IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-435

BETWEEN	ALF NO 9 PTY LIMITED Plaintiff
AND	PHILLIP GEORGE ELLIS, LYNLEY ANN ELLIS AND JOHN LOUIS COKER First Defendants
AND	ANTHONY CLIVE COLLINS Second Defendant
AND	ALEX FERGUSON KNOWLES Third Defendant
AND	TERRY SHAGIN AND FRANCIE SHAGIN Fourth Defendants
AND	JOHN WILLIAM CUNNINGHAM Fifth Defendant
AND	WELLINGTON BOOT LIMITED Sixth Defendant
AND	DOUGLAS RICHARD PAUL AND MELANIE TOLLEMACHE Seventh Defendants
AND	NICOLA JANE ELLIS (STABLES) Eighth Defendant
AND	PHILLIP GEORGE ELLIS Ninth Defendant
AND	NVESTEC LLC Tenth Defendant

Hearing: 30 September 2009

Counsel: M D O'Brien and B M Cash for Plaintiff
R B Stewart QC and S M Hunter for Defendants

Judgment: 13 October 2009

JUDGMENT OF RONALD YOUNG J

Introduction

[1] The essence of these proceedings is whether a debenture holder of IBS Holdings Limited ("IBS") sold the assets of IBS for less than true market value and as a result deprived AMP Capital Investments No. 4 Limited ("AMP") (a shareholder of IBS) of its proper entitlement.

[2] IBS was incorporated in 1999. Its shareholders were AMP (with approximately 14%), the first defendant (69%), the third defendant (15%) and employees of IBS including the eighth defendant (the remaining 2%).

[3] The Ellis Trust (the first defendant) became a debenture holder over IBS' assets, as were other defendants. They had advanced money to IBS. By 2003 it was clear IBS was underfunded but AMP and other shareholders were unable to agree on future funding.

[4] On 18 March 2003 the first defendant, exercised its rights under its debenture and seized of the assets of IBS. It then sold the assets to NVestec, the tenth defendant, for $3.4 million. This price the defendants say enabled IBS to pay its creditors in full save a disputed $49,130 claimed to be owing to the Ellis Trust.

[5] NVestec then sold the assets of IBS to Framenex Ltd in exchange for a shareholding in that company.

[6] In December 2007, on AMP's application, the High Court put IBS into liquidation.

[7] In 2008 the liquidators applied for approval to bring proceedings against the defendants, with funding from the plaintiff, a litigation funder, relating to a claim

that the sale of the IBS assets in 2003 was at an undervalue. This application was refused by Associate Judge Sargisson on 12 November 2008 (see *AMP Capital Investments No. 4 Limited* v *IBS Group Limited* (In liq) [2009] NZCCLR 19 (HC)).

[8] On 3 March 2009 IBS and the liquidators purported to assign the claims made in these proceedings to the plaintiff by an assignment deed. The plaintiff's claim is that the sale of IBS' assets for $3.4 million in 2003 was $11.5 million below their true value of $14.9 million. AMP's loss is therefore 14% of $11.5 million or $1.6 million.

[9] The statement of claim alleges the first to eight defendants breached their statutory and equitable duty of good faith in the sale of IBS' assets and breached their duty to obtain the best price on sale. Further, the statement of claim alleges the ninth defendant breached his statutory and equitable duties as managing director of IBS. It alleges NVestec, the tenth defendant, knowingly received or dishonestly assisted in these breaches and finally alleges conspiracy against the first, ninth and tenth defendants.

[10] The defendants now seek to strike out the proceeding or obtain summary judgment because:

a) the claim or causes of action which the plaintiff says it purchased from IBS by virtue of the Assignment Deed could not be sold by IBS;

b) the purported assignment of the causes of action is prohibited and is essentially the same as previously refused by Associate Judge Sargisson; and

c) the proceedings are an abuse of process.

Principles of strike out and summary judgment

Strike out

[11] High Court Rule 15.1 provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[12] The defendants rely upon 15.1(1)(a) and (d).

[13] Generally the application is to be dealt with on the basis that the plaintiff's pleaded facts can be proved. It is not generally an appropriate form to resolve disputed facts (see *Attorney-General* v *McVeagh* [1995] 1 NZLR 558, 566).

Defendant Summary Judgment

[14] High Court Rule 12.2(2) provides:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> …
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[15] Similarly where there are significant disputes of material facts the summary judgment procedure is not appropriate. Before summary judgment can be granted to a defendant all causes of action have to be untenable.

