

IN THE SUPREME COURT OF NEW ZEALAND

**SC 87/2014
[2015] NZSC 80**

BETWEEN CLIVE RICHARD BRADBURY AND
GREGORY ALAN PEEBLES
Applicants

AND COMMISSIONER OF INLAND
REVENUE
Respondent

SC 90/2014

BETWEEN ACCENT MANAGEMENT LIMITED
(IN LIQUIDATION)
Applicant

AND ATTORNEY-GENERAL
First Respondent

COMMISSIONER OF INLAND
REVENUE
Second Respondent

SC 103/2014

BETWEEN CLIVE RICHARD BRADBURY AND
GREGORY ALAN PEEBLES
Applicants

AND JUDICIAL CONDUCT
COMMISSIONER
Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: R A Edwards for Accent Management Limited (In Liquidation)
R L Roff and S J Leslie for Attorney-General and
Commissioner of Inland Revenue
D J Goddard QC and L Theron for Judicial Conduct
Commissioner
L J Taylor QC for the Hon Justice Venning
G S Caro for Official Assignee
G A Muir as Interested Party

Judgment: 8 June 2015

JUDGMENT OF THE COURT

- A In SC 90/2014, we fix costs and disbursements in favour of the Commissioner of Inland Revenue in the sum of \$3,659.67.**
- B Leave is granted under s 76(2) of the Insolvency Act 2006 to permit continuation of the applications for costs in respect of SC 87/2014 and SC 103/2014.**
- B In SC 87/2014 we fix costs and disbursements in favour of the Commissioner of Inland Revenue in the sum of \$10,653.99.**
- C In SC 103/2014 we fix costs and disbursements as follows:**
- (i) To the Judicial Conduct Commissioner in the sum of \$5,294.50;**
 - (ii) To the Hon Justice Venning in the sum of \$2,829.**
-

REASONS

(Given by William Young J)

Background

[1] In a judgment delivered on 2 December 2014,¹ this Court dismissed three related applications for leave to appeal:

- (a) *Bradbury v Commissioner of Inland Revenue* (SC 87/2014);
- (b) *Accent Management Ltd v Attorney-General* (SC 90/2014); and
- (c) *Bradbury v Judicial Conduct Commissioner* (SC 103/2014).

¹ *Bradbury v Commissioner of Inland Revenue* [2014] NZSC 174, (2014) 26 NZTC 21-112.

Counsel for the Judicial Conduct Commissioner, Justice Venning and the Commissioner of Inland Revenue subsequently filed applications for costs.

[2] Complicating the determination of those applications have been the adjudication in bankruptcy of Messrs Bradbury and Peebles and the placing into liquidation of Accent Management Ltd. This is because there is at least scope for argument whether:

- (a) orders for costs made in the present proceedings would be provable in the bankruptcies of Messrs Bradbury and Peebles; and
- (b) whether pursuit of the claim for costs against Accent Management requires the consent of the liquidators or the sanction of the Court.

The latter issue has been resolved by the liquidators of Accent Management giving consent to the continuation of the proceedings in relation to costs.

[3] In this judgment we will address first the claims for costs against Accent Management and secondly the claims in respect of Messrs Bradbury and Peebles.

Costs in respect of SC 90/2014 – Accent Management

[4] The only applicant in these proceedings is Accent Management. As noted, its liquidators have consented to the continuation of the present proceedings to allow determination of the application for costs. This makes it unnecessary to consider whether the claim for costs is subject to s 248(1)(c)(i) of the Companies Act 1993. As well, it is not in dispute that an order for costs made on that application provides the basis for an admissible claim under s 303 of the Act.

[5] Both the High Court² and Court of Appeal³ awarded indemnity costs against Accent Management and for the reasons given by those courts in doing so and by this Court in refusing leave, an award of indemnity costs is warranted in favour of

² *Accent Management Ltd v Attorney-General* [2013] NZHC 1447, (2013) NZRC 21-020 at [33].,

³ *Accent Management Ltd v Attorney-General* [2014] NZCA 351, (2014) 26 NZTC 21-087 at [45].

the Commissioner.⁴ We fix costs and disbursement in favour of the Commissioner in the sum of \$3,659.67.⁵

Costs in respect of SC 87/2014 and SC 103/2014 – Messrs Bradbury and Peebles

The relevant statutory provisions

[6] Sections 76 and 232 of the Insolvency Act 2006 provide:

76 Effect of adjudication on Court proceedings

- (1) On adjudication, all proceedings to recover any debt provable in the bankruptcy are halted.
- (2) However, on the application by any creditor or other person interested in the bankruptcy, the Court may allow proceedings that had already begun before the date of adjudication to continue on the terms and conditions that the Court thinks appropriate.

...

232 What debts are provable debts

- (1) A provable debt is a debt or liability that the bankrupt owes—
 - (a) at the time of adjudication; or
 - (b) after adjudication but before discharge, by reason of an obligation incurred by the bankrupt before adjudication.

...

[7] On a historical note, s 87 of the Insolvency Act 1967 was in these terms:

87 Provable Debts

- (1) ... all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject at the time of his adjudication, or to which he becomes subject before his discharge by reason of any obligation incurred before the time of his adjudication, shall be debts provable in bankruptcy.

⁴ In saying this we express no view of the other litigation referred to in the submissions of Dr Garry Muir.

⁵ As sought by the Commissioner. These, and all other awards, reflect actual costs charged on a GST inclusive basis.

