

**IN THE HIGH COURT OF NEW ZEALAND  
NELSON REGISTRY**

**CIV-2012-442-000291  
[2013] NZHC 1202**

BETWEEN	STEPHEN KING HAMPSON First Plaintiff
AND	DUNES CAFE BAR LIMITED Second Plaintiff
AND	REGISTRAR OF COMPANIES First Defendant
AND	ROBERT ARCHIBALD HAYWARD DONALD Second Defendant

Hearing: 15 May 2013

Appearances: S J Zindel for Plaintiffs  
A J B Holmes and R Hollyman for Defendants

Judgment: 24 May 2013

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**JUDGMENT OF ASSOCIATE JUDGE MATTHEWS**

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[1] The first plaintiff, Mr Hampson, is a director of the second plaintiff, which I will call “Dunes”. At all relevant times the second defendant, Dr Donald, was a director of 623 Rocks Road Limited (“Rocks Road”). For a number of years prior to mid-2004 Dunes ran a cafe bar and casino in premises it leased at 643 Rocks Road, Tahunanui, Nelson. The lease potentially ran until 2010, but in May 2004 Dr Donald expressed an interest in buying 643 Rocks Road and 623 Rocks Road with a view to demolishing both and redeveloping the site by erecting a building comprising a number of shops on the ground floor, and apartments and car parking.

[2] In June 2004 Dunes and Rocks Road entered a heads of agreement. The principal terms of the agreement were that Dunes would surrender its lease, allowing the development to take place, and would then lease a cafe and bar in the new

premises being built by Rocks Road. It provided for compensatory payments to Dunes in the meantime.

[3] The lease was duly surrendered, but during the course of construction of the new building Mr Hampson, and his wife Danielle, who, though not a director, worked in the business run by Dunes, had significant disagreements with Dr Donald. This culminated in Rocks Road cancelling the heads of agreement. It re-let the premises intended for Dunes to a third party. Dunes sought an injunction, but the Court declined the application. Dunes then cancelled the heads of agreement for wrongful repudiation. Dunes pursued its proceedings against Rocks Road, claiming damages for breach of contract. After a seven day trial Hugh Williams J entered judgment for Dunes on 25 February 2009, on liability. Four weeks later Rocks Road was placed into voluntary liquidation. Leave was granted to continue the claim. On 31 March 2010 judgment was entered for damages in the sum of \$600,229.58 plus interest. However, no part of that sum has been recovered; the liquidators did not recover sufficient assets to pay secured creditors so nothing was received by unsecured creditors. The liquidators filed their final report on 15 October 2010. On 30 November 2010 the period for objections to the removal of the company from the register expired, and removal ensued on 6 December 2010.

[4] In this proceeding, filed on 25 July 2012 and amended on 14 November 2012, Dunes applies for restoration of Rocks Road to the Register of Companies, reversal of the liquidator's decision to issue a final report, and appointment of the Official Assignee as liquidator of the company. Mr Hampson and Dunes seek damages against Dr Donald for breach of various statutory and common law duties they allege he owed to them.

[5] Dr Donald applies under r 15.1 to strike out the causes of action brought against him and seeks an order dismissing the proceeding against him entirely. He says the claims by the plaintiffs do not disclose any reasonable cause of action, they are frivolous, vexatious and an abuse of process, and none can succeed as a matter of law. Dr Donald also says that even if he did owe common law duties as alleged, claims in respect of them are statute barred by the Limitation Act 1950 which applies to this proceeding.

[6] A detailed account of the facts surrounding the events which give rise to this proceeding is contained in the judgment of Hugh Williams J issued on 25 February 2009 on the claim by Dunes against Rocks Road. It is unnecessary for me to repeat, in this judgment, the detailed account and analysis of the facts, or his Honour's conclusions in relation to them. An application to strike out falls to be considered on the basis that the plaintiff can prove the allegations of fact which are pleaded.

