

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2021-404-2342
[2024] NZHC 2969**

UNDER the Companies Act 1993 and High Court
Rules 2016

BETWEEN GAUTAM JINDAL
Plaintiff

AND LIQUIDATION MANAGEMENT
LIMITED
First Defendant

IMRAN MOHAMMED KAMAL
Second Defendant

Hearing: 8 October 2024

Counsel: G Jindal, Plaintiff in person
A Ho for the First and Second Defendants

Judgment: 11 October 2024

JUDGMENT OF ASSOCIATE JUDGE BRITTAIN

*This judgment was delivered by me on 11 October 2024 at 3.30 pm.
Pursuant to Rule 11.5 of the High Court Rules.*

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Registrar/Deputy Registrar

Solicitors:
Crimson Legal, Auckland

Introduction

[1] In this proceeding, the plaintiff, Gautam Jindal (Mr Jindal), asks the Court to review remuneration charged by the second defendant, Imran Kamal (Mr Kamal), as a liquidator in respect of the liquidations of 133 companies (the 133 companies).

[2] Mr Jindal seeks an order that the Court fix Mr Kamal's fees and expenses for each liquidation at a reasonable level, and that any fees and expenses taken beyond that be disgorged by Mr Kamal and/or his company, the first defendant, Liquidation Management Ltd.

[3] An unusual feature of this proceeding is that at the time it was commenced Mr Jindal claimed to have no financial interest in the litigation. He claims to have commenced the proceeding in the public interest in his capacity as a "watch-dog".

[4] The defendants applied for security for costs. On 9 September 2022, Associate Judge Lester ordered Mr Jindal to provide security for costs in stages. Security for stage one, which is Mr Jindal's application for leave to bring the proceeding, was fixed at \$7,500. Mr Jindal has paid that security. His application for leave is yet to be determined.

[5] The defendants now apply for a variation to Associate Judge Lester's orders for security, increasing the security for stage one to \$26,859, which would require a further payment of security of \$19,359.

[6] Mr Jindal opposes that application. He seeks an order that stage one security be rescinded and the \$7,500 returned to him, based on his extant application for orders adding three new plaintiffs, who are each a director of one of the 133 companies. The defendants oppose the application for joinder.

[7] The cross-applications in respect of stage one security and the application to join further plaintiffs are determined in this judgment.

The history of this proceeding

[8] Prior to commencing this proceeding, Mr Jindal applied for leave to bring his claim as an originating application under pt 19 of the High Court Rules 2016 (HCR). That application was declined by Associate Judge Taylor on 1 December 2021.¹

[9] Mr Jindal commenced this proceeding on 2 December 2021, by filing a statement of claim comprising three causes of action:

- (a) alleging that Mr Kamal breached s 276 of the Companies Act 1993 (CA), which entitles a liquidator to charge reasonable remuneration for carrying out their duties and exercising their powers;
- (b) alleging a breach of fiduciary duty in respect of fees and expenses which were not reasonably incurred; and
- (c) alleging unjust enrichment by Mr Kamal, in respect of fees and expenses which were not reasonably incurred, at the expense of the creditors and shareholders of the 133 companies.

[10] Initially, Mr Jindal did not seek to invoke the Court's jurisdiction to supervise liquidations under s 284(1) of the CA, which can be invoked by a liquidator, a liquidation committee, or with the leave of the Court, by a creditor, shareholder, other entitled person or director of a company in liquidation.

[11] On 12 August 2022, Mr Jindal applied for leave to "proceed with the statement of claim", relying on s 284(1) of the CA, despite it being apparent that Mr Jindal did not fall within the classes of person who have standing to apply for leave under s 284(1).

[12] Associate Judge Lester gave judgment on 9 September 2022 awarding security for costs.² He expressed his view that the prospects of Mr Jindal being able to

¹ *Jindal v Registrar of Companies* [2021] NZHC 3268.

