

**IN THE DISTRICT COURT  
AT MANUKAU**

**CIV-2016-092-003280  
[2018] NZDC 11032**

BETWEEN	SHOEI CORPORATION LIMITED Plaintiff
AND	SOUTH AUCKLAND VEHICLE (IMPORTS) LIMITED (In Liquidation) First Defendant
AND	NAVIN DUTT SHARMA Second Defendant

Hearing: 28 May 2018

Appearances: Mr Perese for the Plaintiff  
No appearance for the First Defendant  
Mr Khan for the Second Defendant

Judgment: 11 July 2018

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**RESERVED JUDGMENT OF JUDGE R J McILRAITH**

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[1] In a judgment dated 28 July 2017, I granted the plaintiff's application for summary judgment against the first and second defendants, but with respect to liability only. A judicial settlement conference then took place, but regrettably no resolution was reached. A simplified trial on quantum and the first defendant's counterclaim was set down.

[2] In advance of this trial, the plaintiff filed evidence in the form of an affidavit from Mr Moss dated 25 January 2018. In that affidavit, he set out that the plaintiff relied upon three affidavits in support of its claim with respect to quantum. These affidavits included the one referred to, the earlier affidavit of 27 October 2016 filed in support of the application for summary judgment and the further affidavit of 6 March 2017 filed in further support of the application for summary judgment and in response to the first defendant's counterclaim.

[3] In reply to the affidavit of Mr Moss, Mr Sharma filed evidence in the form of an affidavit dated 13 February 2018. In that affidavit, he noted that he is the second defendant in these proceedings and is the director of the first defendant. He said that he was authorised by the first defendant to make the affidavit on its behalf also. In other words, the evidence filed by Mr Sharma was his own, but it was also filed in respect of the first defendant.

### **Liquidation of first defendant**

[4] I have set out this procedural history because it is relevant given the turn of events that occurred. At the commencement of trial, Mr Khan advised that the first defendant had been placed in liquidation at the behest of Mr Sharma in April this year. This occurred pursuant to s 241(2) of the Companies Act. Mr Khan advised that the liquidator appointed was appraised of the proceedings and, in particular, of the trial taking place, and had advised him that it had considered its position and would be taking no steps in the proceedings.

[5] Mr Khan said that given these events he no longer had instructions to act for the first defendant. He said he was present in Court as counsel for the second defendant, Mr Sharma, only.

[6] Mr Perese for the plaintiff was not taken by surprise. His client had received notification from the liquidator by letter dated 18 April. He summarised his view of the legal position.

[7] Pursuant to s 248 of the Companies Act, in the absence of the consent of the liquidator or court order, the plaintiff may not continue its proceedings against the first defendant. Leave from the Court has not been sought to do so and, of course, there has been no agreement from the liquidator to enable these proceedings to continue. The effect, Mr Perese submits, is that the plaintiff's claim against the first defendant is stayed and, by logical inference, the counterclaim by the first defendant against the plaintiff must also be stayed.

[8] He submitted that the Court ought now to determine quantum in relation to the plaintiff's claim against the second defendant, in relation to whom it is entitled to continue to proceed. The second defendant's liability does, of course, arise pursuant to his guarantee. He is accordingly, a principal debtor. Mr Perese advised that as at the date of trial the amount sought by the plaintiff against the second defendant is \$106,304.

[9] Mr Khan addressed me orally on these matters. I invited him at the conclusion of the trial to file any written submission adding to those oral submissions within seven days.

[10] On 1 June submissions were filed (although these were not brought to my attention until 2 July). In these submissions Mr Khan repeated his oral submissions but added that he now had instructions to act for the first defendant. He requested that the matter be listed for directions to be given "to have the matters to be finalised accordingly in the interest of justice".

[11] When these submissions were brought to his attention, Mr Perese responded. He submitted that well prior to liquidation of the first defendant, the first and second defendants filed a consolidated statement of defence and counterclaim. The second defendant raised the same issues as were advanced in the now stayed proceedings brought by the first defendant.

[12] He noted that the court had afforded numerous opportunities to both defendants to put before the court any evidence relied upon. Evidence was filed well before the first defendant's liquidation.

[13] Given the delays in the case, all attributable to the defendants, he submitted that the court should give its judgment in respect of the plaintiff's claim against Mr Sharma. I agree. Mr Khan has added nothing of substance to his oral submissions on the day of trial. As made clear that day, given the absence of the liquidator and the staying of the proceedings by and against the first defendant, I considered that the court was in a position to proceed to judgment in relation to the claim against Mr Sharma given the evidence which had been filed.

