

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA298/2011  
[2011] NZCA 602**

BETWEEN                      DAVID STUART VANCE, RODNEY  
   GANE PARDINGTON AND SIMON  
   ALEXANDER WALLACE-SMITH  
   Appellants

AND                                HUHTAMAKI NEW ZEALAND  
   LIMITED  
   First Respondent

AND                                LOVITT'S NZ LIMITED (IN  
   RECEIVERSHIP AND IN  
   LIQUIDATION)  
   Second Respondent

Hearing:            18 August 2011

Court:                Arnold, Winkelmann and Andrews JJ

Counsel:            S Barker for Appellant  
                                 G Blanchard for Respondents

Judgment:        1 December 2011 at 10:30 AM

---

**JUDGMENT OF THE COURT**

---

- A        The appeal is dismissed.**
- B        The cross-appeal by the first respondent is allowed.**
- C        The appellants must pay the first respondent's costs for a standard  
          appeal on a band A basis with usual disbursements.**
- 

**REASONS OF THE COURT**

(Given by Winkelmann J)

[1] The issue on this appeal is the effect of the practice of privately appointed receivers limiting their personal liability for post-receivership contracts to the “available assets” of the company in receivership. Section 32(1) of the Receiverships Act 1993 (the Act) provides that a receiver is personally liable on a contract entered into in exercise of the receiver’s powers, but s 32(2) provides that the terms of such a contract may exclude or limit the liability of a privately appointed receiver.

[2] Prior to the receivership of the second respondent, Lovitt’s New Zealand Ltd (Lovitt’s), the first respondent, Huhtamaki New Zealand Ltd (Huhtamaki), supplied Lovitt’s with pouches for its product, pet food. Following receivership Lovitt’s continued to contract with Huhtamaki for the supply of pouches. In those contracts, Lovitt’s purported to limit the personal liability of the appellant receivers (the receivers) for any post-receivership supplies to Lovitt’s “available assets”.

[3] The legal effect of the post-receivership dealings between Huhtamaki and Lovitt’s is hotly disputed between the parties. In particular, there are disputes about the quality of some pouches supplied, whether all of the pouches supplied were supplied pursuant to current orders<sup>1</sup> and Lovitt’s obligation to pay for product manufactured but not yet delivered. Ultimately Huhtamaki issued proceedings against both Lovitt’s, and the receivers of Lovitt’s, claiming \$281,197.44 for product manufactured at Lovitt’s request and alleging that the receivers are personally liable for that amount.

[4] The receivers applied for summary judgment as a defendant on the grounds that they need not be involved in resolution of the issues between Huhtamaki and Lovitt’s because they are entitled to the benefit of the limitation clause. The effect of that clause is, they say, that Huhtamaki cannot look beyond Lovitt’s assets to the receivers personally, because the available assets of Lovitt’s totalled \$1.00 at the time of the issue of proceedings.

---

<sup>1</sup> This is because Lovitt’s claims to have suspended some of the orders.

[5] Associate Judge Christiansen declined the receivers' application for summary judgment.<sup>2</sup> He said that on the evidence available he could not conclude what meaning ought to be given to the expression "available assets" as contained in the receivers' limitation provision and accordingly could not conclude whether or not there were available assets to meet Huhtamaki's claim.

[6] The receivers appeal this decision. They say its effect has called into question the efficacy of the statutory right preserved to privately appointed receivers to limit or exclude liability.

[7] Huhtamaki supports the Associate Judge's reasoning in declining to enter summary judgment. In addition, they have cross-appealed against the Associate Judge's rejection of Huhtamaki's arguments that the provision relied upon by the receivers was not part of the terms of trade proffered by the receivers when placing orders with Huhtamaki, or, if it was part of those terms of trade, it was nevertheless ousted by a provision in Huhtamaki's standard terms of trade.

