IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-005190
[2013] NZHC 263

UNDER	Section 72 of the District Courts Act 1947
IN THE MATTER OF	an appeal of a decision of the Auckland District Court
BETWEEN	WARREN METALS LIMITED Appellant
AND	DAMIEN GRANT AND STEVEN KHOV Respondents

Hearing: 13 December 2012

Counsel: SS Khan and JE Riddle for Appellant
RM Dillon for Respondents

Judgment: 20 February 2013

JUDGMENT OF ASHER J

This judgment was delivered by me on Wednesday, 20 February 2013 at 5pm pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] On 6 August 2012, Judge DM Wilson QC struck out by oral judgment the claim of Warren Metals Ltd against Damien Grant and Steven Khov, on the basis that the District Court had no jurisdiction to hear the case. This occurred at the outset of the trial before the giving of evidence. Warren Metals Ltd appeals that decision.

[2] The respondents, Messrs Grant and Khov, are liquidators. The Judge found that because they were acting as liquidators when they carried out the acts that were the subject of the claim they could not be sued in the District Court. The core issue is whether this conclusion was correct.

Lead up to the dispute

[3] Briefs of evidence were exchanged prior to the trial and have been referred to extensively in the course of submissions. Accordingly, the facts that are the subject of the dispute (as yet unproven) have been set out, and I draw them largely from the brief of Warren Halloran.

[4] The arrangements that led to the claim go back to 1993. The appellant Warren Metals Ltd ("Warren Metals") was, at that point in time, trading with a William Conway and various of his companies. Mr Conway's companies still trading in 2008 are the companies that are now in liquidation.

[5] The business conducted between Warren Metals and Mr Conway's companies was that of obtaining and dealing in scrap metal. William Conway and his companies would pay cash to obtain metal from the public. It would be held in their premises. They would then on-sell the metal to Warren Metals who would dispose of it largely by export. For some of the collected metal to be useable and transportable by Warren Metals, it needed to be compressed.

[6] Warren Halloran is the principal of Warren Metals. In his brief, he outlines how he arranged manufacture of a light gauge metal press for Warren Metals in 1994. In April 2008, it was arranged that he would leave it with William Conway at

his business premises and where it would be used to convert metal into a compressed state. At the time Warren Metals had staff processing the metal at Mr Conway's premises. It was arranged between them that the press remained the property of Warren Metals.

[7] By 2008, Mr Conway was operating through a number of companies. These included 123 Metals Ltd, Cash 4 Scrap (2008) Ltd, North Island Metals Ltd, and Bairds Road Scrap Ltd. These companies operated out of premises leased by Bairds Road Scrap Ltd at 57 Tidal Road. The press was moved to that site.

[8] On 23 May 2008, 123 Metals Ltd was placed into liquidation, followed by Bairds Road Scrap Ltd on 30 May 2008. It seems that Mr Conway's other companies continued to trade.

[9] One company, North Island Metals Ltd, was trading in early June 2008 and was not in liquidation. However, on 5 June 2008 North Island Metals Ltd was placed into voluntary administration. On 11 June 2008, another company, Cash 4 Scrap (2008) Ltd, was placed into liquidation. The liquidators of 123 Metal Ltd, Bairds Road Scrap Ltd and Cash 4 Scrap (2008) Ltd, and the administrators of North Island Metals Ltd, were the respondents Messrs Grant and Khov.

[10] In early 2008, the practice had developed that when Mr Conway was having cash flow problems, Mr Halloran would give large sums of cash to Mr Conway for the purchase of scrap. On 30 May 2008, the appellant and Mr Conway arranged for the appellant to pay $40,000 in advance for two containers of scrap metal that were to be loaded at Tidal Road over the long weekend (Queen's Birthday weekend). $40,000 cash was paid on 1 June 2008.

[11] On 6 June 2008, Warren Metals attempted to uplift two containers of preloaded metal, this being the metal that had been paid for on 1 June 2008. The respondents refused to allow the metal to leave. Mr Halloran required the scrap metal to fill a container bound for export. Mr Halloran in the end wrote a cheque for $32,337.90 to Messrs Grant and Khov, effectively purchasing it, he says, for the second time, so that it could be removed from the premises.

[12] In mid-June, Warren Metals ceased trading with the liquidators. On 22 June 2008, an arrangement was made by Warren Metals to remove the metal press from the Tidal Road premises. However, before this could happen a Mr Low for the liquidators rang Mr Halloran and said that Warren Metals could not uplift the press unless he proved ownership of it. On 23 June 2008, Mr Halloran cancelled the crane that he had booked to move it. He was told by Mr Low and a Mr Cates for the liquidators that nothing would happen to the press until Warren Metals had an opportunity to prove its ownership.

