Hodgson JA; Ipp JA; Basten JA Supreme Court of New South Wales. Court of Appeal. 27th March 2007.

JUDGMENT : HODGSON JA:

1 On 7 April 2005, in proceedings brought by the respondent (Brodyn) against the appellants (the administrator and Dasein), Young CJ in Eq. made the following orders:

The Court declares:

1. That the judgment obtained by the first defendant in District Court proceedings No 4868 of 2003 in the sum of $183,493.64 is extinguished.

The Court orders:

2. That the administrator admit the plaintiff's claim in the sum of $78,459.65.

3. That the first defendant consent with the plaintiff to discharge the judgment in District Court proceedings No 4868 of 2003.

4. That the defendants be restrained pending discharge of the District Court judgment from taking any steps to enforce that judgment.

5. That the defendants pay the plaintiff's costs of the proceedings.

6. That the second defendant be at liberty to receive his costs including any costs paid to the plaintiff under order 5 out of the assets of the first defendant.

7. Liberty to apply.

2 In those orders, the first defendant is Dasein, the second defendant is the administrator and the plaintiff is Brodyn.

3 On 24 February 2006, the Court of Appeal granted necessary extensions of time and leave for an appeal to be brought from these orders, and the appellants have brought such an appeal.

CIRCUMSTANCES

4 In October 2002, Brodyn (which trades as Time Cost & Quality, and is sometimes called TCQ) commenced construction of twelve residential townhouses at Wollstonecraft. In about November 2002, Brodyn entered into a sub-contract with Dasein to undertake concrete work on this project.

5 On 13 June 2003, Brodyn gave notice to Dasein alleging that Dasein had repudiated the contract and purporting to accept that repudiation as putting an end to the contract.

6 There were payment claims and payment schedules under the Building & Construction Industry Security of Payment Act 1999 served in June, July and August 2003; and on 28 September 2003, Dasein served a further payment claim under that Act claiming $214,744.90. Brodyn responded with a payment schedule dated 29 September 2003, contending among other things that money should be deducted for incomplete works and for rectifying defects.

7 In October 2003, Dasein made an adjudication application under this Act, and the adjudicator made a determination on 16 October 2003. An adjudication certificate was issued on 17 October 2003 and filed in the District Court, giving rise to a judgment in that Court for $183,493.64.

8 On 23 October 2003, Brodyn commenced proceedings in the Supreme Court against the adjudicator and Dasein, seeking an order quashing the adjudicator's determination; and on 30 October 2003, Brodyn commenced proceedings in the District Court claiming $385,441.93 against Dasein.

9 On 31 October 2003, Dasein was placed into voluntary administration.

10 On 25 November 2003, Brodyn commenced further proceedings against Dasein in the Supreme Court, seeking leave under the Corporations Act 2001 in relation to three proceedings it had commenced, and also a stay of execution of the District Court judgment or an injunction against its enforcement. These proceedings are the proceedings in which the primary judge's orders were made.

11 On 4 December 2003, a Deed of Company Arrangement was entered into between Dasein and the administrator. Clause 4.1 of that deed provided as follows:

> 4.1 Claims by Creditors shall be determined in accordance with the following procedures:
>
> (a) The Administrator shall at a time determined appropriate by him send out a notice to each of those persons who appear from the records of the Company to be Creditors inviting each within fourteen (14) days of the date of publication of the advertisement referred to in Clause 4.1(b) below to submit a claim to the Administrator by way of sworn Proof of Debt specifying in detail the nature and amount of his claim against the Company as at the Commencement Date;
>
> (b) The Administrator at the time of sending out the notices referred to in sub-clause (a) above shall advertise once in a principal daily newspaper circulated in New South Wales to the effect that any person claiming to be a Creditor may within fourteen (14) days from the date of publication of such advertisement submit a claim to the Administrator by way of sworn Proof of Debt specifying in detail the nature and amount of his claim against the Company as at the Commencement Date;
>
> (c) All claims and rights of action and remedies in respect thereof by a Creditor not submitted in accordance with the provisions of either Clause 4.1(a) above or Clause 4.1(b) above or not proven in accordance with the provisions of Clause 4.1(d) below shall be forever absolutely barred and extinguished against the Company;

(d)(i) The Administrator shall adjudicate upon all claims by Creditors and, in any case of difference between his adjudication and a Proof of Debt by a Creditor submitted pursuant to either Clause 4.1(a) above or Clause 4.1(b) above, shall notify his adjudication to that Creditor at his address shown on his Proof of Debt;

(i)(sic) The Administrator shall settle a list of Participating Creditors and each Creditor who lodges a Proof of Debt as aforesaid shall be admitted as a Participating Creditor for such sum as upon an account fairly stated, after allowing for the amount of any debt or set-off owing by him to the Company, as appears to be the balance due to him, a just estimate being made by the Administrator as far as is possible of the value of such debts and claims as are subject to any contingencies or sound only in damages or which for some other reason do not bear a certain value;

(iii) Notwithstanding the provisions of sub-clause (ii) above of this sub-clause the Administrator may compromise the debt or claim of any Creditor in such manner as he in his absolute and unfettered discretion shall think fit, whereupon he shall enter the name of such Creditor and the amount of his claim upon the list of Participating Creditors in the manner aforesaid;

(e) Except where inconsistent with the provisions of this Deed of Company Arrangement, Regulations 5.6.37 to 5.6.57 inclusive and Regulations 5.6.63, 5.6.64, 5.6.66, 5.6.67 and 5.6.68 of the Corporations Regulations 2001 shall apply to claims of Creditors as if the Company were in liquidation.

