedings. As Mr Hollyman KC, who appeared for Mr Arnerich, pointed out NZS 3910:2003 provides for certain formal decisions by the engineer to be final and binding, unless challenged in the prescribed manner. It also provides for arbitral awards to be final and binding. There is no corresponding provision in relation to adjudication determinations. To the contrary, cl 13.4.4 of NZS 3910:2003 provides that in an arbitration neither party is limited to evidence or arguments put before the engineer for his or her review, or put before a mediator or adjudicator.

[185] DHC also argued that in the first High Court judgment, the Judge ruled that the adjudicator's determination was binding on Vaco and Mr Arnerich, and that this Court

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[83] *Marsden Villas Ltd v Wooding Construction Ltd* [2007] 1 NZLR 807 (HC) at [67]; *Donovan Drainage and Earthmoving Ltd v Halls Earthworks Ltd* [2008] NZCA 135 at [4]; and *Concrete Structures (NZ) Ltd v Inframax Construction Ltd* HC Hamilton CIV-2010-419-909, 9 November 2010 at [17].

endorsed that ruling. That contention misunderstands both judgments. In the first High Court judgment, the Judge said Mr Arnerich could not challenge the existence of the debt found owing by Vaco to DHC by the adjudicator.[84] Similarly, this Court held that the amount awarded by the adjudicator was payable by Vaco to DHC, and that Mr Arnerich was required to pay that amount to DHC.[85] There was no finding that the adjudicator's determination gave rise to any cause of action or issue estoppels. That was not the issue before the Court, and (unsurprisingly) nothing in the 2021 judgment of this Court suggests such a novel and expansive approach to the effect of the adjudicator's determination.

[186] In its proceedings against Mr Arnerich DHC seeks to establish that it had a valid claim against Vaco for time-related costs arising out of four extensions of time totalling 147 days that DHC said were attributable to variations required by Vaco. In order to make out that claim before the High Court, it was necessary for DHC to establish its entitlement to the four extensions of time both as a matter of contract interpretation and on the facts. That issue needed to be considered afresh by the High Court Judge. The conclusion that the adjudicator reached on that issue was not decisive. To the contrary, the Judge should have approached the determination of that issue uninfluenced by the reasoning process adopted by the adjudicator, as Lang J observed in *Concrete Structures (NZ) Ltd v Inframax Construction Ltd*.[86]

[187] Similarly, it was necessary for the Judge to consider afresh all of DHC's other arguments in relation to the interpretation and application of the construction contract, uninfluenced by the adjudicator's determination.

[188] We therefore proceed to determine whether the findings made in the High Court were correct putting to one side the adjudicator's reasoning and conclusions. To the extent that the Judge's reasoning was founded on the adjudicator's determination, we will need to consider the issues afresh.

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84 First HC judgment, above n 3, at [268].
85 CA 2021 judgment, above n 7, at [179].
86 *Concrete Structures (NZ) Ltd v Inframax Construction Ltd*, above n 83, at [26].

Did the construction contract permit DHC to claim extensions of time for delays caused by variations?

The issue

[189] The construction contract dealt separately with the contractor's entitlement to:

(a) extensions of time (which determine the due date for completion of the work, and the start date for any liquidated damages); and

(b) recovery of time-related costs arising out of any extension of time.

[190] The parties' submissions before this Court tended to run those issues together. However we consider that it is helpful to approach them separately, to avoid confusion. We begin with the ability to claim extensions of time.

Submissions

[191] Mr Arnerich's position was that the construction contract expressly precluded any extensions of time. As noted above, Vaco's notification of acceptance of tender included the term: "No claim for variations or extra time will be entered into." He submitted that the Judge erred in finding that DHC was entitled to claim any extensions of time arising out of variations.

[192] Mr Arnerich also emphasised the timeframes for making extension of time claims in cl 10.3.2 of NZS 3910:2003, and the express requirement in cl 4.3 of the CPA that variation price requests should note any time consequences that may affect the overall completion date. Mr Arnerich submitted that even if DHC was entitled to make claims for extension of time, it had not made any *valid* claims for extension of time.

[193] DHC submitted that the Judge was right to find that it was entitled to claim extensions of time arising out of variations requested by Vaco (on its own behalf, or on behalf of ASB). DHC relied on the finding to that effect by the adjudicator. For the reasons set out above, that was not a basis on which the Judge could determine this issue. DHC also relied on the Judge's finding that "in accordance with the terms of

the construction contract and pursuant to [cls] 10.2 and 10.3 of NZS 3910:2003, [DHC] was entitled to make the claims it made for the four extensions of time to extend the completion date for the contract works".[87]

Discussion

[194] DHC's claims for extensions of time were signalled early in the life of the project. Following a geotechnical assessment which identified the need for additional foundation work including piling, DHC sent an email to the engineer, copied to Mr Arnerich, confirming a guaranteed maximum price for the piling requirements of $162,000. DHC noted that they still had some work to do on the programme implications, which on first review might have "about [four] weeks construction delay". On 23 February 2012 DHC advised Vaco that once a revised programme had been issued which incorporated project delays based around design approvals, consents, and additional piling work, DHC would formally apply to the engineer for an extension of time. No reference was made to time-related costs in this correspondence by either party.

[195] Formal claims for extensions of time were ultimately submitted on 6 August, 8 August, and 5 September 2012 and 9 January 2013.

[196] Clause 10.3 of NZS 3910:2003 (set out at [172] above) provides that the engineer must grant an extension of time if the contractor is fairly entitled to an extension by reason of various matters, including the net effect of any variation or weather sufficiently inclement to interfere with the progress of the works. As noted at [162] above, Vaco's notification of acceptance of tender expressly provided that there would be no extensions of time for inclement weather. There was no corresponding exclusion of extensions of time by reason of the effect of any variation.

[197] It is correct, as Mr Arnerich pointed out, that under the heading "General" in the acceptance of tender letter sent by Vaco there appeared the statement: "No claim for variations or extra time will be entered into." However having regard to the scheme of the construction contract, that cannot sensibly be read as extending to

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87 Second HC judgment, above n 8, at [117].

variations, and any extensions of time stemming from such variations, initiated by Vaco for its own benefit or for the benefit of its prospective tenant ASB. Vaco had the right to require variations. In the agreement to lease entered into with ASB (which formed part of the construction contract, as it was one of the sundry documents) Vaco had agreed that ASB could require Vaco to implement variations to the initial design, provided ASB met the differential cost of those variations. Clause 4.3 of the CPA expressly provided for valuation of variations, and provided for variation price requests to note any time consequences that may affect the overall completion date.

[198] Reading the construction contract as a coherent whole, which we must do so far as possible, we consider that it is clear the prohibition on "claiming" variations applied only to variations that DHC might otherwise have sought to initiate (for example, if the original design provided unworkable in some respect), and to extra time consequential on such variations. These were the variations and extensions that DHC could not "claim" under the construction contract. Because the extensions of time claims submitted by DHC were not the product of variations initiated by DHC itself, this prohibition on claims for "variations or extra time" does not apply.

[199] That brings us to Mr Arnerich's submission that even if DHC was entitled to make claims for extension of time, it had not made any *valid* claims for extension of time. He said that DHC failed to comply with the timeframes for extension claims in cl 10.3.2 of NZS 3910:2003, and the express requirement in cl 4.3 of the CPA that variation price requests should note any time consequences that may affect the overall completion date.

