Federal Court of Australia

Brooks (liquidator), in the matter of NB Contracting Pty Ltd (in liq) v JAMP Hardware Pty Ltd [2021] FCA 1612

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| File number(s): | TAD 27 of 2020 |
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| Judgment of: | **KERR J** |
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| Date of judgment: | 20 December 2021 |
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| Catchwords: | **COSTS** –liquidator not taking steps to discontinue a proceeding in circumstances where she did not intend to further pursue her claim – proceeding dismissed for want of prosecution – whether change or clarification of law after proceeding commenced a basis for denying liability for costs – liquidator to pay Respondent’s costs  |
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| Legislation: | *Corporations Act 2001* (Cth)  |
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| Cases cited: | *Badenoch Integrated Logging Pty Ltd v Bryant in the matter of Gunns Ltd (in liq) (receivers and managers appointed)* [2021] FCAFC 64*Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufactures Pty Ltd* [2021] FCAFC 228*Re Buena Vista Motors Pty Ltd (in Liq)* [1971] 1 NSWLR 72 *Riddle v The King* [1911] 12 CLR 622  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 29 |
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| Date of last submission/s: | 17 December 2021 |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant: | Ms P Sutherland |
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| Solicitor for the Applicant: | Paula Sutherland & Associates |
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| Counsel for the Respondent: | Mr R Hudson |
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| Solicitor for the Respondent: | Butler McIntyre & Butler |

ORDERS

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|  | TAD 27 of 2020 |
| IN THE MATTER OF NB CONTRACTING PTY LTD (IN LIQUIDATION) ACN 160 507 317  |
| BETWEEN: | SHELLEY-MAREE BROOKS IN HER CAPACITY AS LIQUIDATOR OF NB CONTRACTING PTY LTD (IN LIQUIDATION)Applicant |
| AND: | JAMP HARDWARE PTY LTD (ACN 139 317 150)Respondent |

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| order made by: | KERR J |
| DATE OF ORDER: | 20 DECEMBER 2021 |

THE COURT ORDERS THAT:

1. The Applicant pay the Respondent’s costs of the proceeding including the costs of its interlocutory application dated 26 November 2021 as may be agreed or in default of agreement as determined by taxation.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KERR J:

1. In October 2020, Ms Shelley-Maree Brooks in her capacity as Liquidator of NB Contracting Pty Ltd (in liquidation) (**the Applicant**) commenced these proceedings inter-alia to recover the sum of $136,000.00. That sum was claimed by the Applicant to have been the product of unfair preference transactions within the terms of s 588FE of the *Corporations Act 2001* (Cth) by way of payments the company had made to JAMP Hardware Pty Ltd (**the Respondent**).
2. On 8 January 2021, the Respondent filed its defence.
3. On 4 February 2021, I referred the proceeding by consent to mediation before a Registrar. It may be inferred that no agreed settlement was forthcoming.
4. On 10 May 2021 a Full Court of this Court gave judgment in *Badenoch Integrated Logging Pty Ltd v Bryant in the matter of Gunns Ltd (in liq) (receivers and managers appointed)* [2021] FCAFC 64 (Middleton, Charlesworth and Jackson JJ) (**Badenoch**). The reasoning in Badenoch addressed how payments made on a running account are (or are not) available to be taken into account in instances where transactions have been asserted to involve an unfair preference. The Applicant cites that decision as the “now fundamental decision” in those regards.
5. At a subsequent case management hearing Ms Sutherland, counsel for the Applicant, indicated that having regard to the Full Court’s reasons in Badenoch her instructions were to not further pursue the Applicant’s claim against the Respondent.
6. On 20 August 2021, I made orders by consent facilitating that the Applicant might seek to discontinue without liability as to costs as otherwise would be the automatic position.
7. When no step was taken in that regard I scheduled the proceeding for a case management hearing.
8. On 20 September 2021, I ordered by consent that the Applicant have leave to file and serve a notice of discontinuance and provided for a timetable for submissions in relation to costs.
9. Again no step was taken by the Applicant. Taking the view that the proceeding could not simply be left in limbo without resolution I scheduled a further case management hearing. When the matter was called there was no appearance for the Applicant nor had any explanation been proffered. The Respondent indicated that it wished to bring finality to the proceeding and intended to bring an appropriate application.
10. On 26 November 2021, the Respondent filed an interlocutory application in which it sought an order that the Applicant’s proceeding be dismissed for want of prosecution. Its application was accompanied by a supporting affidavit. I listed that interlocutory application for hearing on 1 December 2021. Both parties were represented by counsel on that occasion.
11. After hearing from the parties I ordered by consent that the Applicant’s proceeding be dismissed for want of prosecution and that subject to any application as might be made by a party seeking an alternative order that the Applicant pay the Respondent’s costs. I further ordered that any such application would be determined on the papers.
12. The Applicant took advantage of that opportunity. She has filed submissions on the subject of costs as follows:

