IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2017-419-189
[2018] NZHC 1858

BETWEEN	MAURICE DESMOND HAYES Plaintiff
AND	OFFICIAL ASSIGNEE Defendant

Hearing: 25 and 26 June 2018

Counsel: D O'Neill for Plaintiff
P Cornegé for Defendant

Judgment: 25 July 2018

JUDGMENT OF WHATA J

This judgment was delivered by me on 25 July 2018 at 3.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: …….

Solicitors: Nielsen Law, Hamilton
Insolvency and Trustee Service, Auckland

[1] Mr Hayes claims the Official Assignee has breached his duties as a liquidator to, among other things, take possession of three buses belonging to Taniwha Buses Ltd (Taniwha), in liquidation. Mr Hayes is a 50 per cent shareholder in Taniwha. He claims the other shareholder, Mr Gunson, kept the buses and used them after liquidation but the Official Assignee did nothing about it.

Background

[2] The parties have helpfully provided a detailed agreed chronology of facts. I reproduce that here.

[3] Taniwha was placed into liquidation on 20 August 2014. Mr Hayes is the sole director and also an unsecured creditor in the sum of $40,220. He provided a statement of affairs to the Official Assignee on 29 August 2014. Earlier the same month, he had suggested action should be taken quickly to take control of three buses owned by Taniwha but in the possession of Mr Gunson, including: a 1986 Mitsubishi Fuso, a 1990 Mitsubishi Fuso and a 1989 Hino Rainbow. Mr Hayes did not trust Mr Gunson to preserve their value. He also provided Mr Gunson's address, a Bus Stop 2001 Ltd (Bus Stop) valuation and Motorweb information about the three buses to the Official Assignee and said the charges against the buses were invalid. The Bus Stop valuation valued the buses at $82,500.

[4] On 17 September 2014, the Official Assignee obtained Motocheks for the three buses and, on 22 September 2014, requested Mr Hayes provide proof of debt. The Official Assignee, on 2 October 2014, issued a first liquidator's report, which did not recognise the Bus Stop value of the buses. Mr Hayes wrote to the Official Assignee with concerns regarding the report. His letter queries the Official Assignee's failure to take possession of the buses, misinformation in the report, and suggests Mr Gunson has misappropriated company assets. He registers his concern that the buses were continuing to be used, and the Official Assignee was failing to recover any revenue from their use.

[5] The Official Assignee also contacted Mr Gunson in October. Mr Gunson confirmed his address and that he retained three buses, two Mitsubishi Fusos and one Hino Rainbow. The Official Assignee then emailed Mr Gunson and requested details about the buses. Mr Hayes was advised the Official Assignee would examine Mr Gunson if he became uncooperative. It transpired that Mr Gunson advised his accountant would provide the requested information.

[6] In December 2014, Mr Hayes requested an update from the Official Assignee. There was no immediate response. However, in late December Mr Clark, a consultant representing Mr Gunson, wrote to the Official Assignee disputing the validity of Mr Hayes' proof of debt, and claiming Mr Gunson was owed money by the company. Mr Clark further said the asset and depreciation schedule was incorrect.

[7] In February 2015, the Official Assignee liaised with Grays Auctions regarding valuation of the buses. Sight unseen valuations were provided. The three buses were valued at between $9,000 and $18,000. About the same time, Mr Gunson advised that he would not release the buses to the Official Assignee. Mr Clark also emailed the Official Assignee and confirmed that Mr Gunson would not release the buses. Meanwhile, Mr Hayes repeatedly contacted the Official Assignee through the first quarter of 2015, raising concerns about the progress of the liquidation, and in April again advised the Official Assignee that Mr Gunson continued to use buses.

[8] The Official Assignee then summoned Mr Gunson to attend an examination and met with him and Mr Clark on 7 May 2015. Mr Gunson again refused to hand over the buses. The Official Assignee also corresponded with Mr Clark about alleged securities. However, no further progress was made until Mr O'Neill engaged with Mr Guy Stuart Caro, a solicitor for the Ministry of Business Innovation and Employment, in late 2015. The Official Assignee for Hamilton was asked by him to take over the liquidation, but declined to do so.

[9] In early 2016, the Official Assignee discharged Mr Gunson's registered financing statements and in May 2016, the Official Assignee wrote to Mr Nielsen both giving notice that he intended to disclaim the buses, and inviting Mr Hayes to provide

evidence of the value of the buses. He then disclaimed the buses on 10 June 2016 and issued his final report on 25 July 2017.

