IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-6810

IN THE MATTER OF	OPC MANAGED REHAB LTD (IN LIQUIDATION)
BETWEEN	H D LEVIN AND B P JORDAN Plaintiffs
AND	PATRICK IKIUA First Defendant
AND	KENETI APA Second Defendant
AND	TESSA APA Third Respondent
AND	MARK CROSBIE Fourth Defendant
AND	DAVID SMITH Fifth Defendant

Hearing: (on the papers)

Counsel: B H Dickey and G A D Neil for Plaintiffs
C Walker and M Smith for Respondents

Judgment: 7 December 2009

JUDGMENT (NO. 2) OF HEATH J

This judgment was delivered by me on 7 December 2009 at 4.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Meredith Connell, PO Box 2213, Auckland
Gilbert Walker, PO Box 1595, Auckland

Introduction

[1] Messrs Levin and Jordan are the liquidators of OPC Managed Rehab Ltd (In Liquidation) (OPC). They brought proceedings against directors of OPC (Mr Ikiua and Mr Apa) and others who were trustees of trusts associated with Mr Ikiua and Mr Apa. I heard the proceedings in February 2009. Although the liquidators sought damages in the sum of $1,450,618.41 on the five causes of action pleaded, they succeeded on only one (against the directors), recovering $8,000.80: see *Re OPC Managed Rehab Ltd; Levin v Ikiua* (High Court, Auckland, CIV 2007-404-6810, 24 July 2009).

[2] I reserved questions of costs, saying:

> [149] All questions of costs are reserved. However, I make it clear that I regard Mr Ikiua and Mr Apa at fault for the cost that has been incurred by ACC in progressing this proceeding, at least up to the point at which the essence of Mr Sio's witness statement was conveyed to the solicitors for the liquidators and they had time to investigate its veracity. My provisional view is that a significant order for costs ought to be made against Mr Ikiua and Mr Apa in any event, but I reserve final judgment on that issue until I have more information. I am conscious that there may also be other relevant factors; including the possibility of a without prejudice save as to costs letter sent before the proceeding was heard.

[3] During the course of a telephone conference to discuss the question of costs, Mr Walker (for Messrs Ikiua and Apa) raised an issue about the extent to which Mr Sio's evidence had been investigated by the liquidators. This issue assumes some importance because I came to the view, based primarily on unchallenged evidence from Mr Sio, that Mr Ikiua and Mr Apa were unaware of overpayments to OPC alleged to have been made by Accident Compensation Corporation (ACC), the sole creditor in the liquidation.

[4] Mr Sio was a former employee of OPC. However, by the time his evidence was briefed, he was employed by ACC, at its Counties-Manukau Office. The failure of the liqudiators (who were being funded by ACC) to appreciate the significance of Mr Sio's evidence is raised by the defendants as a ground not only to refuse costs to the liquidators, but also to support a claim for costs against them.

The competing contentions

[5] Mr Dickey, for the liquidators, submits that, notwithstanding the modest award made in favour of the liquidators against the directors and the failure of the liquidators' claim against remaining defendants, increased costs should be awarded against Mr Ikiua and Mr Apa. He relies on r 14.6(3)(b)(i) and (ii) of the High Court Rules to support that claim. Rule 14.6(3) is set out at para [12] below.

[6] At the heart of Mr Dickey's submissions is the contention that, prior to receipt of Mr Ikiua's brief of evidence for the hearing (dated 5 February 2009), the defendants had not properly pleaded (or otherwise articulated) the basis of their defence; namely that the undertaking of OPC had been transferred, in December 2000, from OPC to itself, in the capacity of trustee of the OPC Managed Rehab Trust (the OPC Trust). The context in which that submission is made can be gleaned from the summary of background facts, set out at paras [4]-[27] (inclusive) of my judgment of 24 July 2009.

[7] Mr Dickey submits that the liquidators acted responsibly in the prosecution of the claim, even after receiving Mr Sio's brief of evidence. This contention is relevant also to the claim for costs made against the liquidators by the defendants, on the basis that Mr Sio's likely evidence was not properly investigated.