12 On 18 December 2003, Brodyn lodged a Proof of Debt with the administrator claiming $461,882.36, the consideration of which was said to be "loss, expense debts arising from construction contract – various works", supported by 312 pages of attached documentation. Included in this documentation was a copy of a letter from the administrator to Brodyn dated 26 November 2003, setting out items that had been claimed in Brodyn's District Court proceedings, with handwritten alterations to certain amounts made by Brodyn; and it is common ground that that document sets out items in respect of which Brodyn's claim was made, being items identified by letters A-Z (omitting H but with two Ks) and AA-MM (perhaps mistakenly noted as NN).

13 On 2 April 2004, Brodyn's proceedings seeking quashing of the adjudication determination were dismissed with costs. An appeal to the Court of Appeal was lodged on 16 April 2004.

14 On 21 April 2004, the administrator assessed Brodyn's proof of debt at nil, on the basis that there had been no adequate response to a request for particulars, and on the basis of advice of a Mr. Farrell, a project manager. The administrator did not provide Brodyn with Mr. Farrell's advice before coming to this assessment.

15 On 10 May 2004, Dasein undertook not to enforce its District Court judgment on condition that Brodyn provide a bank guarantee to pay Dasein $265,000.00 in accordance with an order of the Court of Appeal or in the event that the appeal was unsuccessful or abandoned. This guarantee was provided on 18 May 2004.

16 On 17 May 2004, Barrett J joined the administrator as a defendant in the proceedings commenced on 25 November 2003 (that is, the proceedings in which the orders challenged here were made), and gave leave to Brodyn to amend the proceedings to challenge the administrator's rejection of Brodyn's proof of debt. The Further Amended Summons which was before the primary judge was one filed on 23 August 2004, which among other things sought declarations as to Brodyn's entitlement to the amount claimed in its proof of debt, a declaration that this amount was set off against the amount in the District Court judgment, and an order pursuant to s.1321 of the Corporations Act.

17 I note here that s.1321 of the Corporations Act 2001 is in the following terms:

1321 Appeals from decisions of receivers, liquidators etc.

A person aggrieved by any act, omission or decision of:
(a) a person administering a compromise, arrangement or scheme referred to in Part 5.1; or
(b) a receiver, or a receiver and manager, of property of a corporation; or
(c) an administrator of a company; or
(ca) an administrator of a deed of company arrangement executed by a company; or
(d) a liquidator or provisional liquidator of a company;
may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit.

18 On 3 November 2004 Brodyn's appeal in the proceedings that sought quashing of the adjudicator's determination was dismissed with costs.

19 On 25 November 2004, these proceedings were heard before the primary judge. At the hearing, evidence for Brodyn was given by an expert Mr. El Safty, who gave an opinion as to a claim by Brodyn totalling $675,545.76, which included items corresponding to the items A-Z and AA-MM referred to earlier, and also additional items identified as NN-YY. Mr. El Safty assessed these claims at $486,371.57, of which he considered $169,996.92 was subject to "legal opinion with regards to repudiation/contract termination".

DECISION OF PRIMARY JUDGE

20 The primary judge noted that s.444D of the Corporations Act provides that deeds of company arrangement bind all creditors so far as concerns claims arising before the specified day, in this case 31 October 2003. He also noted that the Corporations Regulations 2001 made applicable to such deeds the provisions of s.553C of the Act,

which provide for the set off of mutual credits and debts between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company.

21 He found that the administrator had not acted as he should have in rejecting Brodyn's claim (that is, according to standards no less than those of a court or judge: see *Tanning Research Laboratories Inc. v. O'Brien* (1990) 169 CLR 332 at 339), in that he merely adopted Mr. Farrell's report, and did not put that report to Brodyn so that Brodyn could respond to it.

22 He said that in an application under s.1321 of the Corporations Act, the Court conducts a hearing de novo: see *Tanning* at 341. He noted that Mr. Farrell was not called to give evidence, although his brief report was annexed to the rejection of the proof of debt; and that the administrator did not disclose to the Court what he had been told about Brodyn's claim by a former director and a foreman of Dasein and its solicitor.

23 The primary judge rejected a number of submissions put by Counsel for Dasein and the administrator, including a submission that Mr. El Safty did not consider the claim that formed the basis of the proof of debt, but a totally different claim. He accepted Mr. El Safty's evidence, and also accepted that Dasein repudiated the contract. He found that the administrator should have admitted the proof of debt for $486,371.57; and even if he were wrong about repudiation, that the minimum for which proof should have been allowed was this amount less $169,996.92, that is, $316,374.65. He also noted that Brodyn's Counsel was content to have the proof admitted for $262,388.65.

24 He held that there was a set off under s.553C of the Corporations Act, giving rise to a balance in Brodyn's favour of $78,459.65 after elimination of the District Court judgment debt. He also held that Brodyn was entitled to discharge of the bank guarantee. Although no order was made to that effect, it appears that a Registrar of the Court gave effect to this holding by discharging the guarantee.

25 In the later judgment on costs, the primary judge referred to ***Cresvale Far-East Limited v. Cresvale Securities Limited (No.2)*** (2001) 39 ACSR 622 and to the decision on appeal in that case, ***Kirwan v. Cresvale Far-East Limited*** (2002) 44 ACSR 21. He said that these cases supported the proposition that an unsuccessful liquidator or administrator in litigation ordinarily pays costs to the successful party in the same way as any other person; but if he or she has acted reasonably, then he or she is entitled to be indemnified out of the company's assets. On that basis, he ordered both Dasein and the administrator to pay Brodyn's costs.

