IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-343

UNDER	The Companies Act 1993
IN THE MATTER OF	Upland Nominees Limited (struck off and in liquidation)
BETWEEN	DAVID STUART VANCE HENRY DAVID LEVIN Plaintiffs
AND	FIONA MARY LAMB JOHN NEVILLE SIMPSON Defendants
AND	AMERICAN HOME ASSURANCE COMPANY First Third Party
AND	ROLLAND WALLACE AND FIONA MARY LAMB Second Third Parties

Hearing: On the papers

Judgment: 23 February 2009 at 11am

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 11am on the 23rd day of February 2009.

JUDGMENT ON COSTS

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[1] In my judgment delivered on 2 December 2008 I reserved costs and invited memoranda from counsel. These have now been received and I have had an opportunity to consider them. Those memoranda raise a number of issues, which can be conveniently considered under the headings which follow.

Whether costs should follow the event

[2] If costs are to follow the event then that would lead to the following result (leaving aside issues which are addressed under other headings):

(a) The plaintiffs should have costs against the first defendant; and

(b) The second defendant should have costs against the plaintiffs.

[3] The first defendant was not represented and took no part in the hearing. I consider that the plaintiffs are entitled to costs against the first defendant. Counsel for the plaintiffs has submitted a schedule, calculating costs on a 2B basis, which gives a total of $45,120 plus disbursements of $2,827.50. I do not consider that an award at that level is appropriate, broadly for two reasons. First, I consider that the amount awarded should not exceed one-half of the scale, to reflect the fact that the claim was against two defendants, only one of whom is liable for costs. Second, the level of the costs awarded against the first defendant should reflect the fact that the claim was undefended, and the hearing time for that claim alone would have been much shorter than the actual trial. Mr Sullivan submits that the decision not to attend was notified to the plaintiffs only shortly before trial. Against that, the scope of preparation would not have been materially different from that on the claim against Mr Simpson. To reflect these factors I allow one-half of the claim, for all steps prior to step 8. For step 9.1, I allow a notional hearing time of one day, with a consequential two day allowance for step 8. That is a total award for costs of 11.1 days at $1,600, or $17,760. I also allow one half of the claim for disbursements.

[4] I consider that the second defendant is entitled to an award of costs against the plaintiffs. As to quantum, the second defendant claims level 2B for all steps up to preparation and trial, with 3B for preparation and conduct of the trial. Counsel for the plaintiffs submits that the case was categorised as category 2 in April 2007, and there is no justification for a change in category. I accept counsel for the plaintiffs' submission. Under r 48, the category once fixed applies throughout unless there are special reasons to the contrary. Mr Laurenson relies on two features of the claim: that it was a claim against a professional person and that the facts and issues of the

case were complex and difficult. Neither of those factors, in my judgment, constitutes special reason for an increase to category 3.

[5] Counsel for the second defendant calculates the time allowance at 24.75 days. Allowing that at $1,600 per day gives a total figure of $39,600. That is the amount I award. The second defendant is also entitled to disbursements. These are not quantified. I allow disbursements, to be fixed by the registrar.

Whether the award should be made against the plaintiffs personally

[6] The plaintiffs are the liquidators of Upland Nominees Limited, and the claim was brought in that capacity. Mr Sullivan submits that costs should not be awarded against the liquidators personally in that there are no assets in the company from which the liquidators could receive reimbursement, and that it is a relevant consideration that they were performing what is in the nature of a public duty.

[7] There is a helpful discussion of the relevance of the liquidator's status in *Hart v Stiassny* (1998) 12 PRNZ 240. That case was concerned with proceedings under a notice seeking to set aside a transaction as voidable. The liquidator had withdrawn before the hearing. Randerson J noted as relevant to the question of costs the fact that the liquidators are fulfilling a public office and statutory duty. He also noted that the usual practice (though the invariable rule) is that security for costs would not be granted against a liquidator. He held that the practice relating to security for costs does not necessarily hold true when considering an application for costs against liquidators, though the fact that a liquidator has properly brought proceedings and acted responsibly will be an important relevant factor in considering an award, both as to whether the award should be made at all and as to quantum.

