HIGH COURT OF AUSTRALIA

CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

JAMES HENRY STEWART (IN HIS CAPACITY AS LIQUIDATOR OF NEWTRONICS PTY LTD (IN LIQUIDATION)) & ANOR APPELLANTS

AND

ATCO CONTROLS PTY LTD (IN LIQUIDATION) RESPONDENT

Stewart v Atco Controls Pty Ltd (in Liquidation) [No 2]
[2014] HCA 31
15 August 2014
M141/2013

ORDER

1. *Vary the order of this Court made on 7 May 2014 so that paragraph 2 of that order reads as follows:*

   > *"Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 25 June 2013 and, in its place, order that the appeal to that Court be dismissed with costs, such costs to be on an indemnity basis."*

2. *Respondent to pay the appellants' costs of this application.*

On appeal from the Supreme Court of Victoria

CATCHWORDS

Stewart v Atco Controls Pty Ltd (in Liquidation) [No 2]

Procedure – Costs – *Calderbank* offer – Where appeal determined, and order for costs made, in favour of appellants – Whether respondent's non-acceptance of *Calderbank* offer reasonable – Whether respondent should pay costs on indemnity basis.

Words and phrases – "*Calderbank* offer", "indemnity costs".

1 CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ. The appeal in this matter was determined in favour of the appellants and an order for costs, of both the appeal to this Court and the appeal to the Court of Appeal of the Supreme Court of Victoria, was also made in their favour[1]. They now seek an order that the respondent pay those costs on an indemnity basis, relying upon the non-acceptance by the respondent of a *Calderbank* offer[2].

2 The relevant facts may be stated shortly. The issue between the parties when the respondent commenced proceedings in the Supreme Court of Victoria was whether the first appellant, as the liquidator of the second appellant, was entitled to an equitable lien over a fund in the liquidation (referred to in the proceedings as "the settlement sum") for the costs and charges he had incurred in obtaining that fund in proceedings brought against another party. Shortly after the respondent commenced proceedings, the first appellant offered to claim only nominal costs if the respondent discontinued the proceedings. It did not. The respondent was initially successful before Efthim AsJ, but on an appeal by way of hearing de novo, Davies J held that the principle in *In re Universal Distributing Co Ltd (In Liq)*[3] applied and that the first appellant was entitled to an equitable lien over the settlement sum. That sum was of the order of $1.25 million and the first appellant's claim exceeded that sum.

3 A second offer was made by the first appellant prior to the hearing of the appeal by the Court of Appeal. This is the relevant offer for determining the present application. The offer proposed that: the second appellant retain the settlement sum, no doubt in order to discharge its obligation to pay the first appellant; the sum of $55,000 which the respondent had been ordered to pay by way of security for costs of the appeal be released to the appellants; and the parties execute mutual releases. The offer was expressed to remain open until 26 September 2012. It was not accepted. No further offer was made.

4 This Court has a general discretion as to costs. The non-acceptance of a *Calderbank* offer is a factor, in some cases a strong factor, to be taken into account on an application for indemnity costs. The respondent submits that its rejection of the offer was not unreasonable. If that be the test, it would appear to

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1 (2014) 88 ALJR 594; 307 ALR 562; [2014] HCA 15.

2 *Calderbank v Calderbank* [1976] Fam 93.

3 (1933) 48 CLR 171; [1933] HCA 2.

require at the least that the respondent point to a reason for not accepting the offer beyond the usual prospects of being successful in litigation.

5 The offer might have required the respondent to abandon its claim to the settlement sum, but it also contained accommodations in its favour. The appellants would not pursue the not inconsiderable costs which had been ordered in their favour by Davies J (beyond the security for costs). Neither party would risk further costs. At the time the offer was made, the appellants had a judgment in their favour.

6 The principle in *Universal Distributing* and its application to liquidators are not novel. In order for the respondent to succeed in its claim against the appellants, it was therefore necessary for it to distinguish the principle. This is what it sought to do in the Court of Appeal and its argument was accepted. The decision of this Court on 7 May 2014, however, confirms the application of the principle to the circumstance where costs are incurred by a liquidator in getting in assets. That is the decision which ought to have been made by the Court of Appeal. In these circumstances, it can hardly be said that the respondent's non-acceptance of the offer was reasonable.

7 The application for indemnity costs with respect to the appeal to this Court stands on a different footing. At the time of this appeal, there was no extant offer by the appellants for the respondent to accept. There is consequently no failure on the part of the respondent that could found an order for indemnity costs[4].

8 In the result, the appellants should have an order for indemnity costs of the appeal to the Court of Appeal, but not of the appeal to this Court. The appellants have been substantially successful on this application, the costs of which may be treated as part of the appeal to this Court. It follows that they will be taxed, if necessary, on the usual basis.

9 The second order of this Court made on 7 May 2014 should be varied by ordering that the appeal to the Court of Appeal of the Supreme Court of Victoria be dismissed with costs, on an indemnity basis.

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4 See *Trustee for the Salvation Army (NSW) Property Trust v Becker (No 2)* [2007] NSWCA 194 at [8]-[9]; *Monie v Commonwealth of Australia (No 2)* [2008] NSWCA 15 at [71].