² *Jindal v Liquidation Management Ltd* [2022] NZHC 2292.

successfully obtain leave to pursue this proceeding are extremely low, by reference to both s 284 of the CA and this Court's inherent jurisdiction in respect of liquidations.³

[13] Associate Judge Lester considered that Mr Jindal lacked standing because he had no personal interest at stake in the liquidations. Nonetheless, the Judge confirmed that Mr Jindal's application for leave under s 284(1) of the CA should proceed to a hearing once stage one of security of \$7,500 was paid, noting that if the application for leave fails then that will bring the proceeding to an end.⁴

[14] Mr Jindal sought the leave of this Court to appeal Associate Judge Lester's decision on security for costs, which was declined by the Associate Judge on 13 February 2023.⁵

[15] Mr Jindal then sought leave to appeal from the Court of Appeal. That application was declined on 1 September 2023.⁶ The Court held that the appeal could not succeed,⁷ agreeing with Associate Judge Lester's assessment that Mr Jindal's second and third causes of action have no prospect of success.⁸

[16] Regarding the application for leave under s 284(1) of the CA, Wylie J observed:

- (a) It was not in dispute that at the time of Associate Judge Lester's judgments Mr Jindal had no interest in any of the 133 companies.⁹
- (b) Before the Court of Appeal hearing, Mr Jindal had taken an assignment of the debts owed to two creditors of two of the companies, noting that the assignments were not properly before the Court so the Court could give them little weight.¹⁰

³ At [25]–[35].

⁴ At [46].

⁵ *Jindal v Liquidation Management Ltd* [2023] NZHC 183.

⁶ *Jindal v Liquidation Management Ltd* [2023] NZCA 413.

⁷ At [29].

⁸ At [22].

⁹ At [23].

¹⁰ At [24].

- (c) It is unlikely that Mr Jindal will obtain leave under s 284 of the CA. There appeared to be some force in the submissions of the defendants that Mr Jindal's proceeding is motivated by ill-will due to his past dealings with the defendants.¹¹
- (d) All 133 companies have been struck off the Register, and no party with standing under s 284 of the CA, or the right to apply for leave under s 284, had brought the proceeding.¹²
- (e) There was no question of law or fact arising out of Associate Judge Lester's observation of the likelihood of Mr Jindal succeeding on his first cause of action which was capable of bona fide and serious argument on appeal.¹³

[17] After the Court of Appeal's judgment, Mr Jindal filed an amended application for leave under s 284(1) of the CA. Mr Jindal also applied for permission to bring a representative proceeding under r 4.24 of the HCR, attempting to avoid the issue that he faces regarding his standing under s 284(1) of the CA.

[18] The grounds in support of those applications include that Mr Jindal is a creditor of two of the 133 companies, relying on the assignments. Mr Jindal seeks to be appointed as the representative of all creditors and shareholders of the 133 companies on an opt-in basis.

[19] Mr Jindal has not provided an affidavit to confirm the purported assignments to him of debts which would provide him with the status of a creditor of any of the 133 companies. One of the purported assignments has been produced by Mr Kamal, which I will return to.

[20] On 3 May 2024, the defendants filed their application for a variation of the orders for security for costs, on the grounds that Mr Jindal's amended application under s 284(1) of the CA has been expanded to include orders for representation under

¹¹ At [25].

¹² At [25].

¹³ At [25].

r 4.24 of the HCR, and Mr Jindal's conduct of the proceeding was adding to the defendants' costs.

[21] By a memorandum dated 27 May 2024, Mr Jindal applied for the proceeding to be assigned to a Commercial Panel Judge. The application was declined by Fitzgerald J in a minute dated 4 June 2024.¹⁴ Fitzgerald J also expressed doubt about the merits of Mr Jindal's substantive claims, endorsing the reasons of Associate Judge Lester in his judgment on security for costs.¹⁵

[22] On 10 June 2024, Mr Jindal applied under r 4.56 of the HCR for an order that Jujhar Singh (Mr Singh) and Matt Burns (Mr Burns) be added as plaintiffs in this proceeding. Mr Singh was a shareholder and a director of Travel Globe Ltd (Travel Globe). Mr Burns was a director of MB Fleet Ltd (MB Fleet). Travel Globe and MB Fleet are two of the 133 companies.

[23] The application under r 4.56 was amended on 12 June 2024 to include a third proposed additional plaintiff, Andrew Potter (Mr Potter). Mr Potter was a shareholder and a director of The Whole 9 Yards Landscaping Ltd (The Whole 9 Yards), another of the 133 companies.

[24] Mr Singh, Mr Burns and Mr Potter have each provided an affidavit. None mention any assignment of their rights to Mr Jindal. Each agrees to be a representative plaintiff, apparently for all shareholders and creditors of the 133 companies.

