IN THE COURT OF APPEAL OF NEW ZEALAND

CA218/05

	BETWEEN	MANU CHHOTUBHAI BHANABHAI AND DOUGLAS MARK ANDREW BURGESS Appellants
	AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 25 October 2006

Court: William Young P, Chambers and Ellen France JJ

Counsel: K W Fulton for Appellants
C K Wood and Z Wisniewski for Respondent

Judgment: 20 December 2006 at 2.15pm

JUDGMENT OF THE COURT

A The appeal and cross-appeal are both dismissed.

B The appellants are to pay costs of $6,000 together with usual disbursements.

REASONS OF THE COURT

(Given by William Young P)

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Introduction

[1] Mr Manu Bhanabhai is a partner in Dyer Whitechurch (formerly Dyer Whitechurch and Bhanabhai), a firm of solicitors practising in Auckland. In the 1990s he acted for Nautilus Developments Ltd and Golden Gate Holdings Ltd who were developing a residential apartment complex in Hobson Street, Auckland. These companies (to which we will refer as "the developers") were in arrears in relation to their GST output tax liabilities. On 17 April 1997, Mr Bhanabhai wrote (using the letterhead of his firm) to the Commissioner of Inland Revenue in these terms:

> We are the solicitors for Golden Gate Holdings Ltd. We have been instructed to settle the sale of the units in the development and we undertake that on settlement of units 3F, 5A, B, C, D, E, F, 6A, B, C, D, E & F we will forthwith pay to you the GST component of the sale consideration.

It is common ground that unit 9B was also intended to be included in the list of units. As it turned out GST on the sale of the units (other than unit 6C) was not paid to the Commissioner of Inland Revenue. The problem was that by the time the sales of all units (with the exception of unit 6F) came to be settled, the security arrangements with UDC Finance Ltd (the financier for the developers) did not permit any part of the proceeds of sale to be paid to the Commissioner of Inland Revenue. An associated problem was that settlements in relation to a number of the units (including unit 6F) were effected by a firm of solicitors other than Dyer, Whitechurch and Bhanabhai.

[2] The Commissioner issued proceedings in the High Court against Mr Bhanabhai and his partner, Mr Douglas Burgess, claiming that the letter of 17 April 1997 was an undertaking and seeking either orders requiring the firm to honour the undertaking or, in the alternative, compensation.

[3] In a judgment delivered on 5 October 2005, Laurenson J found that the letter was an undertaking and that Messrs Bhanabhai and Burgess had acted in breach of their obligations associated with it. He awarded the Commissioner compensation of $300,000 (together with interest) and costs on a 2B basis: see *Commissioner of Inland Revenue v Bhanabhai* [2006] 1 NZLR 797.

[4] Messrs Bhanabhai and Burgess challenge the finding against them. Their appeal raises the following issues:

(a) Was the undertaking given by Mr Bhanabhai personally, or on behalf of the developers?

(b) If given personally, did the undertaking apply if UDC insisted on (and was entitled to) all proceeds of sale or to settlements not effected through the firm?

(c) If given personally, was the undertaking overtaken by subsequent events?

(d) Should the Judge have granted relief to the Commissioner on orthodox principles associated with undertakings?

(e) Is the claim by the Commissioner an abuse of process?

[5] The Commissioner has cross-appealed against the decision of the Judge to award costs only on a 2B basis.

[6] We will discuss the case primarily by reference to the issues identified in [4] and [5] above; but before we do so, a brief discussion is appropriate in relation to both the factual background and the legal position of the Commissioner vis-à-vis UDC as to the payment of output tax from the proceeds of sale of the units.

Factual background

[7] The developers were closely related companies and were treated as a group for GST purposes. When they came to sell units in the apartment complex they accounted for GST on the basis that output tax was payable only when sales were settled. The true position was that output tax became payable when deposits were paid. This meant that the developers' liabilities to the Commissioner for GST went significantly into arrears. In the meantime, the Commissioner had been refunding input tax paid by the developers. The practical effect was that the Commissioner had been providing some of the working capital for the development.

