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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1098/96
M 56/97
CP 16/97

Procedure
Company
News
N2CLD

UNDER The Companies Act 1955

BETWEEN BAKER NO-TILLAGE LIMITED

Plaintiff

AND CROSS SLOT TECHNOLOGY LIMITED

Defendant

Hearing: By written submissions

Counsel: JE Hodder and PA Cashmore for plaintiff
KW Berman counsel for liquidator of defendant
JE Long and PA Oliver for directors of defendant company

Judgment: 14 May 1997

JUDGMENT OF MASTER FAIRE

Solicitors:
Daniel Overton Goulding, DX EP 71005, for plaintiff
Chapman Tripp Sheffield Young, DX SP 20204, Wellington, for defendant
Kensington Swan, DX CP 22001, for liquidator

Costs - SD

The plaintiff seeks an order for costs against the directors of the defendant company and the defendant company.

The directors of the defendant company oppose the plaintiff's application and seek an order for costs against the plaintiff as a result of their being forced to take steps to oppose a possible order for costs against them. The liquidator of the defendant company opposes an order for costs against the defendant company.

The various applications for costs arise out of proceedings filed by the plaintiff seeking an order that the defendant company be placed into liquidation. Those proceedings rely on non-compliance with a statutory demand served on the defendant company. The statutory demand sought payment of $196,605.02 being the amount owing to the plaintiff under a services agreement as at 1 July 1996.

The services agreement was concerned with the development of technology for a new agricultural seeding apparatus which is known as the "Cross Slot Opener". The intellectual property rights in respect of the cross slot opener had been acquired by the defendant from entities associated with a director of the plaintiff company. In essence, the defendant's intention was to market this new product and to do so required input from the plaintiff pursuant to the services agreement. The defendant denied that it was indebted to the plaintiff for the sum claimed and disputed the debt on two grounds, namely,

a) that the plaintiff had overcharged it, and
b) that the plaintiff had not provided the services that had been agreed to.

The defendant company had ceased trading as at 27 June 1996 and had advised its creditors of that position at that time. Its future survival was really not in issue and was dependent upon the introduction of capital from an outside source. Without that capital it clearly could not pay its debts. Throughout the course of this proceeding there have been several attempts to introduce capital all, which at the end of the day, did not materialise.

The proceeding was part heard as a defended company winding up on 15 November 1996. Plaintiff's counsel had completed submissions. Defendant's then counsel, Mr P Oliver, was part-way through his submissions. On 15 November and immediately prior to the commencement of the hearing, there had been one final attempt to secure funds. Counsel reported that that had not been successful and so the hearing commenced.

At the resumed hearing on 11 December 1996, three new applications were made, two of which were instigated by the defendant company. The first was an application by the defendant company for a stay or adjournment so that a proposal could be put to creditors under Part 5A or B of the Companies Act 1955, and the second sought leave to file an amended statement defence to the counterclaim . The third application was by another creditor who sought leave to file a notice of appearance. The change of direction introduced by the defendant's application was a factor at the time for my granting an order for costs against the defendant in favour of the plaintiff. Another factor was that leave was granted in respect of the application filed by the defendant. As a result, the hearing on 11 December was adjourned to 29 January 1997, principally to see if a proposal was agreed by creditors.

The proceeding was adjourned to await the outcome to 29 January. The outcome was not something I was asked to rule on. Agreement was reached that the alleged dispute, which had been at the centre of the submissions made on 15 November, be referred to a Master pursuant to s 15 of the Arbitration Act 1908 on terms including terms as to security. In addition, the winding up application was stayed. In accordance with the Practice Note [1993] 2 NZLR 328, the Executive Judge's approval to my appointment as arbitrator was sought and, in fact, obtained on 31 January 1997. As a consequence, the timetable directions which were part of the agreement together with the payment schedule in relation to security was put into operation and effect. The agreement was enshrined in a consent order.