[25] Mr Jindal affirmed an affidavit on 12 June 2024, saying that he now represents Mr Singh, Mr Burns and Mr Potter as their counsel and the proceeding is not funded by any litigation funder. Mr Jindal gave no evidence of any purported assignments of debts to him in respect of the 133 companies.

[26] Mr Kamal affirmed an affidavit on 18 June 2024. Mr Jindal objects to its contents and submits it should not be read. Mr Kamal produces a copy of a purported deed of assignment dated 15 April 2023 between Mr Singh and Mr Jindal. Under the

¹⁴ *Jindal v Liquidation Management Ltd* HC Auckland CIV-2021-404-2342, 4 June 2024 (Minute of Fitzgerald J).

¹⁵ At [6].

deed, Mr Singh assigns his claims in the liquidation of Travel Globe to Mr Jindal. I am prepared to accept the deed into evidence.

[27] Associate Judge Taylor directed that Mr Jindal's application under r 4.56 of the HCR be heard together with the applications in respect of stage one of security for costs.¹⁶ The Associate Judge did not direct that Mr Jindal's applications under s 284(1) of the CA and r 4.24 of the HCR be heard at the same time. Those applications remain at large.

[28] Mr Jindal continues to seek leave under s 284(1) of the CA to allow him to personally bring a proceeding under s 284(1), on the ground that he is a creditor of one or more of the 133 companies as a result of assignments of debt.

The joinder application

[29] Mr Jindal has enlisted shareholders of three of the 133 companies to join him as plaintiffs. Mr Jindal submits that two of those parties are solvent, so his security for costs of \$7,500 should be refunded to him.

[30] Mr Jindal's application for joinder is under r 4.56 of the HCR, which provides:

4.56 Striking out and adding parties

- (1) A Judge may, at any stage of a proceeding, order that—
 - (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
 - (b) the name of a person be added as a plaintiff or defendant because—
 - (i) the person ought to have been joined; or
 - (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
- (2) An order does not require an application and may be made on terms the court considers just.

¹⁶ *Jindal v Liquidation Management Ltd* HC Auckland CIV-2021-404-2342, 24 May 2024 (Minute of Associate Judge Taylor).

- (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[31] Rule 4.56(1)(b)(i) applies where a party ought to have been joined from the outset. Rule 4.56(1)(b)(ii) imposes a flexible standard, not a bright line jurisdiction or threshold. If either of the thresholds in r 4.56(1)(b)(i) or (ii) is met then the Court has a discretion as to joinder. Questions informing jurisdiction and the exercise of the Court's discretion tend to overlap.¹⁷

[32] The principles applicable to r 4.56 are well settled and were reviewed by the Court of Appeal in *Newhaven Waldorf Management Ltd v Allen*.¹⁸ There is no fixed general rule in relation to joinder, reflecting the wide variation in circumstances arising in a particular case. It is necessary to assess the rights of the person sought to be joined that will be affected by a judgment in the proceeding. The approach to joinder is liberal. All persons materially interested in the subject of the proceeding ought to be parties.¹⁹

[33] Mr Singh, Mr Burns and Mr Potter each have standing under s 284(1) of the CA to seek leave to apply to the Court to exercise its supervisory function in respect of the liquidated company that each of them was associated with.

[34] Mr Singh, Mr Burns and Mr Potter do not have standing under s 284(1) in respect of the other 132 companies. Like Mr Jindal, they intend to avoid that obstacle by applying for permission to commence a representative action under r 4.24 of the HCR for all 133 companies. That is novel.

[35] The starting point is that the usual procedure is for each of Mr Singh, Mr Burns and Mr Potter to bring a discreet application for leave under s 284(1) of the CA in respect of the company that they were associated with. That is an application made under pt 18 of the HCR, or by originating application if the Court permits.

¹⁷ *Newhaven Waldorf Management Ltd v Allen* [2015] NZCA 204, [2015] NZAR 1173 at [53].

¹⁸ *At* [42]–[53].

¹⁹ *At* [44] and [45].

[36] The issue is whether Mr Singh, Mr Burns and Mr Potter should be invited to file their own discreet applications under s 284(1) or permitted to join in Mr Jindal's application. Mr Jindal submitted that it is more expedient for them to join in his proceeding.