**Was the term limiting the receivers' liability incorporated into the contracts with Huhtamaki?**

*Factual Background*

[8] On 14 November 2008, shortly after their appointment, the receivers wrote to Lovitt's existing suppliers. They advised of their appointment and asked those suppliers who were unpaid for goods or services to complete the enclosed confirmation of debt letter giving details of any claim against Lovitt's and any claims to priority or security for the debt. Suppliers were told that any pre-receivership orders that had not yet been supplied should not be completed. The receivers asked that suppliers note several matters for the period during which the receivers retained control of Lovitt's as follows:

For the period that the receivers retain control of the company would you please note the following in respect of goods and or services provided to the company in receivership:

---

<sup>2</sup> *Huhtamaki New Zealand Ltd v Lovitt's NZ Ltd in rec & liq* [2011] NZCCLR 23 (HC).

1. Close the existing account in the name of the company for goods or services rendered prior to the date of our appointment.
2. Open a new account for the company Lovitt's NZ Limited (In Receivership) for goods supplied or services rendered to the company in receivership.
3. The receivers will not be responsible for payment for goods delivered or services provided to the company after our appointment unless these have been authorised by a written receivers order. Receivers' orders must be signed by one of the following persons:...

[9] The letter enclosed a "Confirmation of Debt" form, which the supplier was asked to complete if they were unpaid for supplies. Trade creditors were asked to insert the amount of their debt and specify whether they held security or held a preferential claim for the debt. The only part of the letter unrelated to confirmation of debts was the last sentence which read:

The receivers' terms for continued supply including the limitation of receivers' liability to the available assets of the company are noted and accepted.

[10] The confirmation of debt form was completed and signed by Huhtamaki's financial controller, Mr Wheeler, on 24 November 2008.

[11] In early December 2008, Mr Lesniak, Huhtamaki's Marketing Manager, was contacted by Mr Hunt, a senior Lovitt's employee, asking that Huhtamaki provide a quote for the supply of a large quantity of pouches. A quote for 1.2 million pouches, together with Huhtamaki's standard terms and conditions, was provided. On 9 December 2008 Mr Vance, one of the receivers, emailed to Mr Lesniak copies of the quotation and Huhtamaki's standard terms and conditions, signed by him as receiver.

[12] Huhtamaki's terms of trade contain the following provisions which are relied upon by Huhtamaki;

#### **Terms**

**Application** These conditions of sale (the "Conditions") apply to all transactions and arrangements between Huhtamaki New Zealand Limited (Huhtamaki) and the purchaser (the "Purchaser") including, as applicable, all quotations and order, supply and sale of goods.

**Conflict** These Conditions shall prevail where and to the extent that they conflict with the Purchaser's terms of order and conditions.

[13] Further orders were placed in January and March 2009. Although Huhtamaki was not asked to provide a separate quote in respect of those orders, Mr Lesniak's evidence was that it was understood and agreed that the pouches were to be supplied in accordance with the price and terms and conditions contained in the quotation and standard terms and conditions signed by Mr Vance on 9 December.

*High Court judgment*

[14] The Associate Judge was dealing with an application by defendant for summary judgment. To grant that application, he had to be satisfied that none of the causes of action in the plaintiff's statement of claim could succeed.<sup>3</sup>

[15] The receivers said that they could have no liability because Huhtamaki signed a form in which it acknowledged that the receivers' terms for continued supply included a limitation of the receivers' liability to the available assets of the company. But Huhtamaki argued that the only terms of trade produced by the receivers were the terms contained in the 14 November letter to all trade creditors, which did not contain a limitation of the type referred to.

[16] Alternatively, Huhtamaki said that even if the limitation of liability was part of the receivers' terms of trade, it was ousted when the receivers agreed to Huhtamaki's terms and conditions of sale, which provided that Huhtamaki's terms would prevail where and to the extent that they conflicted with the purchaser's terms and conditions of order. Huhtamaki's standard terms only contained a limitation of liability for its own benefit. There was no limitation of liability for the benefit of the purchaser. According to Huhtamaki, if the receivers' terms contained a limitation of liability that conflicted with Huhtamaki's, in those circumstances Huhtamaki's should prevail.