### **Principles to be applied on an application for strike out**

[7] In *North Shore City Council v Attorney-General*,<sup>1</sup> the Supreme Court reiterated the principles established in *Attorney-General v Prince and Gardner*<sup>2</sup> and *Couch v Attorney-General*.<sup>3</sup> At [25] Elias CJ said:

It is not necessary to traverse again the approach to exercise of the strike out jurisdiction. (I have had occasion to review it in *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [35]-[38] and *McNamara v Auckland City Council* [2012] NZSC 34 at [80]-[82]). It is enough for me to say of the peremptory procedure here adopted that a claim is not suitable for summary dismissal ahead of trial and before discovery unless, even on repleading, (*Couch v Attorney-General* [2008] 3 NZLR 725 at [31]-[32] and [114]) it is clearly untenable as a matter of law (in which case the pleadings should be struck out) or unless there is a complete and incontrovertible answer on the facts (in which case summary judgment may also be entered for the defendant).

[8] Blanchard J delivered his reasons and those of McGrath and William Young JJ on this point. At [146] he said:

The principles are well settled. The statement of them by Richardson P in *Prince and Gardner* is authoritative (*Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267):

A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed ... ; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material ... ; but

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<sup>1</sup> *North Shore City Council v Attorney-General* [2012] NZSC 49, [2012] 3 NZLR 341.

<sup>2</sup> *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).

<sup>3</sup> *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction ...

To this can be added the cautionary remark of the Chief Justice and Anderson J in this Court in *Couch* (at [33]) that particular care is required in areas where the law is confusing or developing. (“The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed”: *R v Imperial Tobacco Canada Ltd* [2011] 3 SCR 45 at [21] per McLachlin CJ for the Court). They identified liability in negligence for the exercise or non-exercise of a statutory duty or power as just such an area, and stressed the desirability of determining whether a duty of care exists in cases of this kind on the basis of actual facts found at trial, rather than on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out. Even in such cases, however, the range of the factual possibilities which could be established at trial may be sufficiently limited as to remove the danger of relying upon assumptions about what may be able to be proved. McLachlin CJ observed for the Court in the very recent Supreme Court of Canada case, *Imperial Tobacco*: “A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven”.

### **The claims in detail**

[9] The claims against the first and second defendants are now pleaded in an amended statement of claim which was filed on 14 November 2012, and further particulars filed on 28 January 2013. The first cause of action is against the first defendant only. Mr Hampson and Dunes seek orders restoring Rocks Road to the Companies Register, reversing the liquidator’s decision to issue a final report and appointing the Official Assignee as liquidator of the company. The proceeding has not yet been served on the Registrar. It appears that the sole purpose of seeking these orders is to invoke the powers of the Court given by s 301 of the Companies Act, discussed later in this judgment.

[10] The claims by Mr Hampson and Dunes are all set out in a portion of the document under the heading “Second Cause of Action”, but in reality these claims raise two separate and quite distinct causes of action. After pleading that Dr Donald behaved recklessly and allowed Rocks Road to engage in illegitimate business risk, Mr Hampson and Dunes give 16 particulars on which they rely. They also say that his decision that Rocks Road continue to trade in the circumstances they plead was

influenced by collateral advantages for another company owned by Dr Donald which was involved in the design process for the development.<sup>4</sup>

[11] Mr Hampson and Dunes lay their two separate claims on that foundation. First they say that Dr Donald breached the statutory duties imposed on him as a director of Rocks Road by ss 131, 133, 135, 136 and 137 Companies Act 1993. They say that these duties are owed to Rocks Road under s 169(3), but they are also owed to Dunes and to Mr Hampson as creditors of Rocks Road, “whether under section 301 or otherwise”.<sup>5</sup> In a statement of further particulars, they say the duties were owed to Dunes as a creditor of Rocks Road and to Mr Hampson as director of Dunes. In the notice of opposition to this application, they say the duties are owed to Dunes as a creditor of, and contractor with, Rocks Road and to Mr Hampson as a creditor and director of Dunes.