[13] For the next four weeks Mr Halloran endeavoured to obtain proof of ownership of the press. However, this was difficult. It had been made through an informal arrangement with a Mr Rod Johnstone in 1993. He obtained three statements (which are in the bundle of documents) confirming that he had the press built for Warren Metals and that he owned it.

[14] On 9 July 2008, North Island Metals Ltd was placed into liquidation.

[15] On 20 July 2008, the respondents cut the press up, taking the view that they were not satisfied that it was the property of Warren Metals. It was sold for scrap. Mr Halloran states that it was worth approximately $40,000 and would cost $200,000 to $300,000 to replace.

[16] In his brief, Mr Conway confirmed Mr Halloran's evidence, including how the press was the property of Warren Metals and should have been returned to him immediately. Another of Mr Conway's employees, a Mr Rhys Cullen, has also filed a brief confirming Mr Halloran's evidence.

The position of the parties

[17] Warren Metals' amended statement of claim sets out a number of causes of action. First, in relation to the metal press that was destroyed, it claims that the liquidators converted the press, or acted in breach of a duty of care not to destroy it, or were bailees and allowed it to be destroyed, or were guilty of misleading and deceptive conduct under the Fair Trading Act 1986. In relation to the $40,000 paid,

it is claimed that Messrs Grant and Khov are personally liable for the $40,000 and further that they are in breach of the Fair Trading Act 1986. In relation to the $32,337.90, it is claimed that Messrs Grant and Khov were not entitled to that money and have an obligation to pay it back.

[18] Mr Dillon for Messrs Grant and Khov argued, as he did before the District Court, that ss 248 and 284 of the Companies Act 1993 ("the Act") applied. He argued that the High Court had exclusive jurisdiction to determine matters in relation to the decisions of liquidators. The proceedings therefore should have been brought in the High Court.

[19] Judge Wilson essentially upheld this submission. In a short judgment he observed:[1]

> Section 284 Companies Act provides for the Court supervision of liquidation and, in particular, in subs (2) talks about how those powers of the Court can be exercised in relation to a matter occurring "either *before or after* the commencement of the liquidation". (emphasis added)
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> "Court" is, of course, defined in the Companies Act as being the High Court of New Zealand. It has long been the case that the High Court has, with trivial exceptions, had jurisdiction over matters relating to the performance of companies and their directors and liquidators.

[20] The Judge stated that he had been referred to a number of cases which essentially illustrated the point that whether the matter fell within the time of the commencement of liquidation under s 248 of the Act, or under the general court supervision of liquidations under s 284 of the Act, the position was still that only the High Court had jurisdiction.

Section 248 of the Companies Act

[21] Section 248(1)(c) provides in part:

> **248 Effect of commencement of liquidation**
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> (1) With effect from the commencement of the liquidation of a company,—
>
> (a) The liquidator has custody and control of the company's assets:

[1] *Warren Metals Ltd v Grant* DC Auckland CIV-2008-044-2726, 6 August 2012 at [5] and [6].

(b) The directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part of this Act:

(c) Unless the liquidator agrees or the court orders otherwise, a person must not—

(i) commence or continue legal proceedings against the company or in relation to its property; or

(ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company:

…

[22] This section sets out the main consequences of the liquidation of a company. While the assets of the company are not vested in the liquidator, s 248(1)(a) gives him "custody and control of the company's assets". The liquidator therefore has no better title to the assets than the company itself.[2]

[23] Once a company has been put into liquidation the rights of unsecured creditors are limited in proving their claims. To continue a claim against the company requires leave.

[24] It is important to appreciate that this section takes away functions and duties from directors and gives the liquidator particular rights in respect of assets. The liquidator assumes the powers and duties previously exercised by the directors, and is the company's agent.[3] It does not give the company or its liquidators any extra rights or different rights in relation to property owned by third parties.

[25] If an item is owned by a third party it will remain owned by a third party. If an asset, here the metal press, is as it is claimed owned by a third party, it continues to be owned by that third party. It is trite to say that a company's assets do not include assets that are beneficially owned by others.[4] In *Re Waipawa Finance Company Ltd (in liq)*[5] it was held that moneys that were on trust for the company

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2 *Sutherland v North Shore Marine & Industrial Ltd (in liq)* (1981) 1 NZCLC 95,019 (HC).

3 See *Mana Property Trustee Ltd v James Development Ltd* [2010] NZSC 124, [2011] 2 NZLR 25 at [9]; *Dunphy v Sleepyhead Manufacturing Ltd* [2007] NZCA 241, [2007] 3 NZLR 602 at [19]–[25]; *Gilbert v About Body Corporates Ltd* HC Auckland CIV-2009-404-2043, 23 June 2009 at [22]–[30].

4 *Brookers Insolvency Law & Practice* (online looseleaf ed, Thomson Reuters) at CA248.01.