[200] Clause 10.3.2 of NZS 3910:2003 provides that the engineer is not *bound* to grant an extension unless a notice that an extension is claimed is given to the engineer within 20 working days after the circumstances arise which are relied on, or as soon as practicable thereafter. However it remains open to the engineer to grant an extension after that time, as the guidelines to NZS 3910:2003 (which form part of the contract) confirm in section G10. The guidelines explain that the purpose of requiring adequate and timely notice is to ensure that the circumstances can be adequately investigated, and a reliable judgement made. The engineer has a discretion to accept a late claim because there may be valid reasons for delay, and there may be cases

where the lateness of the claims does not prevent a proper investigation. The guidelines then go on to say:[88]

> The Engineer should not refuse to grant an extension on the ground of late application unless the lateness is such as to cause real difficulty in the making of a proper assessment, and there are no special reasons such as might excuse the failure to give notice at the proper time.

[201] In the present case it was not suggested that the delay in making formal claims for extensions of time gave rise to any difficulty in assessing those claims. Mr Arnerich's response on behalf of Vaco to the initial formal claims, set out in an email dated 15 August 2012 to Mr McClatchy of DHC, was as follows:

> Hi Stuart
>
> As discussed in the last PCG meeting regarding the ASB [extension of time] claim please provide a break down for each individual item that you believe have caused a delay and attribute the appropriate time you are claiming against them.
>
> Also please urgently finalise all of the ASB VPR's etc so that they can finalise their budgets as discussed.
>
> Thanks
>
> Antony Arnerich.

[202] Nor do we consider that failure to note time consequences in a variation price request is fatal to DHC's claim for extensions of time. Neither Vaco nor DHC consistently followed the variation procedure set out in cl 4.3 of the CPA. No "Principal's Representative" was ever appointed by Vaco. Indeed that role is not provided for in NZS 3910:2003: there appears to have been a mismatch between the contract administration framework contemplated by the CPA and the framework provided for in NZS 3910:2003. Neither Vaco nor the engineer consistently issued sequentially numbered variation instructions which requested a quotation from DHC, as contemplated by cl 4.3 of the CPA. The requirements in that clause for variation price requests only applied where this process was followed. And even where those requirements did apply, the requirement to note time consequences was not expressed as a precondition for claiming an extension of time.

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88 Clause G10.3.2.

[203] In these circumstances we do not consider that cl 4.3 of the CPA limits the ability of DHC to pursue its extension of time claims.

[204] Drawing these threads together, DHC was entitled to claim extensions of time arising out of variations to the contract. Although DHC did not comply with the timeframes prescribed in NZS 3910:2003, it remained open to the engineer to accept those claims for extension of time and no good reason was identified for the engineer to decline to consider those claims on their merits.

[205] We turn to consider whether DHC's extension of time claims were made out on the merits.

Has DHC established an entitlement to extension(s) of time?

The issue

[206] DHC made four claims for extension of time totalling 21 weeks (147 days). DHC's third extension of time claim for 35 days was not disputed by Mr Arnerich in his pleadings, or in the evidence that he called.[89] The three other extension of time claims were disputed. Did DHC's evidence establish that in each of those three cases it was "fairly entitled to an extension" for the purposes of cl 10.3 of NZS 3910:2003?

[207] We approach this issue putting to one side the adjudicator's findings in relation to DHC's claims for extension of time. The Judge erred in treating those findings as relevant and decisive.

Discussion

[208] As already mentioned, DHC called expert evidence from Mr Bryant in relation to the delays caused by variations required under the contract, and whether those delays fairly entitled DHC to extensions of time for completion of the contract works. Mr Bryant concluded that the combination of the four extension of time claims entitled

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89 This extension of time related to the additional piling requirements identified by the geotechnical assessment.

DHC to a total extension of time of 147 days as that was the aggregate impact of the variations on the critical path for the contract works.

[209] Mr Bryant met with the expert witness instructed for Mr Arnerich, Mr Ewen. They prepared a joint statement, which recorded that Mr Ewen did not have any programming expertise, and that his objection to the extensions of time was on a contractual basis rather than a programming basis. Mr Arnerich did not call any expert evidence on programming inconsistent with the evidence of Mr Bryant.

[210] Mr Bryant was cross-examined at length, but Mr McBride, who argued this aspect of the appeal for Mr Arnerich, did not identify anything in that cross-examination that materially undermined Mr Bryant's critical path analysis.

[211] The Judge found that the total extension of time claimed of 147 calendar days was reasonable and substantiated by the evidence of DHC's witnesses, including Mr Bryant.[90] Mr Arnerich has not persuaded us that that finding was wrong. We therefore proceed on the basis that DHC has made out an entitlement to extensions of time totalling 147 calendar days.

Did the construction contract provide for DHC to recover costs associated with variations?

The issue

[212] The Judge considered that DHC was entitled to claim and recover time-related costs incurred by reason of the net effect of the variations requested by ASB.[91] The Judge did not directly address DHC's entitlement to other costs resulting from variations, but it was implicit in his approach that DHC was entitled to recover such costs.

[213] Mr Arnerich challenges that finding.

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90 Second HC judgment, above n 8, at [117].
91 At [118].

Submissions

[214] Mr Arnerich submitted that DHC was not entitled to claim any costs associated with variations because it had not complied with the contractual processes for making such claims. He added that even if DHC had complied with those processes, there were certain categories of cost that DHC had agreed would not be recoverable including P&G costs. He says that because the time-related costs claimed by DHC were all P&G costs, they are unrecoverable.

[215] Mr Arnerich relied on the following provisions of the construction contract:

(a) Clause 1.2 of the CPA provided that "no compensatable variation shall be recognized unless it is instigated by the Principal and the Contractor has fully complied with the [variation payment request (VPR)] procedures set out in the Contract".

(b) Clause 2.1 of the CPA provided that there shall be "no extra payment and no compensatable Variations other than tenants' Variations, or changes in scope requested by the Principal which are significant and would not be reasonably foreseen by an experienced Contractor".

(c) The VPR procedure set out in cl 4.3 of the CPA required DHC to provide a fixed price quotation for the variation with supporting information. A VPR was required to note time consequences in relation to the requested variation.

(d) Clause 4.4 of the CPA expressly restricted the costs recoverable in respect of a variation. It provided that:

- All processing costs shall be deemed to be included in the original Contract Price and therefore no further allowance will be made;
- All Preliminary and General costs and expenses relating to any changes shall be deemed included in the original Contract Price and therefore no further allowance will be made;

…

(e) Clause 9.3.1 of NZS 3910:2003 provides that the value if any of each variation shall as far as possible be determined by agreement between the contractor and the engineer. Failing agreement, the value must be determined by the engineer in accordance with cl 9.3.

[216] Mr Arnerich submitted that the expert evidence given at trial by Mr Ewen was that "preliminary and general" or "P&G" is a well-known term, made up of unallocated, general, fixed costs of establishing and running a project (for example, establishing and running site accommodation, shed delivery and removal, and scaffold supply, erection and dismantle) both on and off site. DHC's claim for time-related costs was a claim for P&G costs, so was precluded by cl 4.4 the CPA.

[217] Mr Arnerich submitted that the Judge erred in reading down the clear provisions of the CPA and focussing on the variation provisions in NZS 3910:2003. He said that was wrong because the CPA was expressed to form the "overriding basis" of the parties' agreement. To the extent of any inconsistency, the terms of the CPA which the parties had expressly adopted were intended to prevail over the general terms in NZS 3910:2003. There was no proper basis on which the Judge could disregard the procedure for claiming compensatable variations, or the express exclusion in the CPA of any further allowance for certain costs associated with variations.