1. The Applicant refers to the following provision.

**CORPORATIONS ACT 2001 - SECT 471B**

**Stay of proceedings and suspension of enforcement process**

 While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

(a) a proceeding in a court against the company or in relation to property of the company; or

(b) enforcement process in relation to such property;

except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

2. The Applicant did not, at any time, seek leave to proceed. There was no basis to order that the Applicant must discontinue the proceedings due to want of prosecution. The proceedings were stayed by reason of statute without any active steps being taken by the liquidator.

3. It could not be said that the liquidator acted unreasonably in commencing this action. The now fundamental decision in Badenoch post dated the commencement of the proceedings.

4. In *International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors (No 2)* [2013] QSC 307, McMurdo said that If proceedings commenced against a liquidator are successful, usually the cost orders are made against the company. However, if the liquidator acted unreasonably, the liquidator may be personally liable.

5. The costs order in this instance made on 1 December 2021 are against the liquidator personally. The above decision by analogy applies in this instance where the liquidator has commenced proceedings and subsequently did not pursue those because the other party had become subject to a winding up order and because the law effectively changed after the commencement of proceedings. Prior to Badenoch the law in relation to preference payments was different and there could be no sensible argument that the liquidator did not have a case to pursue.

6. Analogous principles apply to liquidators in relation to proceedings in which they participate in their own name: *Re Buena Vista Motors Pty Ltd (In Liq) and the Companies Act* [1971] 1 NSWLR 72, in which Street J ordered a liquidator who brought an unsuccessful claim to pay the opponents’ costs but to be indemnified out of the company’s assets since, although “the claim had been unsuccessful, it could not be characterized as frivolous or vexatious. Nor could the liquidator be said to have been acting unreasonably in bringing the claim forward for litigation” (at 73).

7. I also refer to *Lewis v Nortex Pty Ltd (in liq)* [2006] NSWSC 480 at [47]; the same principles apply also in respect of proceedings which they conduct in the name of the company: *Mead v Watson as Liquidator for Hypec Electronics* [2005] NSWCA 133 at [11].

8. A change in the law after proceedings have been commenced and where prior to that change the law was such that the liquidator had a sound basis to pursue her claim does not justify an order making the liquidator liable for costs. It is not open to conclude, nor has it been submitted that the claim prior to Badenoch could be characterised as frivolous or vexatious.

…

(emphasis in original)

1. The Respondent filed responsive submissions. Having regard to the conclusions I have reached I need not set out those submissions in full but I think it useful to note paragraphs 3 and 4 as are as follows:

3. The Respondent notes the Applicant’s reliance upon (and purported analogy to) statements in Justice McMurdo’s decision in *International Cat Manufacturers PIL (in liq) v Rodrick & ors* (“**Rodrick**”). That reliance/analogy is misplaced - that case in fact directly supports that in the present case the respondent's costs ought be borne by the Applicant. In *Rodrick*, the plaintiff liquidators sought that they not be required to pay the (successful) defendants’ costs of the proceedings. McMurdo J ordered that the liquidators pay the defendants’ costs. The statement of principle in para 4 of the Applicant’s submissions attributed by her to McMurdo J derived from His Honour's quote from the NSW Court of Appeal's decision in *Silvia v Brodyn Pty Ltd*, which His Honour relied upon when distinguishing between cases where the liquidator is an unsuccessful plaintiff (when ordinarily liquidators must pay costs) and an unsuccessful defendant (when liquidators may, particularly if they have behaved reasonably, be provided with relief from personal liability for the costs).