[8] An offer of settlement in the sum of $100,000 (inclusive of costs and disbursements) was made by Mr Ikiua and Mr Apa to the liquidators, on 5 February 2009. The letter was written "without prejudice except as to costs": see r 14.10 of the High Court Rules. Given the proximity of the hearing (which began on 16 February 2009), Mr Dickey submitted there was inadequate time for the offer to be considered sensibly. The principles on which he asks the Court to act are consistent with those articulated in *Health Waikato Ltd v van der Sluis* (1997) 10 PRNZ 514 (CA) at 552.

[9] To support Mr Ikiua's and Mr Apa's claim for costs against the liquidators, Mr Walker disputes that the liquidators can be regarded as "successful parties". He submits that parties who sue and recover $8,000.80 on a claim for $1,450,618.41

cannot fairly describe themselves as "successful". He also relies on the "without prejudice save as to costs" letter of 5 February 2009, to justify a claim for costs.

Costs principles

[10] The general principle is that, while costs are expressed to be at the discretion of the Court (r 14.1 of the High Court Rules), that general discretion is qualified by the specific costs rules and is exerciseable only in situations not contemplated or fairly recognised by them: see *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA).

[11] In *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA), the Court of Appeal reviewed the costs regime, in the context of a claim for indemnity costs which, like a claim for increased costs, forms an exception to the general rule. After reviewing authorities from other jurisdictions in relation to the award of increased or indemnity costs, Baragwanath J, giving the judgment of the Court of Appeal, summarised the distinction between the approaches mandated by the High Court Rules as follows:

> [27] The distinction among our three broad approaches – standard scale costs, increased costs and indemnity costs – may be summarised broadly:
>
> > (a) standard scale applies by default where cause is not shown to depart from it;
> >
> > (b) increased costs may be ordered where there is failure by the paying party to act reasonably; and
> >
> > (c) indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[12] That summary reflects the thrust of the rules for increased and indemnity costs, set out in r 14.6(3) and (4) of the High Court Rules:

> **14.6 Increased costs and indemnity costs**
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> ...
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> (3) *The court may order a party to pay increased costs* if—

(a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

(my emphasis; representing the basis on which the liquidators seek increased costs)

A similar framework applies if reduced costs were sought or awarded: see r 14.7 of the High Court Rules.

Analysis

(a) The critical issues

[13] There are cross claims for costs. To resolve the applications, I need to consider three critical issues. They are:

a) At what point ought the liquidators to have realised that the defendants contended that the undertaking of OPC had been settled on the OPC Trust in December 2000?

b) Did the liquidators investigate adequately the evidential and legal bases for their claims? If so, were those claims reasonably prosecuted?

c) What is the effect of the "without prejudice except as to costs letter" of 5 February 2009, sent by the solicitors for Mr Ikiua and Mr Apa to the solicitors for the liquidators?

[14] Because defendants (other than Messrs Ikiua and Apa) were wholly successful, they would ordinarily be entitled to costs. Because all defendants were represented by the same solicitors and counsel, I approach issues of cost as if Mr Ikiua and Mr Apa had been the only defendants.

(b) Matters of context

[15] The liquidators' case was that OPC (having been previously alerted to a similar problem) had overcharged ACC during a subsequent period of their contractual arrangements, resulting in the sum of $715,684.75 being owing at the time the contract was terminated in August 2002. Subsequent proceedings, brought by ACC through the statutory demand procedure, ended with the Court of Appeal holding there was no "real and substantial" dispute as to $377,520: *OPC Managed Rehab Ltd v Accident Compensation Corporation* [2006] 1 NZLR 778 (CA) at [68].

[16] Material evidence was adduced before me that was not before the Court of Appeal. It came from Mr Sio. Before me both Mr Ikiua and Mr Sio (the Entitlements Manager of OPC at material times) gave evidence that, in conjunction with ACC representatives, measures were put in place, after the initial allegations of overpayments in 2001, to avoid a recurrence of the problem.

[17] Mr Sio answered a number of the liquidators assertions of overpayment. He said that he prepared schedules of claims to be paid each month and those schedules were sent to ACC so that any issues could be raised. Only after any issues raised by ACC had been resolved did Mr Sio refer the schedule to Mr Apa, who arranged for invoices to be raised. On Mr Sio's evidence, ACC never queried any contractual entitlement to the moneys claimed under invoices rendered following completion of that process. Mr Sio's unchallenged evidence left me in real doubt about whether any debt in favour of ACC actually existed (see para [53] of my 24 July 2009 judgment), notwithstanding the Court of Appeal's findings.