[12] The second and distinct claim is that Dr Donald owed a common law duty to Mr Hampson and Dunes, as well as to Rocks Road, to use reasonable care, diligence and skill, and that he breached this duty.<sup>6</sup>

[13] Dunes was a creditor of Rocks Road at all material times. The Heads of Agreement required certain periodic payments to be made to Dunes; evidently some of these payments were not made. Further, and more significantly, in the earlier proceeding the Court found that Rocks Road wrongly cancelled that agreement and was liable in damages to Dunes accordingly. Mr Hampson, though, was not a creditor of Rocks Road until 2011. He maintains that he became a creditor by virtue of a deed of assignment which he and his wife entered with Dunes on 28 June 2011. The deed provides that Dunes:

assigns a proportion of its cause of action against Dr Robert A H Donald [Dr Donald] for reckless trading and any other personal liability which Dr Donald may have at common law, equity or under the Companies Act 1993 or otherwise howsoever to the assignee and that proportion shall be the amount which [Dunes] owes [Mr and Mrs Donald] ...

The amount is stated to be \$389,294.40 plus interest from the date of the deed.

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<sup>4</sup> Amended statement of claim paragraphs 48, 51 and 52.

<sup>5</sup> Amended statement of claim paragraphs 54 and 55.

<sup>6</sup> Amended statement of claim paragraph 56.

### **The claim based on alleged common law duty of care**

[14] This claim was not pleaded in the initial statement of claim filed in July 2012. It is pleaded in the amended statement of claim which was filed on 14 November 2012. The first issue in relation to this claim is whether it is statute barred under the provisions of the Limitation Act 1950.

[15] Rocks Road gave notice of cancellation of the Heads of Agreement on 28 August 2006. On 5 October 2006 Dunes filed its proceeding against Rocks Road and applied for an interim injunction. On 6 October 2006 Rocks Road leased the premises which had been intended for Dunes under the heads of agreement to another company. On 6 November 2006 the Court declined that application. On 5 December 2006 Dunes gave notice cancelling the heads of agreement on the basis that Rocks Road had unlawfully repudiated the agreement by its purported cancellation. The damages awarded to Dunes were assessed at this date.

[16] The issue is whether the cause of action now alleged against Dr Donald based on common law duties of care accrued more than six years prior to the pleading of that cause of action on 14 November 2012.

[17] Mr Holmes says a cause of action in tort accrues when the plaintiff first sustains a loss attributable to the alleged breach of duty. Mr Holmes says that if a duty of care was owed, the date of breach was 28 August 2006 when Rocks Road breached the heads of agreement. At that date Dunes lost the entitlements to compensation which were provided for in the heads of agreement, for the period up to the point where Dunes was to commence its new lease, and lost the value of its business. Damages awarded against Rocks Road were for the periodic payments Dunes was entitled to receive for the period July to December 2006, compensation for lost gaming machine income up to 1 November 2006 and the value of the Dunes' business calculated as at 5 December 2006. All of these, he says, stem from the improper cancellation on 28 August 2006, so that was the date on which Dunes first sustained the losses it recovered in its case against Rocks Road, and which it now seeks to recover against Dr Donald for breaches of an alleged common law duty of care. Mr Holmes says the fact that Dunes had lost its business was even more

apparent after the company granted a lease to a third party on 6 October for the premises in which the business was to be conducted, and it became absolutely clear that was the case on 6 November 2006 when the Court declined to order injunctive relief. Mr Holmes says that as the claim in negligence was filed on 14 November 2012, it was brought more than six years after the cause of action relied on had accrued.

[18] Mr Zindel says that although the Court declined to grant an injunction against Rocks Road, which would have prevented Rocks Road from breaching its contract by refusing to allow Dunes to move into the new premises, this does not mean that Dr Donald was not negligent “in persisting with his stubborn approach after 6 November 2006. Each day that this persisted constituted continuing negligence”.

[19] Mr Zindel also says that in the claim by Dunes against Rocks Road the value of the business was calculated at 5 December 2006, and arguably that is the date for assessment of the loss attributable to the second defendant’s actions.

