

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 365  
3026641

BETWEEN PCX (In Liquidation)  
Applicant

A N D WWX  
First Respondent

PIA  
Second Respondent

XJZ  
Third Respondent

VFK  
Fourth Respondent

Member of Authority: Vicki Campbell

Representatives: Aaron Harlow, counsel for Applicant  
No appearance for First, Second and Fourth  
Respondents  
Stephen Langton, counsel for the Third Respondent

Investigation Meeting: On the papers

Submissions received: 28 July 2020 from Applicant  
15 June and 6 August 2020 from Respondent

Determination: 10 September 2020

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**COSTS DETERMINATION OF THE AUTHORITY**

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- A. The Third Respondents application for an order for costs is declined.**

## **Background**

[1] An interim liquidator was appointed to the Applicant on 23 February 2018. Prior to the appointment of the interim liquidator a dispute had arisen over ownership of a digital platform developed by the First and Second Respondents who were the shareholders and directors of the Fourth Respondent.

[2] On 22 March 2018 the Applicant lodged a statement of problem with the Authority seeking damages against the First and Second Respondents for alleged breaches of their employment obligations and sought interim orders to restrain them from further breaching their obligations.

[3] The Applicant sought orders against the Third and Fourth respondents for aiding and abetting the First and Second Respondent's employment obligations. At the time these matters arose the Third Respondent was the Applicant's Managing Director and the First Respondent's father in law.

[4] The matter was granted urgency and an investigation meeting to investigate and determine the application for interim orders was scheduled for 27 March 2018. The interim issues were settled between the Applicant and the First, Second and Fourth Respondents. The terms of their agreement were recorded by the Authority in a consent determination dated 29 March 2018.<sup>1</sup> On the application of the parties non-publication orders were made in the consent determination and these have been applied to this determination.

[5] An investigation meeting to investigate the substantive claims, including those against the Third Respondent, was scheduled for 15 – 17 May 2018. On 14 May 2018 the Applicant advised the Authority that the parties had resolved matters and were waiting on one party to sign the discontinuance. The settlement did not include the Third Respondent.

[6] The Applicant was put into liquidation on 12 November 2018. Eight months later, on 1 August 2019 the Applicant withdrew its proceedings against the Third Respondent. On 6 August 2019 the Third Respondent indicated that costs may require resolution.

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<sup>1</sup> *PCX v WWX & 3 Ors* [2018] NZERA Auckland 106.

[7] On 11 March 2020 the Third Respondent lodged submissions with the Authority seeking a contribution to costs of representation he incurred in responding to the application made by the Applicant.

[8] The Authority advised the Third Respondent of its preliminary view that s 248 of the Companies Act 1993 prevented him from continuing proceedings for costs against a liquidated company without the liquidators consent or a High Court Order to do so.

[9] The liquidators notified the Authority that it did not consent to the matter being continued.

[10] Section 248(1)(c) of the Companies Act 1993 sets out the consequences of the commencement of liquidation:

(1) With effect from the commencement of the liquidation of a company-

...

(c) Unless the liquidator agrees or the Court orders otherwise, a person must not-

- (i) Commence or continue legal proceedings against the company or in relation to its property; or
- (ii) Exercise or enforce, or continue to exercise or enforce, a right or remedy over or against the property of the company.

[11] The Authority received further submissions from the Third Respondent which referred to a number of cases from the Employment Court and the Authority in which costs were considered where a company had gone into liquidation.<sup>2</sup> The parties were then advised the issue of costs would be determined on the papers by the Authority and a timetable for any further submissions was set.

### **Request for recusal**

[12] In submissions the Third Respondent requested another member be allocated this file to determine the issue of costs. No formal application has been lodged seeking recusal. However, for the sake of completeness, it is appropriate that I deal with this issue.

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<sup>2</sup> *Orakei Group (2007) Ltd v Doherty (No 2)* [2008] ERNZ 505 followed in *Bates v Aden Electrical Ltd (in Liq)* [2013] NZEmpC 130.