[18] Nevertheless, I accepted that overpayments had been made totalling $386,909.81 on the basis that the Court of Appeal judgment gave rise to an issue estoppel, meaning at least that sum was payable. Although the parties to the earlier proceeding were not the same as those involved in the present case, I held (following the principle enunciated in *Shiels v Blakeley* [1986] 2 NZLR 262 (CA)) that there was a sufficient identity between parties to the proceeding in the Court of Appeal and in the present proceeding to raise an issue estoppel: see my judgment of 24 July 2009, at paras [66]-[70].

[19] The liquidators' claims reduced to four causes of action: insider dispositions under s 298 of the Companies Act 1993, money had and received, a right of subrogation to the indemnity of the trustees of three recipient trusts (all of whom received distributions in their capacity as beneficiaries of the OPC Trust) and breach of directors' duties.

[20] I held that the s 298 claim failed because the undertaking of OPC had been settled on the OPC Trust. Therefore, OPC did not have beneficial ownership of the money paid to it by ACC at the time the moneys were paid to beneficiaries of the OPC Trust.

[21] I rejected Mr Dickey's submission that the undertaking of OPC was not validly settled on the OPC Trust. I said:

> [79] ... I act on the principle that all that is required is an expression of an intention to transfer property to a person for a specific purpose. The words and acts of the two directors amount to conduct from which a corporate intent can be inferred. Therefore, even though the property was not transferred to OPC (as trustee) by the settlor, it was open to OPC (in its own right) to direct transfer of the property to itself, for the purpose of holding it on trust for the beneficiaries of the OPC Trust.
>
> [80] I am satisfied, from the evidence of Messrs Ikiua and Apa, the contemporaneous documentation and their conduct after the OPC Trust was formed in late 2000, that there was a clear intention that the undertaking of OPC be held on trust for the beneficiaries. The fact that beneficial ownership in the undertaking was transferred is supported also by contemporaneous financial statements which, from January 2001, show the business as being operated by OPC, as corporate trustee for the OPC Trust. I add that Preamble B to the Trust Deed of the OPC Trust expressly contemplates "that further money, investments and property may from time to time be paid to or transferred into or vested in the name or control of the trustee".
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> ...
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> [82] .... Section 298(2) is directed at recovery of inadequate consideration paid for a business or other property. The provision is concerned with the disposal of a company business or asset. If an application had been made in time, the section would have applied to the original transaction by which OPC disposed of the business to itself (as a trustee) without consideration. But, in my view, the section is not concerned with the distribution of trust property to its beneficial owners.
>
> [83] A decision to distribute money to the beneficial owners of the company's undertaking is made by the directors of the corporate trustee. If the directors decided to distribute money to the beneficiaries, knowing debts

> incurred on behalf of the trust remained unpaid, any loss caused to the creditor by that decision ought to be visited on the directors: see paras [142] and [146] below. That is the creditor's protection.

[22] The claim based on money had and received was dismissed on the basis that no unconscionable conduct was involved.

[23] The subrogation claim was misconceived, to the extent that it relied upon distributions made by the trustee of a Trust to its beneficiaries. In saying that, I recognise that the primary basis for the claim was premised on the notion that s 298 did apply and the subrogation claim was made to attach to moneys that could be recovered under that provision.

[24] I held that the directors were not liable for any payments made to the beneficiaries until such time as they were on notice of the allegations of overcharging made by ACC on termination of the contract. Mr Sio's unchallenged evidence was accepted. On that basis, I held that the directors did not have knowledge of the claimed overpayments until shortly after the ACC contract was terminated. However, the payments totalling $8,000.80, made on 30 January 2003, were made after the directors received notice of those claims. Judgment was entered against the directors for that sum.

[25] A fundamental premise of my decision was that the directors were careful to ensure, before making distributions to beneficiaries of the OPC Trust, that all outstanding creditors of OPC were paid in full, as they fell due. I acknowledged that my findings in respect of the state of knowledge of Mr Ikiua and Mr Apa, in relation to the alleged overcharging, were different from those made in the Court of Appeal on the statutory demand proceeding. I had heard more evidence on the topic and, while bound by the ultimate conclusion reached by the Court of Appeal (that there was no "real and substantial dispute" as to the debt of $377,520), the principles of issue estoppel did not bind me to any findings of fact that the Court of Appeal made, on incomplete evidence, in order to reach that conclusion.