[218] DHC supported the Judge's interpretation of the contract. Alternatively, DHC argued in its cross-appeal that the Judge erred in failing to address its estoppel claim. DHC argued that if Mr Arnerich's interpretation of the contract was correct, then Vaco was estopped from relying on the procedural requirements in the construction contract and the exclusion of P&G costs, as a result of Mr Arnerich's knowledge of and acquiescence in the process adopted by DHC of making variation claims, and in DHC's practice of including P&G claims at a rate of 12% in relation to ASB-initiated variations.

Discussion

[219] We begin by considering the interpretation of the construction contract in relation to DHC's ability to recover the costs of variations. DHC's estoppel claim is addressed below.

[220] It was common ground before us that Vaco was entitled to direct DHC to carry out variations, as contemplated by cl 4.1 of the CPA and section 9 of NZS 3910:2003. The design build lump sum nature of the contract meant that DHC was required to accept, and did accept, the risk of increased costs associated with construction of the project as originally specified. But as cl 2.1 of the CPA made clear, DHC did not accept the risk of increased costs resulting from variations initiated by Vaco if they had been requested by ASB (so could be passed on to ASB under the back-to-back arrangements between Vaco and ASB), or if they involved changes in scope requested by Vaco which were significant and would not be reasonably foreseen by an experienced contractor.

[221] So far as tenants' variations and significant changes in scope requested by Vaco were concerned, both the CPA and NZS 3910:2003 contemplated that DHC would be entitled to recover additional costs associated with the variation from Vaco in an amount that was either agreed, or claimed by DHC and valued on the basis prescribed in the construction contract.

[222] The difficulty with Mr Arnerich's reliance on the procedural requirements set out in cl 4.3 of the CPA is, as explained above, that no "Principal's Representative" was ever appointed by Vaco, and the process contemplated by that clause for requesting a quotation from Vaco was not consistently followed by either party, as Mr Hollyman acknowledged. As is common in construction projects, the parties' main focus was on completing the work in a timely manner. Contractual formalities took a back seat, with the parties adopting a relatively informal approach to making requests for variations and to responding to those requests.

[223] We consider that DHC was required to comply with the VPR procedure prescribed in cl 4.3 of the CPA only where the "Principal's Representative" (or perhaps, taking a purposive approach, the engineer) issued a sequentially

numbered instruction ordering a variation and requesting a quotation. There was no evidence that a process of that kind was followed in requesting any of the variations that gave rise to DHC's claims for time-related costs or other costs, except in the case of the piling work that was required following geotechnical investigations. DHC was asked to provide, and did provide, a written quote for that work. DHC's quote for the piling work specified a fixed price of $162,000. Against the item "P&G" the quote read "NA" (that is, not applicable). The quote did not specify an amount for time-related costs as a result of delays to the wider project (though as already mentioned, the prospect of such delays was referred to in email correspondence at the time, and in subsequent project documents).

[224] Nor did the parties follow the process for valuation of variations contemplated by cl 9.3 of NZS 3910:2003. Clause 9.3.1 required that the value of each variation should as far as possible be determined by agreement between the contractor and the engineer. Failing agreement the value was to be determined by the engineer in accordance with detailed provisions set out in cl 9.3. The engineer never carried out an independent determination of the value of variations applying the principles set out in cl 9.3.

[225] We do not consider that the failure by DHC to follow the procedures for claiming variation-related costs contemplated by the CPA precludes the claims advanced by DHC in the present proceeding, in circumstances where neither Vaco nor the engineer followed those procedures.

[226] However we accept Mr Hollyman's submission that the adoption of a less formal and structured approach to variation requests does not mean that DHC had different substantive entitlements in respect of the cost of variations. In particular, it remains necessary to consider whether certain categories of cost were agreed to be unrecoverable. We turn to consider that issue.

Were certain categories of variation costs unrecoverable under the construction contract?

The issue

[227] The Judge considered that the construction contract could be interpreted to permit DHC to recover time-related costs resulting from ASB variations.[92] The Judge acknowledged that "at first blush it might appear that [cl 4.4 of the CPA] precludes the contractor from claiming time-related costs". However he considered that "an alternative and purposive interpretation of the construction contract is available which reconciles the apparently contradictory provisions", and which enables DHC to recover from Vaco the variation costs (including P&G costs) that Vaco could pass on to ASB, because the variations resulted from requests by ASB.[93] The Judge explained the rationale for this approach as follows:

> [109] It is clear from the contract provisions that Vaco and Mr Arnerich were concerned to ensure that Vaco was not itself confronted with claims for increased costs that it would be responsible for and that it could not pass on to the ASB. Vaco was not however concerned to prevent any claims for variation costs arising from changes to the contract works required by the ASB. That made perfect commercial sense. The ASB was Vaco's key tenant and had entered into an agreement to lease for an extended period. Having the ASB as a major tenant of the premises added considerable value to the property, and as the ASB were obviously able to meet the cost of any variations to the building, facilitating the Bank's requirements was a commercially sensible and advantageous approach for Vaco to take. The provisions of the CPA which state that there shall be no extra payment and no compensatable variations "other than tenants' Variations", is consistent with that interpretation.
>
> [110] Similarly, if the variations related to the tenant and could be passed on by Vaco to the ASB there was no additional cost to Vaco whether the charges related to or resulted from increases in materials or other construction costs, or by reason of associated P&G costs. In either case those costs would be passed on by Vaco to the ASB. Indeed that is exactly what happened. As noted, at an early stage in the construction programme and prior to [DHC] submitting its first variation claims Mr Moore, who was [DHC]'s project manager, discussed the matter of [DHC] including P&G charges in relation to ASB generated variations with Mr Arnerich who agreed and thereafter the claims including P&G costs were made, approved, and paid.
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> …
>
> [114] I also note that Mr Arnerich's approval of the practice adopted by [DHC] of making claims for the costs arising due to variations and including P&G costs in those claims lends support for an interpretation of the contract

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92 At [115].
93 At [108]–[110].

> which finds that process and [DHC]'s entitlement to those costs to have been the intention of the parties. I also note that despite [DHC] (Mr McClatchy) having signalled its intention to make extension of time claims in February 2012, and thereafter [DHC] submitting a succession of three extension of time claims which were tabled and discussed by the Contract Engineer and which were notified to Mr Arnerich, his failure to challenge or dispute [DHC]'s ability to make extension of time claims even when corresponding with Mr McClatchy in emails sent on 15 and 16 August 2012 and even then not until his email to the Contract Engineer on 24 September 2012 questioning whether [DHC] was able to make extension of time claims. I consider that his knowledge of and acquiescence in the process adopted by [DHC] of making approximately 80 variation claims and including P&G claims in some of those variation claims, provides further support for the interpretation that extension of time claims pursuant to NZS 3910:2003 were part of the intended contractual framework upon which the construction contract was conducted. Because I consider Mr Arnerich's subsequent conduct to be relevant to and further inform that interpretation of the contract, I find that evidence is therefore admissible.

[228] On this approach, P&G costs including time-related costs would be recoverable in respect of ASB-initiated variations, but not Vaco-initiated variations.

[229] Mr Arnerich challenges the Judge's interpretation of the construction contract.

Submissions

[230] Mr Hollyman submitted that recovery of processing costs and P&G costs relating to variations was expressly precluded by cl 4.4 of the CPA, which we set out again for ease of reference:[94]

> **4.4 VALUING VARIATIONS**
>
> Each compensatable Variation shall be valued by agreement if agreement can be reached. In the absence of agreement it shall be valued by the Principals Representative having regard to the following basic principles:
>
> - The valuation is to be on a fair and reasonable basis;
> - All processing costs shall be deemed to be included in the original Contract Price and therefore no further allowance will be made;
> - *All Preliminary and General costs and expenses relating to any changes shall be deemed included in the original Contract Price and therefore no further allowance will be made*;

[94] Emphasis added.