[13] The request for recusal is based on my preliminary view that the Authority was unable to receive and consider an application for costs when a company was in liquidation in the absence of the liquidators consent or an order from the High Court. That view was also the view expressed by the liquidator. While not stated explicitly I take from the Third Respondent's submissions that he is concerned I have compromised my impartiality as a result of my earlier intervention.

[14] The Supreme Court has described the test for judicial bias as whether a fair minded and well informed lay observer would have a reasonable apprehension that the decision maker might not bring an impartial mind to the issues which he or she is required to determine.<sup>3</sup>

[15] The lay observer is presumed to be objective and intelligent as well as reasonably informed about the Authority's workings and the facts of this particular case.

[16] A reasonable basis for concluding that the issue of costs would not be decided impartially must be established on the basis of evidence of pre-judgment.<sup>4</sup> I do not accept that raising the issue about whether the Authority could proceed to determine this matter when a company has been put into liquidation is evidence of judicial bias such that I should recuse myself. Further, the preliminary issue was raised as a matter of jurisdiction and not about the merits of the costs application.

### **Can a costs application be made against a company in liquidation?**

[17] The Applicant and the Third Respondent have unsuccessfully attempted to resolve the issue of costs. The Third Respondent seeks a contribution of \$6,000 to costs he incurred. The Applicant opposes the costs sought on the basis that any award would be futile because it would amount to an unsecured debt in the liquidation and the Third Respondent did not take any material steps in the proceeding to justify an award.

[18] The Third Respondent submits that s 248 of the Companies Act does not prevent him from applying for costs against the Applicant. He has referred the Authority to the decision of the Employment Court in *Orakei Group (2007) Ltd v Doherty* in support of his submission.

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<sup>3</sup> *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZSC 72.

<sup>4</sup> *Nisha v LSG Sky Chefs New Zealand Ltd* [2013] ERNZ 162 at [34].

[19] In *Bates v Aden Electrical Limited (in liq)* the Court held that it was questionable whether the Authority was permitted to make a costs order after the liquidation had commenced then applied the decision of the Court in *Orakei* to find it was open to the Court to make such an order against a company in liquidation.<sup>5</sup>

[20] *Orakei Group (2007) Limited* can be distinguished from this case because in *Orakei*, before the hearing of the challenge was set down, Chief Judge Colgan (as he was then) had ordered the plaintiff to pay \$6,000 security for costs. This included \$2,000 for costs which had been ordered by the Authority. The money was paid into Court and was placed into the Employment Court's trust account. The Judge ordered that the money was to be disbursed by order of a Judge.

[21] The Court in *Orakei* held that the money held in the trust account was not an asset of the liquidated company because the Court already had control over the money. As noted by the Court:<sup>6</sup>

The reason that proceedings may not be commenced or continued once liquidation has commenced is to ensure that the assets of the company are administered in an orderly fashion for the benefit of all creditors.

...

Moreover, an order regarding the \$6,000 would not affect the distribution of the company's assets because, as held above, the money paid into Court is not an asset of the company.

[22] The Third Respondent has also referred the Authority to the decision of the Supreme Court in *Mana Property Trustee Limited v James Developments Limited* where the Supreme Court declined an application by Mana Property to recover costs against the liquidator of the James Development company personally.<sup>7</sup>

[23] Based on the findings of the Court it then reversed the decision of the Court of Appeal in relation to costs in that Court, and imposed costs against James Development while it was in liquidation. However, that case can also be distinguished from the present case, because the case before the Court of Appeal was taken by the liquidators of James Development so there was liquidator consent for the appeal to be pursued in that Court.

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<sup>5</sup> *Bates v Aden Electrical Ltd (in Liq)* [2013] NZEmpC 130 at [7].

<sup>6</sup> Above n 2 at [36].

<sup>7</sup> *Mana Property Trustee Limited v James Developments Ltd* [2010] NZSC 124.

[24] In the present case, any orders for costs will affect the distribution of the assets under the control of the liquidator. I find the prohibition in s 248 of the Companies Act 1993 applies. Accordingly, the Third Respondent's application for an order for costs is declined.

Vicki Campbell  
Member of the Employment Relations Authority