ISSUES ON APPEAL

26 The appellants rely on the following grounds of appeal:

With respect to Principal Judgment

1. His Honour erred in concluding that the First Appellant (the "Administrator") did not himself determine the Respondent's ("Brodyn's") proof of debt lodged on 15 December 2003 (the "Proof of Debt").

2. His Honour erred in concluding that the Administrator did not carry out a proper assessment of the Proof of Debt.

3. In finding that the Administrator should have admitted the Proof of Debt in the amount of $486,371.57:
   (a) His Honour misdirected himself by seeking to determine the amounts in which he perceived the Second Appellant ("Dasein") to be indebted to Brodyn for building work and damages without first determining whether any, and if so which of those amounts were claimed by Brodyn in its Proof of Debt;
   (b) His Honour's fact finding exercise miscarried in that His Honour failed to determine which, if any, of the amounts claimed by Brodyn in its Proof of Debt were established on the evidence before His Honour; and
   (c) His Honour fell into error having regard to the fact that the Proof of Debt claimed a lesser sum, namely $461,882.36.

4. His Honour's conclusion that the minimum for which the Proof of Debt should have been allowed was $316,374.65 was erroneous for the reasons set out in 3 (a), (b) and (c) above.

5. His Honour erred in concluding that, after setting off Dasein's District Court judgment against Brodyn, the Proof of Debt should be admitted in the amount of $78,459.65.

With respect to the Costs Judgment

6. His Honour erred in refusing to admit into evidence the affidavit of Brian Raymond Silvia sworn 14 February 2005.

7. In ordering the Administrator to pay Brodyn's costs of the proceedings, His Honour's discretion miscarried in that His Honour failed adequately to bring to account the following facts:
   (a) the Administrator was not joined to the proceedings until almost 6 months after the proceedings were commenced;
   (b) the Administrator was joined as a party to the proceedings without his consent;
   (c) as Brodyn was aware, at the time of the Administrator's joinder, and at all times thereafter, Dasein did not have any funds with which to satisfy any indemnity which might have been obtained by the Administrator against it;
   (d) the proceedings, in large part, dealt with issues other than the Administrator's rejection of the Proof of Debt, including, primarily, the determination, not of a proof of debt, but of claims which differed significantly from the Proof of Debt and which were founded upon extensive evidence that was not before the Administrator at the time that he determined the Proof of Debt;

(e) the participation of the Administrator in the proceedings did not cause Brodyn to incur costs any greater than it would otherwise have incurred; and

(f) the Administrator acted appropriately as a defendant in the proceedings in the Court below.

27 Brodyn relies on the following grounds in its Notice of Contention:

1. The trial judge found that the Respondent was owed by the Second Appellant $486,371.57 or in excess of $300,000, or no less than $316,374.65.
2. The trial judge found that the First Appellant did not carry out a proper assessment of the Respondent's Proof of Debt either in accordance with the Corporations Act or at all.
3. The First Appellant acted inappropriately, and/or unreasonably and/or in his own interest in the proceedings in the Court below.

28 I will consider in turn the challenge to the principal judgment and then the challenge to the costs order.

CHALLENGE TO PRINCIPAL JUDGMENT

Submissions

29 Mr. Einfeld QC for the appellants submitted that, by reason of cl.4.1(c) of the Deed of Company Arrangement, Brodyn could advance its claim only through the proof of debt procedure; and that cl.4.1(a) meant that the only claim that Brodyn could advance was one the details of the amount and nature of which were given in accordance with that clause.

30 Mr. Einfeld submitted that, on an appeal under s.1321, although the hearing is de novo, the only question is whether the administrator was in error in his decision, and if so, what is the correct decision on the proof of debt: see ***Tanning*** at 340-341; ***Ampol Limited v. Matthews*** (1991) 4 ACSR 592 at 605; ***Westpac Banking Corporation v. Totterdell*** (1998) 29 ACSR 448 at 451, 459; ***Murray v. Donnelly*** (2000) 34 ACSR 630 at 631; ***Re Galaxy Media Pty. Limited*** (2001) 39 ACSR 483 at 494. Brodyn's expert never considered the proof of debt, so his evidence was not to the point of what the primary judge had to decide.

31 Mr. Einfeld submitted that, even if a judge hearing such an appeal has power to allow an amendment, as happened in *Re Bow Investments Limited* (1992) 8 ACSR 515, no such amendment was sought in this case. He submitted it would be wrong to apply the approach of ***Leotta v. Public Transport Commission*** *(NSW)* (1976) 50 ALJR 666, because the administrator steadfastly opposed the conduct of the case below on the basis of an increased and different claim, so that at the very least the making of an application for amendment was necessary if such a claim was to be considered. If such an application had been made, the administrator could have decided whether he wished to seek an adjournment, lead more evidence and/or conduct further cross-examination; so that is not a matter that can be pursued on appeal. In any event, before the Court considered an amended claim, the administrator should have had the opportunity to decide whether or not to consent to such a variation: ***Starmaker (No.51) Pty. Limited v. Mawson KLM Holdings Pty. Limited*** (2005) 54 ACSR 453 at 460. Mr. Einfeld submitted that consideration by the Court of a wider and different claim was beyond jurisdiction.

