IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-2342
[2023] NZHC 183

BETWEEN	GAUTAM JINDAL Plaintiff
AND	LIQUIDATION MANAGEMENT LIMITED First Defendant
	IMRAN MOHAMMED KAMAL Second Defendant

Hearing: 1 February 2023 (by VMR)

Counsel: G Jindal self-represented Plaintiff
A Ho for Defendants

Judgment: 13 February 2023

JUDGMENT OF ASSOCIATE JUDGE LESTER
(Application for leave to appeal)

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[1] Mr Jindal seeks leave to appeal my judgment of 9 September 2022 (**the September judgment**), ordering him to pay staged security.[1]

[2] In this proceeding, Mr Jindal alleges that Mr Kamal, as liquidator, charged excessive fees in 133 liquidations which Mr Kamal concluded immediately prior to 31 August 2021. Mr Kamal brought the liquidations to an end within a relatively short period as he was no longer able to practice as a liquidator. In respect of other companies where liquidations needed to continue, alternative liquidators were appointed.

[3] Mr Jindal alleges the Inland Revenue Department (**IRD**) was a creditor in almost all 133 liquidations. Based on the reports filed by Mr Kamal with the Companies Office, Mr Jindal calculates receipts in the 133 liquidations totalled $3,521,000. Mr Jindal says Mr Kamal's reports show liquidator's fees and overheads of approximately $2,582,000, which Mr Jindal asserts were excessive and unreasonable.

[4] In this proceeding Mr Jindal seeks an order that the fees and expenses charged by Mr Kamal be fixed at a reasonable level and any excess amount be refunded.

[5] Three causes of action are alleged by Mr Jindal. In the first cause of action, Mr Jindal seeks leave to challenge Mr Kamal's fees. That leave application has not been dealt with as this proceeding is stayed following Mr Jindal not paying the ordered security.

[6] In the September judgment, I expressed real doubts as to the likelihood of Mr Jindal being able to obtain leave given he has no connection whatsoever to the 133 companies in liquidation. More accurately, the issue is whether Mr Jindal can establish that the Court's inherent jurisdiction to supervise liquidators continues in relation to challenges to liquidator's fees and, if so, whether Mr Jindal has standing to invoke that jurisdiction.[2] Mr Jindal is not within the class of people in s 284 of the

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1 *Jindal v Liquidation Management Ltd* [2022] NZHC 2292.

2 *Commissioner of Inland Revenue v Livingspace Properties Ltd (in rec and in liq)* [2020] NZHC 1434, [2021] 2 NZLR 252.

Companies Act 1993 (**the Act**) who can seek leave to challenge a liquidator's remuneration and so he must rely on the Court's inherent jurisdiction (if it exists).

[7] The second cause of action is headed "breach of fiduciary duty" and alleges Mr Kamal owed a fiduciary duty to each of the 133 companies, their shareholders, directors and creditors. Mr Jindal alleges that by charging excessive fees and expenses, Mr Kamal breached that duty.

[8] The third cause of action is headed "Unjust enrichment at the cost of creditors and shareholders". The allegation is that through charging excessive or unreasonable fees, Mr Kamal unjustifiably enriched himself at the cost of creditors and shareholders. The IRD being the largest of these.

[9] The same relief is sought in respect of all three causes of action.

[10] For reasons set out in the September judgment, I concluded the second and third causes of action were hopeless given Mr Jindal had no connection with the 133 companies. On Mr Jindal's own pleading, the fiduciary duty relied on was not owed to him. In terms of unjust enrichment, the enrichment Mr Jindal asserts Mr Kamal received was not gained at Mr Jindal's expense.