The claims

I now consider each ground in support of the defendants' applications.

A. IBS could not sell the causes of actions to the plaintiff

[16] The plaintiff's entitlement to bring these proceedings, not having suffered any loss itself, is based on what it says was the assignment of the causes of action in the statement of claim to it, from IBS and the liquidators, by an assignment deed ("the Assignment Deed") of 3 March 2009.

[17] The Assignment Deed records, in its introduction, that IBS has certain legal claims which it cannot itself fund and which it assigns to ALF No. 9 Pty Limited ("ALF") on the basis that the parties will share in any proceeds from the litigation.

[18] The Assignment Deed states:

> **3.1 Assignment**
>
> On the execution of this Deed and without further action by the parties being required, IBS absolutely and unconditionally assigns to ALF all (and not part only) of its respective right, title and interest to and in the Causes of Action and the present and future benefit of the outcome or proceeds of the Causes of Action.

[19] "Causes of Action" are defined as:

> Means the legal claims referred to in the draft statement of claim annexed hereto as Schedule A and any associated claims or rights.

[20] The draft statement of claim in the Assignment Deed is similar to the statement of claim filed in these proceedings.

[21] The defendants claim that IBS had already sold all its assets, including the causes of action in the statement of claim, to NVestec in 2003 when the first defendant exercised its power of sale under the debenture and therefore IBS had nothing to sell to the plaintiff in 2008.

[22] The Agreement for Sale and Purchase between IBS, the W C Ellis Trust (the debenture holder) and NVestec was completed on 26 March 2003. It records that the Trust, pursuant to its debenture, took possession of all the property and assets of IBS (clause A). It notes the debenture allows the debenture holders to sell all of the property and assets of IBS (clause B).

[23] The Agreement states that the property to be sold is that described in Schedule A. Schedule A deals with a variety of intellectual and property rights and machinery.

[24] Paragraph 10 of Schedule A then provides:

> All other property and assets whatsoever and wheresoever both present and future including but not limited to; freehold and leasehold land and interests in land held under licence, plant, equipment, machinery, fixtures, fittings, vehicles, vessels, aircraft shares and the capital of any company or corporation, patents, designs, trademarks, tradenames, licenses, book debts, uncalled capital, unpaid capital, goodwill bank accounts and cash on hand.

[25] The defendants' submission is therefore that in the Agreement for Sale and Purchase IBS sold all of its assets and property to NVestec including any causes of action IBS may have had, against any of the defendants. Thus, the liquidator had no IBS assets to sell, and no causes of action to assign to the plaintiff. The Assignment Deed is, the defendants say, therefore void as purporting to assign property to the plaintiff (the causes of action) which IBS did not own.

[26] The second associated submission by the defendants is that even if the causes of action were not sold to NVestec IBS needed the authority of the debenture holder's (first defendant) for its sale to the plaintiff. This obligation to obtain the debenture holders consent, the plaintiffs say, persists even though IBS was in liquidation. The debenture itself prohibits the sale of any company asset without the debenture holder's authority. The failure to get such authority means the assignment of the causes of action is void (see *Citic New Zealand Limited* v *Fletcher Challenge Forests Industries Limited* 1 March 2002, Potter J, HC Auckland, CP 583-SW/99 – [84], [85]).

Causes of action not included in sale

[27] The plaintiff's response to these claims is, firstly, the causes of action in these proceedings were not included in the sale of IBS' assets to NVestec. The plaintiff says that the Agreement for Sale and Purchase does not identify that any "causes of action" as sold as part of the transaction. The first part of Schedule A of the Agreement for Sale and Purchase specifies the intellectual property and machinery directly associated with the steel fabricating business run by IBS. Thus they say the words in cl 10 are governed by the first part of Schedule A. The plaintiff says it is therefore incorrect to infer cl 10 meant the parties intended to sell the causes of action the subject of these proceedings.

[28] I consider that there is no reason in this case not to give the words in cl 10 their ordinary meaning. The ordinary meaning of the words illustrate the objective intention of the parties that the agreement intended to sell all of IBS' property. Clause 10 provides for the sale of "All other property and assets whatsoever …".