- No costs will be considered unless the original invoices relating to such costs are produced to the Principals Representative for inspection.

[231] Mr Hollyman said that the clear language of cl 4.4 could not be disregarded merely because a court considered it produced an unreasonable result. It is not the role of the Court to rewrite a clear contractual provision, or to decline to give effect to such a provision, unless it is obvious that something has gone wrong with the contractual language (for example, where that language produces an absurd or ridiculous result).[95]

[232] DHC adopted the reasoning of the Judge. In the alternative, as already mentioned, DHC argued that Vaco was estopped from relying on the contractual prohibition on recovery of P&G costs as a result of its acquiescence in DHC making P&G claims, and its practice of passing on those claims to ASB and paying a number of claimed P&G amounts to DHC. DHC's estoppel arguments are discussed at [241] below.

Discussion

[233] Clause 4.4 of the CPA is on its face very clear. It recognised that some variations would be compensatable, as contemplated by cls 1.2 and 2.1: tenants' variations and significant and unforeseeable principal's variations. But even in the case of those variations, certain types of cost associated with the variation would not be recoverable as they would be deemed to be included in the original contract price: processing costs and P&G costs and expenses.

[234] We do not consider that there is any tension between this exclusion from the scope of recoverable costs and the other provisions of the construction contract. We do not share the Judge's view that this clear provision can be read "purposively" so as not to apply to ASB variations. The commercial logic of enabling ASB to require variations, provided it met the differential cost of those variations, is not undermined by this exclusion of certain categories of cost from what could be claimed by DHC from Vaco. DHC could still claim and recover the direct incremental costs of

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[95] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [63] and [88]–[93].

variations. But it had agreed, pursuant to cl 4.4 of the CPA, to treat processing costs and P&G costs as included in the original contract price, so not recoverable as a cost attributable to a variation.

[235] The exclusion is on its face commercially favourable to Vaco, perhaps even surprisingly favourable. But it must be borne in mind that it was DHC that prepared and put forward the CPA, with a view to having its tender accepted. DHC chose to include this provision, under which it accepted a potentially material risk in order to make its tender more attractive to Vaco and to secure the work. In circumstances where there was an intention that compensatable variations would be kept to an absolute minimum, DHC must have seen this as a commercial risk it was willing to accept.

[236] It is not the role of the courts to second-guess commercial choices of this kind, and rewrite contracts to come up with what appears to a judge to be a more reasonable allocation of commercial risk. Courts will correct obvious mistakes where something has gone wrong with the contractual language, so that read in the ordinary way it would produce an absurd result. But that is a high threshold, as the Supreme Court explained in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:[96]

> *Commercial absurdity*
>
> [88] Where contractual language, interpreted in the context of the contract as a whole, has a natural and ordinary meaning, the courts will generally give effect to that as they "do not easily accept that people have made linguistic mistakes, particularly in formal documents". The "primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage". It requires a "strong case" to persuade a court that something must have gone wrong with the language. Professor David McLauchlan, who has been one of the principal academic proponents of a liberal contextual approach to contractual interpretation, nevertheless accepts that:
>
> > ... most issues of interpretation that cross a practitioner's desk *can* be advised upon and solved by a reading of the words in the context of the document as a whole. There will usually be no answer to the solution derived from giving the words their 'ordinary' or conventional meaning.
>
> [89] But if consideration of the relevant background forces a court to the conclusion that something has gone wrong with the contractual language, it is

[96] Footnotes omitted.

not required "to attribute to the parties an intention which they plainly could not have had". Just as the courts have accepted that understanding the commercial purpose of a commercial contract is relevant to its interpretation, so have they accepted that that if a particular interpretation produces a commercially absurd result, that may be a reason to read the contract in a different way than the language might suggest. However, it has also been accepted that a court is not justified in concluding that a contract does not mean what it seems to say simply because the court considers that, so interpreted, the contract is unduly favourable to one party. There is an obvious tension between these two positions, and it will often be difficult to determine whether particular cases fall within one category or the other.

[90] Moreover, there is reason to be cautious in this area because commercial absurdity tends to lie in the eye of the beholder. As Lord Hoffmann observed in *Chartbrook*:

> It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another[.]

Assessments of commercial purpose or commercially absurd consequences will be influenced by factors such as the background and experience of the court. In *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd*, Neuberger LJ, although acknowledging the importance of a contextual approach to contractual interpretation, noted that the parties have control of the language of negotiated commercial contracts and went on to say:

> [22] Particularly in these circumstances, it seems to me that the court must be careful before departing from the natural meaning of the provision in the contract merely because it may conflict with its notions of commercial common sense of what the parties may must or should have thought or intended. Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood. ...

[91] In addition, those who negotiate commercial contracts will be influenced by a range of considerations in reaching their final bargains. The contracts that emerge from the process of negotiation will reflect accommodations of the parties' varying interests, as they assess them at the time. The reasons underlying the compromises that typically occur in commercial negotiations may not be easily perceived or understood by a court, even if they are exposed as part of the relevant background.

[92] Despite his expression of caution in *Skanska*, Neuberger LJ did accept that commercial common sense still had a role to play:

> Of course, in many cases, the commercial common sense of a particular interpretation, either because of the peculiar circumstances of the case or because of more general considerations, is clear. Furthermore, sometimes it is plainly justified to depart from the primary meaning of words and

> give them what might, on the face of it, appear to be a strained meaning, for instance where the primary meaning of the words leads to a plainly ridiculous or unreasonable result.
>
> [93] All this means that where contractual language, viewed in the context of the whole contract, has an ordinary and natural meaning, a conclusion that it produces a commercially absurd result should be reached only in the most obvious and extreme of cases.

[237] We do not consider that this is one of those obvious and extreme cases where the Court can rewrite (or disregard) the language used by the parties. There is no available reading of cl 4.4 of the CPA that is consistent with the interpretation adopted by the Judge. This Court cannot disregard the language of cl 4.4 merely because, with the benefit of hindsight, it produces a result that seems unduly burdensome for one party and correspondingly favourable for the other.

[238] Nor do we consider that the subsequent conduct of the parties supports an interpretation along the lines adopted by the Judge. Their subsequent conduct is at least equally consistent with a willingness by Vaco not to insist on the strict terms of the contract if (and only if) it could obtain reimbursement from ASB for P&G costs claimed by DHC. It is often the case that one or more parties to a contract are willing to depart from its strict terms in the course of performance for reasons of commercial expediency. That does not mean that the contract should be interpreted to align with the subsequent conduct. Rather, the question is whether the subsequent conduct gives rise to any relevant waiver or estoppel, or perhaps a variation.

[239] Although subsequent conduct can be relevant to the interpretation of a contract, as the Supreme Court confirmed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd*, the subsequent conduct must be clearly referable to the parties' understanding of the meaning of the contract, as distinct from a willingness to depart from the contract in certain circumstances.[97]

[240] It follows that as a matter of contract, DHC was not entitled to recover P&G costs, including time-related costs, from Vaco. Unless there was some other basis on which those costs were recoverable from Vaco, DHC would not be entitled to

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[97] *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [88]–[90].

recover them from Mr Arnerich in these proceedings. We turn to consider DHC's estoppel argument.

Was Vaco estopped from relying on any contractual limits on recovery of variation costs?

The issue

[241] Before the High Court DHC sought to recover certain P&G costs, including time-related costs, in reliance on pleaded arguments that Vaco was estopped from disputing its entitlement to claim those costs. The Judge did not address DHC's estoppel arguments in the second High Court judgment. DHC's cross-appeal seeks determination of those claims.

