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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY CP.463/96

BETWEEN	BRETT ANTHONY HART
	Plaintiff
AND	MICHAEL PETER STIASSNY AND STEPHEN MARK LAWRENCE AS JOINT LIQUIDATORS OF LIFEFORCE 2000 LTD (IN LIQUIDATION)
	Defendants
AND BETWEEN	BRETT ANTHONY HART
	Plaintiff
AND	M P STIASSNY AND S M LAWRENCE AS LIQUIDATORS OF LIFEFORCE 2000 LTD (IN LIQUIDATION)
	Defendants
AND	LIFEFORCE 2000 LTD (IN LIQUIDATION)
	Counterclaim Defendant

Hearing:	11 June 1998
Counsel:	K F Gould for Plaintiff J R F Fardell for Defendants
Judgment:	11 June 1998

ORAL JUDGMENT OF RANDERSON J

Solicitors:
K F Gould, DX CP20513, Auckland for Plaintiff
Russell McVeagh McKenzie Bartleet and Co, DX CX10085, Auckland for Defendants

This is an application by the plaintiff ("Mr Hart") for costs against the defendants ("the liquidators") as the liquidators of a company named Lifeforce 2000 Ltd ("the company").

Background

This matter had its genesis in a notice issued by the liquidators pursuant to ss 266 and 268 of the Companies Act 1955 to Mr Hart, such notice being dated 12 July 1996. In that notice the liquidators sought to set aside as a voidable transaction, the capitalisation of interest payable under a mortgage dated 28 June 1995 between the company and Mr Hart. The notice makes it clear that the liquidators wished to recover the difference between the interest capitalised under the mortgage and a commercial rate of interest which the liquidators contended would have been at a significantly lower rate than that which was the subject of capitalisation. The amount of the mortgage was approximately $350,000 and the capitalised interest was approximately $186,000 over the twelve month term of the mortgage which the liquidators say would have amounted to an interest rate of 53%.

The mortgage was granted by Mr Hart over the company (of which he was neither a director nor shareholder) to enable the company to proceed with a property development at Avondale. There is evidence that the amount of the advance was approximately 96% of the value of the land. The liquidators were appointed on 7 February 1996 and it seems that there were discussions in or about May 1996 between the liquidators and Mr Hart relating to the transaction, the subject of the notice. Mr Hart has deposed to the fact that in early May 1996 he made an offer to repay to the liquidators one-third of the amount of the capitalised interest, that is an amount of $62,000. Although Mr Fardell has disputed that statement, it does not appear that there is any affidavit evidence in opposition to Mr Hart's assertion.

On 11 July 1996 the Avondale property was sold with a realisation to the company (after all amounts due to Mr Hart and costs) of $102,000. After the issue of the statutory notice, Mr Hart was obliged to issue proceedings challenging the notice otherwise the transaction would have been deemed by law to have been voidable. Accordingly he issued proceedings against the liquidators on 14 October 1996 seeking an order that the

transactions be not voidable. Thereafter there were a number of negotiations between the matters with a view to resolving matters in dispute.

On 28 January 1997 Mr Hart's then solicitors, Simpson Grierson, wrote to the liquidators' solicitors rejecting the contentions of the liquidators and suggesting that the matter should be resolved by the liquidators withdrawing the notice and abandoning any further proceedings against Mr Hart. There was no request for costs at that juncture. On 16 April 1997 Mr Hart's solicitor wrote to the liquidators' solicitors confirming recent telephone advice on behalf of the liquidators that they would now be relying upon the provisions of the Credit Contracts Act 1981 in order to re-open the transactions as being oppressive within the meaning of that Act. On 19 June 1997 the liquidators filed an amended statement of defence and counterclaim relying upon the Credit Contracts Act 1981. However, the claim made under the Companies Act remained on foot. There were intensive negotiations to achieve a settlement of the matter in the period April to August 1997, the details of which have been disclosed to the Court, each party waiving privilege. However, it was clear by about the middle of September 1997 that an impasse had been reached and counsel agreed settlement was not possible at that time. In his affidavit of 27 March 1998, one of the liquidators, Mr S M Lawrence, records that since that time settlement negotiations have virtually ceased.