### *Discussion*

[20] A cause of action in negligence arises not on breach of a duty of care, but when the plaintiff first sustains loss attributable to that breach of duty by the defendant.<sup>7</sup> The time at which the loss is first sustained is the point at which that loss is measurable, though not necessarily measured. In *Thom v Davys Burton* Elias CJ said, in the context of a claim for negligent professional advice:<sup>8</sup>

[16] Difficulties in quantification, such as arose on the facts in *Nykredit (No 2)*, where a security negligently undervalued by a professional advisor had yet to be realised, do not mean that no measurable loss and no cause of action arises. The cause of action arises as soon as the plaintiff who relied on the advice is “financially worse off”, even if quantification is difficult and its measure in a particular case may ultimately depend on further contingencies. As Lord Walker pointed out in *Law Society v Sephton*:

It is a commonplace of negligence actions of all sorts that a cause of action may arise long before it is possible to quantify precisely the damages eventually recoverable.

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<sup>7</sup> *Thom v Davys Burton* [2008] NZSC 65 at [15] per Elias CJ, and at [38] per Tipping, McGrath and Wilson JJ.

<sup>8</sup> At [16].

[21] The Chief Justice then referred to *Wardley Australia Ltd v The State of Western Australia*, where Brennan J said:<sup>9</sup>

A plaintiff may suffer economic loss or damage in a number of ways: by payment of money, by transfer of property, by diminution in the value of an asset or by the incurring of a liability. Whether loss or damage is actually suffered when any of those events occurs depends on the value of the benefit, if any, acquired by the plaintiff by paying the money, transferring the property, having the value of the asset diminished or incurring the liability. If the plaintiff acquires no benefit, the loss or damage is suffered when the event occurs. At that time, the plaintiff's net worth is reduced. And that is so even if the quantification of that loss or damage is not then ascertainable. But if a benefit is acquired by the plaintiff, it may not be possible to ascertain whether loss or damage has been suffered at the time when the burden is borne – that is, at the time of the payment, the transfer, the diminution in value of the asset or the incurring of the liability. A transaction in which there are benefits and burdens results in loss or damage only if an adverse balance is struck. If the balance cannot be struck until certain events occur, no loss is suffered until those events occur. In other words, no loss is suffered until it is reasonably ascertainable that, by bearing the burdens, the plaintiff is “worse off than if he had not entered into the transaction”.

[22] As Mr Zindel accepts, the damage attributable to Dr Donald's negligence, should a duty (and breach of it) be established, is the lost value of the business.

[23] The value of the business was irretrievably lost when Dunes entered an agreement to lease the premises to a third party. It was not lost when Dunes purported to cancel the heads of agreement: that cancellation was found to be invalid. But for the contract with the third party, the remedy available to Dunes may have been an injunction preventing it from terminating the Heads of Agreement, and requiring it to honour its commitment to Dunes. Those possibilities were placed beyond the reach of Dunes at that point, 6 October 2006, and that is when the value of the business was lost. The decision of the Court declining to grant an injunction was a recognition of this position and was also more than six years prior to this cause of action first being pleaded.

[24] For these reasons the cause of action in negligence is statute barred and must be struck out. It is unnecessary, therefore, to consider a second issue, whether the duties were owed as alleged.

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<sup>9</sup> *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514 (HCA) at 536-7.

### **The claim based on the Companies Act 1993**

[25] As will be apparent from the outline of the case above, there is a measure of imprecision in the documents filed for Mr Hampson and Dunes.<sup>10</sup> As it is well-established that a statement of claim will not be struck out if it is capable of amendment, I will consider this application on the assumption that liability by Dr Donald to Mr Hampson can be pleaded on all bases referred to, if appropriate.

[26] For the sake of completeness, in the further particulars Mr Zindel also refers to the financial interests of Mr Hampson being closely connected to those of the Dunes, and that Dr Donald must have appreciated that losses caused to the Dunes would also have a direct impact on the financial position of Mr Hampson. Viewing these contentions in the most favourable light I can, from Mr Hampson's perspective, I cannot see with any clarity how these contentions are said to give rise to a duty of care to Mr Hampson.

[27] The statutory duties of directors on which Dunes and Mr Hampson rely are set out in ss 131 (duty to act in good faith and in the best interests of the company), 133 (requiring that a director exercise a power for a proper purpose), 135 (prohibiting a director from reckless trading), 136 (duty in relation to obligations) and 137 (duty to exercise the care, diligence and skill that a reasonable director would exercise).