[29] The fact that the first part of Schedule A contains specific reference to particular patents, trademarks and machinery was designed to identify particular assets of IBS that were being sold. However, there was nothing to suggest the detail in the first part of the Schedule was intended to somehow limit cl 10. Clause 10 made it clear that all of IBS' assets of whatever type were being sold. The use of the word "other" in this first line of cl 10 makes it clear it is referring to property and assets in addition to those in the first part of the Schedule.

[30] I agree therefore with the defendants' interpretation that the Agreement for Sale and Purchase of March 2003 sold all of the assets of IBS including the causes of action in these proceedings.

Assignment of future property

[31] The words of cl 10 also answer an associated submission by the plaintiff. An assignment of future property is only effective if the property is sufficiently described at the moment the assignee obtains legal ownership (see *Airby* v *Official Receiver* (1883) 13 App Cases 523 at 533). The plaintiff submits that the future property, here the causes of action, were not sufficiently described in the agreement and therefore the assignment of them was not effective.

[32] Here cl 10 of the Agreement for Sale and Purchase describes the property sold as "all other property and assets of IBS whatsoever or wheresoever both present and future..." This is an adequate description of future property in the sense that it describes all of the property of IBS and sufficiently complies with the need to identify future property. I therefore reject this submission of the plaintiff.

No notice of assignment

[33] The second response from the plaintiff to the defendants' submissions is that notice of the assignment (by virtue of the March 2003 Agreement for Sale and Purchase) had to be given to the debtor (IBS) before the assignment was valid. The plaintiff says no such notice was given and therefore the purported assignment was invalid. IBS therefore still had the causes of action to sell to the plaintiff.

[34] This submission is based on s 130 of the Property Law Act 1952 (in force at the time of the assignment of March 2003). Section 130(1) provided:

> **130 Assignment of debts and things in action**
>
> (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal or equitable thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have

> been entitled to receive or claim that debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities that would have been entitled to priority over the right of the assignee if this Act had not been passed) to pass and transfer the legal or equitable right to that debt or thing in action from the date of the notice, and all legal or equitable and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[35] The debtor in this case is IBS. It had notice of the assignment in the sense that it was a party to the agreement which assigned the causes of action to NVestec. In those circumstances it can hardly be said that the debtor, IBS, had no notice of the assignment. I reject this submission.

Equity allows IBS to retain cause of action

[36] The plaintiff submits, on the authority of *Telecom New Zealand Limited* v *Sintel-Com Limited* [2008] 1 NZLR 780; [2007] NZCA 499, that a Court will allow IBS to retain the right to pursue its causes of action on the principle that equity will not allow a party to take advantage of its own wrong doing. In this case, the plaintiff says, the wrongdoing was the defendants' sale of the assets of IBS at an undervalue (but from which the defendants ultimately benefited) from which AMP suffered loss. Thus to allow this (objectionable) sale of IBS' assets by the defendants to itself prevent any challenge to the defendants' actions on this sale would be allowing the defendants to take advantage of their own wrongdoing (the sale of assets). The defendants therefore should not be able to avoid challenge to the value of the sale of IBS' assets by claiming the right to bring such proceedings had been sold in the very same transaction.

[37] The facts of *Telecom New Zealand Ltd* v *Sintel* are as follows. Sintel provided audiotext telecommunications services primarily to Korea. Telecom contracted to provide Sintel with telecommunications services. ANZ advanced Sintel $3.5 million secured by debenture. Sintel gave notice to Telecom of the assignment to ANZ of Sintel's rights under the Telecom contract. Telecom agreed to pay money due to Sintel to the ANZ. Telecom failed to do so.

[38] Sintel disputed the amounts paid by Telecom under the contract. Telecom and ANZ also had differences as to future payments due from Telecom to ANZ. This was resolved by a settlement which involved a payment by Telecom to ANZ and an assignment by ANZ to Telecom of its debenture.

[39] Eventually Sintel was placed in liquidation. Sintel then commenced proceedings against Telecom alleging it had failed to account for $61 million it had received from Telecom Korea intended for Sintel.

[40] Telecom argued the debenture had assigned (by way of mortgage) all of Sintel's assets to ANZ. This included any causes of action relating to Telecom. Thus Sintel did not "own" the property in the causes of action and thus could not sue Telecom. Telecom, by virtue of the settlement agreement with ANZ now "owned" the causes of action and thus Sintel could not sue Telecom based on these causes of action.