[8] The primary financier for the development was UDC.

[9] Mr Bhanabhai acted as solicitor for the developers. He was also involved as an investor (albeit indirectly) in the Hobson Street development, a director of the developers and one the guarantors of the UDC finance facility.

[10] In April 1997 the developers negotiated an arrangement with the Commissioner under which, on certain specified sales (namely those specified in the 17 April 1997 letter and also unit 9B which was mistakenly omitted from the list in

that letter), GST would be paid when the sale of the unit was finally settled. That arrangement provided the immediate context upon which Mr Bhanabhai's letter of 17 April 1997 came to be written.

[11] Under the loan facility, UDC's entitlements in relation to the sale of units which were settled during the term of the loan were not inconsistent with the developers meeting their GST output tax liabilities. But the UDC advances eventually became repayable on 8 May 1998. By this time approximately $3.5m was owing. On the expiry of the loan facility, the developers no longer had a contractual entitlement to retain (and thus to apply for GST purposes) any portion of the proceeds of sale of the units. As it turned out, the sales of the units (with the apparent exception of unit 6F) had not been settled by 8 May 1998, with the result that when settlement did occur output tax was not paid to the Commissioner. Unit 6F would appear to have been settled on 1 May 1998 and output tax likewise was not paid to the Commissioner. We will shortly discuss the relevant legal context in which this occurred. But before we do so we record the position in relation to two other units:

(a) Unit 5E. The security of this unit was taken over by a company associated with Mr Bhanabhai under transactions entered into in June 1999. It remains unsold.

(b) Unit 6C. The security of this unit was taken over by a company associated with Mr Bhanabhai under the transactions entered into in June 1999. It was subsequently sold by that company as a mortgagee in possession and GST has been accounted for.

[12] The developers were placed in liquidation in 1998 (in the case of Nautilus) and 1999 (in the case of Golden Gate). Their liquidator, Mr Montgomery, issued proceedings against the directors, including Mr Bhanabhai, alleging reckless trading. The pleaded particulars associated with this claim made reference to the letter of 17 April 1997. Debts which formed part of that claim included the money owed to the Commissioner of Inland Revenue. These proceedings were eventually settled for

$500,000, a sum which merely covered the costs of liquidation and provided no direct benefit to the Commissioner of Inland Revenue.

The legal position of the Commissioner vis-à-vis UDC as to payment of output tax from the proceeds of sale of the units

[13] After 8 May 1998, the developers did not have the contractual right to call on UDC for partial discharges of mortgage on terms which would permit them to pay GST output tax. If the developers were intent on settling the existing contracts, UDC was entitled to withhold partial discharges of mortgage unless paid full settlement proceeds.

[14] The same situation would probably have applied if the developers had been placed in liquidation and the liquidator had settled existing contracts. This appears to follow from the judgment of Venning J in *Christchurch Readymix Concrete Ltd v Rob Mitchell Builder Ltd (in liq)* (2002) 21 NZTC 18,033 (HC). On the other hand, the liquidators would have been liable for output tax on contracts entered into after liquidation, see *Christchurch Readymix Concrete* at [18]. It is clear that there were difficulties associated with many of the settlements and this required renegotiation of what was to be paid on settlement. If such renegotiations had been carried out by a liquidator or if the liquidator had disclaimed the contracts, the position as to payment of output tax as between the Commissioner and UDC may have been somewhat murky. It does seem plausible to assume that, if so minded, a liquidator could probably have forced UDC into exercising its powers of sale in relation to the units.

[15] Had UDC exercised its power of sale as a mortgagee, it would have been required to account for output tax under ss 5 and 17 of the Goods and Services Tax Act 1986. That this is so was established by the judgment of this Court in *Commissioner of Inland Revenue v Edgewater Motel Ltd* [2003] 1 NZLR 425 which was later affirmed by the Privy Council in *Edgewater Motel Ltd v Commissioner of Inland Revenue* [2005] 3 NZLR 289.

Was the undertaking given by Mr Bhanabhai personally or on behalf the developers?