(c) When were the liquidators' on notice of the "trust" argument?

[26] Mr Dickey's complaint is that the liquidators could not have known the true basis on which Mr Ikiua and Mr Apa defended the s 298 claim before Mr Ikiua's brief of evidence was delivered to him on 5 February 2009. He submits the point ought to have been properly pleaded and that, by failing to do so, the directors breached the pleading provisions of the High Court Rules, thereby bringing r 14.6(3)(b)(i) into play: see para [12] above.

[27] Mr Walker submits that contention does not withstand scrutiny as, in the First Amended Statement of Claim of 29 October 2008, the liquidators pleaded the OPC Trust was settled on 1 December 2000, with OPC being appointed as its corporate trustee. Such a pleading is, Mr Walker submits, inconsistent with the underlying theme of non-disclosure on which Mr Dickey's submission is based.

[28] I uphold Mr Walker's submission on this issue. While I accept that the position to be taken by Mr Ikiua and Mr Apa was not spelt out in explicit language until the brief of evidence was delivered on 5 February 2009, I am satisfied that the liquidators must have understood the nature and substance of that aspect of their defence by the time the First Amended Statement of Claim was prepared, at the latest.

[29] The documentation relating to the establishment of the OPC Trust and the minutes of OPC made it plain that revenue from ACC was distributed in its capacity as corporate trustee. That militates against Mr Dickey's submission. All documents to support that proposition were within the power, possession or control of the liquidators (who controlled OPC's affairs once liquidation occurred) or would have been available on discovery from Mr Ikiua and Mr Apa, well before the Amended Statement of Claim was filed.

[30] I see no reason to criticise the defendants for not pleading this issue more specifically. In opening the liquidators' case, on 17 February 2009, Mr Dickey did not indicate to me that he had been taken by surprise by any late adjustments to the defendants' case, based on matters of the type he now raises.

(d) The liquidators' claims

(i) Investigation of evidential foundation

[31] At the time this proceeding was being readied for trial, Mr Sio was in the employment of ACC. ACC knew (or ought, on proper investigation, to have known) that he was a former employee of OPC who had responsibility for dealing with contractual issues involving OPC and ACC, during the term of the contracts.

[32] Mr Sio did not give any evidence in the statutory demand proceeding (for which both Mr Ikiua and Mr Apa, as directors of OPC, are to be criticised) and was not regarded by the liquidators as a witness whom they needed to call in the present proceeding. Nevertheless, the liquidators, on proper inquiry, must have realised that Mr Sio had material information likely to affect the outcome of any dispute involving the alleged overcharging. It is significant that, when called to give evidence, Mr Sio's deposition was not challenged by counsel for the liquidators.

[33] ACC is the only creditor of OPC. I infer that ACC has funded the litigation, as any benefit from it would go directly to it. No doubt the liquidators would have liaised closely with ACC, as evidenced by witnesses called to establish what was said by Mr Ikiua and Mr Apa in interview to substantiate the overcharging claim.

[34] While I find expressly that neither the liquidators or any ACC officers deliberately took steps to dissuade Mr Sio from giving evidence, the absence of any inquiry, particularly from liquidators who owe duties as officers of the Court, to establish the true facts in relation to the overcharging claim, is concerning. As to the obligations of officers of the Court, in this context, see *Re Condon, ex parte James* (1874) LR 9 Ch App 709 and *Re Byers, ex parte Davies* [1965] NZLR 774 (SC).

[35] The issue of knowledge of overcharging, on the part of Mr Ikiua and Mr Apa, was critical to the claims. Some criticism must be levelled at the liquidators and their advisers for not investigating this issue fully, particularly as Mr Sio was readily available and in the employment of ACC.

(ii) Was the claim prosecuted reasonably?

[36] The s 298 claim failed because I held it did not apply to dispositions of property that were not held beneficially by a company in liquidation. Nevertheless, there was an argument to the contrary capable of being advanced, based on a decision of the Court of Appeal dealing with voidable transaction claims, *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144. While, on the wording of s 298, I held relevant observations in *Anzani* to be inapplicable, I am not prepared to say (for costs purposes) that prosecution of this claim was unreasonable.

