IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2008-470-000998

BETWEEN	CITY BRICKLAYERS 1996 LTD Applicant
AND	GEOFFREY PAYNE First Respondent
AND	SHELLEY PAYNE Second Respondent
AND	CLIVE JOHNSON Third Respondent

Hearing: 26 May 2009
(Heard at Rotorua)

Counsel: R Kettlewell for the Applicant
M McKechnie for the First and Second Respondents
Third Respondent - abides Court's ruling

Judgment: 26 May 2009

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
26.05.09 at 3:00pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

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[1] The applicant applies for pre-commencement discovery. It was the block-laying subcontractor to Civenco BOP Limited (now in liquidation) (Civenco) in the construction of a hotel and apartment complex in Tauranga known as Trinity Wharf. The complex is currently the site of the Sebel Hotel. The first and second respondents were the directors of Civenco. The third respondent is the liquidator of Civenco.

[2] Disputes arose between the applicant (CBL) and Civenco. These were eventually decided by arbitration. Arbitration was determined in two stages, first in respect of liability and secondly in respect of quantum. On 21 June 2007 the arbitrator published his first partial award holding Civenco liable to CBL. On 12 March 2008 (and as corrected on 23 April 2008) the arbitrator made an award by ordering Civenco to pay $106,370 plus GST to CBL. By a final award dated 16 June 2008, the arbitrator further awarded Civenco to pay $229,204.31 by way of costs.

[3] On 11 June 2008 Civenco was placed into voluntary liquidation.

[4] Since about this time CBL has asked for the liquidator to provide copies of documents to enable it to properly assess the merits of a claim against the first and second respondents for relief under sections 135, 136 and 301 of the Companies Act 1993. Those documents have not been forthcoming.

[5] The pre-commencement discovery application is made pursuant to Rule 8.25 (1). There it states:

> *"This rule applies as it appears to a Judge that –*
>
> *(a) A person (the intending plaintiff) is or may be entitled to a claim in the Court relief against another person (the intended defendant) but that it is impossible or impracticable for the intending plaintiff to formulate the intending plaintiff's claim without reference to 1 or more documents or a group of documents; and*
>
> *(b) There are grounds to believe that the documents may be or may have been in the control of the person (the person), who may or may not be the intended defendant."*

[6] CBL's case focuses not upon anecdotal evidence tending to suggest trading whilst in a poor financial position. Rather the applicant's focus is upon Civenco's conduct connected to the arbitral proceedings in which CBL was successful in the outcome. In brief it says Civenco pursued the arbitration process always intending to go into liquidation if it lost. It believes therefore the first and second respondents knew or may have known that Civenco was insolvent at the time of the arbitration. Therefore it believes CBL may have a claim against those respondents under section 135 of the Companies Act 1993 which states:

> *"A director of a company must not -*
>
> *(a) Agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or*
>
> *(b) Cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors."*

[7] In section 136 of the Companies Act 1993 states:

> *"A director of a company must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so."*

[8] In support of CBL's claim that the first defendants were aware of Civenco's insolvency they state:

a) The first respondent stated publicly that he always intended to shutdown Civenco upon completion of the Trinity Wharf project;

b) Civenco was put into voluntary liquidation shortly after the final arbitration award was made;

c) The limited amount of financial information provided to the applicant since has indicated that the first and second respondents may have been trading whilst insolvent during the course of the arbitration; and

d) An email from the liquidator to the applicant's accountant which says *"A least we agree on one thing which is the trading whilst insolvent question."*

[9] CBL says it never wished to pursue arbitration but did so only because Civenco refused to consider any other option, including CBL's offer prior to arbitration to settle the dispute on a "drop hands" (nothing is paid and each party walks away) basis.

[10] CBL believes Civenco's insistence on proceeding to arbitration was ingenuous.

[11] Mr Payne's affidavit chronicles a different view of matters. He refers to the fact that in September 2005 with less than 25% of the contract completed, disputes arose regarding the amount of work CBL had done. The arbitration was preceded by disputes and the engagement of experts. He said there was evidence supporting his view of the extent of work undertaken by CBL. He said Civenco's method of measure of the extent of work undertaken was not adequately revealed until the second part of the arbitration hearing – by which time the issue of liability had already been determined. He refers to discussing an appeal of the arbitration process with Civenco's counsel Mr McKechnie. He said Mr McKechnie was adamant that points of law had been ignored and that if challenged could be successful but that the costs would not be insignificant. He said Civenco had already paid over $200,000 more for alternate contractors to complete the block-laying contract. He denies CBL sought to avoid arbitration. Just as CBL thought they would win at arbitration, so too did Civenco. It was always his intention to shut down Civenco when the Trinity Wharf project was finished. An unfavourable result of arbitration was never contemplated. He denies that Civenco had traded while insolvent. He said Civenco's directors ensured sufficient funds were found to meet the unexpected extra costs to complete the block work. Just prior to the liquidation and before the arbitration award the company's debtors exceeded the creditors. The company was not then trading but it was collecting retentions owed as they fell due and paying out same. He said CBL's assumption that Civenco *"did not want to settle and preferred to drag out the matter"* is speculative, without foundation, and totally wrong. He

said the directors of Civenco have never traded recklessly; that the business had been managed in a manner *to "never create a risk of serious loss to any creditor whilst trading"*.