[17] The Associate Judge found that the meaning of the relevant words used in the limitation provision relied upon by the receivers was clear and unambiguous. For continuing supply Huhtamaki was required to "note" and, if it was willing, "accept"

---

<sup>3</sup> High Court Rules, r 12.2(2).

that the receivers' personal liability would be limited to the available assets of Lovitt's. The receivers' letter of 14 November and the attachment set out the terms of continued supply. Huhtamaki signed and returned the attachment, thereby accepting those terms. The Associate Judge was also satisfied that the limitation provision prevailed over Huhtamaki's terms of trade.

*Analysis*

[18] There is some force in Huhtamaki's argument that the documentation provided by the receivers was so muddled that it was not effective to incorporate the limitation clause.

[19] The letter of 14 November contained the basis on which the receivers would continue to deal with trade creditors. It made no mention of an exclusion or limitation of liability, but simply stated that the receivers would not be responsible for payment unless the order was properly authorised by them. That is consistent with the statutory presumption of personal liability for receivers on contracts entered into by them in exercise of receivers' powers.

[20] The sentence relied upon by the receivers to displace that presumption is contained within the confirmation of debt form. It is by no means clear cut that this can properly be construed as a contractual document for any future supply by Huhtamaki. The purpose of that enclosure was to collect information on amounts owed to trade creditors. Indeed, recipients of the letter of 14 November were only requested to complete the form if they were unpaid for goods and services. Those who completed the form would have focused on providing information as to the amounts due to them by Lovitt's. They had no reason to suppose that the form would contain a sentence stipulating the terms and conditions for future dealings, especially when future dealings were not under active discussion. Even though the form filler was required to sign the form and make deletions if required, the signature could well have been understood by the form filler to be required as authentication of the information supplied by him or her in that form, rather than as assent to the single sentence relied upon by the receivers. For these reasons it seems to us there was a possibility that the particular sentence, or its significance, would be overlooked.

[21] When the order was subsequently placed, there was no mention of the limitation of liability. One of the receivers signed Huhtamaki's terms of trade, an action consistent with the receivers agreeing to deal with Huhtamaki on those terms, rather than in accordance with the arrangements for dealing set out in the receivers' letter of 14 November.

[22] We also see significance in the fact that those who completed the confirmation of debt form were asked to note and accept the receivers' terms "for continued supply". There is an ambiguity as to whether the supply referred to is a supply by the receivers or a supply by Lovitt's trade suppliers. Although the fact that the form is to be completed by trade creditors might suggest that these are conditions for purchase by the receivers there are contrary indications. The reference to the "receivers' terms" suggests that the form filler has already seen the terms and conditions elsewhere, but the only place where terms for trade suppliers are spelt out is the letter of 14 November where the trade supplier is asked unambiguously to note conditions in relation to "goods and or services provided to the company in receivership". The terms the supplier is asked to note there do not include a limitation of liability, but rather strongly imply that the receivers will be responsible for the debt if they have authorised the dealings.

[23] The receivers seek to rely upon this one sentence in the confirmation of debt form to limit their liability. They cannot succeed with this defence unless the sentence is sufficiently clearly and unambiguously expressed to limit their liability as they claim.<sup>4</sup>

[24] For these reasons we are satisfied that there is an arguable case that a term limiting the receivers' liability for post-receivership dealings was not incorporated in

---

<sup>4</sup> We note that there is some suggestion in English authority that exclusion clauses are to be construed more rigorously against the party who seeks to invoke them, than are limitation clauses. This is discussed in *SGS (NZ) Ltd v Quirke Exports Ltd* [1988] 1 NZLR 52 (CA) at 55-56; and *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 17-18. More recently, however, in *i-Health Ltd v iSoft NZ Ltd* [2011] NZCA 575, this Court expressed reservation about whether in the case of ambiguity a limitation clause should be construed against the party seeking to rely on it. At [45] the Court said that "[r]ather, general principles of contractual interpretation should apply to establish what the parties intended. However...where one party seeks to argue that the other has agreed to waive or limit a right of significance to that party, the Court would ordinarily look for clear language or necessary implication before reaching that conclusion." We do not consider it necessary to resolve the issue on this appeal.

the contractual dealings for supply by Huhtamaki to the company in receivership. This is an issue which should be resolved at trial, when it can be considered within the full factual matrix of this case. Huhtamaki's cross-appeal, in respect of the Associate Judge's determination that the limitation of liability clause was part of the contract of supply with Huhtamaki, is therefore successful.

