SUPREME COURT OF QUEENSLAND

CITATION:	*International Cat Manufacturing Pty Ltd (in liq) & Anor v Rodrick & Ors (No 2)* [2013] QSC 307
PARTIES:	**INTERNATIONAL CAT MANUFACTURING PTY LTD (IN LIQUIDATION)** ACN 099 908 942 (first plaintiff) and **DAVID HAMBLETON AND ROBERT MURPHY AS LIQUIDATORS OF INTERNATIONAL CAT MANUFACTURING PTY LTD (IN LIQUIDATION) ACN 099 908 942** (second plaintiffs) v **RAYMOND JOHN RODRICK** (first defendant) and **NU-LOG PTY LTD** ACN 001 420 515 (second defendant) and **SUSAN RUTH CARTER AND JASON WALTER BETTLES** (third defendants)
FILE NO/S:	BS9739 of 2006
DIVISION:	Trial Division
PROCEEDING:	Civil Trial – Further Order
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Philip McMurdo J
ORDERS:	**1. The plaintiffs pay to the first and second defendants their costs of and incidental to the proceeding, including reserved costs, to be assessed on the standard basis.** **2. The plaintiffs pay the costs of the third defendants of the proceeding, including reserved costs, if any, to be assessed on the standard basis up to and including 24 April 2009 and thereafter upon the indemnity basis.**

CATCHWORDS: PROCEDURE – COSTS – JURISDICTION – OTHER MATTERS – where the plaintiff company and liquidators brought proceedings against the defendants – where the liquidators were wholly unsuccessful – whether any order for costs in favour of any defendant should be made against the plaintiff company and the liquidators

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – where the plaintiffs were wholly unsuccessful in their claim against the defendants – whether there should be no order made as to costs

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON THE INDEMNITY BASIS – where the plaintiffs were wholly unsuccessful in their claim against the defendants – whether any of the defendants should have their costs assessed upon the indemnity basis

AMC Commercial Cleaning (NSW) Pty Ltd v Coade [2013] NSWSC 332, considered
Colgate-Palmolive Company v Cussons Pty Ltd (1993) 46 FCR 225, cited
Emmanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd [2003] QSC 299, cited
In re Beddoe; Downes v Cottam [1893] 1 Ch 547, cited
Mead v Watson as liquidator for Hypec Electronics (2005) 23 ACLC 718; [2005] NSWCA 133, considered
New Cap Reinsurance Corporation Ltd v AE Grant (2009) 257 ALR 740; [2009] NSWSC 662, cited
Silvia v Brodyn Pty Limited (2007) 25 ACLC 385; [2007] NSWCA 55, considered

COUNSEL: No appearance for the plaintiffs, the plaintiffs' submissions were heard on the papers.
No appearance for the first and second defendants, the first and second defendants' submissions were heard on the papers.
No appearance for the third defendant, the third defendant's submissions were heard on the papers.

SOLICITORS: McKays Solicitors for the plaintiffs.
Russells for the first and second defendants.
QBM Lawyers for the third defendant.

[1] This judgment deals with the costs of these proceedings, in which, subject to a current appeal, the plaintiffs were entirely unsuccessful.[1]

[2] I made directions for the delivery of written submissions about costs. They required the defendants' submissions ahead of the plaintiffs' submissions, which is what occurred. However, the lawyers now acting for the first and second defendants saw

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1 *International Cat Manufacturing Pty Ltd (in liq) v Rodrick* [2013] QSC 91.

fit to deliver written submissions in reply to those of the plaintiffs. Moreover, they did so without the consent of the plaintiffs' lawyers. I accept their explanation that this was by a mistake within the office of the lawyers for the first and second defendants. Still the plaintiffs maintain their objection to my receipt of those submissions. For the first and second defendants, it was contended that they were necessary in order to reply on matters of law and to correct misstatements of fact. A relatively small part of these submissions addressed legal questions. For the most part, my impression is that the submissions on the facts were not to correct misstatements about the evidence. But in any case, I am not persuaded by those submissions for the plaintiffs and there is no need to consider the further submissions for the first and second defendants, assuming that they were proper submissions in reply to them.

Costs between the plaintiff and first and second defendants

[3] The first and second defendants seek an order that the plaintiffs pay their costs of and incidental to the proceedings, including reserved costs, on the indemnity basis. The plaintiffs submit that there should be no order as to costs. Alternatively, the plaintiffs submit that if any order is to be made in favour of a defendant, it ought to be against the plaintiff company (which is in liquidation and has no funds) and not against the second plaintiffs who are its liquidators.