[41] Sintel argued that it would be wrong to allow Telecom to prevent Sintel from suing Telecom as to do so would allow Telecom to take advantage of its own wrong doing.

[42] The Court identified the question to be addressed as (at [32]):

> "Is there an obligation in equity on the debenture holder to act in good faith vis-à-vis the debtor in relation to its dealing with or holding of the secured property, including an affirmative duty to sue, or at least not to resist a suit, as may be appropriate?"

[43] The Court concluded equity would not allow the debenture holder to take such advantage.

[44] At [44] the Court in Sintel said:

> It seems to us that the fundamental principle contended for by Mr Billington must be correct: equity will not allow a party to take advantage of its own wrongdoing (if such it proves to be). There must be an ability in a case such as this to enable a party in the position of Sintel to bring proceedings, if necessary in its own name, to set aside the underlying agreement, notwithstanding that formal effect has been given to the transaction.

[45] I agree with the defendants that an important distinction on the facts between this case and *Sintel* is that *Sintel* was concerned only with an assignment of a debenture from ANZ to Telecom. Here, there was a sale of the assets of IBS to NVestec which unequivocally sold the relevant property.

[46] The other relevant factor is that here AMP has not challenged the sale of the assets by attempting to set aside the sale by IBS to NVestec. Indeed as the defendants point out the plaintiff's pleadings effectively acknowledge the sale and rely upon it as the basis for their damages claim. The plaintiff says there are difficulties in challenging the sale by IBS to NVestec given NVestec onsold the assets to an apparently bona fide purchaser for value.

[47] However, whatever the reason, the lack of a challenge to the fundamental transfer of the assets from IBS to NVestec does distinguish this case from the facts in *Sintel*.

[48] Two other aspects distinguish *Sintel* from this case. Firstly, delay. In *Sintel* the Court said:

> [47] A second broad concern is that a party seeking to resort to equity should act timeously. This litigation has been regrettably prolonged. There was a gap of almost four years between the June 2000 settlement and the issuing of these proceedings in April 2004. Nevertheless, the proceedings were not out of time.

[49] The plaintiff in the present proceedings submitted that given the proceedings were not outside the Limitation Act 1950 restrictions there should be no concern about any delay. Although these proceedings were not out of time, being filed a few weeks before the six year limitation period expired, the limitation period cannot be the period against which timeousness is to be judged. If that were the case then the equitable principle that those who wish to resort to equity should act timeously

would be of no effect and the Limitation Act would invariably determine the position.

[50] While there may be arguments, as the plaintiff identified regarding the application of the Limitation Act in this case, the fact remains that AMP, aware of the potential for a claim from 2003, have done nothing to pursue the claim before the Courts for almost six years.

[51] Secondly, the basis upon which the Court in *Sintel* was able to satisfy itself that a cause of action existed was based on the proposition that in an assignment of a debenture the assignor retains the legal interest in the asset assigned and the debenture holder an equitable interest. Thus, where the assignee refuses to make a claim, the assignor, who has retained a legal interest in the asset, can do so.

[52] Here, however, the assignor (IBS) assigned both the legal and equitable interests in the assets of IBS when it sold all of its assets to NVestec. IBS therefore retained no legal interest in any asset on which it could sue. The causes of action are not therefore subject to any equitable interest (through the debenture) given there was no division of legal and equitable interests in the asset when sold. NVestec on transfer held both the legal and equitable interest in the assets of IBS. IBS held no interest in any of the assets.

[53] I am satisfied, therefore, that the "*Sintel*" principle has no application in this case and IBS retained no cause of action as its property on the sale of its assets to NVestec. I therefore reject the plaintiff's submission.

Not entitled to enforce security

[54] The plaintiff submitted that the debenture holders (the first defendants) were not entitled to enforce the debenture security and thus the sale of IBS' assets, based on the exercise of debenture rights in March 2003, was void. Thus NVestec could not have obtained title to IBS' assets because no valid sale had taken place given the debenture holder had no right to sell IBS' assets. The plaintiff says that NVestec

knew that the sale to it was improper and thus would not be protected as a purchaser for value and in good faith: s 124, Personal Property Security Act 1999.

[55] The plaintiff's pleadings, however, do not attempt to set aside the sale between IBS, the debenture holders, and NVestec of March 2003. Indeed, as the defendants point out, the plaintiff's pleadings appear to specifically rely upon the validity of the agreement by IBS to sell its assets to NVestec. Nor does the plaintiff seek any remedy in its pleadings arising from its assertion that there was no lawful basis for the debenture holders to exercise their rights under the debenture.