[37] An application for leave under s 284(1) of the CA is not a mere formality. The Court acts as a gatekeeper, ensuring only appropriate challenges proceed to a full hearing.²⁰ Each application turns on its own facts and requires an assessment of the circumstances of the applicant and whether the applicant has standing to apply for leave. If so, the key issues in determining whether to grant leave are whether there is a credible factual basis for the proposed substantive application and a reasonable likelihood that the Court will disturb the liquidator's remuneration.²¹

[38] The latter requires elements of either fraud, lack of good faith in the exercise of a discretion or unreasonableness by the liquidator.²² Unreasonableness means acting in a way that no reasonable liquidator would have acted.²³ Serious and obvious lapses in judgement must be shown before the Court will interfere.²⁴

[39] In respect of Travel Globe, MB Fleet and The Whole 9 Yards, the following factors will differ:

- (a) the reasons for delay in bringing an application under s 284 of the CA;
- (b) the circumstances of the liquidation and the steps undertaken by Mr Kamal in the liquidation;
- (c) an assessment of what is a reasonable fee for Mr Kamal's work;

²⁰ *Manifest Capital Management Pty Ltd v Lawrence* HC Auckland CIV-2010-404-7741, 20 December 2011 at [7].

²¹ *Trinity Foundation (Services No 1) Ltd v Downey* (2006) 3 NZCCLR 401 (CA) at [23] and [31].

²² *Consolidated Technologies Development (NZ) Ltd v McCullagh* (2006) 3 NZCCLR 424 (HC) at [15].

²³ *Re Callis* (1996) 7 NZCLC 261,211 (CA) at 215.

²⁴ *Re Optimisationz Ltd (in liq)* [2012] NZHC 1438, [2012] NZCCLR 23 at [8].

- (d) the composition and value of the creditors' pool and priorities under the CA, which will determine which parties may benefit from any refund of the liquidator's fees; and
- (e) the likely cost of reinstating the company to the Register and placing the company back into liquidation, which will impact on whether there is any point to a proceeding under s 284 of the CA.

[40] This is borne out by the limited affidavit evidence presently available in respect of the proposed applications by Mr Singh, Mr Burns and Mr Potter.

[41] In respect of Mr Singh and Travel Globe, it is unclear whether there is any prospect of a distribution to Mr Singh because:

- (a) the fees charged by Mr Kamal are exceeded by the total amount owed to unsecured creditors;
- (b) Mr Singh says that he is an unsecured creditor, however there is insufficient evidence to establish that; and
- (c) in any event, Mr Singh has purported to assign any debt owed to him by Global Travel to Mr Jindal — it is not possible for both Mr Singh and Mr Jindal to be a creditor of Global Travel in respect of the same debt.

[42] In respect of Mr Burns and MB Fleet, there appears to be no prospect of a distribution to Mr Burns:

- (a) the company had an unpaid secured creditor with a value of \$168,140.32, which far exceeds the fees charged by Mr Kamal; and
- (b) Mr Burns was adjudicated bankrupt after MB Fleet was placed into liquidation.

[43] In the case of The Whole 9 Yards and Mr Potter, it is unclear whether there is any prospect of a distribution to Mr Potter:

- (a) IRD has a preferential claim for \$83,768.09 — IRD is aware of this proceeding but has not sought to participate; and
- (b) Mr Potter says that he was a preferential creditor of the company for unpaid salary, although he does not state the amount.

[44] I do not need to make any findings on the merit of the potential applications under s 284(1) of the CA by Mr Singh, Mr Burns and Mr Potter. I make the comments above to illustrate that the circumstances relevant to each application differ.

[45] I see no reason to depart from the usual procedure which requires Mr Singh, Mr Burns and Mr Potter to each bring a discrete application for leave under s 284(1) of the CA. That will allow any applications for security for costs to reflect the particular circumstances of each proceeding and for any orders made to be directed towards the appropriate plaintiff.

[46] This is not a situation where Mr Singh, Mr Burns and Mr Potter needed to be named as plaintiffs when Mr Jindal filed his proceeding. Their interests at that time were no different than the numerous other shareholders, directors and creditors of the 133 companies. Neither is it necessary that they be present before the Court for the Court to determine all questions involved in Mr Jindal's proceeding. The thresholds in r 4.56 of the HCR are not met.

