

IN THE SUPREME COURT OF NEW ZEALAND

**SC 105/2009
[2010] NZSC 124**

BETWEEN MANA PROPERTY TRUSTEE LIMITED
Appellant

AND JAMES DEVELOPMENTS LIMITED
Respondent

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: J M McCartney SC for Appellant
C S Withnall QC for Respondent
D M Lester for Liquidators of Respondent

Judgment: 11 October 2010

JUDGMENT OF THE COURT (COSTS)

- A The application for costs against the liquidators personally is dismissed with costs to the liquidators of \$2,500.**
- B The costs award made by the Court of Appeal in favour of the respondent is reversed.**
- C The appellant is awarded costs in this Court against the respondent in the sum of \$15,000 together with reasonable disbursements to be fixed by the Registrar.**

REASONS

(Given by Blanchard J)

[1] Mana Property Trustee Ltd has made an application for costs following its successful appeal to this Court.¹ It seeks costs in relation to both the Court of Appeal and Supreme Court stages of the proceeding not only against James Developments Ltd but also against its liquidators personally.

[2] James agreed to purchase some land from Mana for \$4.5 million. It paid a deposit of \$450,000 but later failed to settle. It alleged that it had validly cancelled the contract and asked for refund of the deposit. Mana brought the proceeding against James in the High Court seeking specific performance of the contract. On Mana's application for summary judgment, the High Court made an order for specific performance.²

[3] James appealed to the Court of Appeal and paid for security for costs in the sum of \$4,740. It also applied to the High Court for a stay of execution pending appeal. On 28 May 2009 the High Court granted a stay on terms that James would, within 10 days, pay Mana's costs awarded by the High Court and also pay \$821,214.80 into Mana's solicitors' trust account. A further condition of the stay was that James would obtain a hearing of the appeal in the week commencing 20 July 2009 and diligently prosecute the appeal.

[4] These conditions, which necessarily related to the stay rather than to James's ability to pursue the appeal (it was not an "unless" order), were not complied with. On 6 July Mr Chris James, the sole shareholder of James, by resolution placed James into liquidation and appointed two Dunedin insolvency practitioners, Mr Jenkins and Mr Nellies, to be its liquidators.

¹ *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90.

² *Mana Property Trustee Ltd v James Developments Ltd* (2009) 10 NZCPR 295 (HC).

[5] On 17 July counsel for Mana asked the liquidators whether they intended to pursue the appeal. It was not until 20 August that the liquidators advised that they did. Mana then applied to the Court of Appeal for orders adjourning, staying or striking out the appeal. It also sought an increase in the amount of the security for costs if the appeal was to proceed. The appeal had been set down for hearing by a Court of Appeal panel on 15 September. The presiding Judge, Hammond J, convened a telephone conference on 7 September. He declined to grant an adjournment and, in the absence of the other members of the panel, did not make any of the other orders which had been sought.

[6] Before the appeal was heard, Mana obtained from the High Court an order discharging the specific performance decree but leaving it free to seek damages from James.

[7] The Court of Appeal hearing took place on 15 September and that Court subsequently delivered a judgment allowing James's appeal.³ Disagreeing with the High Court, it took the view that James had been entitled to cancel the contract because Mana had on the settlement date been in breach of an essential term relating to the minimum area of the property. It also, briefly, rejected an argument from Mana that it was entitled to a reasonable time for complying with the essential obligation, which time had not run out when the cancellation notice was given.

[8] Mana obtained leave to appeal to this Court which has now allowed its appeal. We agreed with the Court of Appeal that the minimum area stipulation was an essential term but we held, in response to a reformulated argument from Mana, that, in the circumstances, James's cancellation was invalid because it had not served a settlement notice on Mana giving it 12 working days in which to adduce a compliant title. This Court has made a declaration that James's purported cancellation of the contract was of no effect. The proceeding has been remitted to the High Court for outstanding issues to be determined in light of this Court's judgment. The costs order made by the Court of Appeal has been set aside.