Some more facts

[16] By April 1997, the GST issue between the developers and the Commissioner had been going on for some time.

[17] On 20 May 1995 the developers were assessed for GST for a total of $578,888.92. After some negotiations, the Commissioner was prepared to grant the developers some element of leeway. The position conveyed by the Commissioner to the developers in a letter of 19 January 1996 was that, in relation to contracts entered into prior to 18 January 1996, output tax could be paid when the purchases were settled, but that in relation to contracts entered into after that date the time of supply rules were to apply so that output tax would be paid when the deposits were received by the vendor. At this time, the Inland Revenue Department officer, who had previously been dealing with the developers, Mr Stuart Cunningham, was working on other duties and he was not a party to the letter of 19 January 1996.

[18] When Mr Cunningham resumed responsibility for the affairs of developers in March 1997, he was not entirely happy with the January 1996 letter. As well, some dispute had arisen as to its implementation. This was associated with a contention on the part of the developers that the letter, despite being dated 19 January 1996, had not been received until 17 July 1996. They maintained that the usual rules as to time of supply should apply only from that date.

[19] The upshot was that there were meetings between Mr Cunningham representing the Commissioner, Mr Gregory Davison (the principal of the developers) and his accountant, Mr Lynton Campbell. The last of these meetings was on 17 April 1997.

[20] Following the meeting on 17 April 1997, Mr Campbell wrote to Mr Cunningham in these terms:

> Further to our meeting with you today we write to confirm that the revised assessments prepared by you regarding time of supply are accepted from the

> point of view of recording the output tax in the appropriate revised time of supply period.
>
> The tax payer undertakes to have the GST payable on the settlement of the stage 2 apartments, settled prior to 30 June 1997, paid direct by its solicitors to Inland Revenue. In the ordinary course of events the June-July GST return would have a GST payable on the last business day of August. An undertaking from Dyer, Whitechurch & Bhanabhai to this effect is attached. GST on expected settlements in June amounts to $522,805.
>
> Consequently we are requesting that you release immediately the GST refunds calculated by us to date amounting to $211,370.
>
> We appreciate the fair and co-operative approach under which these matters have been negotiated.

By way of explanation, we note that the reference to "stage 2 apartments" is to the apartments listed in Mr Bhanabhai's letter of 17 April along with unit 9B (which through an error was left out of the list contained in Mr Bhanabhai's letter of that date).

[21] Mr Cunningham's diary note was in these terms:

> A letter was received from Lynton Campbell (Accountant) outlining the agreement:
>
> (1) Refunds of $211,307 will be released.
>
> (2) GST payable on Stage 2 developments will be paid from the solicitors (undertaking given by solicitors).
>
> (3) Stage 3 settlements will be completed a.s.a.p. after 30/6/97 and GST paid on these.
>
> (4) Any balance owing after 01/07/97 will incur interest at 10% pa.
>
> (5) Any new sale and purchase agreements entered into will be covered by normal time of supply rules.
>
> This was agreed to by Marilyn and Graeme [other Inland Revenue Department officers] on the basis that undertakings were obtained in writing.

[22] Mr Bhanabhai, in his evidence at trial, relied on a file note dated 17 April 1997 which purported to record a telephone discussion between him and Mr Cunningham in these terms:

> Stuart Cunningham IRD
>
> Golden Gate – GST Refund
>
> He will process a refund when he has a letter from Lynton confirming meeting & we give an undertaking that GG pay GST on the stage 2 settlements.
>
> I said I was happy to given an undertaking on behalf of the coy & that payment would be after clearing changes on the property → ok. He knows there is a motge to UDC.
>
> He will process the refund ($210,000) as soon as he has the letters.

[23] To a similar effect is a directors' resolution (in relation to one of the developers) of 1 May 1997 which Mr Bhanabhai prepared which indicated that the letter of 17 April 1997 was "an undertaking on behalf of the company".

[24] At trial Mr Bhanabhai maintained that on 17 April 1997 he had had a discussion with Mr Cunningham along the lines indicated in his file note whereas Mr Cunningham's evidence was that no such conversation had taken place.

