

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

**CIV-2015-404-1786
[2015] NZHC 2513**

UNDER the Companies Act 1993 section 286
IN THE MATTER OF an order to enforce liquidators' duties
BETWEEN STOJAN STOJKOV
Applicant
AND IMRAN MOHAMMED KAMAL
Respondent

Hearing: On the papers
Appearances: M Taylor for Applicant
J K Mahuta-Coyle for Respondent
Judgment: 13 October 2015

COSTS JUDGMENT OF ASSOCIATE JUDGE R M BELL

*This judgment was delivered by me on 13 October 2015 at 4:30pm
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Solicitors:

Angela Parlane, Auckland, for Applicant
Devine Law Ltd (Fintan Devine) Wellington, for Respondent

Copy for:

Matt Taylor, Auckland, for Applicant
J K Mahuta-Coyle, Wellington, for Respondent

[1] Stojan Stojkov is a creditor of Bela Ltd for \$18,348.50 being the outstanding part of an award by the Employment Relations Authority for unpaid wages. Bela Ltd carried on business as a restaurant in Auckland. On 20 June 2015 it went into voluntary liquidation, appointing Imran Mohammed Kamal as liquidator. While the company operated only in Auckland and all its creditors are in Auckland, Mr Kamal has his office in Porirua. Mr Stojkov requested a creditors' meeting. Mr Kamal refused. Mr Stojkov applied for an order requiring Mr Kamal to call a creditors' meeting. Mr Kamal opposed. He withdrew his opposition before the matter was called. On 4 September 2015 I made orders in terms of Mr Stojkov's application and directed that a meeting of creditors be called within 15 working days.

[2] I directed the parties to file memoranda if they could not agree costs. This decision deals with the costs application. There are two questions:

[a] What is the costs category for the proceeding?

[b] Should Mr Kamal pay costs personally or is he entitled to be reimbursed out of the assets of the company?

[3] There is no dispute that Mr Stojkov is entitled to costs, as he has succeeded. The parties agree on the time allocations and the steps claimed for. I have assessed costs according to the circumstances at 4 September 2015. In their memoranda for costs, the parties have also raised matters that occurred later. Those matters are not relevant to the costs judgment for this proceeding although they may be relevant for other aspects of the liquidation.

What is the costs category for the proceeding?

[4] Mr Stojkov contends for category 2, Mr Kamal for category 1. This is not a category 1 proceeding. Applications under s 286 of the Companies Act to compel liquidators to carry out their duties are not so straightforward that they should be given to junior counsel. Care is required to ensure that the application is brought

within the provisions of the Companies Act and the High Court Rules to ensure that appropriate relief is sought. Not all counsel get it right, including those with average skill and experience.

[5] I approve the applicant's calculation of costs under category 2 at \$4,906.00 with disbursements of \$540.00, a total of \$5,446.00.

Should Mr Kamal pay costs personally or is he entitled to be reimbursed out of the assets of the company?

[6] The parties agree that ordinarily liquidators are not personally liable for costs. In *Mana Property Trustee Ltd v James Developments Ltd*,¹ the Supreme Court said:

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. In the case of a liquidator that is a principle of very long standing. 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] Counsel for Mr Sojkov also referred to *McPherson's Law of Company Liquidation*:²

... a liquidator will in the absence of negligence, unreasonable behaviour [sic] or misconduct ordinarily have a right to an indemnity out of the company's assets for the costs ... and so in that case will only personally be at risk if the company's assets are insufficient to meet them. A liquidator who has acted unreasonably or misconducted him or herself in relation to the proceeding, however, can be deprived of the indemnity for the costs and forced to bear them him or herself.

[8] In *Re Wilson Lovatt & Sons Ltd*³ Oliver J said:

The indemnity which the liquidator will ordinarily get will be lost if it appears that he has been guilty of some gross misconduct or error, but those are the only circumstances in which he will be deprived of his indemnity.

¹ *Mana Properties Ltd v James Developments Ltd* (No.2) [2010] NZSC 124, [2011] 2 NZLR 25 at [10].

² Michael Gronow and Rosalind Mason (eds) *McPherson's Law of Company Liquidation* (online looseleaf ed, Lawbook Co) at [8.1125].

³ *Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 at 282.

[9] Mr Kamal did breach his duty. Under s 245(1)(b)(iii) of the Companies Act, a liquidator is required to call a meeting of creditors if a creditor gives such notice in writing to the liquidator within 10 working days of receiving the liquidator's notice that no meeting will be held. Mr Stojkov's lawyer did give notice within the required 10 working days. In response, Mr Kamal maintained that the notice was outside the 10 working days. That was incorrect. Mr Stojkov's lawyer pointed out the error to Mr Kamal, but Mr Kamal still refused to call the meeting. He did not later allege that the notice was out of time but claimed instead that the cost of the meeting was not justified.

[10] Mr Stojkov acted reasonably by pointing out to Mr Kamal that his contention that the notice was out of time could not stand scrutiny. It must have been clear to Mr Kamal after receiving the second letter from Mr Stojkov's lawyer, that he was then required to call the meeting of creditors. Whatever Mr Kamal's own views as to the benefits of a creditors' meeting, the Companies Act required him to call the meeting.

[11] In these circumstances, I cannot see that Mr Kamal can say that this was a simple error of judgment on his part. He knew the law. He knew his duty to call the meeting. He refused to do so. In these circumstances, it would be unfair to creditors for the costs incurred in Mr Kamal's failure to carry out his duty under the Companies Act to call a meeting to fall on them rather than Mr Kamal personally. I find that his conduct is so unreasonable and out of the ordinary that he should pay the order for costs personally.

[12] I order costs in favour of Mr Stojkov and against Mr Kamal for \$5,446.00, including disbursements.

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Associate Judge Bell