[4] It is convenient to go first to that alternative submission, which suggests that in a case such as the present, liquidators who bring unsuccessful proceedings should receive some more favourable treatment than other litigants in relation to costs. The plaintiffs' submission was that "a liquidator should only be ordered to pay the costs of proceedings which have been ordered against a company '… when the liquidator's conduct of the litigation is improper in the Beddoe sense'", for which they cite *Mead v Watson as liquidator for Hypec Electronics*.[2] By the "Beddoe sense", the court in *Mead* was referring to the judgment of Bowen LJ in *In re Beddoe; Downes v Cottam*,[3] in which it was held that a trustee could only be indemnified out of the pockets of his *cestui que trust* against costs, charges and expenses properly incurred for the benefit of the trust in the sense that they were reasonably as well as honestly incurred.

[5] In *Mead*, the substantive proceedings, although described in some of the judgments as being brought by a liquidator, were brought by the company in liquidation as the sole plaintiff.[4] The company's claim was to recover assets which, it alleged, had been acquired by one or more of the defendants with the company's funds and were thereby held upon a resulting trust in its favour. The successful defendants sought an order for costs against the liquidator personally rather than against the plaintiff. It was in that context that consideration had to be given to whether it was appropriate to order costs against the liquidator and the principle in *In re Beddoe* was discussed.

[6] 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*

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2 (2005) 23 ACLC 718 at 721 [14].

3 [1893] 1 Ch 547 at 562.

4 See *Hypec Electronics Pty Ltd (in liq) v Mead* (2003) 202 ALR 688.

Commercial Cleaning (NSW) Pty Ltd v Coade,[5] 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",[6] 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*,[7] 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:
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> > '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

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5 [2013] NSWSC 332.

6 [2013] NSWSC 332 at [10]

7 (2007) 25 ACLC 385 at 393-394.

> 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."

[7] 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.

[8] In this case, some of the alleged causes of action were those of the company and some were those of the liquidators. But by no means could it be said that the claims by the liquidators formed only a minor portion of the litigation. And there were issues within the company's claims which arose in the claims by the liquidators, the

most important of which was that of insolvency. I accept the submission for the first and second defendants that the trial would not have been materially shorter or less complex without the claims made by the company.

[9] Therefore the suggested distinction between the position of the liquidators and that of the plaintiff company is not established. If it is otherwise appropriate for any of the defendants to have their costs, they should be ordered against all plaintiffs.

[10] The defendants each argue that costs should follow the event. The plaintiffs have failed entirely against each of them. The plaintiffs submit that for varying reasons, the ordinary rule, that costs follow the event, should not apply here. I go first to their submissions about the first and second defendants.

[11] It is said that the first and second defendants, at many interlocutory hearings, caused unnecessary costs to be incurred. They complain of a number of occasions on which affidavits and draft pleadings were sought to be put before the court, which was prevented each time by a successful objection for the plaintiffs. I accept that there were several occasions on which that occurred. However, at least for the most part, that occurred when the first and second defendants were without legal representation. For those hearings therefore, they would recover no costs if the plaintiffs are ordered to pay their costs of the proceeding.

[12] The same may be said of the attempts by the first and second defendants to persist with allegations of fraud and other misconduct against the liquidators, at the trial. I accept that this caused some prolongation of the trial, although it would be impossible to fairly measure the extent of it. But it could not be thought that the trial was extended by days because of this conduct. And because the first and second defendants were unrepresented at the trial, the burden of any prolongation of the case would be limited to the plaintiffs' own costs.

[13] It must be kept in mind that the trial was the result of the plaintiffs' decision to prosecute what was, according to my judgment, an unmeritorious case so that the argument that the plaintiffs' prosecution of that case at the trial was unjustifiably delayed by defendants who were without legal representation in defending a case of some complexity, is hardly compelling. Further, with the benefit of hindsight, it can be seen that this case was always going to require more time than the five days which were initially allocated to it. Each party called many witnesses, none of whom was clearly irrelevant to an issue.

[14] In the plaintiffs' submissions on costs, it is said that insolvency was not a substantial issue on the pleadings and indeed "the findings on this issue that were made by the court did not form a part of the first or second defendants' submissions at trial". In my view, this misunderstands the effect of my reasons for judgment. In essence, I made the findings which I did in relation to insolvency on the basis of the continued support for the company by the first and second defendants. That was always at the heart of their case. The plaintiffs' case seemed to be oblivious to that point upon which the company's solvency depended. Perhaps that explains why the plaintiffs now say that they lost on this issue "by reason of the court undertaking its own analysis of the matter". That was an analysis which the court was always obliged to undertake. But it was also one which should have been undertaken by the liquidators.

[15] Next the plaintiffs make the bland submission that nine or ten of the 12 days of trial were taken up with "issues of the involvement of the first defendant in the [plaintiff] company and the ownership of the boat". It may be accepted that much of the trial was taken up with those subjects. But the "involvement of the first defendant" was critical to the question of solvency as well as to the question of whether he was a de facto director. Therefore, it is incorrect to say that "the plaintiffs succeeded on both of these matters". They succeeded in proving that his involvement in the company made him a de facto director. But they failed on the question of solvency. Moreover, they failed to prove that the company remained the owner of the boat. It is true that the defendants' argument, that it was always the owner of the boat even during its construction, was unsuccessful. But I found that the boat was effectively sold to the second defendant at or shortly after the completion of its construction.