Submissions

[242] DHC pleaded that Vaco was estopped from relying on contractual provisions such as cl 4.4 of the CPA to deny that DHC could claim and recover certain variation costs, including P&G costs associated with ASB-generated variations. This argument was made on the basis that Vaco had breached cl 1.2 of the CPA, which provided that compensatable variations would be kept to an absolute minimum, by instructing DHC to undertake approximately 80 variations over the course of the project. DHC pleaded that Vaco had agreed at the early stages of the project that P&G sums could be included in invoices for ASB-initiated variations.

[243] DHC also pleaded that Vaco had in fact submitted its own payment claim to ASB (Claim 8) in respect of certain P&G amounts claimed by DHC in Payment Claim 16, and that ASB had paid those amounts to Vaco by way of credit. Despite receiving payment from ASB, DHC says Vaco never passed on those amounts to DHC.

[244] DHC says, and Mr Arnerich accepts, that the Judge did not make any findings in relation to these estoppel arguments.

[245] Mr Arnerich opposes DHC's estoppel claims. He says that there was no agreement or representation by Vaco of the kind alleged by DHC in relation to payment of P&G costs on ASB variations at any stage during the project. He adds that

if an agreement was reached that DHC could include certain P&G amounts in its claims, that agreement only extended to interim claims that Vaco was not precluded from revising and reassessing, consistent with the terms of the construction contract and normal practice in the construction industry. No claim or payment is final under NZS 3910:2003 until a final payment claim has been made and a final payment schedule issued.

[246] Mr Arnerich also submits that it is not easy to understand how dealings between Vaco and ASB in relation to P&G amounts claimed by Vaco from ASB in Claim 8 could give rise to an estoppel as between DHC and Vaco, in circumstances where DHC was not aware of those dealings.

Discussion

[247] It is never entirely satisfactory for this Court to attempt to resolve a distinct claim as a matter of first impression, without the benefit of findings on relevant questions of fact and an assessment of that claim by the High Court. In those circumstances we have considered whether the proceeding should be referred back to the High Court to consider and determine DHC's claim founded on estoppel. However it would be profoundly unsatisfactory for this matter to be heard by the High Court for a third time.[98] In the first High Court judgment, and again in the second High Court judgment, the Judge made a number of findings of fact based on his assessment of the witnesses that are relevant to the estoppel claim. We identify these findings in the following paragraphs. These proceedings have already been on foot for a lengthy period. It is not in the interests of justice that there be a further round of hearings before the High Court and, potentially, this Court. We have therefore decided that we should do the best we can to resolve the estoppel claim on the basis of the record of the High Court proceedings, and the limited submissions made by the parties on this issue.

[248] At the first High Court hearing conflicting evidence concerning the recovery of P&G costs was given by Mr Moore for DHC and by Mr Arnerich. The Judge

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[98] Any further hearing would have to take place before a different judge, as Davison J has retired.

preferred Mr Moore's evidence. In the first High Court judgment, the Judge made this finding in relation to the evidence on P&G costs:[99]

> [121] In his evidence Mr Moore who, prior to Mr McClatchy taking up the role of project manager in late November 2011, was involved during the initial negotiations between [DHC] and the defendant, said that prior to [DHC] submitting its first variation claims which included the P&G charges, he discussed the matter of [DHC] including P&G costs in relation to ASB generated variations with Mr Arnerich. Mr Moore said that Mr Arnerich was aware of the charge and agreed to it. Thereafter, [DHC] included the charge in its ASB variation claims which Mr Arnerich approved for payment. I accept Mr Moore's account of his conversation with Mr Arnerich.

[249] The Judge did not specifically refer to the additional answers Mr Moore gave in re-examination and in response to questions from the bench about his conversation with Mr Arnerich. Mr Moore's evidence was "[Mr Arnerich] basically, as far as I'm aware from past discussions or the discussions that we had, that it wasn't his cost and he would pass them on as it wasn't going to be his cost, it would be his tenant's cost anyway. And that was never challenged as part of the submissions that we put through …"

[250] In the second High Court judgment, the Judge (in the context of his analysis of the interpretation of the construction contract) returned to his previous finding, saying:[100]

> … at an early stage in the construction programme and prior to [DHC] submitting its first variation claims Mr Moore, who was [DHC]'s project manager, discussed the matter of [DHC] including P&G charges in relation to ASB generated variations with Mr Arnerich who agreed and thereafter the claims including P&G costs were made, approved, and paid.

[251] These findings provide a foundation for aspects of the estoppel claim, as we explain below.

[252] DHC's estoppel pleading is not easy to follow. DHC provided the following particulars of its initial estoppel claim:

> c. If and to the extent that any clause in the CPA including clause 4 might otherwise preclude or limit DHC's entitlement to compensation for the time related costs incurred in relation to the extensions of time

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99 First HC judgment, above n 3.

100 Second HC judgment, above n 8, at [110].

totalling 147 calendar days granted in respect of [the four extension of time claims submitted by DHC] (which is denied), in the circumstances of this case VACO and the defendant are estopped from relying upon that clause to preclude or limit such entitlement.

Particulars

i. It was a term of the Contract that compensatable Variations would be kept to an absolute minimum (clause 1.2 of the CPA).

ii. VACO, through the defendant, both directly and by its tenant ASB, breached that term by instructing approximately 80 different compensatable Variations to the Contract.

iii. DHC was granted extensions to the time for completion of the Contract works totalling 147 calendar days as a result of the net effect of those variations instructed by VACO and/or ASB and which were the subject of [the four extension of time claims submitted by DHC].

iv. The net effect of those variations referred to in (iii) above was to extend the period of the Contract by approximately 63% and to cause DHC to incur considerable time related costs and loss.

v. VACO and the defendant are not entitled to take advantage of the deliberate breach of the term of the Contract referred to in (i) above to benefit themselves at DHC's expense and to leave DHC in a worse position as a result of the variations so instructed.

vi. In terms of the first of the basic principles listed in clause 4.4. of the CPA for valuing variations it is neither fair nor reasonable that DHC not be compensated by VACO for the time related costs which it incurred in such circumstances.

vii. VACO and DHC agreed that DHC was entitled to be paid for the P&G costs which it incurred in relation to the variations instructed or generated by ASB; and claims by DHC in respect of such variations incorporating a charge for its P&G costs were received, approved and paid by VACO throughout the course of the Contract.

…

f. If and to the extent that any clause in the CPA including clause 4 might otherwise preclude or limit DHC's entitlement to compensation for its P&G costs associated with each of the ASB Generated Variations (not including time related Costs associated with any delays caused to the Contract Works by any of those variations) (which is denied), in the circumstances of this case VACO and the defendant are estopped from relying upon that clause to preclude or limit such entitlement.

Particulars

i. It was a term of the Contract that compensatable Variations would be kept to an absolute minimum (clause 1.2 of the CPA).

ii. VACO, through the defendant, both directly and by its tenant ASB, breached that term by instructing approximately 80 different compensatable Variations to the Contract.

iii. DHC was granted extensions to the time for completion of the Contract works totalling 147 calendar days as a result of the net effect of those variations instructed by VACO and/or ASB and which were the subject of extension of time claims [the four extension of time claims submitted by DHC].

iv. DHC incurred considerable P&G costs (not including time related Costs associated with any delays caused to the Contract works by any such variations) in relation to such variations including the variations instructed or generated by ASB.

v. VACO and the defendant are not entitled to take advantage of their deliberate breach of the term of the Contract referred to in (i) above to benefit themselves at DHC's expense and to leave DHC in a worse position as a result of the variations so instructed.

vi. In terms of the first of the basic principles listed in clause 4.4. of the CPA for valuing variations it is neither fair nor reasonable that DHC not be compensated by VACO for the P&G costs which it incurred in such circumstances.

vii. VACO and DHC agreed that DHC was entitled to be paid for the P&G costs which it incurred in relation to the variations instructed or generated by ASB; and claims by DHC in respect of such variations incorporating a charge for its P&G costs were received, approved and paid by VACO throughout the course of the Contract.

viii. DHC relied upon the agreement, representations and conduct of VACO and the defendant as referred to in subparagraph (vii) above to its detriment.