[8] In this case, while the liquidators' status as such is a relevant factor, it is not, on my assessment, a strong one. This is not a case where the liquidators were performing the function, which liquidators must perform, of ascertaining the assets of the company, and where necessary challenging transactions entered into by the company prior to liquidation. The Companies Act 1993 imposes certain duties upon a liquidator. The principal duty is set out in s 253 which provides as follows:

253 Principal duty of liquidator

Subject to section 254 of this Act, the principal duty of a liquidator of a company is—

(a) To take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and

(b) If there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4) of this Act—

in a reasonable and efficient manner.

[9] Here, the claim was for breach of duty under ss 131, 135, and 136 of the Companies Act. Those are claims which are available to a company whether or not in liquidation and are not claims enforceable only by a liquidator. In my view, the liquidators were in essentially the same position as any other plaintiff, so far as the decision to pursue these proceedings is concerned. A liquidator's relationship to the company is that of agent, but subject to the statutory duties which are focussed on protecting the rights of creditors. The agency relationship gives rise to a fiduciary duty. That fiduciary duty arising under the law of agency is not essentially different, for present purposes, from the fiduciary duty owed by a director. In this case, the decision whether to pursue the claim or not was one which could be made having regard to ordinary commercial considerations, not overlain by any specific statutory duty. The liquidator's principal duty under s 253 of the Companies Act 1993 is to realise the assets of the company. There is no specific duty to enforce claims such as the present. That is a matter for the judgment of the liquidator. A relevant factor in the exercise of the judgment whether or not to pursue a claim is the possible cost consequence if the claim is not successful. In the absence of a specific duty to pursue such a claim, I do not consider that a liquidator should ordinarily be protected from such cost consequences.

[10] There is the further consideration here that there was only one creditor standing to benefit from the action. This is not, therefore, a case where the liquidators have been required to exercise a judgment on behalf of a numerous category of creditors generally. Where, as here, there is only one creditor who may benefit, it may be expected that the decision to pursue the claim will have been made

after consultation with that creditor. It would not be right, in my view, to apply a general rule which would have the effect of depriving a defendant in such a case of an effective remedy for costs. In this case Mr Sullivan advises that the liquidators intend to seek reimbursement from Inland Revenue Department.

[11] For these reasons, I consider that the order in this case should apply against the plaintiffs personally.

Steps taken by insurers

[12] Counsel for the plaintiffs objects to costs being claimed for steps in the second defendant's defence which were undertaken by the solicitors for the indemnifiers, before they were joined as third parties. I do not consider that that factor justifies any departure from the scale costs. An insurer's rights of subrogation are not, in general, relevant to costs issues in litigation which is conducted in the name of the insured. Counsel for the plaintiffs also states that counsel has sought to know the actual level of costs incurred, but this has not been provided. Under r 47(f), an award of costs should not exceed costs incurred. That principle does not, except where special circumstances may suggest that this is a particular possibility, justify a general inquiry into the level of costs actually incurred.

Third party joinder

[13] The first issue is the costs of the second defendant incurred in joining his insurers, and Mr and Mrs Lamb, as third parties. Mr Sullivan submits that there are no grounds to justify the plaintiffs contributing to those costs. He submits that the issues between Mr Simpson and his insurer were irrelevant to the plaintiffs and that the liquidators could have claimed directly against Mr Lamb but chose not to. He submits that the decision by the defendant to join Mrs Lamb as a third party should not impact on the plaintiffs. None of those factors persuades me that the second defendant should not be entitled to scale costs for the attendances involved in the third party joinder. The award I have made reflects that.

[14] The question whether the plaintiffs should be ordered to meet any costs liability of the second defendant to the third parties does not arise. Mr Laurenson advises that the claim against the insurer has been resolved, with no issue as to costs. So far as the claim against Mr and Mrs Lamb is concerned, they took no part in the proceedings and no award of costs in their favour would be appropriate. I direct that there will be no order as to costs in favour of any of the third parties.

Recovery of second defendant's costs award

[15] The effect of the costs orders I have made is that the plaintiffs must pay the second defendant's costs, and the first defendant must pay the plaintiffs' costs. Counsel for the plaintiffs indicates that the ability of the liquidators to recover the judgment sum and the costs award, from the first defendant, remains in doubt. Two questions arise from that:

(a) Should the plaintiffs be able to recover, as part of the costs award against the first defendant, the amount awarded against the first defendant? and

(b) If so, should the order in favour of the second defendant be in such a form that recovery of costs should be from the first defendant direct, rather than from the plaintiffs?