[11] With Mr Jindal having acknowledged the threshold for an order for security was met and with my having concluded his causes of action were meritless, staged security was ordered. Mr Jindal was ordered to pay $7,500 security to cover the period up until the conclusion of the hearing of his application for leave. If leave was granted, he was to pay a further $40,000 through to the completion of discovery. That figure was to recognise the significant amount of work that would be involved in giving discovery in relation to the reasonableness of fees in approximately 70 of the 133 companies.[3]

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[3] Of the 133 companies, in approximately 60 cases, Mr Kamal's fees ranged from nil to $7,500. At the hearing of the security for costs application, Mr Jindal said if his case continued he would exclude those 60 companies from his claim meaning, the discovery exercise would be limited to approximately 70 companies. The security ordered was based on discovery being required for approximately 70 companies. See *Jindal v Liquidation Management Ltd*, above n 1, at [48].

[12] To meet Mr Jindal's lack of connection to the companies in issue, he submitted that he was adopting a "watchdog" role. Mr Jindal sought to categorise his litigation as having a public interest element, but I concluded that even if such was correct, this was not a barrier to the award of security. In any event, I dismissed the idea that Mr Jindal had any justification for adopting a "watchdog" role. This was because the IRD was more than capable of protecting its own interests given its experience, resources and expertise in relation to the liquidation of companies. The IRD had previously challenged the level of fees charged by Mr Kamal, but chose not to do so in respect of the companies subject to this proceeding, notwithstanding this proceeding being brought to the IRD's attention.

[13] The reality is, that if Mr Jindal has standing to bring the present proceeding, then any member of the public will have the ability to challenge the fees of any liquidator, at any time. I noted the further factor that of the 133 companies, Mr Jindal could only point to excessive fees in respect of two companies. In short, Mr Jindal put the onus on Mr Kamal to justify his fees. The absence of particularisation as to how Mr Kamal's fees were unreasonable, in my view, favoured an award for security. I recorded:[4]

> Mr Jindal's position amounts to saying the fact he has made what in all but two companies is a bare allegation that excess fees have been taken puts the onus on Mr Kamal to disprove that allegation. I reject that submission.

[14] I also noted some practical difficulties with Mr Jindal's claim. Even if he was correct in his assertions, giving effect to the orders sought would require the companies now removed from the Companies Register (**the Register**), to be restored to the Register and a replacement liquidator appointed. Any replacement liquidator would only agree to appointment if they were able to take their fees in the usual way. Those costs would greatly impact on the viability of the proceeding.

[15] Mr Jindal submits each of the conclusions in the above summary of the September judgment was arguably wrong and he seeks leave to appeal.

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4 *Jindal v Liquidation Management Ltd*, above n 1, at [43].

Threshold for granting leave to appeal

[16] The following considerations apply:[5]

(a) a high threshold exists;

(b) the applicant must identify an arguable error of law and fact;

(c) the alleged error should be of general or public importance warranting determination or otherwise of sufficient importance to the applicant to outweigh the lack of general or precedential value;

(d) the circumstances must warrant incurring further delay; and

(e) the ultimate question is whether the interests of justice are served by granting leave.

[17] It is often said that the requirement for leave is intended to act as a "filtering mechanism".[6]

[18] Whether or not to order security and if so, in what quantum, are discretionary matters.

Decision

[19] I am satisfied that leave to appeal is not appropriate and ***I decline*** Mr Jindal's application.

[20] Fundamentally, I do not accept that Mr Jindal has identified arguable errors in relation to the conclusions in the September judgment. I now give my reasons for that conclusion.

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5 *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6] citing *Finewood Upholstery Ltd v Waughan* [2017] NZHC 1679.

6 *Finewood Upholstery Ltd v Vaughan*, above n 5, at [13].

Mr Jindal's public interest argument

[21] A theme of Mr Jindal's application for leave submissions is that there is a public interest in ensuring all tax payers pay their tax.[7]

[22] Mr Jindal's argument was that his litigation is in the public interest. This is because his proceeding is aimed at having Mr Kamal restore fees to the companies in liquidation which will then, in most cases, be paid to the IRD. Mr Jundal submitted this would be for the public benefit and therefore he said the proceeding was in the public interest.

[23] I do not accept this submission.

[24] First, the authorities relied on by Mr Jindal are cases where the Commissioner of Inland Revenue (**the Commissioner**) pursued proceedings. As I have said, the Commissioner was well able to pursue Mr Kamal if she considered he had charged excessive fees.