32 Mr. Einfeld submitted that if, contrary to the submissions made below, the primary judge took the view that he could treat Mr. El Safky's evidence as supporting items in the proof of debt, up to the limit claimed in the proof of debt, then at best this approach could support the amount of $110,647.22 in relation to items ultimately relied on by Brodyn's Counsel. If, in addition, one added items included in the proof of debt, found in Brodyn's favour although not pressed by Brodyn's Counsel, up to the limit in the proof of debt, that would bring the total to $219,525.35; and Mr. Einfeld accepted that if Brodyn's Counsel had pressed these items in his final submissions before the primary judge, the case would not have been conducted any differently by the appellants.

33 Mr. Harper SC for Brodyn submitted that the primary judge was not limited to what was claimed in the proof of debt, because the case also involved the application for a declaration as to what was owed.

34 Next, he submitted that the point taken on appeal, in so far as it sought to distinguish between parts of Mr. El Safty's report that were referable to matters in the proof of debt and parts that were not so referable, was not open, because the only objection taken in relation to Mr. El Safty's report was as to the totality, and there was no suggestion that there were some parts that did relate to the claim and other parts that did not. Had such a suggestion been made, then the question could have been addressed below whether the other parts of the report were in substance within the original claim, and if not whether an amendment would be allowed.

35 Mr. Harper submitted that the case was like one where evidence sought to be led that was outside the particulars given of a cause of action, in which event objection has to be taken specifying how the evidence goes beyond those particulars, so that consideration can then be given as to whether the evidence is allowable without amendment or whether an amendment should be considered.

36 Mr. Harper submitted that, at the very worst for Brodyn, Brodyn was entitled to $219,525.35 plus GST of about $15,000.00. He submitted that it was plain therefore that the decision of the administrator had to be set aside. It was then open to the primary judge either to send the matter back to the administrator to reconsider, or determine the matter himself. Having decided to consider the matter himself, it was open for the primary judge to exercise all the powers of the administrator, including power to allow amendment if necessary.

Decision

37 In my opinion, Brodyn was limited to its rights pursuant to the proof of debt procedure, and associated appeal rights under s.1321, by force of cl.4.1 of the deed and s.444D of the Corporations Act. (However, if Dasein had

not had the benefit of the District Court judgment, it may be that Brodyn could have relied directly on s.553C of the Corporations Act to resist any claim against it by Dasein, without having to conform to the proof of debt procedure; although it would have had to conform to that procedure to claim any balance in its favour.)

38 In my opinion, the only objection to Mr. El Safty's report by the appellants was to the totality of that report, on the basis that Mr. El Safty did not consider the proof of debt, and on the basis that he considered a different claim. However, it was clear that Mr. El Safty was giving evidence about Brodyn's entitlement against Dasein for loss expense and debts arising from the subject construction contract, that being the consideration stated for the claim in the proof of debt. It was also clear that his evidence related specifically to items A-Z and AA-MM particularised in that claim. In those circumstances, the evidence was plainly admissible and relevant, and supported findings at least to the extent of those items, up to the limits of the amounts claimed in respect of them in the proof of debt.

39 Accordingly, the appeal to the primary judge had to be allowed, on the findings made by the primary judge.

40 The primary judge was wrong to say that the administrator should have admitted the proof of debt for $486,371.57, when the claim before the administrator was for only $461,882.36. Once it was established that the appeal had to be allowed, the question before the primary judge was what order was to be made under s.1321 reversing or modifying the administrator's decision, on the basis of the material before the primary judge. What the court was then doing was adjudicating upon the claim made by Brodyn, in terms of cl.4.1(d)(i) of the Deed of Company Arrangement.

41 However, I think there is a distinction to be drawn between the claim made by Brodyn, being for $461,882.36 for loss, expense, debts arising from a construction contract identified in accompanying material, and the detailed specification of the nature and amount of the claim required by cl.4.1(a). This distinction is similar to that between the statement of the cause of action relied on in court proceedings, which identifies issues to be determined, and particulars of the cause of action, which can help to identify issues but operate more significantly in limiting the evidence that can be led. If an administrator sought further material from a creditor after it had lodged a proof of debt, and that material supported a claim within the general description of the proof of debt (the cause of action) but varied in some respect from the detailed specification of the nature and amount of the claim given with the proof of debt (the particulars), in my opinion the administrator could adjudicate on the claim, relying on that additional material despite the variations; although I do not think this could justify the administrator allowing the claim *in a greater amount* than stated in the proof of debt, unless an amended proof of debt was provided. On that approach, the administrator could have allowed Brodyn's claim to the extent of $461,882.36 on the basis of Mr. El Safty's evidence, even though that evidence did not altogether coincide with the particulars originally given of the claim. Accordingly, in my opinion it would have been open to the primary judge to do so. In my opinion, this is consistent with *Tanning* and the other cases cited by Mr. Einfeld.

42 Further, the administrator could have permitted an amended proof of debt to be submitted, claiming a larger amount; and the primary judge could also have done so. (To that extent, I agree with *Bow Investments*.) However, no application was made for him to do this.

43 In any event, in my opinion Mr. Harper is correct in his submission that the appellants should not be permitted to rely on an argument not put below, namely that a distinction should be drawn between parts of Mr. El Safty's evidence that were within the details of the nature and amount of the claim in the proof of debt, and parts of his evidence that were outside those details. This is quite a different point to the objection that was made to the totality of Mr. El Safty's report, on the basis that the totality did not address the claim made in the proof of debt. Had the point concerning a distinction to be drawn between different parts of Mr. El Safty's evidence been taken, this would have directed attention to the question whether there needed to be an amended proof of debt in order to satisfy the requirements of cl.4.1 of the deed, if the whole of the report of Mr. El Safty was to be considered; and if so, whether the Court could and should permit such amendment to be made. I accept that, if such amendment had been sought, the appellants could then have conducted the case differently; but the reason why the question of amendment did not arise was because of the appellants not putting any argument (or any question in cross-examination of Mr. El Safty) that distinguished between different parts of Mr. El Safty's report.