[25] We do not propose to consider the "conflict of forms" argument further because of the view we have reached on the principal argument in relation to the incorporation of terms. However, the cross-appeal having been allowed, that issue may also be argued at trial.

### **Interpretation of the limitation of liability clause**

[26] The receivers' argument before the Associate Judge, and initially before us, was that the wording they rely upon has the effect of excluding the receivers' personal liability. This is because the plain meaning of the words is that, whatever assets may or may not have been available to meet Huhtamaki's disputed claim, they still had to be those of the company. To the extent to which Lovitt's did not itself have available assets in whatever form from which to meet any payment due, Huhtamaki could not then look beyond the company and to the receivers personally for payment.

[27] The alternative argument advanced for the receivers before the Associate Judge was that there were no available assets of the company. Therefore, even if the clause did not exclude the receivers' liability, but rather limited it to the available assets of the company, if there were no available assets, the receivers could not be liable. Since there were insufficient assets to pay out the debenture-holder from day one of the receivership, and no assets at all by the time the proceedings were issued, there were no assets of the company available to pay trade creditors.

[28] The Associate Judge noted that the schedule of receipts and payments addended to the receivers' report dated July 2010 showed that Lovitt's bank balance at 11 May 2010 was \$407,467.91. It was arguable that those funds amounted to available assets out of which the funds could be paid. He concluded that the

definition of “available assets” was far from clear and the time at which the assets were to be measured for these purposes could be critical. This was, he considered, an issue properly for trial.

[29] Although the written submissions filed in support of this appeal maintained the argument that the term excluded the receivers’ personal liability, this position shifted in oral argument. Mr Barker, for the receivers, accepted that this was a limitation of liability clause rather than an exclusion clause. However, he maintained the argument that there were no “available assets” at the material time. From day one of the receivership the available assets to pay unsecured trade creditors was nil because there was a shortfall left owing to the secured creditor. In oral argument, Mr Barker clarified that the receivers accepted that the material time for measuring the available assets was the date on which the creditor became entitled to be paid. Here that date would not be until the dispute as to the obligation to pay is resolved in Huhtamaki’s favour (if it ever is). But even prior to the commencement of the proceedings the receivers had sold all of Lovitt’s assets and paid away any funds.

#### *Factual background*

[30] To place this issue in proper context it is useful to outline something of the contractual dealings between the parties and something of the course of the receivership.

[31] By around March or April, Huhtamaki had delivered and invoiced for all of the pouches ordered by the receivers in December 2008, although there were delays in delivery of those pouches. The delays resulted in an email dated 25 March 2009 from Mr Hunt suspending orders. On Huhtamaki’s case, the orders were subsequently re-instated and Huhtamaki proceeded to manufacture all of the pouches for the second and third orders.

[32] On 17 April 2009 Huhtamaki invoiced the receivers for part of the second order. That invoice related to 536,400 pouches which were then delivered (on 20 April). By the end of July, Huhtamaki had manufactured the balance of the

second order and all of the third order. It withheld delivery of these because Lovitt's had not paid for any of the approximately 1.7 million pouches already delivered, for which it had invoiced Lovitt's \$130,676.20.

[33] Over the next few months the receivers made a series of payments reducing the figure of \$130,676.20 due to Huhtamaki to \$51,560.80. Huhtamaki continued to withhold delivery of the balance of pouches, although it did request delivery instructions and a payment schedule, neither of which it received. In December 2009 it issued two invoices totalling \$281,197.44 relating to the balance of the second order and all of the third order. Those pouches have never been delivered, although they have been ready for delivery since July 2009.