[16] The plaintiffs submit that the conduct of the first and second defendants in "denying any significant involvement with the company and asserting ownership of the boat … brought about the litigation". That cannot be accepted. The litigation was the result of the liquidators' decision to commence and prosecute it.

[17] Next there is a complaint that the "repeated serious allegations made by the first and second defendants", being allegations of criminal conduct, "made it a practical impossibility to resolve the matter without having those allegations vented by way of a trial". That is an extraordinary submission to come from any unsuccessful litigant, let alone a liquidator. The starting point in all of this is that the plaintiffs have failed on all of their claims. It cannot be suggested that they were compelled to litigate what I have found to be an unmeritorious case in order to refute allegations of misconduct on their part. According to my judgment, if they could not have "resolved the matter", they should not have pursued it to a trial.

[18] In the plaintiffs' favour, it can be said that some of the trial was taken up with an issue upon which the plaintiffs succeeded, namely whether the participation by Mr Rodrick was such as to have made him a de facto director. I accept that the plaintiffs' costs would have been less had that question been conceded by Mr Rodrick. But a successful defendant is not usually denied its costs because some of its arguments were unsuccessful.[8] And a further reason for not departing from the ordinary rule in this case is the practical difficulty of fairly assessing the time and costs which were involved only in the litigation of the de facto director question.

[19] Therefore, it is my conclusion that the plaintiffs should be ordered to pay to the first and second defendants their costs of the proceedings, including reserved costs. The remaining question is whether those costs, or any part of them, should be assessed upon the indemnity basis. As is accepted, it must be established that there is something about the facts and circumstances of the case which warrants the making of an order other than upon the standard basis.[9] I go then to the various circumstances advanced by the first and second defendants which are said to justify an award of indemnity costs.

[20] The first is a contention that the liquidators prosecuted the litigation when, it is said, it was clear for a long time that they and their lawyers would be the only

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[8] See in particular the judgment of Chesterman J (as he then was) in *Emmanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299 at [84]-[88].

[9] *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225.

beneficiaries from a successful suit. That is said to come from the fact that the unsecured creditors, other than the second defendant, were quantified, in returns filed by the liquidators with the Australian Securities and Investments Commission, as amounting to about $346,000. It is suggested that this sum was always likely to be exceeded by the costs and expenses of the liquidation and the costs of prosecuting this proceeding net of any costs to be recovered from the defendants. However, that is not to say that success in this case would have provided no dividend to those unsecured creditors. The decision to prosecute this case, consistently with my judgment, must be seen as incorrect. But it far from follows that it was prosecuted for the improper purpose of benefiting only the liquidators and perhaps their lawyers. That is a serious allegation which could be established only by cogent evidence. Some attempt was made, within the written submissions about costs, to establish that fact. But that allegation could not be fairly determined in the present context. It was open to the first and second defendants to apply to stay the proceedings upon the basis that they were brought for that improper purpose, if there was evidence to support that application. This is what the defendants should have done if their complaint had substance. From time to time Mr Rodrick did say in interlocutory hearings that the case was being brought for that improper purpose. I raised more than once with the lawyers for the liquidators whether they had considered whether, having regard to the amounts involved, it was in the interests of the proper winding up of the company to prosecute the case. I was assured that the question had been considered and that the liquidators had received advice on the matter. Now I am asked, within written submissions, to find that this was a case which was pursued only in the interests of the liquidators and perhaps their lawyers. That contention must be rejected.

[21] Next it is said that the plaintiffs unreasonably rejected an offer to settle. The offer was unusual. It was made on 10 December 2009 whilst I had reserved my judgment on the defendants' applications for summary judgment and security for costs. It was made conditional upon those applications being unsuccessful. The offer was to provide a sum of $10,000 in favour of the liquidators (to come from funds held by the receivers), to be used by them to obtain advice from new solicitors and counsel as to whether they should settle the proceeding upon terms that the plaintiffs gave a full discharge to the defendants, the proceedings were dismissed by consent, the plaintiffs consented to an order to pay the defendants' costs, the plaintiffs would assign to the defendants their right of indemnity (if any) from their then solicitors and counsel in respect of their liability to the defendants for costs and the plaintiffs would cooperate in full with the defendants in their claims against those former solicitors and counsel.

[22] It is difficult to see how the conduct of the plaintiffs in pursuing this litigation, in the face of that offer, should affect the question of costs at all, let alone that it should warrant indemnity costs. The offer was to have the plaintiffs completely capitulate and, moreover, to remain burdened by an obligation to cooperate in litigation which would be pursued against the lawyers for the liquidators.