[47] I do not consider that the position is altered by the novel application by Mr Jindal, and signalled by Mr Singh, Mr Burns and Mr Potter, for permission to bring a representative proceeding under s 284(1) of the CA. Those applications are yet to be heard, and raise their own issues regarding the availability of a r 4.24 class action for proceedings under s 284(1) of the CA. For example, whether any party seeking to join as a plaintiff must first obtain leave under s 284(1) of the CA.

[48] Mr Jindal's applications for leave under s 284(1) of the CA and for permission to bring a representative proceeding under r 4.24 of the HCR should be determined on their own merits. If Mr Jindal has no standing to bring this proceeding, then it is a nullity and there is no proceeding to join Mr Singh, Mr Burns and Mr Potter to.

Security for costs

[49] I do not propose to review Associate Judge Lester's reasons that supported his decision to fix security for costs for stage one at \$7,500. I focus on the changes in the circumstances since Associate Judge Lester's judgment on 9 September 2022 fixing security.

[50] Mr Jindal's application for rescission of his security for costs must fail. He remains the only plaintiff.

[51] Associate Judge Lester's fixing of security of \$7,500 for stage one contemplated that Mr Jindal's application for leave under s 284(1) of the CA would immediately proceed to a hearing. As outlined above, that has not been the case.

[52] The defendants seek an increase in security for stage one of \$19,359, based on 2B costs for steps in the proceeding to date, including steps taken before the judgment ordering security on 9 September 2022. The steps taken before 9 September 2022 must be disregarded when considering any adjustment to the security ordered on 9 September 2022.

[53] Counsel for the defendants submitted that the defendants have had to complete the following steps since 9 September 2022 due to Mr Jindal's conduct of this proceeding:

- (a) file memoranda dated 7 September 2023, 6 October 2023, 9 October 2023, 8 November 2023, 22 February 2024, 11 March 2024, 9 April 2024, 16 May 2024 and 27 May 2024 — an award of 2B costs for those steps would be \$8,604;

- (b) attend conferences on 22 September 2023, 10 April 2024 and 23 May 2024 — an award of 2B costs for those steps would be \$2,151; and
- (c) deal with the amended application under s 284(1) of the CA and the applications under rr 4.24 and 4.56 of the HCR.

[54] Orders for security for costs are generally prospective. The above steps are complete, however, I can infer that the pattern of the plethora of memoranda on this file will continue, requiring attendances by counsel for the defendants beyond the contemplation of Associate Judge Lester in September 2022.

[55] In addition, the defendants still face applications for orders under r 4.24 of the HCR and s 284(1) of the CA, which are more complicated than Mr Jindal's original application under s 284(1) of the CA, which was before Associate Judge Lester when he ordered security for costs.

[56] I consider that the additional procedural steps required of the defendants and the more complex applications they now face are changes in circumstances that justify a modest increase in the level of security for stage one. Stage one will end on determination of the applications under r 4.24 of the HCR and s 284(1) of the CA. Mr Jindal should provide further security of \$2,500 for stage one, increasing the total security for stage one to \$10,000.

[57] Mr Jindal has not paid the costs orders made against him following his unsuccessful applications for leave to appeal the security for costs judgment. Associate Judge Lester ordered Mr Jindal to pay \$6,692 plus disbursements of \$160. The Court of Appeal ordered Mr Jindal to pay \$3,346 plus disbursements of \$43.48. These costs orders should be paid before Mr Jindal is allowed to progress his outstanding applications.

Orders

[58] The plaintiff's application for orders joining Jujhar Singh, Matt Burns and Andrew Potter as plaintiffs in this proceeding is dismissed.

[59] The defendants' application for further security for costs is granted. The plaintiff shall pay further security for costs for stage one of the proceeding of \$2,500, by payment into Court.

[60] This proceeding is stayed until the plaintiff pays the further security of \$2,500 and the costs orders set out in [57] above.

[61] The defendants may file and serve written submissions on costs in respect of the applications determined in this judgment, of no more than five pages, by **25 October 2024**.

[62] The plaintiff may file and serve written submissions on costs in respect of the applications determined in this judgment, of no more than five pages, by **8 November 2024**.

[63] I will then determine costs on the papers.

[64] The plaintiff shall immediately serve a copy of this judgment on Jujhar Singh, Matt Burns and Andrew Potter and file proof of service.

Associate Judge Brittain