#113

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-2891

	BETWEEN	MAGSONS HARDWARE LIMITED First Applicant
	AND	VIJAY HOLDINGS LIMITED Second Applicant
	AND	PRITISH PATEL First Respondent
	AND	DORIC INTERIORS & CONSTRUCTION LIMITED (IN LIQUIDATION) Second Respondent

Hearing: On the papers

Appearances: David E Smyth for Applicants
Dhirendra Singh for Respondents

Judgment: 10 September 2010

RESERVED JUDGMENT OF ALLAN J
[on application for costs]

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.30 pm on Friday 10 September 2010

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Copy for:
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Introduction

[1] This is an application made for costs by the applicants against the first respondent in his capacity as liquidator of the second respondent and against the second respondent itself. It follows the making of a consent order granting leave to the applicants to commence proceedings against the second respondent pursuant to s 248 of the Companies Act 1993.

Factual Background

[2] The underlying dispute concerns cross-claims between Magsons Hardware Limited ("Magsons") and Vijay Holdings Limited ("Vijay") on the one hand and Doric Interiors & Construction Limited (In Liquidation) ("Doric") on the other.

[3] Doric contends that it entered into separate construction contracts with Magsons and Vijay for the construction of certain residences in Auckland. Doric, as contractor, issued payment claims in terms of s 20 of the Construction Contracts Act 2002 to which Magsons and Vijay failed to respond. Doric accordingly claimed that they were liable pursuant to s 22 of the Construction Contracts Act for the amounts claimed and must pay Doric, leaving for later determination questions of ultimate liability.

[4] Doric subsequently issued statutory demands for the sums involved.

[5] In a judgment delivered on 10 August 2009 Associate Judge Robinson held that the demands against Magsons must be set aside because there was a genuine and substantial dispute as to the existence of a construction contract. Vijay had not disputed the existence of a contract with Doric but claimed that the amount of the demand was wrong. The learned Associate Judge found that the correct amount of the statutory demand was $23,795 and not $451,858, and he set aside the statutory demand except to the extent of the lower figure.

[6] Subsequently, in a judgment delivered on 20 October 2009, Lang J held that, as between Vijay and Doric, Vijay had satisfied the outstanding liability of $23,975

by taking an assignment from Magsons of a sum alleged to be owing by Doric to Magsons.

[7] There has been no appeal against the judgment of Lang J. However, a week after it was delivered, Doric's shareholders placed Doric in voluntary liquidation and appointed the first respondent to be liquidator of the company. Doric did, however, appeal against the judgment of Associate Judge Robinson. That appeal was filed before Doric was placed in voluntary liquidation.

[8] Against that background, Magsons and Vijay sought the consent of the liquidator to the commencement of proceedings or an adjudication under the Construction Contracts Act against Doric for the purposes of establishing whether the applicants had any liability to Doric arising out of the work carried out by it, together with the extent of Doric's claimed liability to Magsons.

[9] There were, in fact, three significant outstanding claims and cross-claims. Doric claimed approximately $780,000 from Magsons and $451,858.67 from Vijay (these claims being unaffected by the statutory demand litigation which was concerned only with issues arising out of ss 20 and 22 of the Construction Contracts Act). For its part, Magsons contended that at least $560,062.36 was owing by Doric to it in respect of the supply of construction materials.

[10] The liquidator refused consent in a letter to Mr Smyth dated 14 December 2009. On 12 May 2010 Magsons and Vijay filed an application for the Court's consent pursuant to s 248 of the Companies Act 1993. The delay between December 2009 and May 2010 is unexplained. The application was supported by an affidavit from the chief financial officer of the applicants.

[11] On 17 May 2010 the Court of Appeal heard the appeal from the judgment of Associate Judge Robinson.

[12] In late May 2010 the respondents to the present application filed a notice of opposition and detailed affidavits from both Mr Patel as liquidator and a Mr Prasad,

the former general manager of Doric. At that point therefore, the application for the Court's consent was opposed.

[13] On 1 June 2010 the Court of Appeal delivered its judgment, in which the decision of Associate Judge Robinson was upheld in all respects.

[14] The present application was first called in the Duty Judge list on 31 May 2010. At that time Duffy J adjourned the application, observing (correctly, as it turned out) that by reason of the limited character of the appeal to the Court of Appeal, a judgment of that Court might well be delivered within a short time, and that the outcome of the appeal might affect the position of the parties in respect of the present application.

[15] When the proceeding was called again before me on 28 June 2010 Mr Singh, for the respondents, indicated that in the light of the decision of the Court of Appeal there was now no opposition to the making of an order granting the consent sought by the applicants. I accordingly made the order sought by consent.

[16] Mr Smyth thereupon sought costs on a Category 2B basis against both the first and second respondents; Mr Singh opposed the making of an order, more particularly in respect of the first respondent upon whom the order would fall personally, there being no funds presently in the liquidation of Doric. Indeed, Mr Singh sought costs against the applicants on behalf of the first respondent.

[17] Having heard from counsel, I decided that written submissions ought to be filed. Submissions were duly filed accordingly.

Legal Principles

[18] Certain relevant principles are well-established. For example, in *Waimate Investments Ltd (in liq) v O'Dea*[1] it was said that:

> [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

[1] [2004] 2 NZLR 433 at [32].

> 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.