[12] Of course the applicant's view of matters is a perspective, an assumption supported by a little more than inference. Yet by its application it seeks annual accounts for Civenco for the four years preceding voluntary liquidation. In earlier correspondence with the liquidator accounts and related details were sought for the previous two years only.

[13] Accordingly pre-commencement discovery has been sought by challenging Civenco's motives of insisting on arbitration rather than accepting CBL's *"walk away"* offer. The focus of CBL's enquiry should be limited to that period beginning pre-arbitration, when on 1 September 2006 the walk away offer was put.

[14] The issue then is whether because of its perception of ingeniousness there is sufficient to support a claim of insolvency or reckless trading and the kind.

[15] Upon applications such as the present one the Court is charged with determining whether:

a) CBL is or may be entitled to claim relief against the respondents;

b) It is impossible or impracticable for CBL to formulate a claim without the documents sought; and

c) There are grounds for belief that the documents may be or have been in the possession of the respondents. *(Welgas Holdings Limited v Petroleum Corp of NZ Limited* (1991) 3 PRNZ 33).

[16] In the absence of a draft statement of claim being filed the Court is left in the position of being asked to extract some possible claim from the contents of affidavits (refer McGechan J in Welgas, Supra). When I heard this matter today Mr Kettlewell for CBL provided a draft of a proposed statement of claim. It sought to recover the sum of about $229,000 awarded as costs by the arbitrator.

[17] At face value CBL undoubtedly believes the timely (if it was) liquidation of Civenco confirms its own belief of insolvent or reckless trading. But, it does not provide any evidence to link those claims to its dealings with Civenco pre the arbitration process. CBL's accountant expressed in an email his view of insolvency as far back as 2004. But that email is not evidence before the Court. Also the accountant did not explain his reasons for making that claim.

[18] When the case is measured in this way some care is needed to ensure a proper foundation has been laid for a pre-commencement discovery order. We have in the first respondent and in CBL two distinct and conflicting accounts about reasons why the arbitration process continued to its conclusion. The documents sought by the plaintiff may or may not assist it. But, it is questionable whether it could be claimed that it is impossible or impractical for CBL to formulate its claim without the documents sought.

[19] The Court is always weary about promoting a process which enables an intending plaintiff to see whether it has a claim as opposed to enabling a plaintiff to pursue a claim for which a sufficient evidential foundation has been laid.

[20] In this case I am not satisfied there is such a sufficient evidential foundation.

[21] Civenco has been in liquidation for nearly one year. The third respondent is the liquidator. There is no criticism of the liquidator save that he initially encouraged the applicant to formalise its complaint but later appeared unwilling, in the absence of authority compelling him to do so, to assist the applicant. That apart there is nothing of substance to suggest the third respondent has not, as he must, properly address his obligations to creditors and shareholders alike.

[22] I perceive this application is not so much about substance as it is about inference. It is easy to accede to a submission that nothing would be lost if the documents were provided for if an applicant was then to realise there was nothing to his claim he would not pursue it. Considerations of costs of expediency are often promoted in support of such a submission. That is not, I think, the test.

[23] I accept Mr McKechnie's submission that the present application is premature and misguided. The liquidation of Civenco is proceeding. There is evidence the liquidator is aware of this application and that he has turned his mind to the question of whether Civenco was trading whilst insolvent. The liquidator's report is to be filed on 11 June 2009. Likely it will address the issue of whether or not the company traded while insolvent.

[24] I accept also the submission that the application before me does not establish that Civenco was trading while insolvent. The applicant's case is that Civenco was engaged in an arbitration while it was not solvent. That is, as Mr McKechnie submits a different issue from whether or not the company was trading i.e. carrying on business as a construction company or builder. Evidence of participation in an arbitral process is not evidence of Civenco being "in trade".

[25] Civenco was entitled to participate in the arbitration. Indeed it was contractually bound to do so. The process was initiated by the applicant. The applicant now seems to be saying that when the arbitrator had made his initial award Civenco should not have challenged the subsequent processes in which both quantum and later costs were argued. The plaintiff's proposition appears to be that by refusing to withdraw from the arbitral process Civenco was somehow in breach of ss 135 and 136.

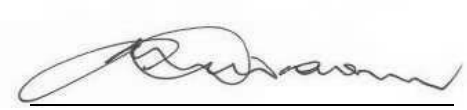
[26] What is clear is that on the present state of the evidence this application is entirely premature. Rule 8.25 (4) provides that an order for pre-commencement discovery should not be made unless the Court is satisfied the order is necessary at the time when the order is made.

Result

[27] The application is dismissed.

[28] There is no reason why costs should not now be fixed and ordered to be paid. The costs of the first and second respondents shall be met by a single payment.

Costs are to be paid on a 2(b) basis together with disbursements as approved by the Registrar.



Associate Judge Christiansen