5 *Re Waipawa Finance Company Ltd (in liq)* HC Napier CIV-2010-441-4365, 30 September 2011.

were never available in the liquidation for the creditors. Just as a receiver may be responsible for any torts or breaches of contract that the receiver commits during the course of the receivership,[6] so may a liquidator.

[26] Mr Dillon argued that if the liquidators made a decision regarding an asset of the company to which the appellant objects, it must issue proceedings in the High Court to obtain leave and challenge that decision, and not in the District Court. That might be so if Warren Metals accepted that the metal press was an asset of the company. However, it does not. It says that it owned the metal press. Further, it is not saying that the company has done anything unlawful in relation to the metal press. It says that the liquidators have.

[27] Mr Dillon argued in particular that under s 248(1)(c)(ii) Warren Metals could not exercise or enforce or continue to exercise or enforce a right or remedy over or against "property of the company". He argued that even on Mr Khan's argument for the appellant, the liquidator had a possessory right to the metal press, and to the metal in the containers. He submitted that the rights, interests and claims include a possessory right relying on the definition of "property" at s 2 of the Act:

> **property** means property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise:

[28] I do not accept that submission. The short answer is that on the case of Warren Metals, the company and the liquidators had no possessory right at the time the machine was cut up. It had been terminated when Warren Metals asked for the press to be returned. Section 248 concerns the assets, the property and the rights and remedies of the company, not of others. The press is claimed to have been always an asset of Warren Metals, and it is claimed that the company had no right to retain it or use it, and the liquidators committed a tort when it was cut up.

[29] Section 248 is not designed to protect liquidators from unlawful actions by them against the property of third parties, whether or not they consider themselves to be acting in their capacity as liquidators at the time. If they choose to commit an

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6 *Lathia v Dronsfield Brothers Ltd* [1987] BCLC 321 (QB).

unlawful act against the property of a third party they can be personally liable. That is what Warren Metals claims has happened here. Section 248 does not pose an impenetrable jurisdictional bar.

[30] I also note that s 248(1)(c)(ii) applies to the exercise of enforcement of rights or remedies, not the commencement of continuation of legal proceedings, to which s 248(1)(c)(i) applies. It is s 248(1)(c)(i) that would apply to these facts.

[31] The main defence for the liquidators is not going to be s 248. It will be the fact that they are likely to say they were acting as agents of the company, and can claim the protection of agents. This may be a defence for Messrs Grant and Khov,[7] and they can raise it in the District Court.

Section 284 of the Companies Act

[32] Section 284 provides:

> **284 Court supervision of liquidation**
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> (1) On the application of the liquidator, a liquidation committee, or, with the leave of the Court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the Court may—
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> (a) Give directions in relation to any matter arising in connection with the liquidation:
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> (b) Confirm, reverse, or modify an act or decision of the liquidator:
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> (c) Order an audit of the accounts of the liquidation:
>
> (d) Order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests:
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> (e) In respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances:
>
> (f) To the extent that an amount retained by the liquidator as remuneration is found by the Court to be unreasonable in the circumstances, order the liquidator to refund the amount:

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[7] Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at 97.

(g) Declare whether or not the liquidator was validly appointed or validly assumed custody or control of property:

(h) Make an order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.

(2) The powers given by subsection (1) of this section are in addition to any other powers a Court may exercise in its jurisdiction relating to liquidators under this Part of this Act, and may be exercised in relation to a matter occurring either before or after the commencement of the liquidation, or the removal of the company from the New Zealand register, and whether or not the liquidator has ceased to act as liquidator when the application or the order is made.

[33] It gives the High Court supervisory jurisdiction in relation to matters arising in connection with a liquidation. The High Court's powers include the power to confirm, reverse or modify an act or decision of the liquidator.[8] Mr Dillon argued that it followed from this section that any claim against liquidators, who are officers of the High Court, must be dealt with in the High Court.

[34] This is not what the section says. The section gives the High Court various powers in relation to the conduct of the liquidation, but the section has no direct relevance to a claim by a third party in relation to property that has been unlawfully interfered with by persons who happen to be liquidators. It is not part of the function of s 284 to take away claims that are otherwise arguable against persons who have committed alleged wrongs in their capacity as liquidators. It is open to any third party to sue liquidators personally, although that party must overcome the hurdle of proving that the liquidators have made themselves personally liable. The Court will determine such a proceeding on orthodox common law principles.[9]

The specific claims

Claim in relation to the press

[35] It can be seen from the above analysis that a claim against Messrs Grant and Khov can be brought by Warren Metals as the owner of a chattel that has been allegedly unlawfully converted by them. The essence of conversion involves dealing

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8 Companies Act 1993, s 284(1)(b).