[37] The money had and received, subrogation and director liability claims all failed (save for the last dispositions made on 31 January 2003) because my conclusion on the state of knowledge of Mr Ikiua and Mr Apa was different from that made by the Court of Appeal: para [147] of my judgment of 24 July 2009. My finding on that issue turned predominantly on the new evidence of Mr Sio, which corroborated that of Mr Ikiua. Therefore, the reasonableness (or otherwise) of prosecuting those claims is closely linked to the failure to investigate Mr Sio's evidence adequately.

(e) The without prejudice save as to costs letter

[38] On 3 February 2009, the solicitors for the liquidators wrote to the solicitors for the defendants on a "without prejudice save as to costs" basis. Coincidentally, on the same day, the defendants' solicitors wrote to the liquidators' solicitors on the same basis. Both offers were made on a global basis, incorporating interest, costs and disbursements. The liquidators offered $660,000 whereas the offer from the defendants was for $100,000.

[39] The solicitors for the defendants requested a response to the offer by midday the following day. The letter explains difficulties that the solicitors had experienced in identifying the legal basis for the claim, as well as direct reference to the problems in proving an overpayment. The letter put forward the proposition that s 298 did not apply when property was held on trust and opined that remaining causes of action

were "hopeless". The offer of settlement appears to have been based on an assessment of the risks and costs of litigation, rather than any specific reference to amounts claimed.

[40] The letter sent on behalf of Mr Ikiua and Mr Apa also raised extrinsic issues which were plainly designed to put pressure on ACC to settle. The possibility of a trial demonstrating that no overpayment had been made was raised, suggesting expressly that the fact that ACC had made such accusations against Mr Ikiua and Mr Apa without justification would "not reflect well on the ACC or the individual ACC employees involved". In addition, a suggestion was made that ACC had discouraged Mr Sio from giving evidence on behalf of Mr Ikiua and Mr Apa, going so far as to suggest that its conduct might amount to a contempt of Court. I find such allegations are baseless, on affidavit evidence filed by Mr Sio and Mr Mercier on the costs application.

[41] Applying *Health Waikato Ltd v van der Sluis*, I do not give the "without prejudice" offer any weight in determining costs. The letter was sent eight working days before trial and a response was required by the following day. In those circumstances, I do not consider the liquidators should be penalised in costs for failure to accept that offer.

(f) What order should be made?

[42] Both parties bear some responsibility for excessive costs in this proceeding. On the one hand, the liquidators ought to have investigated further (and independently) what evidence existed to establish the overpayment. That would have required a full briefing of Mr Sio, at an early time. As his evidence was not challenged, I presume that an investigation of that type would have revealed information that accorded with his evidence.

[43] Nevertheless, so far as issue estoppel is concerned, the failure of Mr Ikiua and Mr Apa (through their then solicitors) to put in issue (in the statutory demand proceeding) the question of overcharging, through evidence from Mr Sio, meant that the Court of Appeal reached a decision in favour of ACC which, legitimately, ACC

considered it was entitled to enforce by liquidating the company and taking action through the liquidators. In other words, by failing to put OPC's case adequately in the statutory demand proceeding, Mr Ikiua and Mr Apa brought this proceeding on their own heads.

[44] On the other hand, there is no basis on which I can responsibly find that Mr Ikiua and Mr Apa unreasonably conducted the defence of *this* proceeding: (r 14.6(3)(a)(ii)) or failed to comply with rules of pleading (r 14.6(3)(a)(i)).

[45] On balance, I consider that costs should be awarded in favour of the liquidators but temper the costs to reflect the issues of investigation to which I have referred. I consider justice will be done by awarding, in favour of the liquidators, costs representing 75% of the amount that would otherwise be ordered on a 2B basis, together with all reasonable disbursements. I certify for second counsel.

[46] That conclusion represents an award of reduced costs. I am satisfied that reduced costs can be awarded because of the modest award in favour of the liquidators and their failure to investigate the evidence of Mr Sio in a timely way and to determine the relevance of that evidence to an issue in the proceeding: see r 14.7(f)(iii) and (g).

Result

[47] Adapting the figures provided by Mr Dickey, to which I understand no objection is taken, I award costs in favour of the liquidators in the sum of $39,000, plus disbursements of $37,029.30. That makes a total award of $76,029.30.

P R Heath J

Delivered at 4.00pm on 7 December 2009