IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 44/2025
[2025] NZSC 120

BETWEEN	DHC ASSETS LIMITED Applicant
AND	ANTONY IVO ARNERICH Respondent

Court: Glazebrook, Ellen France and Miller JJ

Counsel: F J Thorp and L J Turner for Applicant
R J Hollyman KC and J D McBride for Respondent

Judgment: 17 September 2025

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay the respondent costs of $2,500.

REASONS

Introduction

[1] The applicant, DHC Assets Ltd (DHC), seeks leave to appeal to this Court in relation to one aspect of a judgment of the Court of Appeal; namely, whether DHC could recover time-related "Preliminary and General" (P&G) costs.[1]

Background

[2] The application for leave arises in the context of long-running litigation between the parties. The background is set out in detail in the judgment of the

[1] *Arnerich v DHC Assets Ltd* [2025] NZCA 104 (Goddard, Brewer and Osborne JJ) [CA judgment].

Court of Appeal.[2] For present purposes we need only note the following. DHC is a construction company. It was contracted to construct a commercial building for Mr Arnerich's company, Vaco Investments (Lincoln Rd) Ltd (Vaco).

[3] The construction contract between Vaco and DHC is described in the Court of Appeal judgment.[3] It consisted of seven contract documents including the contract performance agreement (CPA) and the general conditions of contract, NZS 3910:2003.[4] Clause 4.4 of the CPA, relied on by the Court of Appeal, provided that "[a]ll [P&G] costs and expenses relating to any changes shall be deemed included in the original Contract Price and therefore no further allowance will be made". As we shall discuss, a different approach applied to some of the variations requested by ASB Bank Ltd (ASB), the intended principal tenant for the building.

[4] Numerous variations over the course of construction delayed completion of the project, as a result of which DHC incurred time-related costs.

[5] Vaco was placed into voluntary liquidation on 1 July 2014. DHC is an unpaid creditor of Vaco. DHC pursued claims for just over $1 million plus interest from Vaco. Ultimately, Vaco was unable to pay either the sum awarded to DHC in an adjudication under the Construction Contracts Act 2002, or further sums claimed by DHC.

[6] DHC brought proceedings under s 301 of the Companies Act 1993 against Mr Arnerich, the respondent. DHC's claim succeeded in part in the High Court.[5] Following a partially successful appeal by Mr Arnerich to the Court of Appeal, the matter was referred back to the High Court for a further hearing.[6] The High Court, following the further hearing, made an order requiring Mr Arnerich to pay DHC a sum of approximately $1.1 million.[7] That sum included time-related P&G costs. The Court of Appeal allowed Mr Arnerich's appeal in relation to the High Court's decision that DHC was entitled to recover time-related costs from Vaco and that

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2 At [1]–[146].
3 At [153]–[177].
4 NZS 3910:2003 was a standard form of general contractual conditions for incorporation into construction contract documents, and was widely used in the construction industry.
5 *DHC Assets Ltd v Arnerich* [2019] NZHC 1695.
6 *Arnerich v DHC Assets Ltd* [2021] NZCA 225, [2021] NZCCLR 25. This Court declined Mr Arnerich's application for leave to appeal: *Arnerich v DHC Assets Ltd* [2021] NZSC 121.
7 *DHC Assets Ltd v Arnerich* [2022] NZHC 1381 (Paul Davison J) [HC judgment].

Mr Arnerich should pay those amounts to DHC under s 301 of the Companies Act. It is from that decision DHC seeks leave to appeal to this Court.

The proposed appeal

[7] DHC says that the proposed appeal raises two general questions of importance.[8] The first of these is as to the legal effect of contractual provisions requiring specified formalities to be observed for variations or modifications. DHC relies in this respect on *MWB Business Exchange Centres Ltd v Rock Advertising Ltd.*[9] The second issue relates to the applicable principles to contractual interpretation where there are potentially conflicting contractual provisions. Finally, the applicant says there has been a miscarriage of justice.[10] This aspect of the application relies in large part on natural justice issues said to arise because the Court of Appeal did not address DHC's arguments, including on the matters it now seeks to raise.

[8] This Court may wish to consider, at some point, the first of these issues; namely, the effectiveness of provisions requiring specified formalities to be undertaken for variations or modifications. However, we do not see the present case as an appropriate vehicle to consider that issue. As the respondent submits, this was a bespoke contract. It is not suggested cl 4.4 is a standard industry term. Further, it does not appear that the particulars of DHC's present argument were raised in the Court of Appeal, or in the High Court, and this Court would not have the benefit of the views of the Courts below on it.[11] Finally on this aspect, there is some force in the respondent's submission that a contrast can be drawn with *Rock Advertising*, in that this was not a case of a post-contract oral modification contrary to a no oral modification clause but, rather, the CPA was part of the original written contract.

[9] In relation to the second proposed ground, the Court of Appeal considered cl 4.4 was very clear — some variations would be compensable but, even for those, some costs associated with the variation would not be recoverable. The Court did not consider there was "any tension between this exclusion from the scope of recoverable

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8 Senior Courts Act 2016, s 74(2)(a); and see s 74(2)(c).
9 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119.
10 Senior Courts Act, s 74(2)(b).
11 See HC judgment, above n 7, at [39]–[48].

costs and the other provisions of the construction contract".[12] DHC had agreed to treat processing costs and P&G costs as included in the original contract price and so not recoverable as a cost attributable to variations. While the Court saw this exclusion as "perhaps even surprisingly favourable" to Vaco, it was DHC that "prepared and put forward the CPA, with a view to having its tender accepted".[13] The Court made the point that it was DHC's choice to include cl 4.4, "under which it accepted a potentially material risk" to secure the work.[14]

[10] A choice was also made as to the way in which ASB-requested variations were to be managed. The Court of Appeal addressed the merits of DHC's claim in relation to these variations in the context of considering DHC's cross-appeal. The cross-appeal was brought in relation to DHC's claim that Vaco was estopped from relying on cl 4.4. The Court of Appeal found that the respondent had agreed, despite the terms of cl 4.4, that DHC could make claims for P&G costs in relation to variations requested by ASB. The Court said that Mr Arnerich "was willing to pass on those claims to ASB. Provided ASB paid them, he was happy for Vaco to pay DHC."[15] But, the Court concluded, "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".[16]

[11] Nothing raised by DHC suggests it is in the interests of justice for this Court to reconsider the Court of Appeal's assessment of these matters which followed on from an orthodox examination of the relevant features of the parties' particular bespoke contractual arrangements and of the evidence that was before the High Court. No question of general or public importance or of commercial significance accordingly arises.[17] Nor, in the circumstances we have discussed, do we see any appearance of a miscarriage of justice as that term is used in the civil context.[18]

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12 CA judgment, above n 1, at [234].
13 At [235].
14 At [235].
15 At [11]; and see at [256].
16 At [11]; and see at [256]. The Court accordingly allowed DHC's cross-appeal in relation to its estoppel claim in part to the extent of amounts DHC claimed from Vaco, claimed by Vaco from ASB, and paid to Vaco by ASB (including by way of credit).
17 Senior Courts Act, s 74(2)(a) and (c).
18 Section 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

Result

[12] The application for leave to appeal is dismissed.

[13] The applicant must pay the respondent costs of $2,500.

Solicitors:
Duthie Whyte, Auckland for Applicant
Cowan Law, Auckland for Respondent