9 *Norris v Johnson Price Holdings Ltd* [2012] NZCA 541 at [22]–[25].

with the appellant's chattel in a manner inconsistent with the appellant's property rights, wilfully and without lawful justification. The fact that the respondents claim to have been acting as liquidators of a company that had ownership of the press does not take away the District Court's jurisdiction to hear that claim. Warren Metals says that the liquidators, and indeed the company, had no right at all to it once it had asked for it back. Sections 248 and 284 are irrelevant. Therefore, the decision to strike out the claim in relation to the press was incorrect.

[36] I make no comment on the merits of the claim. Ordinary common law principles will apply. Defence assertions that the liquidators are not personally liable and were acting as agents of the company will be determined in the District Court.

The cash payment

[37] Although the pleadings do not reflect it, the way in which Mr Khan put the claim on appeal was that property in the metal purchased with the $40,000, passed to Warren Metals prior to the voluntary administration of North Island Metals Ltd. This meant that the metal belonged to Warren Metals at the commencement of the liquidation, and the liquidators had no right to refuse to hand it over. It was just as well that he put his claim this way in submissions, as the pleaded claim asserting that Warren Metals had paid the $40,000 to the liquidators appeared to be inconsistent with the facts.

[38] It is stated in the briefs of Messrs Halloran and Conway that the arrangement in respect of the metal was made on 1 June 2008. Mr Halloran said that there had been a longstanding arrangement going back to early 2008 whereby Warren Metals would pay in advance for metals. Cash up front would be provided and Warren Metals would then go to the premises at Tidal Road and pick up the metal. Three of Warren Metals' employees would be on site at the Tidal Road property on a permanent basis and would pack the container loads of metal. It is not clear from the briefs, but I was informed by Mr Khan that Warren Metals will assert that the containers were its property.

[39] The payment of the $40,000 was made in anticipation of Queen's Birthday weekend. The arrangement was that 123 Metals Ltd would be able to continue trading over the weekend and would collect the metal and place it in containers. Although it is not entirely clear from the evidence, Mr Khan asks me to infer that the containers were loaded by the Sunday of that weekend, 1 June 2008. He states specifically that Warren Metals employees loaded the two shipping containers over Queen's Birthday weekend. They were to be taken to the Auckland commercial wharf and loaded onto a vessel bound for South Korea on 6 June 2008.

[40] Mr Khan argues that the metal, after it was paid for on the Friday and then loaded by Warren Metals' employees over the weekend into containers owned by Warren Metals, became the property of Warren Metals by 1 June 2008. Accordingly, when North Island Metals Ltd went into liquidation on 5 June 2008, nothing changed. The property in the metal had already passed in terms of ss 19 and 20 of the Sale of Goods Act 1908 to Warren Metals and Warren Metals was entitled to it.

[41] If the facts relied on by Mr Khan are proven, then there is an arguable cause of action available to Warren Metals based on conversion or detinue against the liquidators for refusing to provide the containers of metal worth $40,000. There may also be a claim based on quantum meruit for the unjust enrichment of the liquidators in relation to the second payment of $32,337.90, a payment for the metal which was in fact at that point already owned by Warren Metals.

[42] It can be seen that this reasoning has nothing to do with ss 248 and 284 of the Act. Rather, the issues turn on the law relating to agency and the sale of goods. Warren Metals is not claiming in these proceedings to have any causes of action against the various companies in liquidation. What it is claiming is that it owned certain property and that Messrs Grant and Khov had acted unlawfully in respect of that property. There is no jurisdictional bar. There is the defence already referred to that the liquidators were acting only as agents for the company and are not personally liable. There are issues as to passing of property. However, those arguments can be dealt with in the District Court.

Conclusion

[43] Sections 248 and 284 were not a bar to the personal claims that were being brought against the liquidators. Those claims should not have been struck out on the basis that the District Court had no jurisdiction. It had jurisdiction.

[44] Mr Khan's amended statement of claim does not reflect the causes of action that he has now argued before me in relation to the payments. However, presumably Warren Metals will be seeking leave to file an amended statement of claim in the District Court. I observe that providing it does so promptly, there may be no prejudice and no impediment to an amendment. Given that I am going to allow the appeal in any event in relation to the press, I propose allowing the appeal generally so that the appellant can re-plead.

Result

[45] The appeal is allowed and the order striking out the proceedings is set aside. I order that the proceedings are to be heard in the District Court.

[46] The order giving costs in favour of the respondents against the appellant of 21 September 2012 is also quashed.

[47] As to costs, at this point the appellant appears to be entitled to costs in this Court. I would propose making an order for costs and reasonable disbursements in the appellant's favour. I would quash the costs order on the strike out application. Those costs will be determined ultimately in the substantive District Court decision.

[48] However, I have not heard argument on the point. If the parties cannot agree costs the appellant is to file submissions by Wednesday, 6 March 2013 and the respondents are to file submissions by Wednesday, 20 March 2013.

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Asher J