[34] On 26 January 2010 the solicitors for Huhtamaki wrote to the receivers demanding payment. The receivers' solicitors responded by way of letter dated 10 February 2010. They said that the receivers would pay the sum of \$51,560.80 that was owed in respect of the pouches already supplied. However the balance of \$281,197.44 would not be paid as the orders for the undelivered pouches had been suspended. Huhtamaki's solicitors responded rejecting the claim that the suspension relied upon had been a permanent suspension. On 31 March 2010 the receivers replied stating that their liability was limited to the available assets of the company, which were said to be \$0.

[35] Huhtamaki issued proceedings in August 2010.

[36] We are told that the receivership did not have a good outcome for the appointing creditor.<sup>5</sup> The trading on resulted in a loss. The receivers sold the Lovitt's business in March 2010. They received \$3,125,271 for the business and assets. We were told that funds continued to flow into Lovitt's between May and November 2010. Mr Barker could not state with certainty when the last of Lovitt's funds (assets) were paid away. However, what is clear is that when final distributions were made to the appointing creditor, it did not receive full repayment of Lovitt's indebtedness to it.

---

<sup>5</sup> The receivers were appointed pursuant to a general security agreement.

## *Analysis*

[37] The concession made by the receivers that the sentence, if a term of the contract, provides a limitation rather than exclusion of liability for the receivers, is properly made. The plain and natural meaning of the sentence is that the receivers have a personal liability, but that liability cannot be for a greater sum than the available assets of the company.

[38] The sentence closely resembles clauses frequently employed to limit the liability of professional trustees. For trustees, the reasoning behind limiting their personal liability to the assets of the trust is that they are usually entitled to an indemnity from the assets of the trust to meet any personal liability.

[39] Section 32(9) of the Act provides that receivers are entitled to an indemnity out of the assets of the company in respect of personal liability under the section.<sup>6</sup> The indemnity takes priority over the appointing creditor's security. If construed in this light, the sentence relied upon can best be understood as an attempt to ensure that any personal liability of the receivers is no greater than the assets *available to the receivers* to indemnify them for that liability.

[40] The receivers' alternative argument (that there never were available assets because of a shortfall to the appointing creditor) also must fail in the light of this construction. The assets are available to indemnify the receivers, notwithstanding the shortfall, because the receivers' entitlement to indemnity takes priority over the appointing creditor's security.

[41] There remains an issue as to the point in time at which the "available assets" are to be measured in order to fix the upper limit of the receivers' personal liability. There is a range of possibilities - the date when the contractual obligation to pay on delivery was incurred by Lovitt's, the date when the goods were delivered or offered for delivery by Huhtamaki, the date when proceedings were issued, or the date when,

---

<sup>6</sup> Receivers may also negotiate a contractual indemnity from their appointing creditor in addition to the statutory indemnity.

in the case of a disputed liability, judgment was entered. The first alternative is Huhtamaki's favoured interpretation, while the last is that favoured by the receivers.

[42] The evidence to date suggests that assets could still have been passing through Lovitt's until after the issue of proceedings. Therefore, to succeed with their application for summary judgment, the receivers need to show that the correct contractual interpretation is the last option identified. As argued for here, if this were the correct interpretation, receivers could avoid any personal liability by disputing liability and then subsequently paying away the assets. That seems to us a most unlikely interpretation. It clearly favours the party seeking to rely upon the limitation of liability and is by no means the clear and unambiguous meaning of the words used. In any event, the answer to this question of interpretation, if it arises, is not clear cut and should be resolved at trial following consideration of all of the evidence.

### **Decision**

[43] For these reasons we agree with the Associate Judge's finding that the receivers' application for summary judgment should be declined. The receivers' appeal is dismissed.

[44] We allow the first respondent's cross-appeal against the Associate Judge's finding that the limitation clause was part of the contract of supply.

[45] The first respondent is entitled to costs on this appeal. The appellants must pay the first respondent's costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:  
Buddle Findlay, Wellington for Appellant  
Speakman Law, Auckland for First Respondent