44 For those reasons, in my opinion the appeal on the principal question should be dismissed. The evidence plainly justified the amount of $262,388.65, reflected in the orders of the primary judge, and indeed justified at least the higher figure of $316,374.65 referred to by the primary judge. However, there is no cross-appeal seeking a higher figure.

45 I should note that I also accept Mr. Harper's submission that, even if I were wrong in my view that the appeal should be dismissed, for the reason that this Court should limit Brodyn's recovery to items specified in the proof of debt and to the amounts there specified in relation to each of such items, the appropriate result would be to allow the proof of debt to the extent of $219,525.35 plus GST, that is, about $235,000.00, this being the amount produced if Brodyn is strictly limited to the amounts claimed in each of the items in the original proof of debt, to the extent that each of these items was supported by Mr. El Safty. Since the appellants can point to no different course that they would have taken if Brodyn had pressed below all the items in Mr. El Safty's report that coincided with items in the original proof of debt, up to the limit of those items in the proof of debt, there is no reason why Brodyn could not now do this, if it were necessary.

46 Although in my opinion the appeal on the substantive question should be dismissed, there may be a question as to the form of orders 3 and 4 made by the primary judge. Strictly, I think the effect of the set-off required by s.553C of the Corporations Act and given effect to by declaration 1 and order 2 made by the primary judge, would be to *satisfy* the District Court judgment rather than to make it necessary to discharge it. That is, it would be equivalent to paying the amount required to be paid by the judgment. However, no order is required to correct this matter.

CHALLENGE TO THE COSTS ORDER

47 The administrator's challenge to the costs order against him made by the primary judge raises two issues:

1. What is the ordinary rule or practice as to making orders having the effect that liquidators or administrators are personally liable for the costs of proceedings in which they and/or the company they control are involved?
2. If the ordinary rule or practice in a case such as this would be that the administrator would not be made personally liable for costs, are there reasons for departing from it in this case, and if so to what extent?

The Ordinary Rule Or Practice

48 In my opinion, the weight of authority is in favour of the following principles.

49 If proceedings are brought by a company in liquidation, with the liquidator not being a party, and if those proceedings are unsuccessful, an order for costs would generally be made against the company but not against the liquidator, unless the liquidator has acted unreasonably: ***Mead v. Watson*** [2005] NSWCA 133, 23 ACLC 718. However, a defendant to such proceedings may be able to obtain, in advance of the hearing, an order for security for costs: ***Hession v. Century 21 South Pacific Limited (In Liquidation)*** (1992) 28 NSWLR 120.

50 If proceedings are brought by a liquidator in relation to a company's affairs, generally an order for security for costs will not be made; but if those proceedings are unsuccessful, then an order for costs will generally be made against the liquidator personally: ***Re Wilson Lovatt & Sons Limited*** [1977] 1 AllER 274. In that case, at 285, Oliver J said this:

> *I think that a review of the authorities does disclose that a clear dichotomy between the case where the liquidator is sued and the case where the liquidator initiates proceedings, is established, and indeed it seems me to be a perfectly reasonable one. I cannot at the moment see why it should be contended that a liquidator who takes it on himself to institute proceedings, to bring parties before the court, to subject them to costs, and as against whom it is quite clearly established that no order for security can be made, should then be entitled to plead that he is not responsible beyond the extent of the assets in his hands. I can see no reason at all why a liquidator should be entitled to an immunity which is not conferred on other litigants. A trustee or a personal representative who institutes proceedings no doubt has a right to indemnity out of the estate which he represents but, if he litigates, he litigates at his own risk and so, in my judgment, it should be with the liquidator, and the authorities which point that way seem to me, if I may say so respectfully, to be completely reasonable.*
>
> *I can quite see that there may be very powerful reasons of policy for a rule that a liquidator, when carrying out his functions and thus subjecting himself to the possibility of proceedings against him by parties who are discontented with the way in which he has carried out those functions, must be entitled to defend himself without being subjected to the risk of having costs awarded against him personally, because of course he cannot protect himself against claims being made. Unless there were some such rule it might be very difficult to get persons to take on the heavy responsibility of the liquidation of companies. It seems to me that it is quite a different matter where the liquidator himself takes it on himself to institute proceedings, whether they be proceedings in the winding-up or otherwise.*

51 The liquidator would generally be entitled to an indemnity from the assets of the company, although that may be denied if the liquidator has acted unreasonably: ***In Re Silver Valley Mines*** (1882) 21 Ch.D. 381.

52 If proceedings brought against the liquidator are successful, generally a costs order will be made in such a way that the liquidator does not incur any personal liability. This is in accordance with the passage from ***Re Wilson Lovatt*** quoted above, and is supported by ***Re Bonang Gold Mining Co. Limited*** (1893) 14 NSWLR (Equity) 262, ***Re Beuna Vista Motors Pty. Limited (In Liquidation)*** [1971] 1 NSWLR 72, ***Irons v. Merchant Capital Limited*** (1994) 116 FLR 204 at 209-10, and ***Kirwan v. Cresvale Far East Limited (In Liquidation)*** [2002] NSWCA 395, (2002) 44 ACSR 21. I generally agree with the discussion of the authorities by White J in ***Mendarma Pty. Limited (In Liquidation) (No.2)*** [2007] NSWSC 99 at [13]-[34].