[25] The payment by the Commissioner of the "refund" of $210,000 (approximately) was a mistake as the developers had no entitlement to this payment.

The approach of the Judge

[26] The Judge preferred the evidence of Mr Cunningham to that of Mr Bhanabhai and thus proceeded on the basis that Mr Bhanabhai had not qualified the terms of his letter of 17 April 1997 in any direct discussions with Mr Cunningham. He concluded (primarily by reference to its terms) that the letter of 17 April 1997 should be construed as a solicitor's undertaking.

[27] It is right to say at this point, however, that the Judge took a reasonably limited view as to the extent of the undertaking. In [83] of his judgment he said:

> I find that the terms of the defendants' undertaking were clear and were given by the defendants deliberately as a personal undertaking to make payment of moneys to be received in relation to specified units when settlement took place in respect of those units. It follows that I reject the evidence of Mr Bhanabhai in relation to these matters.

And, later in his judgment, at [158] he observed:

> Mr Bhanabhai is an experienced solicitor. I do not accept that he would understand the undertaking to be anything other than a means by which payment to the CIR would be assured. It was not an acceptance by him that he personally would accept the companies' liability to pay the GST. It was a promise by him as a solicitor that he would pay the CIR moneys which he received as a solicitor.

It will be necessary to revert to these findings in the next main section of this judgment.

The key arguments of the parties

[28] In his arguments in support of the appeal, Mr Fulton challenged the factual finding made by the Judge in relation to the conflict in the evidence between Mr Bhanabhai and Mr Cunningham. He noted that Mr Bhanabhai's file note of 17 April 1997 and the reasonably contemporaneous board resolution of 1 May 1997 were on files associated with the developers which were taken over by the liquidator and thus were plainly in existence long before the undertaking claim was formulated by the Commissioner. He was also critical of the evidence and conduct of Mr Cunningham. He argued that if the letter from Mr Campbell is read with the Mr Bhanabhai's letter, their combined effect is consistent with the view that the undertaking was given on behalf of the company. He also noted that the Commissioner was not particularly prompt in pursuing claims based on the undertaking.

[29] Mr Wood for the Commissioner defended the Judge's factual finding. He also noted that Mr Bhanabhai's letter is expressed as a personal undertaking. As well, if it was not a solicitor's undertaking, it did not add much to the undertaking given by Mr Campbell and thus the deal offered little security for the Commissioner.

Evaluation

[30] Mr Bhanabhai's ability to pay GST output tax from the proceeds of sale of the units was subject to two major contingencies: first, that he remained in control of the settlement processes associated with the sales of the units; and secondly, that the security arrangements with UDC permitted him to apply the sale proceeds to the GST liabilities in question. This consideration is relevant not only to the scope of the undertaking (assuming the letter constitutes an undertaking) but also whether the letter should be construed as an undertaking at all. It is, of course, not particularly common for solicitors to give personal undertakings in relation to events which are not within their control.

[31] As against that, the security arrangements with UDC in April 1997 meant that there was sufficient headroom between the anticipated proceeds of sale and the amounts required to be paid to UDC to obtain clear title to permit GST output tax to be paid. Further, given the dynamics of the commercial situation, including Mr Bhanabhai's equity role in the Hobson Street development, it is not particularly likely that his instructions as to the conveyancing transactions would be withdrawn. As well Mr Bhanabhai was far better placed than Mr Cunningham to understand the conveyancing practicalities which might affect his ability to give effect to the terms of the 17 April 1997 letter. In addition, unless the letter is construed as an undertaking it added nothing to the promises made by Mr Campbell in his letter. If the undertaking was to be just on behalf of the developers, there is no obvious reason why it should be given by their solicitors.

[32] In context, it seems to us that the letter is best construed in the usual manner, ie as meaning what it says. So we, in company with the Judge, read it as an undertaking by the firm.

