

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2009-404-1427

UNDER SECTIONS 243 AND 286 OF THE
COMPANIES ACT 1993

IN THE MATTER OF AN APPLICATION THAT LIQUIDATOR
COMPLY WITH DUTY

BETWEEN AUCKLAND LINING SERVICES
LIMITED
BUNNINGS LIMITED
DYSART TIMBERS LIMITED
HYNDS ENVIRONMENTAL SYSTEMS
LIMITED
KENNA BUILDING SUPPLIES
LIMITED TRADING AS
PLACEMAKERS PORIRUA
AND MAD PLUMBING MERCHANT
LIMITED
Applicants

AND MARK DAVID STEVENS
Respondent

Hearing: By memoranda

Appearances: Mr N Jones for applicants
Mr M D Stevens in person

Judgment: 14 December 2009 at 4.45 pm

**JUDGMENT OF LANG J
[on costs]**

*This judgment was delivered by me on 14 December 2009 at 4.45 pm, pursuant to Rule
11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

Solicitors:
Minter Ellison Rudd Watts, Auckland
Copy to:
Mr M D Stevens, Wellington

[1] This proceeding was commenced by way of originating application filed by several unsecured creditors of Ingleburn Developments Limited (In Liquidation). The respondent, Mr Stevens, was the original liquidator of the company. The sole purpose of the originating application was to obtain an order requiring Mr Stevens to call a creditors' meeting under s 243 of the Companies Act 1993. At that meeting creditors would consider whether or not Mr Stevens should be replaced as liquidator.

[2] Ultimately Mr Stevens elected not to defend the application. Instead, he resigned as liquidator on 9 September 2009 and appointed two other persons in his place. The replacement liquidators subsequently called a creditors' meeting at which they resigned and appointed new liquidators in accordance with the wishes of the creditors.

[3] The applicants now seek costs and their counsel has filed a detailed memorandum in support of that application. Mr Stevens has been given an opportunity to make submissions in relation to the issue of costs. Despite extensions of time being given for this to occur, he has failed to file any submissions in response to the memorandum filed by counsel for the applicants.

[4] It is patently clear that Mr Stevens should not have continued to defend the originating application. Instead, he ought to have acknowledged the concerns of the creditors at an early stage and made arrangements for a creditors' meeting to be called. I therefore have no doubt that costs should follow the event and that an award of costs should be made in favour of the applicants.

[5] Counsel for the applicants seeks an order for increased or indemnity costs. Increased costs may be ordered if the opposing party has contributed unnecessarily to the time or expense of a proceeding by taking or pursuing an unnecessary step or an argument that lacks merit: r 14.6(3)(b)(ii). Indemnity costs may be ordered if the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding: r 14.6(4)(a). They say that increased or indemnity costs are appropriate because of the lengths to which Mr Stevens went in

defend the proceeding. This caused the applicants to incur considerable unnecessary expense.

[6] I accept that it can be argued that Mr Stevens acted unnecessarily in continuing to defend the proceeding for as long as he did. For that reason it would be open to the Court to make an award of indemnity costs against him. An award of indemnity costs and disbursements would require Mr Stevens to pay the sum of \$34,139 (excluding GST). By way of comparison costs and disbursements on a category 2B basis would amount to just over \$13,000.

[7] On balance, I have concluded that it would be inappropriate to require Mr Stevens to pay indemnity costs notwithstanding the unrealistic stance that he has adopted throughout. I consider that his conduct is such that it warrants an award of increased costs rather than indemnity costs. He has undoubtedly contributed unnecessarily to the expense of the proceeding by continuing to defend it in circumstances that entirely lacked merit.

[8] I consider that justice will be done if he is required to pay costs in the sum of \$23,500 together with disbursements of \$741.25. This would mean that Mr Stevens will be making a contribution amounting to approximately two-thirds of the actual costs that the applicants have incurred.

[9] There will be orders accordingly.

Lang J