IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2008-441-547

IN THE MATTER OF	Hawkes Bay Vehicle Exchange Limited (In liquidation)
BETWEEN	JOHN FRANCIS MANAGH Plaintiff
AND	PETER ROSS JORDAN Defendant

Hearing: 16 November 2009

Counsel: E M Bate for the Plaintiff
D M Kerr for the Defendant

Judgment: 17 November 2009

JUDGMENT OF MILLER J AS TO COSTS

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[1] In my judgment of 19 June 2009 I held:

> In the result, the liquidator has succeeded in small part on the first and second causes of action, considered together, but Mr Jordan has succeeded on the third and more substantial cause of action. As he has had the better of it, Mr Jordan will have costs, calculated on a 2B basis before a substantial adjustment to reflect the mixed result.

[2] Counsel have been unable to reach agreement on costs. I now have before me an application to recall my judgment on the ground that I did not receive submissions concerning costs at the hearing, and competing submissions about the quantum of costs payable. The plaintiff liquidator says that he ought not be personally liable for costs, although he brought the proceeding in his own name and funded it personally.

[3] Neither counsel addressed me on costs at the hearing. For that reason I will address the recall application by reference to the merits of the liquidator's claim that he should not be personally liable for costs.

[4] This case concerns the exercise of the liquidator's duty to get in the assets of the company: s 253 Companies Act 1993. Mr Bate does not dispute that the liquidator is liable for costs, but submits that I must recognise that the liquidator was getting in the assets, using powers (ss 297 and 298) that are available to a liquidator alone, and that the liquidator acted reasonably throughout. He submits that the award should at least be reduced to recognise the statutory duty being exercised as well as the mixed result in the judgment.

[5] Mr Kerr responds that the aspects of the claim on which the liquidator failed were not enforceable only by a liquidator performing his or her statutory duty. They were based on claims of breach of contract and money lent, and would have been available to the company whether or not it was in liquidation. The defendant has had to defend the proceedings using his own funds and has been largely successful, so should be entitled to costs against the liquidator personally: *Vance v Lamb* HC WN CIV 2007-485-343 23 February 2009.

[6] Where a liquidator sues in his own name he is ordinarily personally liable for costs. In *Waimate Investments Ltd (In Liquidation)* v *O'Dea* [2004] 2 NZLR 433, the Court of Appeal observed:

> [32] It has long been the law that an action by a company in liquidation should be brought in the name of the company and not in the name of the liquidator: *Re Tongaririo Hemp Co Ltd* (1909) 12 GLR 7. In respect of such proceedings, absent exceptional circumstances, the liquidator will not be responsible for the costs of the company, let alone the costs of a successful defendant to the proceeding: *Re Anglo-Moravian Hungarian Junction Railway Company, ex p Watkin* (1875) 1 Ch D 130. It has equally long been the law that applications to the Court in a winding up are made by or against the liquidator personally and in such cases the liquidator may be ordered to pay costs personally as the liquidator is the party to the proceedings: *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 and *Hart v Stiassny* (1998) 12 PRNZ 240.

[7] The statement of claim comprised three causes of action: a claim in contract that Mr Jordan had bought a car from the company but not paid for it, a claim that he

had bought the car at an undervalue, and a claim for money lent, in the form of a current account debit. The plaintiff succeeded on the second cause of action but failed on the others. The second cause of action was the only one which is available to a liquidator alone. It also comprised the smallest part by far of the amount in issue. In the circumstances, the remarks of MacKenzie J in *Vance v Lamb* are apposite:

> [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.

[8] For these reasons Mr Bate's somewhat tentative submission that the liquidator should not be personally liable for costs at all lacks merit.

[9] I accept that costs may be influenced by the Court's view of the reasonableness of the liquidator's conduct of the action: *Hart v Stiassny* (1998) 12 PRNZ 240. Mr Bate appealed to this principle, saying that the liquidator was trying to take possession of company assets, in the interests of creditors. Mr Kerr responded that the liquidator's stance in relation to costs is unreasonable.

[10] I accept that there was room for debate about the director's salary and compliance with s 161. The first cause of action was untenable, but it accounted for less than half of the total claim. The liquidator succeeded on the second cause of action. Accordingly, I accept that the liquidator's claim was reasonably brought.

[11] I now turn to the quantum of costs claimed. The parties have accepted that the appropriate scale is 2B. Mr Kerr submits that the appropriate figure in terms of the scale is $15,200, while Mr Bate calculates it at $13,280. The difference is that Mr Bate says there should be no costs for filing memoranda for a case management conference because the defendant did not file one; rather, a joint memorandum of 11 February 2009 was filed. Mr Kerr also appears to have miscalculated the costs payable for the case management conference. I would allow 50% of the scheduled costs for the conference, resulting in a quantum of $13,600 as follows:

Description	**Multiplier**	**Rate**	**Amount**
Commencement of defence	2	1,600	$3,200
Production of documents for inspection	1	1,600	$1,600
Inspection	1.5	1,600	$2,400
Filing memorandum for case management conference	0.2 (0.4 x .5)	1,600	$320
Appearance at case management	0.6	1,600	$960
Preparation for hearing	2	1,600	$3,200
Appearance at hearing	1	1,600	$1,600
Sealing judgment	.2	1,600	$320
			$13,600

[12] The next question is what reduction ought be made on account of the liquidator's partial success and my finding that he acted reasonably in bringing the proceeding. Mr Kerr submits that a proper reduction is in the order of 25%, while Mr Bate submits that the allowance should be 50%.

[13] I prefer Mr Bate's figure. While the dominant consideration must be the defendant's success, the liquidator did succeed in part, and it was not unreasonable to pursue the claim in respect of the current account. I decline to make any further adjustment on account of the parties failing to reach agreement on costs.

[14] Accordingly, I decline to recall the judgment. The defendant will have costs of $6,800 together with disbursements as fixed by the Registrar. The plaintiff is personally liable to pay these costs.

Miller J

Solicitors:
Hansen & Bate Limited, Hastings for the Plaintiff
Elvidge & Partners, Napier for the Defendant