[33] In making his credibility finding, the Judge did not specifically address the point made by Mr Fulton that the key documents relied on by Mr Bhanabhai were in existence before the Commissioner first signalled an intention to make a claim against the firm based on the 17 April 1997 letter. This has given us pause for

thought but is not in itself inconsistent with the decision of the Judge. It seems odd that Mr Bhanabhai should have been so particular in his file note and in the directors' resolution to make it clear that the undertaking was on behalf of the developers but not to have made that point explicit in the letter. The 17 April letter looks like a solicitor's undertaking and, for the reasons already given, unless it is so construed, there was no commercial point to the letter. It is possible that Mr Bhanabhai (who is an experienced solicitor) may have been concerned as to the potentially serious liabilities to which he had committed his firm and the file note of 17 April 1997 and the directors' resolution of 1 May 1997 may, conceivably, reflect what he would like to have made clear to Mr Cunningham rather than what he had in fact said to him. There was plainly an evidential basis for the Judge's conclusion and a tangible error in relation to it has not been shown.

[34] Accordingly, we are not prepared to interfere with the Judge's factual conclusions.

If given personally, did the undertaking apply if UDC insisted on (and was entitled to) all proceeds of sale or to settlements not effected through the firm?

[35] In the events as they happened, some the sales of the units mentioned in the letter of 17 April 1997 were settled by solicitors acting for UDC and others by Dyer, Whitechurch and Bhanabhai. More importantly these settlements (with the exception of the settlement of unit 6F which, in any event, was handled by UDC's solicitors) did not occur until after 8 May 1998 by which time the advances from UDC were due for repayment and the developers had no contractual entitlement to apply any part of the proceeds of sale to the payment of GST liabilities. So by the time the transactions were settled, it was no longer within the power of the firm to give strict effect to the undertaking.

[36] On the other hand, it would have been open to Mr Bhanabhai to have preserved (or at least enhanced) the Commissioner's position simply by telling the Commissioner that if he did not put the developers into liquidation, the units were likely to be settled on a basis which would defeat the Commissioner's entitlements to

be paid output tax. We also note that Mr Bhanabhai was in a position to influence events as a director of the developers and as someone who indirectly had an entrepreneurial interest in them. That some of the steps which Mr Bhanabhai could have taken to protect the Commissioner may have involved a prima facie breach of his obligations to his clients is not necessarily a controlling consideration. Any solicitor who goes on risk on a personal undertaking creates the potential for a conflict of interest with his or her client. The ability of Mr Bhanabhai to protect (or at least enhance) the Commissioner's position and to influence the course of events suggests that it may not necessarily be correct to treat the events as they unfolded as being outside Mr Bhanabhai's control. But, for present purposes, we will approach the case on the basis that Mr Bhanabhai was not able to give effect to his undertaking.

[37] There are a two possible interpretations of the undertaking.

[38] On one approach, the undertaking is not expressed to be conditional and should not be construed in that light. By its terms, the undertaking indicated that any practical difficulties associated with its implementation had been resolved to Mr Bhanabhai's satisfaction before he gave the undertaking.

[39] Another approach is to regard the undertaking as subject to two conditions: first, the firm retaining the instructions of the developers in relation to the sales of the units and secondly, and more importantly, the proceeds of sale of the units being available for payment of GST output tax.

[40] As already indicated, the Judge seems to have adopted, at least broadly, the second interpretation of the undertaking, that is "as a promise by him as a solicitor that he would pay the CIR monies that he received as a solicitor" (see [158] of the judgment). He did not see it as an "acceptance" by Mr Bhanabhai "that he personally would accept the companies' liability to pay the GST". On the other hand, the Judge treated the undertaking as carrying some associated implied obligations, particularly to notify the Commissioner once problems with its implementation became likely and, as well, to do his best to ensure its

implementation (in terms for instance of seeking UDC's authority to make payments to the Commissioner despite its security entitlements). The findings made by the Judge against Messrs Bhanabhai and Burgess were essentially based on his conclusion that Mr Bhanabhai had acted in breach of these implied associated obligations. It is fair to say that we have some hesitation about the Judge's precise conclusions as to breach of these implied associated obligations. On the other hand it may be that his overall conclusions could be supported on the basis that that the Commissioner, if alerted to the problem by Mr Bhanabhai, could probably have forced UDC to resort directly to its security and might well thus have recovered output tax directly from UDC. As will become apparent, however, our preferred interpretation of the undertaking is rather different from that of the Judge.