[28] Section 169(3) provides that the duties set out in these sections are owed to the company, and not to shareholders.

[29] Mr Zindel argues that Mr Hampson and Dunes may recover personally from a director under s 301 of the Companies Act, that they could also sue Dr Donald directly for breach of the duties of care set out in the statute, and that if Mr Hampson and Dunes cannot recover personally under s 301 they may still claim on behalf of all creditors. In this event, Mr Zindel acknowledges that his clients would only share in the pool of funds recovered after distribution by a liquidator in the ordinary course of administering the liquidation.

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<sup>10</sup> At [11] above.

[30] Mr Holmes says that a creditor cannot recover personally under s 301 in respect of claims for negligence or breach of duty by a director; any sums recovered on that basis would fall into the assets of the company. Mr Holmes says that the statutory duties relied on are not owed to creditors, though of course creditors may benefit from an action against directors for breach of those duties, by the company, as the pool of assets for distribution among creditors would thereby increase. He accepts that if the circumstances required by s 301 are applicable a claim can be made on behalf of all creditors under that section.

### *Discussion*

[31] In *Mason v Lewis*<sup>11</sup> the Court of Appeal considered the duty imposed on directors by s 135. The Court of Appeal said that the purpose of this provision is the avoidance of inappropriate loss to the company's creditors through reckless trading.<sup>12</sup> This does not mean, however, that the duty in s 135 is owed by directors to creditors; rather, it is owed to the company, and it is the company which may recover losses to the company incurred by the directors trading recklessly. It is in that way that inappropriate loss to the company's creditors is avoided. The Court said:

[51] The essential pillars of the present section are as follows:

- The duty which is imposed by s 135 is one owed by directors to the company (rather than to any particular creditors) ...

[32] Although the Court did not discuss the other sections relied on by Mr Hampson and Dunes in this case, ss 131 to 138 inclusive are grouped in the Act under the subheading "Directors' Duties", and there is no reason to consider that the position in relation to any other section in this group should be other than it is for s 135.

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<sup>11</sup> *Mason v Lewis* [2006] 3 NZLR 225 (CA).

<sup>12</sup> At [57].

[33] In arguing that a director may owe a duty to creditors under these sections Mr Zindel relied on *Benton v Priore*.<sup>13</sup> In the course of a discussion about s 301 Heath J said:

[46] ... I am satisfied that Parliament expressed an intention not to codify all directors' duties within those articulated in ss 131-138 of the Act. Instead, those provisions should be seen as a restatement of basic duties in an endeavour to promote accessibility to the law. The possibility of further duties being owed by directors (whether through statutory obligations or otherwise) is not expressly excluded by the Act.

[34] On that basis Mr Zindel submits that common law and statutory duties may be owed to creditors directly.

[35] I accept, on this authority, that directors may owe other duties beyond those they owe under these sections, but the question is to whom the duties in the statute are owed. The same question arises in relation to any other duties that may be alleged, but given that claims relying on alleged duties outside the ambit of these sections are statute barred, as I have found, the issue of whether they are owed does not arise. *Mason v Lewis* is clear Court of Appeal authority that the duty imposed on directors by s 135 is not owed to creditors, and the same position applies in relation to all the duties relied upon by Mr Hampson and Dunes in this case.

[36] Mr Zindel argues that creditors may recover directly from directors under s 301. Section 301(1) provides:

**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] 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 [director]; 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

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<sup>13</sup> *Benton v Priore* [2003] 1 NZLR 564 (HC).

- (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.

[37] As I understand Mr Zindel's argument, he says that Mr Hampson and Dunes can recover as creditors against Dr Donald, under this section, provided that the company is reinstated to the Register and the liquidation continues (as sought in the first cause of action). He relies on *Sanders v Flay*.<sup>14</sup> Mr Zindel says that in this case Heath J indicated that while a claim under s 301 would ordinarily result in restoration of missing funds to the company's assets, for distribution among all creditors, the section itself gives standing to a creditor to bring the proceedings, and the Court has a discretion to award any money for which judgment has been entered to the applying creditor rather than to the liquidator for the benefit of all creditors. Mr Zindel reviewed cases referred to in the judgment.