[56] The plaintiff's statement of claim is based on the proposition that the sale from IBS and the debenture holders to NVestec was valid but at an impermissible under value. Thus the claim seeks damages based on the difference between a "proper" sale price and the actual sale price of IBS' assets. The plaintiff's pleadings, therefore, rely upon the agreement between IBS and NVestec. Given that proposition it is hardly open to the plaintiffs to claim that the IBS/debenture holders/NVestec sale was void given this sale is the basis for AMP's and the plaintiff's claim for damages. I reject the plaintiff's submission.

Sale of causes of action

[57] The defendants submit that if in fact the causes of action in these proceedings for some reason remained assets of IBS, despite the sale to NVestec, then IBS was and is prohibited, by virtue of the debenture, from selling its assets including the causes of action [26]. Thus, the liquidators on behalf of IBS could not sell the causes of action they purported to sell in the assignment to the plaintiff. The debenture in favour of the first defendant and other debenture holders prohibited the sale of company assets. To sell such an asset would reduce the security value of the debenture. Thus, any sale of IBS' assets had to be with the authority of the debenture holder. The debenture holders did not give their authority for IBS to sell any causes of action to the plaintiff. Such a transaction, therefore, the defendants say, must necessarily be void.

[58] The defendants say if the causes of action were still owned by IBS then the liquidators could apply to the Court for permission to pursue the action on behalf of IBS (as it unsuccessfully did). In doing so the causes of action remain an IBS asset within the security of the debenture irrespective of the funding arrangements between the liquidator and the litigation funder. The defendants stress that in this example IBS brings the proceedings, not the litigation funder through a purported assignment of an asset of IBS.

[59] The plaintiff's response is to point to s 87 of the Personal Property Securities Act 1999 ("PPSA"). This provides:

> **87 Rights of debtor may be transferred**
>
> (1) The rights of a debtor in collateral may be transferred consensually or by operation of law despite a provision in the security agreement prohibiting transfer or declaring a transfer to be a default.
>
> (2) A transfer by the debtor does not prejudice the rights of the secured party under the agreement or otherwise, including the right to treat a prohibited transfer as an act of default.
>
> (3) In this section, transfer includes a sale, the creation of a security interest, or a transfer under judgment enforcement proceedings.

[60] Geyde et al in *Property in New Zealand* (2002) provides a useful commentary on s 87. The authors state (pages 321–322):

> Section 87(1) recognises a debtor's power to further encumber or dispose of its interest in the collateral regardless of the form of the security interest and regardless of any term contained in the security agreement that purports to restrict the debtor's ability to encumber or transfer the property.
>
> …
>
> The transferability of the debtor's interest in the property is not affected by the fact that a transferee (including a subsequent secured party) or seizing creditor may know of a contractual prohibition on transfer.

And further:

> Under s87(1) a secured party cannot prevent a voluntary or involuntary transfer of the debtor's interest in the collateral from being effective to create property rights in the transferee's favour.

[61] I agree with the plaintiff that s 87 provides a complete answer to the defendant's submissions. The Act applies to the defendants' security agreement with

IBS (its debenture). Section 87, therefore, recognises the power of IBS to transfer (here sell) its interest in collateral being the causes of action subject to the security interest. Thus, IBS was entitled to sell its interest in the causes of action to ALF. When IBS sells any interest in its property, which is subject to the debenture then, generally, the property remains subject to the security interest. Given these conclusions I am satisfied the March 2009 transfer of the cause of action by IBS and the liquidators to ALF was not void as a sale of assets which the debenture holder did not consent to. IBS, therefore, were entitled to sell the causes of action to ALF in March 2009.

[62] The plaintiff also submitted that given registration of the defendant's security interest under the PPSA had apparently expired by March 2009 the plaintiff would have taken clear title to the causes of action: s 52 PPSA. While not vital to respond to the defendants' submissions this seems correct.

[63] I therefore reject the defendants submission on this ground as a basis to strike out the plaintiff's claim.

Summary

[64] I am therefore satisfied IBS and the liquidators had nothing to assign to the plaintiff. IBS had no cause of action against the defendants which it could assign to the litigation funder.