Thereafter it is apparent that the parties were preparing for trial. Lists of documents were filed and Mr Hart took a number of other steps, including filing a statement of defence to the counterclaim by the liquidators, applying for security for costs, and attending a directions conference held on 30 March 1998 before Salmon J. It is apparent that the matter had not been resolved at the time of that conference on 30 March 1998 in which Mr Hart's solicitors were informed that the liquidators were withdrawing the notice of 12 July 1996 with immediate effect. The letter also indicated that the liquidators while maintaining that they had a valid claim, did not consider it would be cost effective to proceed to trial. Thereafter it was clear that the matter would not proceed to trial and the only outstanding issue was that of costs.

The submissions

On behalf of Mr Hart, Mr Gould has submitted that an award of costs of the order of $20,000 would be appropriate given that Mr Hart has incurred solicitor and client costs of the order of $30,000. In support he relies on the fact that these proceedings were initiated by the liquidators in the sense that they were brought as a response required by statute to the liquidators' notice of 12 July 1996. He has referred me to the decision of Oliver J (as he then was) in *Re Wilson Lovatt and Sons Ltd* [1977] 1 All ER 274 and to the following passage which appears at p 285:

> "I am bound to say that I find myself unable to accept counsel for the liquidator's submissions. I think that a review of the authorities does disclose that a clear dichotomy between the case where the liquidator is sued and the case where the liquidator initiates proceedings, is established, and indeed it seems to me to be a perfectly reasonable one. I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A trustee or a personal representative who institutes proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator, and the authorities which point that way seem to me, if I may say so respectfully, to be completely reasonable.
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> I can quite see that there may be very powerful reasons for policy for a rule that a liquidator, when carrying out his functions and thus subjecting himself to the possibility of proceedings against him by parties who are discontented with the way in which he has carried out those functions, must be entitled to defend himself without being subjected to the risk of having costs awarded against him personally, because of course he cannot protect himself against claims being made. Unless there were some such rule it might be very difficult to get persons to take on the heavy responsibility of the liquidation of companies. It seems to me that it is quite a different matter where the liquidator himself takes it on himself to institute proceedings, whether they be the winding-up otherwise. In fact of course any other proceedings would be proceedings in the name of the company where, in the ordinary way, the litigant on the other side could get security for costs under the provisions of the Companies Act."

Mr Gould submits that his client has been put to the cost of defending his position and defending the counterclaim brought by the liquidators pursuant to the Credit Contracts

Act. His client takes the view that the proceedings having been effectively abandoned by the liquidators, he ought to be entitled to recompense for the costs incurred.

On behalf of the liquidators, Mr Fardell has made a comprehensive submission and has referred to the practice of the Courts in this country when considering applications for security for costs in cases where liquidators are parties to proceedings. He relies particularly on two decisions, the first of Williams J in *Stiassny v Total Roofing Ltd* [1962] NZCLC 68,155 in which His Honour considered a question of costs where a liquidators action was dismissed, the Court having found that the liquidator had not discharged the onus of demonstrating that there was a dominant intention to prefer in the context of s 309 of the Companies Act 1955. Towards the end of His Honour's decision he expressed a preliminary view that it would not be appropriate to make an order for costs against the liquidators. His Honour indicated that in his view the application was a proper one for the liquidator to bring in discharge of the duties of his office (p 68,165).

The second authority relied upon by Mr Fardell is the decision of Master Williams QC (as he then was) in *Re Pacific Wools Ltd (In receivership and in liquidation)* (1990) 2 PRNZ 469. The Master was there considering an application for security for costs in proceedings where liquidators sought orders against the company's secretary under s 151 of the Companies Act 1955. The Master reviewed the authorities where applications for security are made against a liquidator including *Re Strand Wood Co Ltd* [1904] 2 Ch. 1; *Re New Zealand Gum-Machine Co Ltd (In liquidation)* [1927] NZLR 100; and, *Re World Style Builders Ltd (In receivership and voluntary liquidation)* (1982) NZCLC 98,401. Having reviewed those authorities, the Master concluded that the practice enunciated in *Strand Wood Co Ltd* (supra) to the effect that a liquidator is not bound to give security for costs (at least where the proceedings were not frivolous and properly taken), was equally applicable in New Zealand. The Master referred to the fact that a liquidator should not be hampered in carrying out his or her statutory duties and is liable to pay the ultimate costs personally, subject to an indemnity from the assets of the company. In those circumstances, the Master confirmed the usual practice that security for costs would not be granted against a liquidator in those circumstances.