[19] Where a liquidator elects to sue in his own name, then he will ordinarily be personally liable for costs to a successful defendant: *Vance v Lamb*,[2] *Managh v Jordan*.[3] However, overall quantum and indeed the decision as to whether or not to award costs at all against a liquidator may be influenced by the Court's view of the reasonableness of a liquidator's conduct of the action: *Hart v Stiassny*.[4]

Discussion

[20] In the present proceeding the liquidator is of course a respondent and not an applicant. Moreover, he has taken no step in the proceeding save to file a notice of opposition and supporting affidavit, following which he consented to the application as soon as the decision of the Court of Appeal had been delivered. But Mr Smyth's application for costs does not rest upon the liquidator's stance in the proceeding itself. Rather, he attacks the liquidator's earlier decision not to consent to the commencement of proceedings.

[21] In his letter of 14 December 2009, in which consent was declined, Mr Patel simply referred to the failure of the applicants to provide payment schedules under the Construction Contracts Act once Doric had issued its own claim, and asserted that the amounts claimed by Doric were therefore due and payable to it.

[22] The underlying dispute between the parties included, of course, Magsons' claim against Doric for approximately $560,000 in respect of the alleged supply of building materials. Mr Patel had earlier indicated that he was dissatisfied with the extent of the documentation submitted on behalf of Magsons in respect of that claim.

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[2] HC Wellington CIV-2007-485-343. 23 February 2009.
[3] HC Napier CIV-2008-441-547, 17 November 2009.

As to that, Mr Smyth points out that Lang J, at para [11] of his judgment of 20 October 2009 had expressly referred to Doric's apparent acceptance that it owed $560,062.36 to Magsons in respect of the purchase of building materials.

[23] Mr Smyth is also highly critical of a subsequent letter dated 15 December 2009 (the following day) from Mr Patel to Mr Smyth in which the former challenged Magsons' position as to the authority of a Mr Krishna who was, at certain material times, group trade manager of Magsons. Mr Patel asserted in the letter of 15 December 2009 that Magsons' stance was inconsistent. Mr Smyth regards that contention as amounting to a "grossly improper exercise of the power granted to him under s 248 of the Companies Act 1993" in that he contends that the liquidator was seeking to extract an admission from Magsons as to Mr Krishna's authority which would assist Doric in the prosecution of its appeal to the Court of Appeal.

[24] On a reading of the correspondence, it appears that Mr Patel adopted a somewhat combative attitude towards Magsons' claim in the liquidation and that he was perhaps somewhat less than objective in his assessment of matters involving Doric and Magsons. But in determining whether Mr Patel's stance justifies an order against him for costs on the present application, it is necessary to bear in mind the scheme of s 248 of the Companies Act 1993. Section 248(1)(c) simply provides that unless the liquidator agrees, or the Court orders otherwise, a person must not commence or continue legal proceedings against a company in liquidation or in relation to its property. There is no obligation upon a liquidator to consent. As is said in the commentary to *Insolvency Law & Practice*:[5]

> No guidance is given by the legislation as to when such consent would be appropriate. It is thought that liquidators will act conservatively and that applications to the Court will continue to be made.

[25] Issues between the parties in this case are factually and legally complicated. The liquidator was not bound to give his consent to the commencement of proceedings. It is routine for liquidators in such situations to leave matters to the determination of the Court. Although Mr Patel's letters to Mr Smyth of 14 and 15

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[4] (1998) 12 PRNZ 240.
[5] (Online looseleaf ed, Brookers) at [CA248.05]

December 2009 are somewhat confrontational in tone, they could not of themselves justify the making of an order for costs against Mr Patel.

[26] Once the application for the Court's consent had been filed, Mr Patel played an active role by filing a notice of opposition and an affidavit in support. The applicants had apparently intended filing an affidavit in reply but that was overtaken by the delivery of the Court of Appeal's judgment. So the documents filed by the liquidator led to little further work on the part of the applicants' solicitors and counsel although I accept, of course, that the liquidator's documents would have been carefully considered. As soon as the Court of Appeal's judgment was available the respondents consented to the application for the Court's consent.

[27] As earlier noted, Mr Smyth's argument for costs does not rest upon the steps taken by the liquidator following the filing of the present application – rather, he asserts that had Mr Patel acted in good faith, then he would have granted his consent as liquidator, so obviating the need for the making of any application to the Court at all. In my opinion it would not be proper to make an order for costs against Mr Patel on that ground. A liquidator is entitled to leave the question of consent to the Court if he or she so chooses. Although I accept that where bad faith on the part of the liquidator is established there may be a case for an award of costs, this is not such a case. In general, liquidators must remain entitled to decline consent without automatically running the risk of incurring personal liability for costs.

[28] The applicants' claim for costs against the first respondent in his capacity as liquidator is accordingly refused.

[29] Mr Singh applies for costs, on behalf of the liquidator, against the applicants. He says that the liquidator ought not to have been joined in his personal capacity in the proceeding and he should accordingly receive an award of costs.

[30] I am not prepared to accede to that application either. Where a liquidator has refused consent, it seems to me that he or she ought to be entitled to participate in a subsequent application to the Court since the liquidator's initial decision might well

be examined in the course of the application, and the liquidator is entitled to be heard in respect of the impact of the proposed litigation upon the company in liquidation.

[31] Moreover, here the company and the liquidator were represented by the same solicitors and counsel. Mr Singh has not identified any additional costs arising from the liquidator's direct participation in the proceeding as a party. Nor is there any explanation as to why the respondents, having filed detailed affidavits in opposition, then consented to the application following the judgment of the Court of Appeal, which dealt only with certain limited aspects of the dispute between the parties and did not affect the underlying claims.

Result

[32] For the foregoing reasons all costs, including those of the present application for costs, are to lie where they fall as between the applicants and the first respondent. There will however be an order for costs calculated in accordance with category 2B in favour of the applicants against the second respondent.

C J Allan J