The evidence

[10] Mr Hayes provided a detailed narrative of key events which, together with the account given by Mr Pullan, Deputy Official Assignee, and Mr Caro, forms the backbone of the agreed chronology. I also had evidence from Leslie Graeme Alexander Currie, who is the Official Assignee for Hamilton. Mr Currie provided expert evidence as to the process adopted and concluded, in short, he would not have done anything differently.

Valuation evidence

[11] Two witnesses gave evidence about the valuations of the buses; Mr Michael Wells of Bus Stop and Mr Michael Edmond.

[12] Mr Wells has been dealing in buses for more than 30 years. He confirmed that he had valued the buses in 2013. He had a very clear recollection of them and stood by the 2013 valuation of $82,000. It was put to him that the odometer readings in his valuation did not align with official records. He responded that the official records were not reliable, noting that the official records show major reductions in odometer readings. For this reason, he insisted valuations of buses must be based on visual inspection. Mr Wells was also cross-examined on the fact that he had previously disavowed any knowledge of the 2013 valuation. But he said, forthrightly, that he was just trying to put the Official Assignee off involving him in the litigation. He also agreed that a forced sale of the buses would have yielded a small return. Overall, I assess Mr Wells' evidence to be robust. It was based on a visual inspection and he cogently explained why they were valued in the way they were.

[13] Mr Mike Edmond gave valuation evidence for the Official Assignee. He has been valuing buses since 2013, formerly with Grays Auctions. He has valued about 50 buses. He was retained in early 2015 to appraise the three buses. He did a desk top valuation based on available information (age, mileage, type of vehicle). His values were:

(a) 1986 Mitsubishi Fuso – EAV $2,000 - $5,000;

(b) 1990 Mitsubishi Fuso – EAV $4,000 - $7,000; and

(c) 1989 Hino Rainbow – EAV $3,000 - $6,000.

The statutory frame and issues

[14] Section 253 of the Companies Act 1993 states:

> **253 Principal duty of liquidator**
>
> Subject to section 254, the principal duty of a liquidator of a company is—
>
> (a) to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and
>
> (b) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4)—
>
> in a reasonable and efficient manner.

[15] Section 254(b) also states:

> **254 Liquidator not required to act in certain cases**
>
> Notwithstanding any other provisions of this Part,—
>
> …
>
> (b) where—
>
> (i) a company is put into liquidation under section 241(2)(c); and
>
> (ii) the Official Assignee is the liquidator of the company; and
>
> (iii) the company has no assets available for distribution to creditors of the company,—
>
> the Official Assignee shall not be required, without the consent of the Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act, to carry out any duty or exercise any power in connection with the liquidation if, to do so, would or would be likely to involve incurring any expense.

[16] It is common ground that the proper threshold test for s 253 is whether the Official Assignee "has acted in a manner that no reasonable liquidator would have acted".[1] This accords with the view, recently expressed by Toogood J in *Levin v Lawrence*, about the role of the Court in liquidations, namely that:[2]

> The Courts should be slow to intervene where matters of judgment and assessment on commercial matters are concerned. That includes assessing how far to investigate possible avenues of recovery of funds for distribution. Weighing the likely cost of pursuing such avenues against the prospects of success and the amount which may be recovered are matters of judgment which are squarely within the liquidator's domain.

[17] I do not, however, subscribe to the view promoted by Mr Cornegé that only irrational business decisions amount to a breach. Rather, I prefer the approach taken by Lindgren J in *Pace v Antlers*:[3]

> In my view, a liquidator must exhibit care (including diligence) and skill to an extent that is reasonable in all the circumstances. "All the circumstances" will include the facts that a liquidator is a person practicing a profession, that a liquidator holds himself or herself out as having special qualifications, training and experience pertinent to the liquidator's role and function, and that a liquidator is paid for liquidation work. "All the circumstances" will also include the fact that some decisions and courses of action which a liquidator is called upon to consider will be of a business or commercial character, as to which competent liquidators acting with due care, but always without the benefit of hindsight, may have differences of opinion.

[18] Section 254 also provides a limited exception to the s 253 duty where assets are "not available" for distribution. The scope of s 254 was sparsely argued. Mr Cornegé submitted that the exception applied whenever seizing assets was unreasonable. But that would make the exception co-extensive with the scope of s 253. I prefer a construction that makes the exception worthwhile. In any event, for reasons that will become evident, it is unnecessary to resolve the scope of s 254 with finality. I simply construe "not available" to refer to situations where there are no assets capable of distribution to creditors. This does not encompass assets that might be retrievable through proceedings. It is agreed that the assets were in fact retrievable. I therefore give s 254 no further consideration.