[38] Mr Zindel acknowledges quite correctly that *Sanders v Flay* was a case in which it was established that funds had been misappropriated, and recovery was ordered. This is an important factor, because s 301(1) provides for different results, depending on the nature of the claim which is established.

[39] Mr Holmes relies on *Mitchell v Hesketh*,<sup>15</sup> as followed in *General Marine Services Ltd v The Ship "Luana" (No 2)*.<sup>16</sup> These cases analyse s 301(1)(c) thus: where an application under s 301 is made by a creditor the Court may order the director to pay transfer money or property which the director has misapplied, retained or become liable or accountable for, direct to a creditor, but the section does not provide that the Court may order that contributions by a director for negligence, default or breach of duty or trust may be paid to a creditor. Rather, such payments are made to the company.

[40] In the event, therefore, that the liquidation should continue as a result of Dunes succeeding on the first cause of action, and subsequently a breach of one or

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<sup>14</sup> *Sanders v Flay* HC Auckland CIV-2004-404-6712, 25 July 2005 per Heath J.

<sup>15</sup> *Mitchell v Hesketh* (1998) 8 NZCLC 261,559 (HC).

<sup>16</sup> *General Marine Services Ltd v The Ship "Luana" (No 2)* HC Auckland CIV-2010-404-2435, 7 February 2011.

more of the duties set out in the Act were to be established, any sum recovered from Dr Donald would be an asset of Rocks Road.

[41] Mr Zindel says that his clients wish, nonetheless, to proceed if that is the position. Ultimately that is a decision for them; for completeness I note, too, that Mr Zindel says that if Rocks Road is restored to the Register and the liquidation continues, Dunes would argue that Dr Donald has become liable or accountable for money or property of Rocks Road and would seek to invoke s 301(1)(c). That is not pleaded in the amended statement of claim. The remedy sought is squarely within s 301(1)(b)(ii).

[42] This underscores an argument by Mr Holmes that, in any event, any attempt to invoke the rights given to creditors under s 301 is premature. He argues that it is by no means a foregone conclusion that Rocks Road will be restored to the Register and consequential orders made. He says that an applicant for such orders must be able to show that the application is not completely pointless as a gateway for the recovery of its claim.<sup>17</sup>

[43] Without commenting in any way on the likelihood of success on the first cause of action, I accept that the claim is being presented to the Court the wrong way around, presumably because Mr Hampson and Dunes sought to proceed against Dr Donald directly, for a breach of statutory duties, and in tort, rather than, at least initially, invoking s 301. Neither of these is an avenue available to them, for the reasons I have given. However, if the liquidation of Rocks Road continues Dunes as a creditor could apply under s 301 for the orders permitted by that section.

[44] That section provides a procedural mechanism for bringing these claims during a liquidation. First liability must be established, then relief is assessed under s 301.<sup>18</sup>

[45] As noted at [11] above, the notice of opposition to this application states that the duties alleged on the part of Dr Donald are owed to Dunes as a creditor of and

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<sup>17</sup> *Albacore Fisheries Ltd v Sunsai Ltd* [2012] NZHC 117.

<sup>18</sup> *Mason v Lewis*, above n 11 at [51] to [55]; *Drilling Fluid Equipment NZ Ltd v Falloon* HC New Plymouth CIV-2008-443-377, 27 March 2009 at [28].

contractor with Rocks Road and to Mr Hampson as a creditor and director of Dunes. No argument was presented to substantiate the allegation that duties were owed by Dr Donald to Dunes in its capacity of a contracting party with Rocks Road. Nor was any argument presented to substantiate the contention that Dr Donald owed duties to Mr Hampson in his capacity as a creditor of Dunes, or in his capacity as a director of that company. As noted in [12] some of these allegations are in the notice of opposition so are not the subject of this application to strike out. But the allegation that duties were owed to Mr Hampson as a director of Dunes is in the particulars.