³ *James Developments Ltd v Mana Property Trustee Ltd* [2009] NZCA 483.

[9] We deal first with Mana’s application for costs against the liquidators personally. The commencement or continuance of a proceeding against a company in liquidation requires the consent of its liquidator or the Court⁴ but a liquidator has power under para (a) of Schedule 6 to the Companies Act 1993 to commence, continue or defend a proceeding on behalf of the company in liquidation without any court consent being needed. The party to the litigation is the company, not the liquidator, even in the case of a proceeding commenced against the company after it is in liquidation. It was therefore James itself which was the successful appellant in the Court of Appeal and the unsuccessful respondent in this Court. The liquidators were merely its agents in relation to the litigation, having taken over the conduct of its affairs from its director.

[10] A non-party like a director or liquidator is not at risk of a costs award in other than exceptional circumstances, that is, circumstances outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.⁵ In the case of a liquidator that is a principle of very long standing.⁶ There is certainly jurisdiction to order a liquidator as a non-party to pay costs personally but such an order will not be made unless there has been some relevant impropriety on the part of the liquidator.⁷ The courts recognise that the other party can protect its position, should it be successful, through its ability to seek in advance an order for payment of security for costs.⁸ In *Metalloy Supplies Ltd v MA (UK) Ltd* Millett LJ summarised the position:⁹

⁴ Companies Act 1993, s 248(1)(c)(i).

⁵ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145 at [25](1). In *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 (CA) at 20, Phillips LJ said that the test is whether the case’s characteristics were “extraordinary in the context of the entire range of litigation that comes to the courts.”

⁶ See, for example, *Re Anglo-Moravian Hungarian Junction Railway Co, ex parte Watkin* (1875) 1 Ch 130 (CA). It is different when the liquidator is required, or chooses, to bring a proceeding or application in his or her own name, for example an application to set aside an insolvent transaction under s 292 of the Companies Act 1993, which is a right given to the liquidator and not to the company in liquidation. In such a case, if the liquidator is unsuccessful, he or she may be exposed to a costs award personally – whether or not he or she is able to obtain reimbursement from available company assets – as happened, for example, in *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 (Ch) and in *Hart v Stiassny* (1998) 12 PRNZ 240 (HC).

⁷ Andrew R Keay *McPherson’s Law of Company Liquidation* (2nd ed, Sweet & Maxwell, London, 2009) at 514.

⁸ *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 (CA) at 1618.

⁹ At 1620.

The court has a discretion to make a costs order against a non-party. Such an order is, however, exceptional, since it is rarely appropriate. It may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified.

The position of a liquidation is a fortiori. Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. ... If he brings the proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay their costs as well as his own if the proceedings fail. It may be commercially unwise to institute proceedings without the means to provide any security for costs which may be ordered, since this will only lead to the dismissal of the proceedings; but it is not improper to do so. Nor (if he considers only the interests of the company, as he is entitled to do) is it necessarily unreasonable.

[11] That passage has the approval of the Privy Council in what is now the leading case in this country on costs orders against a non-party, *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*.¹⁰ The Privy Council recognised that in some cases where a non-party may have both controlled the proceeding and funded it, or is to benefit from it, justice will require that if the proceeding fails, the non-party will pay the successful party's costs.¹¹

The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.

Such a person is the real party to the litigation. But that is not ordinarily the position of a liquidator, although it may be the position of a creditor or shareholder who funds a liquidator. As the Privy Council remarked, where the non-party is a liquidator, he or she can realistically be regarded as acting rather in the interests of the company

¹⁰ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145.

¹¹ At [25](3).

(and more especially its shareholders and creditors) than in his or her own interests.¹²

The reluctance of courts to make awards against liquidators who are non-parties is for the very good reason that otherwise they may not be prepared to take on the role and enter into litigation that may be beneficial for the company and thus for creditors.