4. In full, paragraphs [5] – [6] of McMurdo J’s decision read:

[5] **“**The plaintiffs here cite a recent decision of the Supreme Court of New South Wales, in which costs were ordered against a liquidator, and submit that it is contrary to “the previous line of authority” and ought not be followed. The case is *AMC Commercial Cleaning (NSW) Pty Ltd v Coade*, where the liquidator was a respondent to the proceeding. The question for the judge there was whether, in all the circumstances, it was “appropriate to treat the liquidator as a defendant with the attached protection for that class of case”, when it was said that it was the liquidator's conduct which effectively necessitated the commencement of the proceedings. Rein J was persuaded that in the facts of that case, the liquidator should not be treated as a defendant and that he should be ordered to pay the costs. That judgment applied what is a well established distinction between the respective positions of a liquidator as a plaintiff and as a defendant. The distinction was explained by Rein J by reference to a decision of the New South Wales Court of Appeal *in Silvia v Brodyn Pty Limited*, in which Hodgson JA (with whom Ipp and Basten JJA agreed) said:

“[50] If proceedings are brought by a liquidator in relation to a company's affairs, generally an order for security for costs will not be made; but if those proceedings are unsuccessful, then an order for costs will generally be made against the liquidator personally: *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274. In that case, at 285, Oliver J said this:

‘I think that a review of the authorities does disclose that a clear dichotomy between the case where the liquidator is sued and the case where the liquidator initiates proceedings, is established, and indeed it seems me to be a perfectly reasonable one. I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A trustee or a personal representative who institutes proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator, and the authorities which point that way seem to me, if I may say so respectfully, to be completely reasonable.

I can quite see that there may be very powerful reasons of policy for a rule that a liquidator, when carrying out his functions and thus subjecting himself to the possibility of proceedings against him by parties who are discontented with the way in which he has carried out those functions, must be entitled to defend himself without being subjected to the risk of having costs awarded against him personally, because of course he cannot protect himself against claims being made. Unless there were some such rule it might be very difficult to get persons to take on the heavy responsibility of the liquidation of companies. It seems to me that it is quite a different matter where the liquidator himself takes it on himself to institute proceedings, whether they be proceedings in the winding-up or otherwise.’

[51] The liquidator would generally be entitled to an indemnity from the assets of the company, although that may be denied if the liquidator has acted unreasonably: *In Re Silver Valley Mines* (1882) 21 ChD 381.

[52] If proceedings brought against the liquidator are successful, generally a costs order will be made in such a way that the liquidator does not incur any personal liability. This is in accordance with the passage from *Re Wilson Lovatt* quoted above, and is supported by *Re Bonang Gold Mining Co Ltd* (1893) 14 NSWLR (Equity) 262, *Re Beuna Vista Motors Pty Ltd (in liq)* [1971] 1 NSWLR 72; *Irons v Merchant Capital Ltd* (1994) 116 FLR 204 at 209-10, and *Kirwan v Cresvale Far East Ltd (in liq)* [2002] NSWCA 395; (2002) 44 ACSR 21. I generally agree with the discussion of the authorities by White J in *Mendarma Pty Ltd (in liq) (No 2)* [2007] NSWSC 99 at [13]- [34].

[53] The result indicated by those authorities may be achieved by ordering that the company in liquidation pay the costs (if the company is also a defendant), or by ordering that the liquidator's liability for costs be limited to the amount of assets of the company available for that purpose.

[54] However, if the liquidator has acted unreasonably in defending the litigation, the liquidator may be made personally liable: In *Re Beddoe* [1893] 1 Ch 547; *Mead v Watson; Re Network Welding Pty Ltd (in liq) (No 2)* [2001] NSWSC 809.”

[6] The plaintiffs’ submissions did not refer *to Silva v Brodyn Pty Limited*, and their contention that liquidators can bring unmeritorious cases with an immunity against an order for costs, reflects a serious misunderstanding about an important part of the work of liquidators. *Silva v Brodyn Pty Limited* was cited in the (original) submissions for the first and second defendants and the plaintiffs did not seek to distinguish it or suggest that it was not correct.**”**

The Respondent submits that *Rodrick’s* and *Silva’s* cases ought be applied to the present case.