[41] Up until the mid 1980s the conventional view was that the only remedy for breach of an undertaking was an order requiring the undertaking to be fulfilled. If that was not possible, there was no jurisdiction to award compensation. This was for instance the approach taken by Hardie Boys J in *Re McDougall's Applications* [1982] 1 NZLR 141 (HC). But in the late 1980s the English Court of Appeal asserted a jurisdiction to require a defaulting solicitor who could not fulfil an undertaking to pay compensation, see *John Fox v Bannister, King and Rigbeys* [1988] QB 925 (CA) (Note) and *Udall v Capri Lighting Ltd (in liquidation)* [1988] QB 907 (CA). This jurisdiction is part of the law in New Zealand, see for instance *Countrywide Banking Corp Ltd v Sharp Tudhope* (1992) 6 PRNZ 335 (HC) and *Australian Guarantee Corporation (NZ) Ltd v East Brewster Urquhart and Partners* [1990] 2 NZLR 167 (HC).

[42] All of the cases we have just cited illustrate something which might be thought to be obvious: solicitors sometimes give undertakings in relation to events which are not within their personal control. The later cases also show that there is no principle of law which requires an unconditional undertaking in relation to such events to be read down so as to be conditional upon fulfilment of the undertaking being possible. That is not to say, of course, that an undertaking should not be read sensibly and in light of the commercial context in which is given, a proposition

which is illustrated by the Canadian decision *Bank of British Columbia v Mutrie* (1981) 120 DLR (3d) 177.

[43] In taking a limited view of the obligations accepted by Mr Bhanabhai, the Judge would appear to have been influenced by expert evidence from solicitors as to the way in which undertakings operate. We accept that it does not make much sense for a solicitor to give an undertaking in relation to events over which the solicitor does not have control. We also accept that if Mr Bhanabhai had had a purely professional connection with the development, this would have supported the second interpretation. In such a situation it might seem unreasonable to expect him to guarantee his continuing retainer by the developers and their continuing ability to use the proceeds of sale of units for the purposes of meeting GST liabilities. As well, had the undertaking been given to a solicitor (who could be expected to recognise and perhaps explore with Mr Bhanabhai possible difficulties with its implementation) this too may have supported a narrow interpretation.

[44] There are, however, a number of factors which support the view that the undertaking should be construed as meaning what it says.

[45] Mr Bhanabhai's role was not purely professional. He had an equity interest in the development and he was also on risk as a guarantor of the UDC facility. One of the consequences of the April 1997 arrangements was a payment by the Commissioner to the developers of approximately $210,000, a payment which was of considerable significance to them in terms of their cash-flow and thus potentially to Mr Bhanabhai. Mr Bhanabhai was far better placed than Mr Cunningham both to recognise the practical contingencies which might affect his ability to give effect to the undertaking and to assess the risk that those contingencies might crystallise. Mr Bhanabhai was in a position at least to influence the timing of the settlements.

[46] In those circumstances, it does not seem unreasonable to hold him to the words of the undertaking which he gave. If he was not prepared to ensure that he was in position to give effect to what he promised (or to accept the consequences of not being able to do so), he should not have given the undertaking.

If given personally, was the undertaking overtaken by subsequent events?

[47] The arrangements made on 17 April 1997 were supplemented by further arrangements arrived at on 21 April 1997 in a meeting between Messrs Cunningham and Davison and confirmed by correspondence of the same day between Messrs Cunningham and Campbell.

[48] Mr Fulton sought to argue that these varied arrangements should be treated as discharging the undertaking given by the firm. We can see no basis for that suggestion. The arrangements entered into on 21 April were primarily addressed to units which were not the subject of the 17 April undertaking. In effect, Mr Cunningham made payment of the GST refund (of approximately $210,000) which had already been agreed, conditional upon further agreement as to GST payments being made direct by Mr Bhanabhai's firm in relation to unit sales not covered by the 17 April undertaking. There is nothing in these arrangements which impugns the continuing effectiveness of that undertaking.