[12] The present case is not one in which the liquidators should be required to pay a costs award personally. There was no impropriety on their part in electing to continue with the extant appeal by James to the Court of Appeal. Indeed, it is only with hindsight that it can clearly be seen that the argument being pursued by James (concerning the essential term) could not carry the day even if, as happened, James was right on that issue. The crucial issue, on which James ultimately lost, was not then fully developed by Mana and did not plainly emerge until after James had won in the Court of Appeal and Mana applied for leave to this Court.

[13] The liquidators, who obviously were not themselves responsible for the company going into liquidation (that was the act of Mr James), were at all times acting on behalf of the company and its creditors. They have been criticised in submissions of counsel for Mana for having pursued an appeal which was contrary to its interests as the major creditor (the others were Mr James and entities associated with him) but they could rightly see it as their duty to the company to establish whether Mana in fact had any claim at all as creditor against James provable in the liquidation and whether an asset of \$450,000 (the deposit) was recoverable by James. It seems that the liquidators may have been funded for the appeals by Mr James. But, if so, that is not something which should expose the liquidators to personal liability. They would have committed no impropriety in accepting such funding in order to fulfil their duty to the company. Furthermore, it appears that before making their decision to continue with James's appeal the liquidators took independent legal advice.

[14] As Waller LJ remarked in *Metalloy*, it cannot be seen as unreasonable, let alone an impropriety, for liquidators to continue with a proceeding in which they bona fide believe there is some prospect of recovery. To brand liquidators as

¹² At [29].

unreasonable or as acting improperly could only be justified “if the action or defence [or appeal] were not being conducted bona fide in the sense of being reasonably arguable”.¹³ Clearly this was not a situation in which the appeal was so hopeless that the liquidators could be regarded as having acted improperly in continuing with it.

[15] It has been submitted for Mana that the liquidation was a means of avoiding the High Court’s stay conditions. But, even if there may have been such a motive for the decision of Mr James to put his company into liquidation (on which we express no view), the decision was not made by the liquidators. There is nothing before the Court to suggest that they may have shared any such motive when accepting appointment. Furthermore, the stay would no doubt have been removed on application to the High Court once it became clear that the company in liquidation would not be in a position to comply with the financial conditions imposed by that Court. And, as we have said, non-compliance with the conditions of the stay would not in any event have prevented James from continuing with its appeal.

[16] A further criticism made of the liquidators is that they did not respond for some five weeks to Mana’s counsel’s inquiry about whether they intended to cause James to continue with its appeal. It is said that by the time they gave an answer it was too late for Mana to obtain the protection it sought at the telephone conference before Hammond J on 7 September 2009, including an increase in the security for costs. But the liquidators do not appear to have delayed unreasonably in this respect. They must have needed time to get legal advice and to assess the prospects of the appeal. Mana could have sought an adjournment and an increase in security for costs at an earlier time or sought a review of Hammond J’s decision not to grant an adjournment, which placed Mana in the position of having to go to the hearing of the appeal without an adequate level of security.

[17] For these reasons, Mana’s application for costs against the liquidators personally must be dismissed, with costs to the liquidators of \$2,500.

[18] It appears that Mana’s application for costs against James may in the circumstances be without much practical value, as the material before the Court

¹³ At 1618–1619.

indicates that James may have no assets to satisfy an award other than the security for costs given when it appealed to the Court of Appeal. It is, however, appropriate that an award be made. Accordingly, we reverse the costs award in the Court of Appeal (made on the basis of a standard appeal on a band B basis with usual disbursements) and, in respect of the appeal to this Court, order the respondent to pay costs of \$15,000 together with the appellant's reasonable disbursements as fixed by the Registrar.

Solicitors:

Hoffmann Law, Auckland for Appellant

La Hood Van Aart, Dunedin for Respondent

Layburn Hodgins, Christchurch for Liquidators of Respondent