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1 *Commissioner of Inland Revenue v Hulst* (2000) 19 NZTC 15,693 at [24].

2 *Levin v Lawrence* [2012] NZHC 1452 at [54]. See also discussion in *Company Law* (online loose-leaf ed, Thomson Reuters) at CA284.01 – CA284.02.

3 *Pace v Antlers Pty Ltd (in liq)* (1998) 26 ACSR 490 at 503.

[19] Section 301 then empowers the Court to make restitutionary and/or compensatory orders for breach of this duty (among others) in the following terms:

> **301 Power of court to require persons to repay money or return property**
>
> (1) If, in the course of the liquidation of a company, it appears to the court that a person who has taken part in the formation or promotion of the company, or a past or present director, manager, administrator, liquidator, or receiver of the company, has misapplied, or retained, or become liable or accountable for, money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company, the court may, on the application of the liquidator or a creditor or shareholder,—
>
> (a) inquire into the conduct of the promoter, director, manager, administrator, liquidator, or receiver; and
>
> (b) order that person—
>
> (i) to repay or restore the money or property or any part of it with interest at a rate the court thinks just; or
>
> (ii) to contribute such sum to the assets of the company by way of compensation as the court thinks just; or
>
> (c) where the application is made by a creditor, order that person to pay or transfer the money or property or any part of it with interest at a rate the court thinks just to the creditor.
>
> (2) This section has effect even though the conduct may constitute an offence.
>
> (3) An order for payment of money under this section is deemed to be a final judgment within the meaning of section 17(1)(a) of the Insolvency Act 2006.
>
> (4) In making an order under subsection (1) against a past or present director, the court must, where relevant, take into account any action that person took for the appointment of an administrator to the company under Part 15A.

[20] In combination, the statutory duty at s 253 and the power to remedy breach at s 301 raises the following key issues for resolution in the present case:

(a) Was the decision to refuse to secure the buses reasonably available to the Official Assignee in all the circumstances;

(b) If not, whether and to what extent, the breach caused Mr Hayes' loss; and

(c) Whether it is just to make the Official Assignee compensate Mr Hayes for any loss.

[21] I turn to address these issues.

Was the decision to refuse to seize the buses reasonable?

[22] The full chronology is noted at [2]–[9]. Most relevantly:

(a) The liquidation commenced on 20 August 2014;

(b) The plaintiff supplied information to the Official Assignee, including the Bus Stop valuation on 26 and 28 August 2014 and sought urgent retrieval;

(c) The Bus Stop valuation does not identify or display the expertise of the valuer and is not signed by the valuer, but no checks were made about the cogency of the valuation;

(d) The Official Assignee obtained a "Motochek" for the three buses in September 2014 and identified a mismatch between the odometer records and the assumptions made in the Bus Stop valuation;

(e) The Official Assignee's First Report ignores the Bus Stop report;

(f) Mr Hayes complains about the First Report, including the omission of the Bus Stop report. He also raises the possibility Mr Gunson was continuing to use the buses;

(g) The Official Assignee engaged with Mr Gunson in October through to December 2014 and through this process was advised that Mr Hayes' claim was disputed and Mr Gunson claimed to be a creditor;

(h) Mr Hayes complained about lack of progress in December 2014;

(i) The Official Assignee obtained a "sight unseen" valuation of the buses in February 2015 at between $9,000 and $18,000;

(j) The Official Assignee sought to retrieve the buses by sending an agent to collect them, but Mr Gunson refused to co-operate;

(k) The Official Assignee is again informed by Mr Hayes that Mr Gunson is using the buses in April 2015;

(l) The Official Assignee summoned Mr Gunson for examination and meets with him in May 2015. Mr Gunson refused to hand the buses over;

(m) In May through to August 2015, the Official Assignee discussed alleged securities interests with Mr Gunson;

(n) In late 2015, the Official Assignee engages, through Mr Caro, with Mr Hayes' representatives about a potential approach;

(o) In December 2015, Mr Caro advised Mr Hayes' representatives that proceedings would only be justified if there was an adequate valuation and if Mr Hayes was prepared to fund them;

(p) In January, Mr Gunton's financial statements are discharged; and

(q) The Official Assignee in May 2015 invited Mr Hayes to provide a valuation, and then disclaimed the buses in July 2016.