[253] DHC also amended its pleading at a late stage to include allegations that Vaco was estopped from denying DHC's entitlement to compensation for DHC claims that Vaco passed on to ASB, in particular where those claims were included in Vaco's Claim 8 which was paid in full by ASB to Vaco.

[254] The original estoppel pleading was based on an allegation that Vaco breached the CPA provision that "it is intended that compensatable variations shall be kept to an

absolute minimum". We do not consider that there was any such breach. This was a statement of intention of the parties, not a promise by Vaco not to require variations. But we accept that this clause provides relevant background for understanding the significance of the comfort that DHC was given by Vaco that DHC could include claims for P&G costs in respect of ASB variations, and Vaco would seek payment of those amounts from ASB.

[255] We also accept Mr Hollyman's submission that dealings between Vaco and ASB that were not known to DHC could not of themselves give rise to any form of estoppel vis-à-vis DHC.[101]

[256] Standing back from the detailed particulars of DHC's pleading, there was no evidence before the High Court that could support a finding that there had been an unequivocal agreement or representation by Vaco that time-related costs or other P&G costs would be paid in relation to ASB variations despite cl 4.4 of the CPA. What the Judge found, on his assessment of the evidence of Mr Moore and Mr Arnerich in particular, was that DHC could include P&G costs in relation to ASB-generated variations at a standard rate, and those claims would be passed on to ASB. The evidence similarly supports a finding that Vaco and the engineer acquiesced in the inclusion of P&G costs in payment claims submitted by DHC to Vaco, on the basis that Vaco would then seek payment of those amounts from ASB under the back-to-back contract between Vaco and ASB. As Mr Arnerich explained in his evidence, if ASB was willing to pay those amounts that would not cost Vaco anything so "it did not overly bother" him. This is consistent with Mr Moore's recollection that Mr Arnerich said any claim for P&G in respect of ASB variations "would be his tenant's cost anyway".

[257] There was no clear evidence of reliance by DHC on assurances given by Vaco about passing on P&G costs to ASB, in the sense that DHC altered its position to its detriment with the result that it would be unconscionable for Vaco to resile from an expressed willingness to accept and pass on claims for P&G amounts relating to ASB variations. However we are prepared to infer that DHC may have been less willing to

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101 *South London Greyhound Racecourse Ltd v Wake* [1931] 1 Ch 496 (Ch).

implement the numerous ASB requests without putting other arrangements in place, had it not been given this limited comfort by Vaco.

[258] Consistent with that understanding, DHC submitted a number of payment claims in respect of ASB variations that included modest amounts in respect of P&G costs, charged at a standard rate of 12 per cent.[102] Vaco invoiced ASB in respect of those amounts. Prior to December 2012 ASB paid those amounts, and Vaco in turn paid DHC.

[259] However in December 2012 ASB objected to payment of P&G costs on the basis of the flat 12 per cent margin. It sought substantiation of those costs from Vaco, which in turn sought substantiation from DHC. DHC advised Vaco that because of the time that had passed, it was no longer in a position to provide a breakdown of those costs. DHC also noted that because of the difficulty of analysing P&G costs, it was standard industry practice to use a fixed percentage amount.

[260] It does not appear from the material before us that the discussion about including P&G costs in claims made by DHC to Vaco expressly extended to time-related costs. There was no evidence that the ability to charge time-related costs was expressly discussed at the time when it is alleged Vaco agreed to DHC claiming P&G costs (at a fixed rate of 12 per cent) in its payment claims. DHC included time-related costs in its later payment claims, following its formal applications for extensions of time. Vaco called on DHC to provide details of those costs. Vaco informed ASB of these claims, but does not appear to have formally claimed the corresponding amounts from ASB. And whether or not a claim for these amounts was made by Vaco, it is not suggested by DHC that ASB paid amounts in respect of time-related costs to Vaco.

[261] DHC emphasises that Vaco never flatly rejected its claims for time-related costs. Rather, it sought further detail, suggesting it was open to seeking to recover those costs from ASB if properly substantiated. On a number of occasions the engineer noted that further information was sought in respect of those claims, and noted that an engineer's decision was awaited. It was not until very late in the piece,

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[102] A number of claims for ASB-initiated variations used a lesser rate of five per cent for P&G.

after practical completion of the project, that Vaco asserted that such costs were unrecoverable under the construction contract.

[262] In the final wash-up between Vaco and ASB in December 2013, ASB agreed to credit Vaco with the unpaid amounts in Vaco's Claim 8, including a modest amount in respect of P&G costs. So Vaco was, as already mentioned, effectively paid those amounts.

[263] Vaco did not formally claim from ASB, and did not obtain, any allowance for the time-related costs claimed by DHC. Vaco says that responsibility for that outcome lies with DHC, which was slow to make its claims for time-related costs, and slow to provide the supporting information requested by the engineer and Vaco. We consider that Vaco and the engineer had the necessary information to pass on these claims to ASB well before the final wash-up between those parties. But the claim was not pleaded on the basis that Vaco was required to make such claims as a result of any assurances giving rise to an estoppel, and an argument along those lines would have faced a number of difficulties.

[264] In *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* this Court identified the elements required to establish an estoppel of the kind DHC has pleaded:[103]

(a) A belief or expectation by the first party has been created or encouraged by words or conduct by the second party.

(b) To the extent an express representation is relied upon, it is clearly and unequivocally expressed.

(c) The first party reasonably relied to its detriment on the representation.

(d) It would be unconscionable for the second party to depart from the belief or expectation.

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[103] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44], citing *Burbery Mortgage Finance and Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) at 361 and *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86.

[265] Standing back and assessing the dealings between the parties as a whole, it seems to us that DHC was encouraged to proceed with construction, including implementing variations requested by ASB beyond what had initially been anticipated, as a result of the comfort DHC was given by Vaco that it could make claims for P&G costs associated with those variations at a standard rate of 12 per cent. There was no unequivocal commitment by Vaco that such claims would all be accepted: that was necessarily a matter for assessment. But we consider that DHC was entitled to proceed on the basis of the expectation created by the discissions between Mr Arnerich and Mr Moore, and Vaco's subsequent conduct in passing on claims of this kind, that such claims would be passed on to ASB, and that to the extent they were accepted and paid by ASB, Vaco would pay DHC. There is however no record of any clear or unequivocal assurance or subsequent conduct in relation to other types of P&G claim, beyond the standard rate of 12 per cent. In particular there is no evidence of any assurances by Mr Arnerich or subsequent conduct by Vaco extending to claims for time-related costs.

[266] We do not consider that DHC could reasonably have understood that Vaco was accepting responsibility for any P&G amounts that Vaco could not recover from ASB. It was always very clear to DHC that Vaco was not willing to take on any risk that was not covered by its back-to-back commitment from ASB.

[267] Vaco appears to have passed on all of DHC's P&G claims to ASB, and made claims for the corresponding amounts with the exception, as noted above, of time-related costs. Vaco received payment in respect of some of those claims from ASB, and did not then make corresponding payments to DHC. We consider that to that extent, but only to that extent, it would be unconscionable for Vaco to rely on the contractual restriction on DHC recovering P&G costs.