[65] For those reasons the Assignment Deed is void, purporting to assign property, it could not. The lawfulness of the assignment is the backbone of the plaintiff's entitlement to bring these proceedings. It is therefore appropriate to strike out the statement of claim against all defendants. For the sake of completeness I consider the defendants' further grounds.

B. The Assignment Funding Deed

[66] The second broad ground of attack by the defendants is based on the Assignment Deed. The defendants say that a liquidator may:

a) issue proceedings in its own right with the assistance of a litigation funder as long as the liquidator retains sufficient control of the litigation. This arrangement will typically be subject to Court control. This approach was rejected by the Associate Judge in this case as giving too much control of the litigation to the litigation funder: [7];

b) assign a company's property including any causes of action absolutely in return for a fixed fee or a share of the proceeds of the litigation. The litigation funder, to whom the causes of action are assigned, may then bring the proceedings in its own name but it cannot have the use of any of the special statutory powers available to liquidators in such circumstances (see *Re Oasis Merchandising Services Ltd* (in liq) [1998] Ch 170 (CA)).

[67] The agreement with which we are now concerned, the defendants say, assigned the causes of action absolutely to the litigation funder (in compliance with (b)) but then attempted to retain for the litigation funder the advantage of the liquidators powers. This the defendants say, is prohibited and essentially an attempt to get around the Associate Judge's decision and the Court's supervision of such arrangements (see *Re Nautalis Developments Ltd* (in liq) [2000] 2 NZLR 505 (HC); *Consolidated Technologies (NZ) Ltd* v *McCullagh*, CIV 2005-404-6454, 15 May 2006, Rodney Hansen J).

[68] The plaintiff submits that the Assignment Deed does not require the liquidators to exercise any of their special statutory powers but to simply co-operate to ensure the litigating funder has access to all relevant information when undertaking the litigation.

[69] The issue therefore between the parties comes down to the interpretation of the Assignment Deed. I consider that the Assignment Deed is capable of either interpretation. This is a summary judgment/strike out application. Before I could be sure of the correct meaning of the relevant provisions in the Assignment Deed I would want a full exploration of the relevant factual matrix. Only then would it be appropriate to declare the objective intention of the parties to the agreement, taking account of its commercial context. On this ground the defendants' application for strike out/summary judgment would therefore fail.

[70] To illustrate some of the interpretation issues. The Assignment Deed is between IBS, the liquidators and the plaintiff ALF. As I have observed the Agreement assigns all the causes of action in the current proceedings to ALF.

[71] At 3.2 the Assignment Deed provides:

> 3.2 In order to give effect to the assignment in clause 3.1 each party agrees that it will do, give, make, or execute all such acts, matters, things or documents as may be required by the other from time to time to:
>
> 3.2.1 perfect or give effect to the assignment;
>
> 3.2.2 give notice to third parties of the assignment;
>
> 3.2.3 enable the Causes of Action to be properly pursued by ALF; and
>
> 3.2.4 enable ALF to obtain the benefit of the outcome or proceeds of the Causes of Action.

[72] And at 5.1, 5.2.1 and 5.2.2 it provides:

> 5.1 Without limiting the generality of clause 3.2 but subject to clause 5.2 hereof, IBS agrees that it will on request by ALF:
>
> 5.1.1 deliver to or at the direction of ALF from time to time all documents, files and records in its possession, custody or control;
>
> 5.1.2 co-operate with ALF and assist ALF to obtain documents, files and records and information and evidence from:
>
> 5.1.2.1 existing and former officers of IBS and its related corporations;

5.1.2.2 existing and former legal, accounting or financial underwriting, consulting and expert advisers to IBS and its related corporations;

5.1.2.3 any other person in connect with the pursuit of the Causes of Action,

provided that nothing in this clause 5.1 shall require the Liquidators to do any act or thing that they reasonably consider would be contrary to law or constitute a breach of their duties as liquidators for IBS.

…

5.2.1 its reasonable out of pocket expenses in complying with its obligations under clause 5.1; and

5.2.2 the reasonable time spent by its Liquidators and their staff in discharging the obligations under clause 5.1 at the Liquidator Rates.

[73] The Assignment Deed does not expressly refer to the liquidators special statutory powers. Clause 5, however, which relates to assistance and co-operation, is concerned in the first part only with the assistance and co-operation of IBS without mention of the liquidators. Thus the plaintiff argues the agreement does not expect the liquidators to do anything other than, when acting as managers of IBS, assist ALF with the litigation. They would not, therefore, be exercising any of their special statutory powers.