53 The result indicated by those authorities may be achieved by ordering that the company in liquidation pay the costs (if the company is also a defendant), or by ordering that the liquidator's liability for costs be limited to the amount of assets of the company available for that purpose.

54 However, if the liquidator has acted unreasonably in defending the litigation, the liquidator may be made personally liable: ***In Re Beddoe*** [1893] 1 Ch. 547; ***Mead v. Watson; Re Network Welding Pty. Limited (In Liquidation) (No.2)*** [2001] NSWSC 809.

55 Generally, the same principles apply to administrators as to liquidators: ***Kirwan v. Cresvale Far East Limited (In Liquidation).***

56 In my opinion, the primary judge's statement that an unsuccessful liquidator or administrator ordinarily pays costs to the successful party was incorrect, at least in relation to a defendant/administrator; so that in my opinion the

primary judge applied the wrong principle in reaching his decision concerning costs, making it necessary for this Court to re-exercise the discretion as to costs.

57 This leads to the second question I identified, namely are there reasons for departing from the ordinary rule in this case, and if so to what extent.

Departure From Ordinary Rule Or Practice

58 This question involves grounds 2 and 3 of Brodyn's Notice of Contention. As originally elaborated in Brodyn's written submissions, these grounds were supported by the contention that the administrator acted unreasonably and/or in his own interests in the following respects:
(1) in failing to provide the procedural fairness in dealing with Brodyn's proof of debt;
(2) in actively opposing the appeal to the Court instead of submitting;
(3) in that his purpose in the conduct of litigation was to obtain payment of his expenses and remuneration; and
(4) in that Brodyn was compelled to prosecute difficult and expensive litigation so that the administrator could keep alive his chances of obtaining money to fund the administration.

59 During oral submissions, it was also put that the administrator refused a reasonable offer of settlement, that the history showed that it was the administrator's purpose of enforcing the District Court judgment and his unreasonable attitude to resolution of the matter that was the substantial cause for the incurring of the costs of the proceedings, and that the liquidator should be regarded in substance as the instigator of litigation rather than merely defending himself against claims made against him. That gave rise to a further round of written submissions following the hearing of the case.

The Administrator As A Party

60 One question addressed in these additional submissions was whether the administrator was a proper party to the proceedings. Both sides accepted that he was, and I agree. Section 1321 of the Corporations Act relates to acts and omissions of liquidators and administrators, not just to decisions, and it can give rise to orders and directions to the liquidator. Even if an appeal does challenge a decision, and there is another party interested in supporting the decision of the liquidator who could be a proper party to the proceedings, it is still in my opinion appropriate that the liquidator, whose decision is challenged and who may be made subject to orders, be joined in the proceedings.

61 There may be a question in some cases whether a liquidator or administrator should take an active part in the proceedings or simply submit to the order of the court. It may be appropriate in some cases, where the question is purely one between the appellant and some other party affected by the decision, for the liquidator to submit. However, in the present case, the other party affected was the company being administered by the administrator, and active participation by the administrator (instead of just the company alone) did not add to the costs. In my opinion, the active participation of the administrator in the appeal to the primary judge is not a ground for making the administrator personally liable for costs in the circumstances of this case.

Relevant History

62 In order to decide the remaining questions about costs, it is necessary to set out a little more of the history of the matter.

63 As noted earlier, the administrator was appointed on 31 October 2003. At that time, Dasein had a District Court judgment against Brodyn for $183,493.64, and Brodyn had just commenced proceedings in the Supreme Court challenging the adjudication determination on which that judgment was based, and also had commenced District Court proceedings claiming nearly $400,000.00.

64 On 18 November 2003, Brodyn offered to settle all proceedings by a payment to Dasein of $30,000.00, and this offer was repeated on 25 November 2003. On 26 November 2003, the administrator rejected this offer.

65 The Deed of Company Administration was signed on 4 December 2003; and at this time, according to an affidavit sworn by the administrator, it was his intention to recover, as a minimum, the $183,493.64 judgment debt, and to use those funds to recover further claims owing to Dasein by various parties.

66 On 15 December 2003, the administrator received Brodyn's detailed proof of debt, amounting to over 300 pages. As noted earlier, the administrator assessed the proof of debt at nil on 21 April 2004, on the basis of advice given by Mr. Farrell which had not been provided to Brodyn.

67 On 2 April 2004, Brodyn's proceedings seeking the quashing of the adjudication determination were dismissed with costs. However, on 3 May 2004, Barrett J was satisfied there was a serious question to be tried as to the correctness of the administrator's rejection of Brodyn's proof of debt and as to whether the judgment debt was totally absorbed by a set-off to which Brodyn was entitled, and Dasein's enforcement of the judgment was restrained.

68 On 30 May 2004, Mr. El Safty's detailed report was served on the administrator.

69 In late June 2004, there was a conversation between Andrew Cummins, who was assisting the administrator, and Brett Matterson, the principal of Brodyn, as follows:

Matterson: "Andrew its Brett Matterson. I want to speak to you about the Dasein matter"

Me: "Hullo Brett"

Matterson: "We are both burning dollars in this matter. We have spent a great deal on Lawyers and the expert report which we have commissioned has cost us a great deal of money."

Me: "Yes I agree but our position is probably not as bad as yours as our solicitors are acting on spec. Notwithstanding that we have spent a considerable amount of time, the fees for which will be only recoverable if we are successful in defending the proceedings commenced by Brodyn."