[268] We therefore allow DHC's cross-appeal to the extent of the amounts that were claimed by DHC from Vaco, claimed by Vaco from ASB, and paid to Vaco by ASB (including by way of credit). We are not in a position to quantify these amounts. If the parties cannot agree on the relevant amounts, then to that limited extent this proceeding will need to return to the High Court to settle matters of quantum.

Dispute about quantum of time-related costs

The issue

[269] DHC's evidence about the quantum of time-related costs included two alternative calculations. The Judge adopted the higher figure.[104] Mr Arnerich challenges that approach.

Submissions

[270] Mr Arnerich says that the Judge did not engage with his argument that if time-related costs were recoverable, only the lesser amount calculated by Mr Johnson in his valuation of the variations claimed by DHC was recoverable under the construction contract. No reasons were given by the Judge for adopting the higher figure. The clause of NZS 3910:2003 relied on by DHC (and identified by Mr Johnson) as the basis for the higher sum is concerned with the situation where part of the contract works is delayed by reason of a variation for a greater period than any overall delay to the contract works.[105] DHC did not claim that any identifiable part of the contract works was delayed for a period greater than the delays in the overall critical path for the works assessed by Mr Bryant. Thus, Mr Arnerich submits, there was no basis identified by DHC for the application of cl 9.3.13. Nor was any other contractual basis for recovering these costs advanced by DHC.

[271] DHC submits that the Judge found that Mr Johnson's calculation of time-related costs incurred over a greater period than the delay to the contract works as a whole was justifiable and reasonable. DHC says the High Court simply granted an express contractual entitlement. It relies on cl 9.3.13 of NZS 3910:2003.

Discussion

[272] We have found that time-related costs are not recoverable by DHC, so this quantum issue does not strictly speaking arise. However we will deal briefly with this issue in case the matter goes further.

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104 Second HC judgment, above n 8, at [118].
105 Clause 9.3.13.

[273] As noted above, DHC called expert evidence from Mr Johnson about the quantum of time-related costs. He calculated the time-related costs incurred during the periods of delay to be $159,423.25. He also provided an alternative calculation of those costs on the basis that additional hours claimed by DHC outside the delay periods were also claimable. Adopting this approach, he calculated the total time-related costs to be $191,386.98. Mr Johnson recorded that the issue of whether the extension of time claims for costs outside the period of the contract delay could be recovered under clause 9.3.13 of NZS 3910:2003 was a matter for the Court to determine.[106]

[274] Mr Johnson was not cross-examined, and Mr Arnerich did not call any evidence on the quantum of time-related costs.

[275] The Judge found that Mr Johnson's calculation of the extension of time costs in respect of all four extension of time claims, in the sum of $191,368.98, was "justifiable and reasonable". He found that DHC was entitled to recover that sum from Vaco plus GST.[107]

[276] The Judge did not discuss the contractual basis for awarding the higher of the two amounts calculated by Mr Johnson.

[277] We consider that it is clear that DHC cannot rely on cl 9.3.13 of NZS 3910:2003 to recover the higher figure, as there is no evidence to the effect that variations resulted in time-related costs over a greater period than the delay to the works as a whole. DHC has not identified any other contractual basis for recovery of the higher figure. In those circumstances, it was not open to the Judge to award the higher figure calculated by Mr Johnson.

[278] Thus, if time-related costs were recoverable, only the lower figure calculated by Mr Johnson, being $159,423.25, could properly have been awarded.

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106 Second HC judgment, above n 8, at [86]–[87].
107 At [118].

What interest is recoverable by DHC from Mr Arnerich?

[279] Mr Arnerich challenges the interest award in the High Court. He says that the Judge was wrong to find that the engineer's rejections of DHC's claims in its final Payment Claim 17 were "unreasonable deduction[s]" that triggered an entitlement to contractual interest under cl 12.7.3 of NZS 3910:2003. The focus of this argument was on the award of contractual interest on the time-related costs which we have held DHC is not entitled to recover. But it was presented in general terms that could be understood as extending to the award of contractual interest on amounts awarded by the adjudicator, so out of an abundance of caution we will deal with that issue also.

Contractual interest on the principal amount awarded by the adjudicator

[280] The adjudicator's determination awarded DHC $367,768.12 including principal amounts payable under the construction contract of $151,928.80 which the adjudicator held should attract contractual interest, $136,115.72 in respect of amounts that the adjudicator found should not attract contractual interest, and an amount in respect of interest and costs.[108] In the first High Court judgment the Judge mistakenly awarded contractual interest on the whole of the sum of $367,768.12.[109] Contractual interest should not have been awarded on amounts which the adjudicator held should not attract contractual interest, or on the amounts awarded in respect of GST and the costs of the adjudication.[110] This Court set aside the award of interest in the first High Court judgment, and remitted that issue back to the High Court.[111]

[281] In the second High Court judgment the Judge awarded contractual interest on the sum of $151,928.80 from the date Payment Claim 17 ought to have been paid, namely 4 May 2013, to the date of payment. The Judge accepted that the applicable rate was 12.4 per cent compounding monthly, as this was the rate adopted by the adjudicator and was supported by a certificate from DHC's bank.[112]

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108 Adjudicator's determination, above n 2.
109 First HC judgment, above n 3, at [353].
110 CA 2021 judgment, above n 7, at [185].
111 At [186].
112 Second HC judgment, above n 8, at [122] and [124].

[282] The Judge did not address the basis for awarding contractual interest on this amount in the second High Court judgment: his focus was on whether contractual interest should be awarded on time-related costs. But that is unsurprising in circumstances where he had previously made such an award in the first High Court judgment, and that had not been challenged before this Court — rather, as noted above, the challenge was to the award of contractual interest on other components of the adjudicator's total award.

[283] We do not consider that it was necessary for the Judge to address whether the amount of $151,928.80 from Payment Claim 17 should carry contractual interest because the adjudicator's determination included an ongoing award of contractual interest on this amount as against Vaco. For the same reason that neither Vaco nor Mr Arnerich could dispute Vaco's liability to pay the principal sum awarded by the adjudicator, it was not open to them to challenge Vaco's liability under the determination for interest awarded on that sum.[113] We add that it would have been difficult to challenge a finding that these deductions were unreasonable in circumstances where the engineer had failed to make independent and timely determinations in respect of these matters, and had failed to have regard to the detailed information provided to him by DHC in relation to certain matters.

Statutory interest on balance of adjudicator's award

[284] The High Court awarded statutory interest on the sum of $136,115.72 from 11 May 2017 (the date on which judgment was entered in the District Court) until the date of payment.[114] There was no challenge to this award on appeal.

Contractual interest on time-related costs

[285] As already mentioned, the Judge awarded contractual interest in respect of the time-related costs pursuant to cl 12.7.3 of NZS 3910:2023, on the basis that the deduction of the amount of those claims in Final Payment Schedule 17 was unreasonable.[115]

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113 See [185] above.
114 At [125].
115 At [121].

[286] Mr Arnerich challenged that award of interest. He submits that the High Court did not examine the reasons given by the engineer for rejecting these claims, or Mr Arnerich's expert evidence at trial about those matters. Mr Arnerich also submitted that it could not be unreasonable for the engineer to reject the time-related cost claims in circumstances where the adjudicator had reached the same conclusion.

[287] We consider that deduction of amounts from a contractor's final payment claim in a payment schedule would be unreasonable in this context if it was the result of the principal or engineer directing themselves incorrectly on the interpretation of the contract. Put another way, a deduction is reasonable only if it is reasonably open on a proper interpretation of the contract. But we have concluded that DHC was not entitled to recover the time-related costs under the construction contract, properly interpreted. It follows that the deductions were justified under the construction contract, and no question of interest in relation to those amounts arises.