Should the Judge have granted relief to the Commissioner on orthodox principles associated with undertakings?

[49] It is trite that enforcement of an undertaking involves resort to the disciplinary jurisdiction of the High Court and thus depends on the conduct of a solicitor as being such as to warrant sanction. This was recognised by the Judge who put the issue in these terms:

> [148] The issue to be determined is therefore, whether the defendants' failure to honour their undertaking in this case amounted to conduct which was inexcusable, or whether there was real scope for genuine misunderstanding by the defendants as to the nature of the commitment contained in the letter of undertaking.

[50] In concluding that there was misconduct on the part of Mr Bhanabhai the Judge focused on Mr Bhanabhai having placed himself in a position in which his personal interests conflicted with his duties. He was particularly critical of actions taken (or not taken) by Mr Bhanabhai after the UDC facility fell due. The Judge's approach to this aspect of the case was very much a result of his limited

interpretation of the undertaking. Since he treated it as applying only to settlement proceeds actually received by the firm to which UDC did not insist on priority, his finding against the firm was based essentially on breaches of what might be regarded as implied ancillary obligations. On our approach, the undertaking was unconditional and the firm has simply failed to honour it. That factor in itself is enough to warrant (although it does not necessarily require) a response from the Court, see for instance *Bentley v Gaisford* [1997] QB 627 at 648 (CA) per Henry LJ.

[51] Given that the undertaking was relied on by the Commissioner we see no reason why it should not be enforced.

Is the claim by the Commissioner an abuse of process?

[52] In September 2001, the liquidator of the developers commenced proceedings against the directors, including Mr Bhanabhai. The primary cause of action was reckless trading. The largest creditor was the Commissioner who, if the claim had succeeded at trial, would have been the major beneficiary of any judgment.

[53] The particulars of the liquidator's pleading referred to inter alia the undertaking of 17 April 1997 but of course the undertaking itself was not the subject of any cause of action. Nor could it have been as the Commissioner was not a plaintiff. Further, Mr Burgess (Mr Bhanabhai's partner and co-appellant in this case) was not a defendant. On the other hand, the defendants had introduced the Commissioner as a party to the claim, essentially because they sought to challenge the quantum of the debt which the liquidator had recognised was owing to the Commissioner.

[54] These proceedings were eventually settled as between the liquidator and directors for a payment by the directors of $500,000. No part of the settlement proceeds went to the creditors as they were completely absorbed by the liquidator's costs. The Commissioner was not a party to this settlement but permitted the directors to discontinue their claim against him without seeking costs.

[55] Because the Commissioner was not a party to the deed of settlement, there can be no suggestion that he is contractually precluded from making a claim on the undertaking. As well, because the proceedings never resulted in a judgment, there can be no res judicata. But that does leave on the table the question whether the proceedings on the undertaking amount to an abuse of process in light of the earlier proceedings. In the judgment under appeal the Judge addressed only the contractual and res judicata issues and not the abuse of process question which formed the primary focus of the arguments in this Court.

[56] There is a sense in which the liquidator and the Commissioner were allies in relation to the first proceedings and as the Commissioner would have been the major beneficiary in relation to any net proceeds of the claim, he could thus perhaps be regarded as privy to it (and a privy therefore of the liquidator). An unfortunate aspect of the case is delay on the part of the Commissioner in notifying the firm of the claim on the undertaking. This did not occur until after the reckless trading proceedings were settled.

[57] On the other hand the proceedings are conceptually different. The liquidator was mounting a claim on behalf of the companies against the directors, whereas the Commissioner, as well as having a right to participate in such recoveries as might be made, had a direct personal claim against the firm. The liquidator was entitled to act independently in settling the claim and indeed did not seek the Commissioner's approval before settling it.