[25] Second, this is not a tax evasion case. The companies in liquidation were assessed for tax which they did not pay. The Commissioner was a creditor for the amount of taxation unpaid. Whether the companies in liquidation had done anything that might amount to the evasion of tax, is a separate issue which the Commissioner was able to take up with the companies pre-liquidation and post liquidation with Mr Kamal. Under the Tax Administration Act 1994, the Commissioner has wide ranging powers of recovery if evasion is established.

[26] The reality is that in almost all cases, the level of a liquidator's fees will have an impact on the return to creditors, including the IRD. This does not mean, however, that a liquidator who has charged fees that might be held to be unreasonable, should be treated as having avoided or evaded tax owed by the company of which they were a liquidators.

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[7] Mr Jindal referred to *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd* [2016] NZCA 276 [2016] 3 NZLR 303 at [48]; and *Commissioner of Inland Revenue v BNZ Investments Ltd* [2002] 1 NZLR 450 at [82].

[27] I consider Mr Jindal's reliance on the tax avoidance/evasion cases misplaced.

[28] In any event, if the matter was to be viewed through a tax evasion lens, then the focus goes back to the Commissioner as the one to pursue that evasion, or perhaps the liquidator, if such involved a breach of director's duties.

[29] Mr Jindal submitted:

> Once the Court made a finding that [he had] "no personal interest" in the matter, the only logically correct conclusion should've been that the matter was one of "public interest".

[30] It does not follow that Mr Jindal not having a personal interest in the proceeding, means there ***must*** be a public interest in doing so. I do not accept Mr Jindal's submission that it is reasonably arguable that I wrongly concluded that his case was not one involving public interest and therefore he lacked standing.

[31] I also note that the authorities relied on by Mr Jindal in relation to standing, all involve judicial review. I do not consider Mr Jindal's reference to the principles from judicial review authorities establishes there is an arguable legal error in respect of the September judgment.

[32] Mr Jindal submitted that where a case does involve public interest, that can be a reason in favour of waiving security for costs on the basis that there may be no costs order, even if a party is unsuccessful. Mr Jindal referred to *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations*.[8] Such considerations may well apply in public interest cases, but there is no absolute rule that plaintiffs in litigation with a public interest are immune from advance costs or security for costs.

[33] At the end of the day, neither the Commissioner, the directors, shareholders or creditors of the 133 companies require Mr Jindal to act on their behalf.

[34] These comments are really directed at the first cause of action. As to the second cause of action, that is the breach of fiduciary duty, as I have said, Mr Jindal does not

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8 *Ngāti Te Ata v The Minister for Treaty of Waitangi Negotiations* [2018] NZCA 471 at [5] – [6].

plead the fiduciary duty asserted was owed to him. In respect of the claim of unjust enrichment, the enrichment Mr Jindal complains of, that is Mr Kamal's excessive fees, was not gained at Mr Jindal's expense. Mr Jindal did not attempt to address the submissions for Mr Ho, counsel for the defendants, that on Mr Jindal's pleading, the elements of these causes of action are not present.

[35] As already noted, I was critical in the September judgment of Mr Jindal not providing any particulars in relation to why Mr Kamal's fees were excessive, save in respect of two of the 133 companies. Mr Jindal, in his application for leave, submitted that I was in error in not considering that the only information available to Mr Jindal was from the liquidator's reports. Mr Jindal said that information was "high level" and quite "scanty". In his application for leave to appeal Mr Jindal asserted:

> The Court expected the applicant to "crystal ball gaze", which is unrealistic and impossible. The appellant is unable to particularise or establish the allegation before a complete discovery exercise is conducted.

[36] This part of Mr Jindal's application for leave to appeal highlights the speculative nature of his proceeding. It is an acknowledgment that he does not know whether Mr Kamal's fees are in fact excessive. He makes the bald allegation that the fees are unreasonable but he is dependent upon discovery to assess whether the fees are unreasonable. In other words, discovery will be a pure fishing exercise, as Mr Jindal on his own case, is wholly dependent upon discovery to identify whether Mr Kamal's fees and expenses were unreasonable. This highlights Mr Jindal's lack of connection to the companies.