Matterson: "We remain of the opinion that Dasein owes us money and we'd like to suggest that our respective experts meet to see whether there is some common ground between them which may allow this matter to be settled."

Me: "That may be something that we are interested in. I'll discuss it with Brian Silvia and let you know."

Matterson: "Our costs are approaching $180,000 and there is considerable doubt whether these will be paid if we are successful. When I was asked to submit a Proof of Debt I thought that what you required was proof of payment."

Me: "I would have thought that our letter of 26 November made it abundantly clear to you what information we required in order to assess your claim against Dasein. I will speak to Brian Silvia and get back to you."

There is no evidence as to what then happened following that conversation.

70 On 10 August 2004, the administrator made an affidavit for the proceedings before the primary judge, in which he said the following in pars.23-26:

23. In determining a future course of action for the conduct of the Deed of Company Arrangement I determined that it was most appropriate to initially pursue the Brodyn claim as it had previously been adjudicated upon pursuant to the Security for Payments Legislation.

24. Detailed hereunder is an estimate of the costs in defending proceedings commenced by Brodyn:

Party	**Amount $**
Farrell Coyne (Experts)	12,980.00
Turnbull Bowles, Lawyers (est)	40,000.00
Gerard Fisher (est)	60,000.00
Paul Bard, Lawyer (est)	5,000.00
Deed Administrator's Remuneration	64,321.11
	$182,301.11

25. I have not adjudicated upon the claims of any other creditor and do not intend to do so until funds are available for distribution to them. I only adjudicated upon the claim of Brodyn as it was required for the purpose of the proceedings presently before the Court.

26. In determining whether to continue to defend the present proceedings, I am mindful of the fact that Brodyn has appealed the decision of Gazell (sic) J. in ***Brodyn Ptv Limited v Davenport & Anor*** NSW SC 254. In that matter Brodyn sought to obtain an Order in the nature of Certiorari against the adjudicator's determination under the Building and Construction Industry Security of Payment Act 1999. Should the Court of Appeal ultimately determine that such an order should be granted then there is no utility in my defending the present proceedings as the offsetting claim of Dasein arising from the adjudication will be lost. In these circumstances I will immediately call a meeting of Dasein's creditors and recommend that the Deed of Company Arrangement be terminated and Dasein be wound up

71 On 3 November, Brodyn's appeal from the dismissal of its challenge to the adjudicator's determination was dismissed. The hearing before the primary judge took place on 25 November 2004.

Submissions

72 Mr. Harper submitted that the administrator's rejection of the offer to settle in November 2003 and his unwillingness to compromise later on showed that the administrator acted unreasonably. He submitted that the evidence also showed that almost the entirety of the District Court judgment, if paid, would be consumed in paying the administrator's fees and those of his lawyers and consultants. He submitted that the administrator acted unreasonably in not giving Brodyn procedural fairness when he rejected the proof of debt, and his failure to call evidence in the hearing before the primary judge in order to support this rejection confirmed that he had acted unreasonably. Mr. Harper submitted that at all times Brodyn had been compelled to bring proceedings to resist execution of the District Court judgment, in circumstances where it was plainly not doing so to recover something from Dasein, but only to avoid enforcement of the judgment against it; so that in substance it was the administrator who was the instigator of the proceedings and Brodyn was in the position of defending proceedings.

73 Mr. Einfeld submitted that it was not unreasonable in November 2003 for the administrator to reject a settlement offer, when he had a judgment for over $180,000.00 and no evidence of the merits of Brodyn's claim. There was no subsequent offer made, and the conversation of June 2004 took the matter no further, there being no evidence

as to what discussions later ensued. He submitted it was reasonable for the administrator to seek to collect the District Court judgment; indeed, it was his responsibility to do so. His purpose in doing so was to recover the debt of the company he was administrating, not to pay his own fees; and in any event, much of the fees and expenses which needed to be paid had been incurred in the administrator's successful defence of Brodyn's other proceedings. Mr. Einfeld submitted that the administrator was not in substance the plaintiff; the District Court debt was an asset of the company, and its enforcement was simply part of the administration of the company. Mr. Einfeld submitted there should be no finding of any impropriety against the administrator when this was never put to him.

Decision

74 The Building and Construction Industry Security of Payment Act shows a legislative intention that a person with the benefit of an adjudication determination should be paid in accordance with that determination, at least unless very strong reasons to the contrary are made out; and I do not think the administrator's reliance on the judgment can fairly be regarded as either unreasonable or as putting him into the same position as if he were a plaintiff in proceedings. On the other hand, there is a real sense in which, ever since that judgment was obtained, Brodyn's actions have been in defence of its position and in resisting the enforcement against it of a judgment based on a provisional assessment only, which in the result has turned out to be a wrong assessment.

75 Brodyn's offer of $30,000.00 in November 2003 has some relevance to the question of costs, but there is no evidence of it being repeated at a time when the administrator had material putting him in a better position to assess the reasonableness of such an offer; and I do not think it can be said that the administrator's rejection of that offer was unreasonable in such a way as to make it appropriate to impose on the administrator personal liability for costs. He had the benefit of a District Court judgment and the responsibility of maximising the return to creditors; and at the time that offer was made, had only very limited information as to the merits of Brodyn's off-setting claims.

76 The conversation of June 2004 does not take the matter further. There is no evidence as to what followed that conversation. It may be reasonable to infer from all the circumstances that Brodyn would have been prepared to settle the proceedings on the basis that neither side would pay anything to the other, or even on the basis of a small payment from Brodyn to Dasein, but no evidence was put on to that effect, and certainly there was no evidence of any firm offer being made.