[74] By itself the provision of information or assistance by the liquidators to ALF would be unobjectionable if there was no reliance on their special statutory powers. IBS would simply be co-operating in ensuring that the litigation funder could pursue the litigation. This would be in IBS' interest. However, the final part of cl 5.12 and cl 5.2.2 could be seen to put a rather different light on cl 5. These subclauses could be seen as suggesting the liquidators are expected to exercise their statutory authority in assisting and co-operating with the litigation funder.

[75] The position is far from clear. Clause 5.2.2 could be doing no more than recognising that IBS must act through the liquidators who will spend time complying with the legitimate obligations of IBS to ALF on the assignment.

[76] The other aspect relevant to the interpretation of the Assignment Deed is the fact that cl 5.1 is in very similar terms to the litigation funding arrangements which the Associate Judge rejected. This was rejected on the basis that the litigation funders had too much authority in the litigation. This would seem to favour the defendants' interpretation that the Deed assumed the exercise of the liquidator's statutory powers as did the proposal put to the Associate Judge.

[77] Given the difficulty of interpretation this issue is in my view unsuitable for resolution on a summary judgment or on a strike out application. It should be left for trial. I acknowledge of course that given my ruling in this first part of this judgment no trial will occur.

[78] After I had heard this application counsel for the plaintiff filed a further affidavit which annexed what the parties to it called an Interpretation Deed (dated 7 October 2009). The parties to the Interpretation Deed are ALF, the liquidators and IBS.

[79] The Deed as relevant provides:

> 1. The Assignment Deed is not intended to require, and does not require, the Liquidators to exercise any of their statutory powers in support of the Proceeding or otherwise. The Liquidators retain unfettered discretion as to the exercise of their statutory powers.
>
> 2. Clause 5.1 of the Assignment Deed was intended to apply, and does apply, only to IBS, such that it is only IBS that is required to deliver documents and other material and to co-operate to obtain documents, other material, information and evidence under clause 5.1. Neither the proviso to clause 5.1, nor any provision of the Assignment Deed, is intended to derogate from this.
>
> 3. This Interpretation Deed is subject to the same interpretation principles as is the Assignment Deed including but not limited to the requirement of clause 2.6 (i.e. that a provision shall be read down to the extent necessary to be valid and shall be severed if it cannot be read down to that extent).

[80] Whatever the effect of the Interpretation Deed given my conclusions in [73] it is of no moment in resolving the applications before the Court.

C. Abuse of process

[81] These proceedings allege that when the debenture holders sold the assets of IBS they did so at an under value of at least $11.5 million, thus they currently seek damages of $11.5 million.

[82] However, of all the shareholders only AMP, a 14% shareholder, says it has suffered any loss. The maximum AMP could recover based on the current pleadings is therefore 14% of the $11.5 million or $1.6 million.

[83] If the proceedings are wholly successful then, after the litigation costs are paid, AMP will receive about $900,000 from the litigation, the litigation funder about $4 million and the other shareholders of IBS about $5.5 million. This means in effect that 86% of the shareholders of IBS will be funding litigation to recover approximately $900,000 for AMP by paying about $4 million to the litigation funder and its legal costs to bring the proceedings. The 86% of the shareholders who are the defendants will get nothing from the proceedings because, if they are successful, the damages ordered to be paid to IBS will be by these 86% shareholders.

[84] Unsurprisingly the 86% of the shareholders are opposed to these proceedings. The defendants' case is that this funding structure gives rise to an abuse of process sufficient to strike out the proceedings. Beyond the arguments identified in part A and part B of this judgment the defendants accept that AMP is entitled to bring proceedings against them for the $1.6 million. The defendants, therefore, say their liability should be limited to the $1.6 million in damages plus any costs awarded against them. What they should not have to face is an extra $4 million plus in costs for the litigation funder. To allow the plaintiffs to bring these proceedings given the litigation funding would be an abuse of process.