[23] Next it is said that the plaintiffs made allegations of improper conduct, involving moral turpitude on the part of Mr Rodrick, with no proper foundation. They refer to the allegations of misleading and deceptive conduct and breach of fiduciary duties including an improper use of his position as a director to gain an advantage for himself or his company. Some of those allegations were not pursued at the trial. Some were pursued. But the claims which were pursued, although ultimately

unsuccessful, were not so devoid of any arguable case as to warrant indemnity costs.

[24] It is submitted that "the judgment demonstrates that the case was plagued by fundamental problems that should have been obvious to any competent liquidator, properly advised". It is further claimed that "many of the defects in the numerous causes of action exposed in the judgment were highlighted in the defendants' written submissions in support of the summary judgment application". Of course it is relatively easy to assert, when a case has failed, that it had no prospects of success. But in this case, to a large extent, the plaintiffs' prospects turned upon the findings which would be made about the nature and extent of the support of the first and second defendants for the ongoing trading of the company. It would be wrong to characterise this case as one in which it was obvious, or should have been obvious, to the plaintiffs that they had no prospects of success.

[25] Many other matters are then grouped, within paragraph 35 of the defendants' submissions, as together constituting a "high-handed conduct of the case" by the plaintiffs. Two of them are the numerous amendments to the statement of claim and the unsatisfactory conduct of some interlocutory steps. But the first and second defendants were equally culpable in those respects. There is a complaint about the delay in bringing the case to trial. But that was also, to no small extent, due to the first and second defendants. Criticism is made of "the lack of a report by an independent and more senior expert witness" and "the apparent failure of the much more experienced Mr Murphy to concern himself in this sorry affair". I have no basis for concluding that the plaintiff Mr Murphy did not concern himself in this litigation.

[26] It is asserted that the case was commenced by the plaintiffs with no intention or expectation "that the defendants would go to trial, because to do so would be ruinous for them". I am unable to find that that was the state of mind of the plaintiffs when they commenced this case.

[27] Lastly, it is said that because the first and second defendants were for much of the case without legal representation, so that they can recover only their out of pocket expenses, "the burden of the litigation was greater than usual". I accept that the personal burden upon Mr Rodrick was very considerable. But the fact that he and his company will recover costs for only some of this extensive litigation does not mean that those costs should be assessed upon the indemnity basis.

[28] In my conclusion, the plaintiffs should be ordered to pay to the defendants their costs of and incidental to the proceeding, including reserved costs, to be assessed on the standard basis.

Costs between the plaintiffs and the third defendants

[29] The third defendants took no part in the trial. But clearly they have incurred some costs as a result of their joinder. They seek their costs from the plaintiffs upon the standard basis up to 24 April 2009, and upon the indemnity basis from that date.

[30] That date is chosen because it was the day following an email from the plaintiffs' solicitors to the solicitors for the third defendants which was in these terms:

> "We are instructed to withdraw, and hereby withdraw, all offers to resolve this matter.

> To remove any doubt, our clients are of the firm belief that the charge, which your clients rely upon to justify their actions in this matter, is invalid and that orders to this effect will be obtained following any trial.
>
> As a consequence, all moneys received by your clients, including those applied to your clients' fees have been unlawfully received and converted to your clients' use.
>
> In addition, our clients believe that your clients are also liable to (sic) an additional sum as general damages for trespass/conversion."

[31] The third defendants were proper parties to this claim, because they held funds which they had collected as receivers appointed by the first defendant under its charge. If the plaintiffs' challenge to the charge had succeeded, those funds (if still held) would have been payable to the liquidators. But it is another thing to say that the receivers would have been liable for dealings with property, or the proceeds of sale of property, which they seized as receivers prior to obtaining orders under s 588FF of the *Corporations Act* 2001 (Cth). These claims for conversion against the receivers seemed to be unsustainable.[10]

[32] On 21 April 2009, the third defendants attempted to settle the case by paying the balance of the funds held by them into court and upon the basis that the plaintiffs would discontinue the proceedings against them with no order as to costs. I am persuaded that the continued prosecution of the case against the third defendants at least from that point was so unreasonable as to warrant indemnity costs.

[33] The arguments for the plaintiffs as to why they should pay no costs to the third defendants have no substance. For example, the contention that the third defendants should have brought an application to strike out the claim against them is hardly sufficient to excuse the unsuccessful parties from having to pay the costs of the successful ones.

[34] In my conclusion, the plaintiffs should pay the costs of the third defendants of the proceeding, including reserved costs, if any, to be assessed on the standard basis up to and including 24 April 2009 and thereafter upon the indemnity basis.

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[10] *New Cap Reinsurance Corporation Ltd v AE Grant* (2009) 257 ALR 740 at 745 [19].