Initial position adopted by the Official Assignee

[8] The position initially adopted by the Official Assignee was that if orders for costs were made by this Court they would not be provable in the bankruptcy of Messrs Bradbury and Peebles; this because, prior to adjudication, there was no obligation to pay costs. Since costs ordered by the Court would not be provable in bankruptcy, s 76 has no application and the Official Assignee therefore has no standing on the costs application, albeit that Messrs Bradbury and Peebles could be heard.

[9] This argument is consistent with a series of English cases in which it was held that an order for costs made after adjudication in respect of proceedings which had been commenced before adjudication were not provable in bankruptcy.⁶

Recent developments in the Supreme Court of the United Kingdom

[10] The cases to which we have just referred were recently over-ruled by the Supreme Court of the United Kingdom in *Re Nortel GmbH*.⁷

[11] In issue in *Nortel* was r 13.12 of the Insolvency Rules:

13.12.— “Debt”, “liability” (winding up)

- (1) “Debt”, in relation to the winding up of a company, means (subject to the next paragraph) any of the following—
 - (a) any debt or liability to which the company is subject—
 - (i) in the case of a winding up which was not immediately preceded by an administration, at the date on which the company went into liquidation;
 - (ii) in the case of a winding up which was immediately preceded by an administration, at the date on which the company entered administration;
 - (b) any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date; and

⁶ See *In re Bluck, Ex p Bluck* (1887) 57 LT 419 (QB), *In re British Gold Fields of West Africa* [1899] 2 Ch 7 (CA), *In re A Debtor (No 68 of 1911)* [1911] 2 KB 652 (CA), and *In re Pitchford* [1924] 2 Ch 260 (Ch) and *Glenister v Rowe* [2000] Ch 76 (CA).

⁷ *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209.

- (c) any interest provable as mentioned in Rule 4.93(1).
- (2) For the purposes of any provision of the [Insolvency Act 1986 (UK)] or the Rules about winding up, any liability in tort is a debt provable in the winding up, if either—
 - (a) the cause of action has accrued—
 - (i) in the case of a winding up which was not immediately preceded by an administration, at the date on which the company went into liquidation;
 - (ii) in the case of a winding up which was immediately preceded by an administration, at the date on which the company entered administration;
 - (b) all the elements necessary to establish the cause of action exist at that date except for actionable damage.
- (3) For the purposes of references in any provision of the Act or the Rules about winding up to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in any such provision to owing a debt are to be read accordingly.

...

[12] As will be noted, r 13.12(1)(a) and (b) are very similar in expression to s 232(1) of our Insolvency Act. The judgment in *Nortel* focused primarily on r 13.12(1)(b), albeit that r 13.12(3) was also mentioned.

[13] Lord Neuberger’s approach is captured in the following passage from his judgment:⁸

In my view, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to the discretion of the court. An order for costs made against a company in liquidation, made in proceedings begun before it went into liquidation, is therefore provable as a contingent liability under rule 13.12(1)(b) [corresponding to s 232(1)(b) of the Insolvency Act], as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings.

⁸ At [89]. See also Lord Sumption’s judgment at [179].

The New Zealand authorities

[14] The New Zealand cases proceeded on the basis that costs awarded after adjudication are not provable.⁹ This has been so in relation to both the former s 87 and the current s 232. In these cases, the courts simply followed, directly or indirectly, the English cases which have now been over-ruled by *Nortel*.

The current position of the Official Assignee

[15] The Official Assignee accepts that *Nortel* should be regarded as the controlling authority and has no opposition the continuation of the applications for costs.

Our approach

[16] The logic of the approach adopted in *Nortel* is convincing and we are satisfied that it should be followed.

SC 87/2014

[17] Indemnity costs were awarded in the High Court¹⁰ and the Court of Appeal¹¹ upheld that award albeit, that Court awarded scale costs only on the appeal.¹² Despite the approach adopted by the Court of Appeal we consider that indemnity costs are appropriate given that what was proposed was a collateral attack on the judgment of this Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*.¹³

SC 103/2014

[18] These proceedings were an abuse of process and an order for indemnity costs is appropriate.

⁹ See for example *Re Auckland Council, ex parte Mawhinney* [2014] NZHC 297 and *Kaye v Auckland District Law Society* [1998] 1 NZLR 151 (HC),

¹⁰ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZHC 441, (2014) 26 NZTC 21-073 at [24]–[28].

¹¹ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 350, (2014) 26 NZTC 21-086 at [58].

¹² At [60].

¹³ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

Orders as to SC 87/2014 and SC 103/2014

[19] The orders made are:

- (a) Leave is granted under s 76(2) of the Insolvency Act to permit continuation of the applications for costs in respect of SC 87/2014 and SC 103/2014.
- (b) In SC 87/2014 we fix costs and disbursements in favour of the Commissioner of Inland Revenue in the sum of \$10,653.99.
- (c) In SC 103/2014 we fix costs and disbursements as follows:
 - (i) to the Judicial Conduct Commissioner in the sum of \$5,294.50; and
 - (ii) to Justice Venning in the sum of \$2,829.

Solicitors:

Anderson Creagh Lai Limited, Auckland for Accent Management Limited (In Liquidation)
Crown Law Office, Wellington for Attorney-General and Commissioner of Inland Revenue
Bell Gully, Wellington for the Hon Justice Venning
Meredith Connell, Wellington for Judicial Conduct Commissioner
Ministry of Business, Innovation and Employment, Auckland for Official Assignee