I note, however, that this is not the invariable rule and the Court retains a discretion with regard to security for costs: see for example, *Re Securitibank Ltd (In receivership and liquidation) v Rutherford (No.28)* (1984) 2 NZCLC 99,073 at 99,078 where His Honour Barker J ordered substantial security for costs in the sum of $500,000 relying on the creditors on the company in order to provide the necessary security. In my experience, it is not uncommon for security for costs to be ordered, notwithstanding the general principle, where a proceeding is brought for the benefit of the creditors. In such cases, the ability and willingness of creditors to provide the funds necessary for security is a relevant factor when considering the issue of security for costs in a given case, along with all other relevant factors.

In any event, the practice relating to security for costs does not necessarily in my judgment hold true when considering an application for costs against liquidators pursuant to r 46 of the High Court Rules. No doubt the fact that a liquidator has properly brought proceedings and has acted responsibly will be an important relevant factor in considering awards for costs not only as to whether they should be made at all, but also in relation to quantum. The case of *Stiassny v Total Roofing Ltd* (supra) is an example of such a case.

This case

In the present case, I am prepared to accept that the liquidators acted reasonably and responsibly, at least up to the time when it became clear that a settlement was not possible around September 1997. Thereafter, both parties accepted that the prospects of settlement were slim if indeed there were any at all. I am of the view that the liquidators ought reasonably to have considered their position at that point and if they were of the view that it was uneconomic to proceed, then they ought promptly to have advised Mr Hart rather than stand by while he incurred further costs towards preparation for trial. I also take into account as a relevant factor, that Mr Hart had made an offer as early as May 1996 which was rejected and in January 1997 proposed that the proceedings should be abandoned against him without costs. In effect, that is the position which the liquidators reached some 15 months later in March 1998. In my view, they ought to have appreciated the difficulties earlier and taken steps accordingly. I therefore consider that this is an appropriate case for costs bearing in mind that the liquidators have effectively

abandoned the proceedings at a stage after it had become clear that there was no prospect of settlement.

However, the matters which have been advanced by Mr Fardell as to the liability of the liquidators for costs are relevant to the issue of quantum. In particular, the liquidators are fulfilling a public office and statutory duty and that is a factor which is relevant to quantum. I also take into account the fact that the parties agreed to a figure of $5000 for security for costs, a consent order being made on 3 October 1997 in that amount. That sum was intended to be security for costs in favour of Mr Hart for the trial. It was not in fact paid by the liquidators and the action was stayed from that date pending payment. I consider that the fixing of security is relevant in two respects. First, it indicates the quantum of costs which the parties, including Mr Hart, considered were appropriate if the matter proceeded to trial. Secondly, it indicates that the liquidators appreciated that they would have to provide security for costs if they were to proceed to trial.

In all the circumstances I consider that an award of costs should be made which is commensurate with a reasonable contribution towards the costs incurred by Mr Hart since September 1997. In the circumstances I fix that amount at $3000.

The issue of whether this sum should be paid by the liquidators personally or should rank as an unsecured claim against the company was canvassed in argument. It is an important issue in the present case because it seems unlikely that if the latter position prevails, there would be any significant recovery of costs by Mr Hart as the dividend in the liquidation for unsecured creditors is unlikely to exceed 10 cents in the dollar according to the advice received on behalf of the liquidators. In the *Securitibank* case which I have mentioned, it was accepted by His Honour Barker J (at p 99,078) that the liquidator would be liable to pay the ultimate costs personally, subject to an indemnity out of the assets of the company. In the present case, the statutory notice issued on 12 July 1996 was issued in the name of the liquidators personally and the proceeding brought by Mr Hart challenging that notice was also issued in the name of the liquidators "as joint liquidators of Lifeforce 2000 Ltd (In liquidation)". Although when the liquidators' counterclaim was issued the company itself was also named as counterclaim defendant, the counterclaim itself indicates that is brought in the name of the defendants (that is the liquidators personally), as well as in the

name of the company. In these circumstances I am satisfied that the order for costs should be made against the liquidators personally, subject to any indemnity which they may have against the assets of the company in liquidation.

Accordingly there will be an order that the defendants Michael Peter Stiassny and Stephen Mark Lawrence pay to the plaintiff the sum of $3000 by way of costs. By consent the proceedings are dismissed.

A P Randerson J