IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2013-441-223
[2014] NZHC 2736

UNDER	section 293(1A)(b) of The Companies Act 1993
IN THE MATTER OF	Nature Green (NZ) Limited (in liquidation)
BETWEEN	DAVID ROSS PETTERSON as liquidator of NATURE GREEN (NZ) LIMITED (in liquidation) Applicant
AND	COLIN IAN CROMBIE Respondent

On the papers

Counsel:	D M Hughes and L M Van for Applicant N Gray for Respondent
Judgment:	5 November 2014

RESERVED JUDGMENT (NO. 2) OF ASSOCIATE JUDGE SMITH

---

[1] In my judgment dated 18 June 2014, I called for memoranda from counsel dealing with the following matters:

(a) The appropriate order to be made in respect of the sum of $25,241.64 which was not secured by the 2012 GSA;

(b) Costs;

(c) The need or otherwise for the order sought by the liquidator removing the registration of the 2012 GSA from the Personal Properties Securities Register (PPSR).

[2] Counsel have now filed a number of memoranda, the most recent of which was received on 10 October 2014.

The appropriate order in respect of the $25,241.64

[3] This is the amount of the charge held by Mr Crombie over the 2012 leaf stock which was not set aside by the Court. I am obliged to counsel for their extensive submissions on what is to become of the sum, and have decided in favour of the liquidator on this point.

[4] I accept Mr Hughes' submission for the liquidator that, notwithstanding s 84 of the Judicature Act 1908 and the rules of equity, the general position is that a liquidator who successfully recovers a voidable preference does so for the benefit of unsecured creditors, and not secured ones. He relies on the English case *Re Yagerphone* to support his position.[1] In that case Bennett J said:

> There have been two cases which establish quite clearly that, whether in bankruptcy or in the liquidation of a company, a secured creditor has no right to enforce for his benefit the remedy which is given to a trustee in bankruptcy or the liquidator of a company of avoiding a payment or setting aside a transaction made or entered into with a view to preferring a creditor of the bankrupt or a company in liquidation.

[5] Mr Hughes says that ANZ's GSA over the leaf stock is non-specific, and accordingly Disability Training Services Investment Trust Board cannot stand in its place to recover the sum, as Mr Gray for Mr Crombie contends. Mr Hughes' submission is supported by the Australian case *Tolcher v National Australia Bank Ltd.*[2]

[6] Accordingly I direct that the liquidator is entitled to payment of the sum of $25,241.64.

---

1 *Re Yagerphone* Ltd [1935] Ch 392.
2 *Tolcher v National Australia Bank Ltd* [2003] NSWSC 207; (2003) 174 FLR 251.

Costs

[7] On the issue of costs, Mr Hughes submits that the liquidator has been partially successful, and that in accordance with ordinary principles costs should follow the event.[3] He points out that Mr Crombie's submissions relating to estoppel and the application of s 296 of the Act both failed, as did his claim to a beneficial interest in the 2010/2011 leaf stock proceeds under an alleged constructive trust. He submits that there is no assertion that the liquidator acted irresponsibly in carrying out his statutory duties under the Act, or that he acted in bad faith.

[8] Mr Hughes also argues that it would not be appropriate to make any order for costs against a liquidator who brings a proper application in the discharge of the duties of his office. A liquidator has a duty to perform, and as long as the liquidator acts responsibly, he should not be hampered in his attempts to perform it. Mr Hughes asks for costs to the liquidator on a scale 2B basis, in the total sum of $10,574.

[9] For Mr Crombie, Mr Gray seeks costs against the liquidator, with an uplift. The essence of his argument is that the liquidator knew before the proceeding was filed that Mr Crombie held a valid substituted charge over the 2012 leaf stock. He submits that all of Mr Crombie's arguments which prevailed following the hearing on 3 April 2014 had been advanced in correspondence between his firm and the liquidator's solicitors before the proceeding was filed, and that the liquidator should have appreciated then that the proceeding could not succeed. Instead, the liquidator allowed himself to become distracted by his belief that Mr Crombie was aware (before the event) of the sale of the first quantity of 2010 leaf stock, when any such knowledge could not have affected the issue of the validity of the 2010 GSA over the proceeds of sale of that leaf stock.

[10] Mr Gray submits that the correct approach is to start by assessing scale 2B costs in Mr Crombie's favour, then discount those costs by 12 per cent, being the proportion of the total claim (for $212,728.79) on which Mr Crombie was unsuccessful. Adopting that 12 per cent discount, Mr Gray came up with a scale 2B

---

[3] High Court Rules, r 14.2(a).

figure of $7,881. To that sum, he submitted there should be added a 50 per cent uplift to mark the liquidator's alleged intransigence in proceeding with an untenable claim.

[11] In my view, there is some merit in each party's submissions. The liquidator has been partially successful, albeit for a far more modest sum than the amount which was claimed. Having appreciated his error in advising Mr Crombie that he regarded the 2012 GSA as valid in respect of the entire proceeds of sale of the 2012 leaf stock, I accept that it was appropriate for the liquidator to reopen the issue of the validity of the 2012 GSA, and to take appropriate steps in the interests of unsecured creditors to recover any sum he reasonably believed Mr Crombie was not entitled to retain.

[12] There was no mention in Mr Crombie's costs submission of any offer to pay to the liquidator the $25,241.64 for which he was eventually found liable, and of course his arguments based on the constructive trust, estoppel, and s 296 of the Act were all unsuccessful.

[13] On the other side of the ledger, I accept Mr Gray's submission that the liquidator could have and should have appreciated much earlier that the claim was likely to fail to the extent of the sum of $187,487.15, being the value of the remaining 2010/2011 leaf stock proceeds at the date the 2012 GSA was given. If that position had been recognised and accepted at a far earlier stage, it may well be that the parties could have reached some resolution which would have avoided the need for the hearing. For one thing, the issues of detriment and unconscionability, relevant to the estoppel argument, may well have been viewed in a different light by Mr Crombie if he had known that he was only facing a claim for approximately $25,000.

[14] I have a broad discretion in the matter of costs, and in my view the justice of this case will best be met if costs are left to lie where they fall. There will accordingly be no order for costs.

The PPSR issue

[15] The remaining issue on which I sought submissions from counsel related to the need or otherwise for an order removing the registration of the 2012 GSA from the PPSR. Neither counsel made any submission on the point, and in those circumstances I infer that no order is considered necessary.

Associate Judge Smith

Solicitors:
Kensington Swan, Auckland for Applicant
Sainsbury, Logan & Williams, Napier for Respondent