[23] In this context, I am satisfied it was not commercially unreasonable for an Official Assignee to refuse to seize the buses for the following reasons:

(a) The "Bus Stop" valuation supplied by Mr Hayes was unreliable on its face – it was not signed by a qualified valuer;

(b) A cross-check of publicly available information suggested that the valuation was unreliable because it appears to refer to incorrect mileage (and the fact that the LTA records appear to be equally unreliable is not a reason to have confidence in an unauthored valuation);

(c) A standard independent (desk top) valuation placed a low value on the buses;

(d) The ownership of the buses was contested by a shareholder who refused to deliver up the buses;

(e) It was reasonable to assume Mr Gunson would not readily comply with simple written demands only to deliver up the buses;

(f) Based on the standard independent (desk top) valuation, it was likely to be uneconomic to incur the litigation expense to retrieve the buses; and

(g) Based on Mr Wells' valuation evidence, a forced sale was, in any event, unlikely to yield true market value of the buses, meaning that a real risk of an uneconomic retrieval would have confronted the Official Assignee even had he sought out Mr Wells' opinion at the outset.

[24] The delay taken by the Official Assignee to fully respond to Mr Hayes' requests for seizure was, I accept, unreasonable. The above steps should have been completed in a matter of months, not some 18 months. I also accept the Official Assignee could have proactively sought out better valuation advice and sent letters of demand. The failure to do so was unreasonable. But these factors do not make the failure to seize the buses unreasonable overall. Objectively assessed, the risk of an uneconomic retrieval process was always reasonably high, given Mr Gunson's likely opposition and the likely low value of the buses in a liquidation sale. There is nothing to suggest that the 18-month delay unduly exacerbated that reality or that seeking out Mr Wells' advice would have made a material difference.

Did the breach cause Mr Hayes's loss?

[25] Mr Hayes claims that, but for the failure to retrieve the buses, Taniwha would have enjoyed a sufficient surplus to pay all creditors, including Mr Hayes who was owed $40,220 for services rendered. It is unnecessary to explore in depth the arguments made by the Official Assignee based on causation; that is, Mr Hayes broke the chain of causation by refusing to take up offers to provide valuations, fund retrieval proceedings or to vest the buses in him, because I think there is a major, orthodox, causation problem for Mr Hayes. As explained, the weight of the evidence suggests that the buses would not have sold at the value stated in the Bus Stop valuation in a liquidation context. It is more likely, in my view, that they would have sold at a value substantially less than that. In this regard, Mr Wells accepted this was likely and Mr Edwards' experience showed that, at auction, buses tended to attract a sale price within the sight unseen range of values.

[26] I am therefore not satisfied, on the balance of probabilities, that securing and selling the buses would have resulted in a sufficient surplus to pay the sum owing to Mr Hayes, as well as the fees payable to the Official Assignee (which already exceed $16,390).

Is it just to compensate Mr Hayes?

[27] This question now has a hypothetical quality. But there is much force in the argument that relief should be declined, at least in part, to creditors who do not take up the opportunities to mitigate their own loss in the liquidation process. While Mr Hayes' frustration at the inactivity of the Official Assignee is entirely understandable; Mr Hayes could have helped himself at several points, including by seeking assistance from Mr Wells when it became clear that the Official Assignee was not satisfied by the Bus Stop valuation, or by offering to fund the retrieval process, and/or by applying to have the buses vested in him and seeking the retrieval himself. This failure to mitigate is aggravated by the fact that Mr Hayes stood to benefit most from the seizure of the buses. The context to this is that the Official Assignee is statutorily bound to perform the liquidator's role. It performs a public service and the Official Assignee gains nothing commercially from the exercise. Accordingly, if I am

wrong about the reasonableness of the Official Assignees' breach, I would have reduced the sum payable by 50 per cent to account for Mr Hayes' failure to mitigate his own loss.

Outcome

[28] The claim fails. The Official Assignee did not breach his s 253 duty by refusing to seize the buses. It was reasonably available to him to refuse to secure the buses because the price obtainable for the assets may have been insufficient to return a surplus to creditors after expenses are paid. Assuming there was a breach, it was unlikely the sale of the buses would have resulted in a surplus to creditors after expenses, in any event. Finally, Mr Hayes also failed to adequately mitigate his loss by refusing to either fund the recovery process or take the buses and pursue recovery himself.

Costs

[29] Notwithstanding the result, the Official Assignee's ineffectiveness over a period of 18 months, while not a s 253 breach, was the genesis of this proceeding. The action was not improperly brought and, indeed, serves as a flag-post to Official Assignees of what not to do. I would let costs lie where they fall. However, submissions may be filed no more than three pages in length, if necessary, on costs. If the submissions, however, do not persuade me to change my mind, costs on the cost memoranda are likely to follow.