77 It is clear however that the administrator should, before dealing with Brodyn's proof of debt, have given Brodyn the opportunity to comment on Mr. Farrell's report. Probably, if that had been done, Brodyn would have obtained Mr. El Safty's report and provided it to the administrator. On the basis of the primary judge's decision, the administrator should then have admitted the claim to the extent of $461,882.36, or at least $316,374.65. It is fair to regard the administrator's failure to act in that way as leading to the incurring of costs by Brodyn following the service of Mr. El Safty's report.

78 In my opinion, the combination of all the factors I have referred to justify the Court regarding the administrator's conduct of the proceedings following the service of Mr. El Safty's report on 30 May 2004 as unreasonable, and as justifying an order that the administrator pay Brodyn's costs of the proceedings incurred after the service of that report on 30 May 2004. This is not a case where personal impropriety is alleged against the administrator, and I do not think the fact that the matters I have referred to were not put to the administrator in cross-examination preclude them being taken into account in determining an appropriate order as to costs: ***Mead v. Watson*** [2005] NSWCA 133, 23 ACLC 718 at [128]-[134].

79 For those reasons, in my opinion the appropriate orders as to the costs of the proceedings before the primary judge are that Dasein pay Brodyn's costs of the proceedings, and that the administrator pay Brodyn's costs of the proceedings incurred after 30 May 2004.

80 As regards the costs of the appeal, Dasein has been wholly unsuccessful on its appeal, and so should pay Brodyn's costs of its appeal. The administrator has been partly successful, and in my opinion the appropriate order is that there be no order in relation to the administrator's costs of his appeal. The administrator's own costs significantly overlap Dasein's costs in any event.

GUARANTEE

81 The guarantee provided by Brodyn in relation to the earlier appeal to the Court of Appeal should not have been discharged. It was given to secure the costs of those proceedings as well as the amount of the District Court judgment; and in any event, the order proposed by the primary judge was not made.

82 However, there is in this appeal no application for an order that the guarantee be reinstated, and in any event, I would not be prepared to make such an order.

83 Dasein would have had the benefit of the guarantee only to satisfy the costs which it actually incurred. As I understand the evidence from the administrator quoted in par.[70] above, his estimate of costs in defending proceedings commenced by Brodyn puts them at $182,301.11. However, of this, $64,321.11 is his own remuneration, probably not recoverable as legal costs; the amount appears to include costs incurred in these proceedings as well as the previous proceedings which Brodyn lost (they include Mr. Farrell's fees); and there is no evidence as to the amount at which these costs would be assessed. Brodyn can set off against any liability for costs it has to Dasein the amount of $78,459.65 determined by the primary judge. In addition, it now has the benefit of orders against Dasein for the costs of these proceedings and this appeal. Even when it has recovered

some of the costs of the first instance proceedings against the administrator, the balance of the costs of the proceedings recoverable against Dasein would in all probability exceed any excess of Dasein's costs in the other proceedings over $78,459.65.

84 The enormous amount of costs apparently incurred by both sides in this dispute points up the desirability of some restraint being exercised in those cases where a determination by an adjudication under the Building and Construction Industry Security of Payment Act, albeit a valid determination, has defects of the kind present in this case, as pointed out in par.[86] of the Court of Appeal's judgment in ***Brodyn Pty. Limited v. Davenport*** [2004] NSWCA 394, 61 NSWLR 421. Where such a determination contain major errors, and where the beneficiary of such a judgment is in financial difficulties, there is every reason for the parties to try to avoid expensive litigation and come to a practical resolution.

ORDERS

85 I propose the following orders:

1. Dasein's appeal dismissed with costs.
2. Administrator's appeal allowed in part.
3. Costs order against administrator set aside, and in lieu thereof order that the administrator pay Brodyn's costs of the proceedings incurred after 30 May 2004.
4. No order as to costs of the administrator's appeal.

86 **IPP JA:** I agree with Hodgson JA.

87 **BASTEN JA:** I agree with the orders proposed by Hodgson JA and, with one minor qualification, his Honour's reasons.

88 The qualification concerns the remark at [74] that there may be "very strong reasons" which would deny a person the benefit of an adjudication determination. Assuming a valid adjudication determination, s 25(4) of the *Security of Payment Act* denied Brodyn the right to bring a cross-claim, or raise a defence in relation to matters arising under the construction contract, as a basis for setting aside a judgment based on an adjudication certificate. Whether a Court could properly order a stay of a judgment on an adjudication certificate and, if so, in what circumstances does not arise: c.f. ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421, [85]-[88]; ***Bitannia Pty Ltd v Parkline Constructions Pty Ltd*** [2006] NSWCA 238 at [82]. That changed when Dasein went into voluntary administration and s 553C of the *Corporations Act* 2001 (Cth) was engaged. (No issue was raised in the current proceedings as to the possible operation of Pt 1.1A of the *Corporations Act*, and, for example, in particular s 5G(11).)

89 Nor, as his Honour notes, was there any challenge in this case to the application of the principles with respect to liquidators, established in ***Tanning Research Laboratories Inc v O'Brien*** (1989-90) 169 CLR 332, to an administrator operating under Pt 5.3A of the *Corporations Act*.

Mr. M. Einfeld QC with Mr. J. Horowitz for appellants instructed by Paul Bard Lawyers
Mr. R. Harper SC for respondent instructed by Johninfo Lawyers