[58] The relevant line of cases starts with the judgment of Sir James Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100 and concludes with *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 (HL). Also of more general relevance is the discussion in *Chamberlains v Lai* [2006] NZSC 70 of abuse of process principles, particularly at [59] et seq by Elias CJ, Gault and Keith JJ and at [159] et seq by Tipping J. For present purposes it is sufficient to cite first from the judgment of Sir James Wigram V-C in *Henderson* and then from the speeches given in *Johnson* by Lords Bingham of Cornhill and Millett.

[59] In *Henderson* Sir James Wigram V-C observed (at 114-115)

> In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[60] In *Johnson*, Lord Bingham observed (at 498-99):

> … *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

[61] It is clear from the speeches in *Johnson* that the doctrine applies not only where the first case was determined by judgment but also where it was settled and, as well, that there is no requirement of absolute identity of parties. But, on this latter point, Lord Millett in *Johnson* observed (at 526):

> The rule in *Henderson v Henderson* cannot sensibly be extended to the case where the defendants are different. There is then no question of double vexation. It may be reasonable and sensible for a plaintiff to proceed against A first, if that is a relatively simple claim, in order to use the proceeds to finance a more complex claim against B. On the other hand, it would I think normally be regarded as oppressive or an abuse of process for a plaintiff to pursue his claims against a single defendant separately in order to use the proceeds of the first action to finance the second, at least where the issues largely overlap so as to form, in Sir James Wigram V-C's words, 'the same subject of litigation'.
>
> Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so.

[62] In the circumstances, we are satisfied that the claim on the undertaking is not an abuse of process for the following reasons:

(a) The liquidator in the first proceedings was acting independently in terms of prosecuting and settling the proceedings. Settlement was not assented to expressly by the Commissioner. The defendants are not the same. Mr Burgess was appropriately a defendant to the present claim, but of course was not a defendant in the claim against the directors.

(b) Further, the claim by the liquidator was conceptually very different to that of the Commissioner. In substance the liquidator was seeking relief based on the contention that the directors had breached their duties to the company whereas the Commissioner's claim is that Mr Bhanabhai incurred a direct responsibility to the Commissioner in respect of the undertaking. In that sense the Commissioner and the liquidator can only be regarded as privies if a particularly broad approach is taken to that concept.

(b) The claim on an undertaking is not like other civil proceedings. It invokes the disciplinary jurisdiction of the court over solicitors and is thus not defeated by the technicalities which might affect an orthodox

> civil proceeding. In *Udall*, a claim in contract on the undertaking given by the solicitor would not have been available because the promise was one to which the Statute of Frauds applied and there is no relevant memorandum in writing. That was not a bar to the claim on the undertaking. Likewise, it is not self evident that a claim against a solicitor under the disciplinary jurisdiction of the court is necessarily affected by a settlement of other proceedings in which the solicitor was a party in a different capacity.

The Commissioner's cross-appeal

[63] In his judgment, Laurenson J concluded this aspect of the case by saying:

> [180] The parties have not sought to reserve the position as to costs for further submissions. Accordingly, I further order that the plaintiff is entitled to costs, disbursements and witnesses' expenses against the defendant. The costs are to be calculated on the 2B formula. The disbursements and witnesses' expenses are to be fixed if necessary by the Registrar.

[64] The issue of costs was not much pressed in argument. The Commissioner's broad position is that the case justified an award of costs on a 2C or indemnity basis "given the number of issues which were raised in the court below and in this appeal".

[65] We see no basis for interfering with the discretionary determination of the Judge.

Result

[66] We recognise that our finding against Messrs Bhanabhai and Burgess is on a basis which differs slightly from the approach adopted by the Judge. The Commissioner, however, did not cross-appeal on the quantum of the award. The quantum of the award was not put in issue by Messrs Bhanabhai and Burgess. In those circumstances, we do not propose to revisit the award of compensation made.

[67] Accordingly, the appeal and cross-appeal are both dismissed.

[68] As the Commissioner has been substantially successful, Messrs Bhanabhai and Burgess are to pay costs of $6,000 together with usual disbursements.

Solicitors:
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