[288] For the sake of completeness, we note that there can be no entitlement to contractual interest in respect of the amounts that we have found to be recoverable by DHC on the basis of an estoppel. It was not unreasonable for the engineer to decline to approve amounts that the construction contract expressly provided were not recoverable, in circumstances where DHC had not expressly identified and relied on the matters that estopped Vaco from relying on cl 4.4 of the CPA.

Should leave be reserved to DHC to make a further claim against Mr Arnerich in respect of any costs that may be awarded in the dormant arbitration?

The issue

[289] In its cross-appeal DHC challenges the omission of the High Court to address its request for leave to revert to that Court and seek a further order under s 301 of the Companies Act that Mr Arnerich pay to it any award of costs made against Vaco in favour of DHC in the (dormant) arbitration. DHC says the Judge should have granted it leave to do so.

[290] DHC says it was required to pursue its claims by way of arbitration under the construction contract. It is seeking costs in that arbitration. If costs are awarded by

the arbitrator, then as a result of Mr Arnerich's breaches of duty Vaco will have no assets to meet that claim. DHC says it should be able to come back to the High Court to seek direct payment of any costs award from Mr Arnerich.

[291] The application is opposed by Mr Arnerich.

Discussion

[292] We accept DHC's submission that the High Court should have addressed and determined its application for leave to seek a further award under s 301 of the Companies Act. Rather than requiring the High Court to do so, it is appropriate for us to consider that issue in light of our other findings.

[293] The arbitration process was commenced in 2016. It appears that no steps have been taken in the arbitration since 2018.[116] If DHC wished to seek an award of costs from the arbitrator, and have that taken into account in its claim against Mr Arnerich under s 301 of the Companies Act, DHC should have taken the necessary steps to obtain a determination from the arbitrator before its claim was heard in the High Court. It would be unfair to Mr Arnerich, and an inefficient use of the Court's time, to have a further hearing in relation to a possible claim against Mr Arnerich for the costs of the arbitration. Nor is it self-evident that such costs would be recoverable from Mr Arnerich, in circumstances where arbitration was commenced (and any costs liability arose) after Mr Arnerich procured the distributions by Vaco, and after the company was placed in liquidation.

[294] We therefore dismiss this limb of DHC's cross-appeal.

Summary of outcome

[295] Mr Arnerich's appeal has been substantially successful.

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116 CA 2021 judgment, above n 7, at [102]–[103].

[296] In the second High Court judgment the Judge made the following orders:[117]

> (a) An order that the defendant, Antony Arnerich, pay DHC the sum of **$1,217,276.38** being:
>
> (i) The sum of **$367,768.12** being the amount awarded to [DHC] by the Adjudicator in his determination dated 5 October 2016.
>
> (ii) Further contractual interest accruing on the sum of $151,928.80 from 5 October 2016 to the date of payment, but which as at 4 February 2022 was **$220,372.46** and which shall continue to accrue until payment.
>
> (iii) Interest on the sum of $136,115.72 at the rate of five per cent per annum from 11 May 2017 until payment is made, which DHC calculates as at 10 November 2021 to be **$30,626.03**, and which shall continue to accrue at five per cent per annum until payment.
>
> (iv) The sum of **$220,095.03** (being $191,386.98 plus GST) being DHC's time-related costs in connection with its extension of time claims.
>
> (v) Contractual interest on the time-related costs of **$378,414.74** as at 4 February 2022 and which shall continue to accrue until payment.
>
> (b) Such further and additional interest as has accrued or which may accrue in relation to each of the sums referred to in (ii), (iii) and (v) above until payment in full satisfaction of those amounts and all interest thereon is made.

[297] The Judge subsequently corrected an omission to award GST in respect of the time-related costs under the slip rule by minute dated 4 April 2023.[118]

[298] This Court has already upheld the award against Mr Arnerich of the amount awarded to DHC by the adjudicator. Mr Arnerich could not, and did not, challenge that limb of the orders made.

[299] As explained at [280] above, the interest awarded by the Judge at [128(a)(ii) and (iii)] of the second High Court judgment reflects a correction of the error in approach to interest identified in the 2021 judgment of this Court. These awards are upheld.

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117 Second HC judgment, above n 8, at [128] (footnotes omitted).
118 High Court Rules 2016, r 11.10.

[300] The award in sub-para (iv) of the sum of $191,386.98 plus GST must be set aside and replaced with an award of P&G costs actually recovered by Vaco from ASB by payment or credit, and not already paid to DHC or included in the amount awarded by the adjudicator, plus GST on that amount. The proceeding is remitted back to the High Court to determine that amount, if it cannot be agreed by the parties.

[301] The award of contractual interest in sub-para (v) is also set aside. DHC is entitled to statutory interest from the date on which the relevant payment or credit was received by Vaco until the date of payment. The amount of interest payable will need to be quantified by the High Court if it cannot be agreed by the parties.

[302] DHC's cross-appeal has succeeded in relation to part of its estoppel argument. The outcome of that limb of the cross-appeal is reflected in the orders set out above. The balance of DHC's cross-appeal is dismissed.

Costs

[303] Mr Arnerich sought an award of costs in respect of the appeal and cross-appeal. DHC sought costs but asked that these be reserved, as there are matters which may be relevant including *Calderbank* correspondence.[119]

[304] Mr Arnerich has been substantially successful in this appeal. He would ordinarily be entitled to costs in respect of his appeal for a standard appeal on a band A basis, with usual disbursements.

[305] The component of the cross-appeal that occupied the most time was the estoppel claim, on which DHC was partly successful: the balance of the cross-appeal was dismissed. Given the partial success each party enjoyed in relation to cross-appeal issues, our preliminary view is that the costs of the cross-appeal would ordinarily lie where they fell.

[306] However in circumstances where there was a measure of success for each party, and it appears there may have been a *Calderbank* offer, we take the unusual step in

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[119] See *Calderbank v Calderbank* [1976] Fam 93 (CA). Rules 14.10 and 14.11 of the High Court Rules govern *Calderbank* offers.

this Court of reserving costs. We would expect the parties to be able to resolve questions of costs in both the High Court and this Court by agreement, with the assistance of their experienced counsel.

[307] If costs in the High Court cannot be agreed, they should be determined by that Court.

[308] If costs in this Court cannot be agreed, each party may file a brief memorandum (10 pages, excluding attachments such as any relevant *Calderbank* correspondence and schedules of amounts). Mr Arnerich's memorandum should be filed within 15 working days of delivery of this judgment. DHC's memorandum should be filed within 10 working days of receipt of Mr Arnerich's memorandum. Costs will then be determined on the papers.

Result

[309] Mr Arnerich's appeal is allowed in part.

[310] DHC's cross-appeal is allowed in part.

[311] The order made by the High Court at [128(a)(iv)] of the second High Court judgment is set aside, and replaced with an award of the amount of P&G costs actually recovered by Vaco from ASB by payment or credit, and not already paid to DHC or included in the amount awarded by the adjudicator, plus GST on that amount.

[312] The order made by the High Court at [128(a)(v)] of the second High Court judgment is set aside, and replaced with an order that DHC is entitled to statutory interest on the amount referred to in the substituted order set out above from the date on which the relevant payment or credit was received by Vaco until the date of payment.

[313] The proceeding is remitted back to the High Court to determine the amounts payable pursuant to the substituted orders set out above.

[314] The order for costs in the High Court is set aside. Costs in that Court are to be determined by that Court in light of this judgment.

[315] Costs in this Court are reserved, and are to be determined in accordance with the process set out at [308] of this judgment.

Solicitors:
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