# Consideration

1. I reject that s 471B of the *Corporations Act 2001* (Cth) has any material bearing on the question. It is commonplace that a liquidator will choose to pursue sums alleged to be due to a company in liquidation: such an application is not capable of being characterised as a proceeding against the company or in relation to its property. A proceeding initiated to recover an unfair preference pursuant to the statute is no more than an assertion by the liquidator to the Court that a third party who has received a payment from the company in liquidation by reason of the circumstances and timing of their receipt has a liability to disgorge funds otherwise lawfully paid to him or her.
2. As was recently reiterated in *Morton as Liquidator of MJ Woodman Electrical Contractors Pty Ltd v Metal Manufactures Pty Ltd* [2021] FCAFC 228 the obligation to pay under s 588FF arises from an order of the Court sought upon the application of the liquidator. It is not an obligation owed to the company arising from a right it has against the creditor (Allsop CJ at [43], [143] [154]; Middleton J at [219] Derrington J concurring).
3. I therefore reject that the proceeding was automatically stayed by reason of the statute. Accordingly I have no need to consider whether in any event it could lie in the mouth of the Applicant at this final remove to assert her own want of power to bring the proceeding she compelled JAMP Hardware Pty Ltd to respond to without previously having even suggested such a contention.
4. I have no reason not to accept the Applicant’s submission that there is no basis for the Court to conclude that the proceeding brought by the liquidator was frivolously or vexatiously brought but that ultimately is a neutral factor in this analysis.
5. I am not entitled assume that prior to the decision in Badenoch the liquidator had “a sound basis to pursue” her claim if that submission is understood to contend I could be satisfied the claim otherwise would have been successful. Prior to the decision in Badenoch, the Respondent had filed a defence in which it had contested the premises of the liquidators claim on the basis of the law prior to that decision. The Respondent maintains that its defence would have been upheld. I note in response simply that there has been no determination on the merits as would allow the Court to make any assessment of whether but for Badenoch the liquidators claim would or would not have succeeded. What is unarguable is that the liquidator ultimately recognised that the proceedings she had brought were without sufficient prospects of success for her to continue with them.
6. Accepting that a proceeding has been properly brought does not for that reason immunise a losing party that has had judgement entered against that party from liability for the costs of the successful party. That is so even if there may have been a clarification of the law by subsequent authority as may have been the cause of that loss. The law is evolutionary in its development. There is always a risk with litigation that subsequent judicial authority may make what a party had understood to be at least an arguable case, unarguable. As Griffith CJ remarked in *Riddle v The King* [1911] 12 CLR 622 at 629 (with the chutzpah appropriate only to a Chief Justice of the High Court and with acknowledgement that it was not his own original observation) “the law is always certain although no one may know what it is”.
7. Moreover, in this instance, as I have earlier referred to and as the Respondent submits, it is a bridge too far for this Court to proceed on the basis that but for the decision in Badenoch the Applicant would have succeeded.
8. The ordinary consequence, as Gleeson CJ, Gummow, Hayne and Crennan JJ explained in *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56; (2007) 234 CLR 53 at [25]-[26] is that while there is “no absolute rule” generally the discretion to award costs is to be exercised in favour of a successful party.
9. I am entitled to infer, having regard to the position counsel for the Applicant took during earlier case management hearings and from the terms of its written submissions on costs that at some point not long after the Full Court’s decision in Badenoch was published the liquidator formed the view that whatever prospects her proceeding may or may not earlier have had it was now doomed to failure.
10. Despite that the Applicant did not immediately discontinue those proceedings as would have avoided further costs being incurred both by her and by the Respondent notwithstanding having been given leave to do so on two occasions with liberty to make submissions as to costs. It was not until after the Respondent had filed its interlocutory application of 26 November 2021 that the Applicant finally consented to these proceedings being dismissed.
11. It is trite that ultimately the discretion to award costs is not fettered. Yet the discretion must be exercised according to law and in the absence of facts or circumstances that justify an alternative order it would be an error of law to not award a successful party their costs.
12. Contrary to the submissions advanced by the Applicant, for the reasons I have given above, I am satisfied the Respondent is entitled to have my discretion exercised in its favour consistently with its prima facie entitlement.
13. That leaves to be resolved whether, consistently with the reasoning of Street J in *Re Buena Vista Motors Pty Ltd (in Liq)* [1971] 1 NSWLR 72 the liquidator who brought this unsuccessful claim should be the beneficiary of an order that she be indemnified in respect of those costs out of the company’s assets as I take to be her submission.
14. The Respondent is not an interested party in that regard and does not argue against such an order being made but plainly any recoupment of those costs from the funds the liquidator has called in will reduce the funds available in the liquidation to be distributed to creditors.
15. In my view I should not make such an order unless sought by formal application of which those creditors have had notice.
16. That provides no reason, whatever course the liquidator may or may not take in that regard, for the Court not to confirm its provisional order of 1 December 2021 that the Applicant pay the Respondent’s costs of the proceeding as may be agreed or in default of agreement as determined by taxation.

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| I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kerr. |

Associate:

Dated: 20 December 2021