[16] The principles to be applied when there are two defendants, one successful and one not, are set out in the commentary to McGechan at HR 50.03(2).

> (2) **Two defendants — one successful and one not**
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> (a) There is no general principle governing liability for costs as between a successful and unsuccessful defendant, such costs remaining in the Court's discretion: *Waller v Davies* (2005) 17 PRNZ 747. The reasonableness of a plaintiff's decision to join both defendants does not entitle the plaintiff to an order that the unsuccessful defendant pay the successful defendant's costs, but that reasonableness is a relevant factor. If joinder of both defendants was unreasonable, the plaintiff cannot seek to pass costs payable by it to the successful defendant over to the unsuccessful defendant. Even if the joinder was reasonable at the outset, the position

must be looked at from the viewpoint of the unsuccessful defendant. Whether that party caused or contributed to the original joinder is a factor. Factors which may also be relevant are: any change of position since the defendants were sued; how the proceeding developed; and the extent to which the claim succeeded. In the end, the Court must assess the overall justice of the matter as between the three parties concerned: *Lane Group Ltd v DI & Patterson Ltd* [2000] 1 NZLR 129; (1999) 13 PRNZ 509 (CA), at paras 83-84; *Ladstone Holdings Ltd v Leonora Holdings Ltd* 19/8/04, Potter J, HC Auckland CP308/SD200.

(b) Costs orders as between defendants can be achieved by either of the following:

(i) A "Bullock" order — the circuitous route of ordering the plaintiff to pay the successful defendant's costs but allowing it to recover part or all of these in the costs payable by the unsuccessful defendant: *Bullock v London General Omnibus Co* [1907] 1 KB 264 (CA). See also, Ronaldson v Rankin [1948] NZLR 850.

(ii) A "Sanderson" order — an order for direct payment by an unsuccessful defendant to a successful defendant: *Sanderson v Blyth Theatre Co* [1903] 2 KB 533 (CA). For a helpful discussion of Sanderson orders, see *Brown v Heathcote County Council (No 2)* [1982] 2 NZLR 618, at p 627, per Hardie Boys J (but note the overruling of this in Lane Group Ltd (above), in relation to Bullock orders).

[17] As to the first question, of whether the first defendant should be ordered to pay the costs awarded against the plaintiffs in favour of the second defendant, counsel for the plaintiff submits, on the basis of *Lane Group Ltd v D I & L Paterson Ltd* [2000] 1 NZLR 129, that the criterion are met for such an award to be made. I consider that in the circumstances of this case that course is appropriate. There will accordingly be an order that the costs payable by the first defendant to the plaintiffs shall include the costs awarded against the plaintiffs in favour of the second defendant.

[18] As to the second question, the effect of the order I have made will be that the plaintiffs will be liable to the second defendant for the costs awarded in his favour. That is a Bullock order. It is described by the editors of McGechan as a circuitous route. The more direct route is to order payment to the second defendant by the first defendant direct, under a Sanderson order. The difference is very significant if the

first defendant is less creditworthy than the plaintiffs. That seems highly likely here. In considering whether a Sanderson order would be more appropriate, the essence of the question is who, as between plaintiffs and second defendant, should bear the risk of the inability of the first defendant to meet the award for costs. In the circumstances, I consider that that risk must be borne by the plaintiffs. The decision to join both defendants was that of the plaintiffs, and the claims against the two defendants were essentially separate claims. That makes it inappropriate for the second defendant to bear, for the benefit of the plaintiffs, a credit risk on the first defendant for payment of costs awarded against the plaintiffs. Accordingly, the award will be in the form of a Bullock order.

Result

[19] There will be cost orders as following:

(a) Costs in favour of the plaintiffs against the first defendant in the sum of $17,760 plus disbursements of $1,413.75, plus any amount paid by the plaintiffs under paragraph (b) below.

(b) Costs in favour of the second defendant against the plaintiffs in the sum of $39,600 plus disbursements to be fixed by the registrar.

(c) No order for costs in favour of the third parties.

"A D MacKenzie J"

Solicitors: DLA Phillips Fox, Wellington for Plaintiff
Morrison Kent, Auckland for First Defendant
Sievwrights, Wellington for Second Defendant`
Minter Ellison Rudd Watts, Wellington for First Third party