The defendant was required to pay the first payment for security of $40,000 on 10 February 1997. A fixture for the hearing of the arbitration on 15 April 1997 was set. A new developed occurred, however, with the passing of a resolution on or about 11

February, that is one day after the first payment for security was due, appointing Mr JP Meltzer of Auckland, chartered accountant, liquidator of the defendant company. As a result, the basis for the stay was removed. In addition, all counsel agreed that the proceeding should be struck out subject to appropriate orders for costs and I made such an order on 18 April 1997. The position summarised then is as follows:

a) the plaintiff's application to wind up the defendant company has become unnecessary because of the appointment of the liquidator by the defendant company's own resolution

b) the relief as sought by the plaintiff has, in effect, been achieved although not by Court order but by the defendant's own resolution

c) the defendant had not been involved in any commercial activity since 27 June 1996 and had advised shareholders and creditors that it had ceased trading from that date

d) the defendant company contested the plaintiff's status as a creditor by disputing the debt and therefore the plaintiff's right to seek an order for the defendant's winding up. Although the plaintiff agreed to a stay it did so on terms that would have provided security for the amount it was claiming

e) the liquidator now asserts that solvency or otherwise of the defendant at the time of the application has not been conclusively determined and that he has not yet discounted the possibility that the creditors may be paid out in full or at least receive a substantial dividend. At first sight, that claim appears contrary to the defendant's position as revealed to the Court, unless the liquidator is able to secure, in respect of the intellectual property rights over the cross slot opener, a substantial price. Certainly the proceeding and the proposed arbitration has come to an end, not by any act of the plaintiff but by the express actions of the defendant in appointing a liquidator.

I consider first the basis for an order of costs against the directors who are non-parties to this litigation. The jurisdiction for such an application was considered first by Master Hansen in *Carborundum Abrasives v BNZ* [1992] 3 NZLR 187. The Master summarised the position at page 193 as follows:

> "1. That there is jurisdiction in New Zealand to award costs against non-parties, pursuant to the provisions of R 46(1).
> 2. That an award of costs against a non-party will only be made in exceptional circumstances.
> 3. It is necessary for the applicant to show that the persons against whom the order is sought are in some way connected with the proceedings.
> 4. Without in any way attempting to be exhaustive, it is my view that for an applicant to succeed to obtain an order for costs against a non-party, the applicant must establish some form of impropriety, fraud or bad faith on the part of the non-party."

The decision was taken on review and is reported at [1992] 3 NZLR 757. On the question of jurisdiction, Tompkins J at page 763 said

> "For the same reasons as those expressed by Lord Goff of Chieveley in *Aiden* [1986] AC 965, I find no reason for limiting the Court's jurisdiction to award costs to parties to the proceedings by implying into [s 51G of the Judicature Act 1908] and R 45(1) such a limitation. On the contrary, it accords with the approach that the Court should have full control over proceedings before it, to hold that in appropriate cases and for proper reasons the Court should be able to order a person who is not a party to those proceedings to make a payment towards the costs incurred by a party."

Both Master Hansen and Tompkins J have held that there was a dual jurisdictional basis to award costs against someone not a party to the litigation; that is, an inherent jurisdiction and Rule 46.

In *Quinby Enterprises Ltd (In Liquidation) v General Accident Fire and Life Assurance Co Public Ltd Co* (High Court, Auckland, CP 681/89, 4 December 1995, Barker J expressly adopts the decision of Tompkins J in *Carborundum Abrasives v BNZ (No 2)* (supra) although, where he refers to jurisdiction, he refers to expressly only to Rule 46.

Against the conclusions of Justice Tompkins and Master Hansen, (as he then was) Elias J, in *Premier Soft Goods Limited v Warnock* (High Court, Auckland, CP 111/95, 6 May 1996) has commented that R 46

> "seems a somewhat slender foundation"

(at page 3) on which to order costs against a non-party. Elias J makes it plain that she is not deciding the point and has not heard full argument on it.

I conclude there is jurisdiction to award costs in an appropriate case against a non-party.