[85] In *Hall & Ors* v *Poolman & Ors* [2007] NSWSC 1330 (Supreme Court of New South Wales) and see also [2009] NSWCA 64 (Court of Appeal), the Supreme Court observed at [385]–[388]:

> As I have noted earlier, the liquidators must have appreciated before they commenced these proceedings what the cost of the proceedings was likely to

> be and what the return to creditors was likely to be. They should have approached the court for directions under [the relevant Australian statutory provision] as to whether they were justified in commencing the litigation in view of the terms of the proposed funding agreement with IMF, the likely return to creditors even if the proceedings were wholly successful, and the cost of the proceedings generally. Applications to the court by liquidators for directions as to whether funded litigation should be commenced are frequent.
>
> …
>
> A liquidator proposing to enter into a litigation funding agreement should apply to the court for directions as a matter of course: the application enables the court to control, as far as it can, the use of litigation funding so that it does not destroy the very system of justice upon which it feeds. The law countenances litigation funding only because it provides access to justice to those who would otherwise be denied justice. If a liquidator's funding arrangements provide no more than a token benefit to the creditors and are in truth a means for the litigation funder and liquidator to profit handsomely, the liquidator should be directed not to proceed.

[86] The plaintiff says that it would not be appropriate for the claim to be brought only for AMP's loss because these proceedings are on behalf of IBS, not AMP. They say that there are other minority shareholders who may be affected by any such claim and there may be creditors of IBS who would also be entitled to be paid from any successful claim against IBS.

[87] It is clear, however, from the defendants' affidavits that all of the shareholders other than AMP have abandoned any rights or interest in this litigation and thus seek no compensation. Given they are all in some way or another associated persons this is hardly surprising.

[88] Secondly, on behalf of the defendants, Dr D R Paul, the seventh defendant, has sworn an affidavit that all creditors of IBS (save Mr Ellis, one of the defendants) have been paid. The liquidators have not disputed this claim. IBS has been in liquidation now for almost two years without a claim from any creditor. In those circumstances, in my view, it can be said with confidence that there are no other creditors of IBS.

[89] These factors, therefore, do not answer the fundamental proposition that the AMP claim could properly be restricted to 14% of the total loss said to have been

suffered by IBS. Such a claim could not be challenged as an abuse of process as the defendants accept.

[90] The plaintiff suggested, however, that the better course was to leave resolution of this matter to trial when the trial Judge could restrict damages solely to AMP's loss if he or she thought that was suitable.

[91] I am satisfied that to allow these proceedings to continue on the current basis would be an abuse of process. To unnecessarily expose the defendants to a potential payment of $4 million to a litigation funder effectively to fund litigation to recover $800,000–$900,000 for AMP is an abuse of process. This is especially so in this case where it is clear AMP could restrict the litigation to a claim solely for 14% of the loss of IBS.

[92] It would not be an abuse of process if the pleadings and the Assignment Deed between IBS and the plaintiff were amended to provide for a damages claim of no more than 14% of the loss alleged to IBS. I would have allowed an amendment to the pleadings by the plaintiff to reflect this principle. This in turn would no doubt have required an amendment to the Assignment Deed between IBS, the liquidators and the plaintiff. Amendments to pleadings are generally allowed if this causes the alleged defect (see *Marshall Futures Ltd* v *Marshall* [1992] 1 NZLR 316).

[93] I do not consider it would have been appropriate to leave this question to the trial court. Given I am satisfied that in its present state the arrangement is an abuse of process it would not be proper to allow the litigation in its current form to continue. The amendments suggested would protect the plaintiff's rights to bring the proceedings and challenge the alleged undervalued sale but would avoid the abuse of process inherent in this litigation funding arrangement. I also consider that the liquidators should have applied to the Court for approval for this litigation funding arrangement. The Courts have made it clear liquidators contemplating any form of litigation funding arrangement would be wise to seek Court approval (Re *Nautalis Developments Ltd* (in liq) (supra)). In this case at least the argument based on Part C (abuse of process) would have been avoided.

[94] At the end of the hearing I allowed the plaintiff to file further submissions of a new point raised by the defendants relating to the sale of the causes of action. These submissions have been taken into account at ([57]–[63]). However, the plaintiff's submissions also dealt with Part C of the judgment relating to abuse of process. I did not give the plaintiff permission to file further submissions on this topic. Given my conclusions these submissions in any event would not have influenced my decision.

[95] Subject to the appropriate amendments I would not have struck out these proceedings as an abuse of process.

[96] In summary, therefore, for the reasons given, especially at paragraphs [16] to [56] the proceedings by the plaintiff against all defendants will be struck out.

Costs

[97] The defendants are entitled to costs on their successful application. They should file a memoranda within fourteen days, the plaintiff's a further fourteen days in reply.

Ronald Young J

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