[46] Whilst the Court must move with caution on applications to strike out causes of action where novel duties of care are pleaded,<sup>19</sup> there are certain principles to be applied by the Court in determining whether a duty of care is owed. In *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd*, Glazebrook J said at [58]<sup>20</sup>:

The ultimate question when deciding whether a duty of care should be recognised in New Zealand is whether, in the light of all the circumstances of the case, it is just and reasonable that such a duty be imposed. The focus is on two broad fields of inquiry but these provide only a framework rather than a straight jacket. The first area of inquiry is as to the degree of proximity or relationship between the parties. The second is whether there are other wider policy considerations that tend to negative or restrict or strengthen the existence of a duty in the particular class of case. At this second stage, the Court's inquiry is concerned with the effect of the recognition of a duty on other legal duties and, more generally, on society.

[47] On an application to strike out a cause of action which has not been recognised in New Zealand it is not sufficient for a respondent to rest its position on the cautionary notes sounded in the cases referred to above.<sup>21</sup> At the very least there should be principled analysis of the case to show that it is sufficiently arguable that a Court might, at trial, find that a duty of care should be imposed. This analysis should follow the framework of the approach to such a determination, enunciated in *Rolls Royce*. If that course is followed a sound footing will be established on which the Court considering the application to strike out can properly assess whether the issue is sufficiently arguable to proceed to trial, where it must ultimately be determined.

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<sup>19</sup> At [8] above.

<sup>20</sup> *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [58].

<sup>21</sup> At [8].

[48] In this case that course was not followed. Nor, on the material before me, can I see any arguable basis upon which it might be suggested that Dr Donald may have owed a duty of care to Mr Hampson as a director of Dunes, let alone as a creditor of Dunes. Accordingly these grounds in the notice of opposition are without substance.

[49] The allegation that the duties alleged on the part of Dr Donald were also owed to Mr Hampson as a director of Dunes appears, as well, in the statement of further particulars. For the same reasons, that must be struck out.

### **Outcome**

[50] Accordingly, my decision in relation to the second cause of action is this:

- (a) All pleadings by Mr Hampson on the basis that he is a director of Dunes are struck out.
- (b) All pleadings by which Mr Hampson and/or Dunes say that in their capacity as creditors of Rocks Road they were owed duties by Dr Donald under any of the six sections of the Companies Act on which they rely are struck out.
- (c) All pleadings relating to causes of action in tort are struck out.
- (d) The second cause of action is stayed until the first cause of action has been dealt with, and the stay will only be lifted if the first cause of action succeeds. The terms on which the stay may be lifted can be determined at the time, but the second cause of action will need to be substantially recast to reflect the position established by this judgment, namely that any remedy the plaintiffs may seek will be under s 301 for breach of statutory duties.
- (e) At the time of the actions of Dr Donald which are under scrutiny, Mr Hampson was not a creditor of Rocks Road, nor was he a plaintiff in the proceeding by Dunes against Rocks Road. Neither counsel presented argument to me on the effect of the assignment to

Mr Hampson, described in the deed of assignment as “a proportion of its cause of action against Dr Robert A H Donald”. At present, therefore, the claim against Mr Hampson, based on his position that he is a creditor of Rocks Road by virtue of this assignment, will not be struck out, but if the stay is lifted the repleaded statement of claim must set out with precision the facts on which it is contended that he is a creditor entitled to claim a remedy under s 301.

### **Costs**

[51] Dr Donald has succeeded on this application. Ordinarily, costs should follow. I am informed that Mr Hampson is legally aided on this proceeding. Section 45 of the Legal Services Act 2011 provides that no order for costs may be against Mr Hampson unless the Court is satisfied that there are exceptional circumstances, and even if so satisfied, costs awarded must not exceed the amount that it is reasonable for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute. If Dr Donald wishes to pursue an application for costs against Mr Hampson it will be necessary for material to be presented which deals with the matters set out in s 45 of the Act. This does not apply, of course, to Dunes.

[52] I therefore reserve leave to Dr Donald to file a memorandum in relation to costs within 10 working days, and for Mr Hampson and Dunes to file a memorandum in response within a further 10 working days. I will then deal with issues relating to costs, on the papers.

[53] Timetable directions should now be made in relation to the first cause of action. A telephone conference will be convened.

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J G Matthews  
Associate Judge

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Counsel: S J Zindel