Factors relevant to the exercise of that discretion are now summarised:

1. The Court has a wide and overriding discretion on all questions of costs that must be exercised judicially. *Carborundum Abrasives v BNZ* (supra)

2. As a general approach, costs will not be awarded against a person not a party. *Carborundum Abrasives v BNZ* (supra) p 764

3. The discretion to order costs against a non-party should only be exercised against a person standing behind a company litigant and in exceptional circumstances. Dorset J *Forest Pty Ltd v Keen Bay Pty Ltd* (1991) 4 ACSR 107 at 122

4. For costs to be awarded against a non-party, that person must have some connection with or involvement in, the proceedings.

> "Such an order would be justified only where the circumstances demonstrate that the connection or involvement was such as to justify the making of what I accept should be regarded as an exceptional order."
>
> *Carborundum Abrasives v BNZ* (supra), p 764

5. Generally, costs are not to be awarded against the directors of an insolvent company only because they caused the company to bring or defend proceedings

when they know or suspect that the company may not be able to meet an order for costs against it. *Carborundum Abrasives v BNZ* (supra), p 764

6. A persuasive reason for awarding costs against a non-party would arise if that non-party has been involved or connected with the prosecution or defence of proceedings through the insolvent company and has acted with impropriety, or with *mal fides*. *Carborundum Abrasives v BNZ* (supra), p 764

7. There may be other cases which justify an order for costs against a non-party, for example, where proceedings are

> "controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their results such as a receiver or manager appointed by a secured creditor, a substantial unsecured creditor or a substantial shareholder it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently."

I do not consider that this case justifies an order for costs against the directors. Whilst they undoubtedly have a personal financial interest in the result, they are not in, what might be described as, the special position of a receiver or manager appointed by a secured creditor. In addition, the actions undertaken by them had a large measure of support from creditors. Accordingly, I decline the application for costs made by the plaintiff against the directors.

The application itself called for careful consideration by counsel for the directors, including the filing of memoranda. The directors' liability for costs was put fairly in issue by the plaintiff, requiring an answer. In the circumstances, the plaintiff being unsuccessful in its application for costs against the directors, the directors are entitled to costs which I fix at $400 plus disbursements to be fixed by the Registrar.

The remaining issue concerns the question of costs against the defendant company. Costs are opposed by the liquidator on the grounds that the debt was genuinely and substantially

disputed. That position was never accepted by the plaintiff. Although I stayed the proceedings on terms as agreed to, the terms were very much tied to a programme under which security for the amount of the claim was to be provided. The only reason the plaintiff does not proceed with its application is because of the liquidation of the defendant as a result of the resolution passed by it. I have no doubt that had there been a default in relation to the provisions made by which security was ordered to be given, that an application would have been made by the plaintiff to lift the stay and to proceed with the winding up application.

The plaintiff is already the recipient of an order for costs in the sum of $3,000 as a result of the new applications filed in the hearing which took place on 11 December 1996. Plaintiff's counsel, however, was required to attend on 29 January 1997 and I consider that some allowance for the attendances on that occasion and in relation to the settling of matters leading to the proposed arbitration should now be fixed and be ordered as costs against the defendant company. The plaintiff, for all intents and purposes, has achieved in part what it sought in its proceeding, namely, the appointment of a liquidator. I bear in mind that its status as creditor was clearly put into question by the defendant, but of course the final determination of that issue became unnecessary because of the actions of the defendant itself and not by any action of the plaintiff. I am required to fix costs for the January hearing and the steps taken with a view to setting up the arbitration.

In my view, the appropriate allowance for costs to the plaintiff is the sum of $1,500 together with disbursements as fixed by the Registrar. I make an order for costs against the defendant accordingly.

In summary:

1) the plaintiff's application for costs against the defendant's directors is refused;
2) the directors' application for costs is granted and the plaintiff is ordered to pay the directors $400 costs plus disbursements as fixed by the Registrar;
3) the defendant is ordered to pay the plaintiff's costs of $1,500 together with

disbursements as fixed by the Registrar.

Master J Faire