[37] Mr Ho, counsel for the defendants, submitted that whether the proceeding had any public interest element was beside the point as the proceeding was so lacking in merit that security was called for. As I have said, that a proceeding may involve public interest does not make a plaintiff immune from an application for security for costs. Ultimately, Mr Ho submitted that one comes back to the merits. I agree.

[38] In respect of the merits, Mr Jindal, other than saying he needed to have discovery before he could detail in what respect Mr Kamal's charges were unreasonable, in effect asks the Court to infer there was something suspect about Mr Kamal's fees. This was to be inferred from the fact that Mr Kamal had been

declined registration as an insolvency practitioner by Restructuring Insolvency and Turnaround Association of New Zealand (**RITANZ**) on character grounds. This submission is not a substitute for detail as to why the challenged fees were unreasonable. For the purposes of security for costs the merits of a case are assessed, as far as possible, at the time of the application. At the moment, Mr Jindal cannot point to any issue with the fees, save for two instances; one of which Mr Kamal says involved a typographical error.[9]

[39] Mr Jindal referred to para [38] of the September judgment where I said Mr Kamal was no longer an insolvency practitioner and so there is no wider public interest arising from his continued involvement in the insolvency field. I went on to say that in any event, if Mr Kamal was to seek to resume practice, he would have to meet the requirements of the Insolvency Practitioners Regulation Act 2019. Mr Jindal submitted it was not brought to my attention at the time of the September judgment that Mr Kamal had in fact already sought to obtain registration as an insolvency practitioner. Thus, Mr Jindal submitted there was a public interest element in this proceeding.

[40] I do not accept that proposition. Mr Jindal's proceeding is based on Mr Kamal's liquidator's reports in the 133 companies. Those reports are public documents and are available to RITANZ, just as they were available to Mr Jindal. If RITANZ considers the public record calls for an explanation from Mr Kamal, then no doubt RITANZ will seek the same. RITANZ does not require Mr Jindal to conduct some form of parallel enquiry.

Conclusion

[41] As I have said, the application for leave to appeal is ***dismissed***. I do not consider an arguable error of law or fact has been identified. The interests of justice in all the circumstances do not warrant the granting of leave to appeal as Mr Jindal's case is meritless. In balancing the interests of the parties, the defendants should not be exposed to further costs without the protection of security.

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9 *Jindal v Liquidation Management Ltd*, above n 1, at [41] and [42]..

[42] I have not lost sight of the fact Mr Jindal says the ordering of security means his claim will not proceed. Mr Jindal says that the threshold for security in those circumstances is similar to a strikeout.[10] That is a valid point but I consider the merits of Mr Jindal's case to be so weak that the threshold was met in this case. In my view, nothing raised by Mr Jindal in his application for leave to appeal raises an arguable appeal point. Mr Jindal submitted the Court does not have all the facts to assess the merits of his case. It is Mr Jindal that does not have the facts to plead why Mr Kamal's fees are unreasonable. Mr Jindal wants to go on a fishing expedition to try and uncover material that supports his bare assertion that Mr Kamal's fees are unreasonable. The situation calls for security.

[43] If Mr Jindal is correct, any member of the public could challenge the fees of any liquidator on the grounds the IRD was a creditor ***and*** not have to identify any basis for that challenge (with the liquidator then having to justify their costs – not knowing in which way their fees or expenses were considered unreasonable). One only needs to state that proposition to see that it cannot be correct.

[44] The application for leave to appeal is ***declined***.

Costs

[45] There is an award of costs in favour of the defendants on a 2B basis plus disbursements as fixed by the Registrar.

Associate Judge Lester

Solicitors:
Crimson Legal, Auckland (for Defendants)

Copy to:
Mr G Jindal (self-represented Plaintiff)

[10] *Deliu v Chapman* [2020] NZHC 2100 at [5] and [6].