## **The evidence on quantum**

[14] Mr Perese took me through the plaintiff's claim and the defence filed by the first and second defendants. He did so by reference to the evidence of Mr Moss. In particular, he referred to paragraph 5 of Mr Moss's affidavit of 25 January 2018.

[15] In that affidavit, Mr Moss breaks down the plaintiff's claim into three components:

- (a) A claim for interest with respect to 32 vehicles sold by the defendants;
- (b) A claim for 10 vehicles which had been uplifted, all of which had now been sold, but in relation to which a claim for penalty interest with respect to 8 vehicles was maintained; and
- (c) A claim for 6 vehicles which were sold by the defendants but not paid for.

[16] Mr Perese pointed out, as Mr Moss had done in his affidavit, that the defendants have had the source documentary material in relation to these claims for over a year. Despite that, no evidence disputing these details had been filed by the defendants.

[17] In conclusion, Mr Perese sought that judgment be entered against the second defendant in the amount of \$106,304. He noted that the plaintiff has registered a charging order against the property of the second defendant as a judgment creditor pursuant to my earlier decision on liability.

[18] For Mr Sharma, Mr Khan took no issue with Mr Perese's analysis of s 248 of the Companies Act and, in particular, that the effect of the liquidation of the first defendant was that the plaintiff's claim against it must be stayed, as must the first defendant's counterclaim. He submitted however, that it was not possible for the Court to make findings on quantum in relation to the claim against Mr Sharma. Mr Khan's reasoning was that aspects of the plaintiff's claim are disputed by the second defendant and need to be determined, but he was not in a position to advance the dispute given

the liquidation of the first defendant and the decision of the liquidator to take no steps in the proceedings. Mr Khan sought, however, to instead focus upon the registering of the charging order by the plaintiff which he said had occurred improperly. He overlooked, or was unable to comment further upon, the fact that Mr Sharma had already filed his evidence.

### **Analysis and Decision**

[19] It is clear that while s 248 of the Companies Act has the effect of staying the proceedings against the first defendant, a co-defendant in the same proceedings is not entitled to have the legal proceedings stayed. Further, the section does not operate to stay legal actions against directors as individuals.<sup>1</sup>

[20] The plaintiff is, accordingly, quite entitled to seek to further proceed with its claim against Mr Sharma. He is a principal debtor pursuant to the guarantee he gave and as noted, I have earlier found him to be liable. The only issue for determination is quantum.

[21] In that regard, Mr Khan submitted that Mr Sharma had filed an affidavit in which he disputed aspects of the plaintiff's claim. That is correct. It is clear from the affidavit Mr Sharma filed and dated 13 February 2018, that he has sworn that affidavit as the second defendant. It is, accordingly, his evidence in this proceeding. As Mr Perese submitted, I am therefore in a position to determine quantum in relation to the claim against Mr Sharma. The ongoing involvement of the first defendant in this proceeding is not necessary for me to do so.

[22] It was notable that despite Mr Perese making this point clear when this matter first fell to be heard, and this being reinforced in a Minute issued by me on 21 March 2018, Mr Khan did not require Mr Moss to be cross-examined. Mr Perese had, however, made such a request of Mr Sharma. I inquired of Mr Khan during the trial whether Mr Sharma was prepared to give evidence and be cross-examined in relation to his affidavit. To my surprise, Mr Khan advised that he was not. Given the

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<sup>1</sup> Re NZ Banking Corp, XP Hankey (1869) 21 LT 481.

circumstances, I observed that his declining to do so would come with consequences. This was also made clear by Mr Perese in submissions.

[23] As noted earlier, and emphasised by Mr Perese in his submissions on several occasions, Mr Sharma has not filed evidence which disputes in any significant manner the claim made by the plaintiff. The vast majority of his evidence relates to the alleged counterclaim of the first defendant against the plaintiff.

[24] After considering the affidavits of Mr Moss, the affidavits of Mr Sharma and the evidence in the round, I am satisfied that the amount claimed by the plaintiff is due and owing by Mr Sharma pursuant to his guarantee. Accordingly, judgment is entered against Mr Sharma in the amount of \$106,304. The proceedings involving the first defendant are, of course, stayed.

[25] The plaintiff seeks interest on that amount as between the date of the liability judgment to the date of this judgment. That is appropriate and needs to be calculated by the parties. Should there be any disagreement, it can be referred back to me for determination.

[26] The plaintiff also seeks costs. It seeks indemnity costs in reliance upon clause 6.3 of the agreement between the parties. I am not satisfied that is appropriate. Costs are ordered on a category 2B basis. Once again, the parties are encouraged to agree that amount. If they are unable to do so, then the matter can be referred to me for determination.

R J McIlraith  
District Court Judge