

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL COURT  
CORPORATIONS LIST

Not Restricted

S CI 2015 01790

AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION

Applicant

v

PLANET PLATINUM LIMITED  
(LIQUIDATOR APPOINTED)

First Respondent

v

GIDEON ISAAC RATHNER

Second Respondent

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JUDGE: EFTHIM AsJ  
WHERE HELD: Melbourne  
DATE OF HEARING: 15 April 2016  
DATE OF JUDGMENT: 4 May 2016  
CASE MAY BE CITED AS: ASIC v Planet Platinum and anor (No 2)  
MEDIUM NEUTRAL CITATION: [2016] VSC 214

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COSTS

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr M Pearce SC and Ms Z Maud	Australian Securities and Investments Commission
For the First Respondent	Mr C Möller	K&L Gates
For the Second Respondent	Mr S Marks QC and Mr R Harris	Pointon Partners



HIS HONOUR:

**Application for costs**

- 1 On 1 April 2016, on the application by the Australian Securities and Investments Commission ('ASIC'), I ordered that the appointment of Gideon Isaac Rathner on 4 May 2015 as the administrator of Planet Platinum Limited ('Planet Platinum') was invalid, void and of no effect. I also dismissed an application by Mr Rathner, in his former capacity as voluntary administrator of Planet Platinum, for an order that his appointment as administrator was valid pursuant to s 447C and 447A(1) of the *Corporations Act 2001* (Cth) ('the Act').
- 2 ASIC now seeks that it be paid its costs by Mr Rathner. Mr Rathner opposes that application and submits that ASIC's costs should be paid out of the assets of Planet Platinum. He also applies for his costs to be also paid by Planet Platinum. Planet Platinum seeks its costs to be paid by Mr Rathner.

**ASIC's costs**

- 3 ASIC submits that it is entitled to its costs, as costs should follow the event. It seeks that its costs be paid by Mr Rathner, who opposed the application and was unsuccessful in his application. ASIC does not seek that its costs be paid by Planet Platinum.
- 4 In *Commonwealth Bank of Australia v Fernandez (No.2)*,<sup>1</sup> Finkelstein J had before him an application for costs where an administrator was removed from office. His Honour acknowledged that there was no general rule as regards how costs should be awarded in applications to remove an insolvency practitioner from practice. He did refer to some general rules of thumb which could be applied in that type of case. His Honour said:

The first rule is that the successful parties (here the two banks) should have their costs. The general rule that is applied in most cases is that costs follow the event. That rule should be applied on a removal application.

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<sup>1</sup> [2011] FCA 709 ('*Fernandez*').

The second rule of thumb is that the costs should be paid by the unsuccessful party. One has to be careful in applying this rule on a removal application because the circumstances which give rise to the application can vary significantly. Here Mr Fernandez made a deliberate decision to resist the banks' application, despite having been forewarned of the grounds on which they would rely. In addition, Mr Fernandez knew that the Australian Securities and Investments Commission (ASIC) intended to support the banks' application. Moreover, looked at objectively, it would have been apparent to Mr Fernandez that the banks' case for his removal was a fairly good one. Having unsuccessfully resisted the application, he should pay the banks' costs.

The third rule of thumb is that a person in Mr Fernandez' position should be entitled to an indemnity out of the companies' assets. It was, after all, the directors of the Willmott Forests group companies that appointed Mr Fernandez to the office. Generally an administrator has a right to indemnity for expenses incurred while in office provided he has acted properly. In this connection acting properly means acting reasonably and honestly: *Re Beddoe* [1893] 1 Ch 547 at 562. Perhaps some might view this as a borderline case where Mr Fernandez ought to have resigned rather than resist the removal application. But his problem originated with his appointment by the directors, which put Mr Fernandez in a very embarrassing position. Finally, I note that the banks have not suggested that Mr Fernandez should be denied an indemnity.<sup>2</sup>

- 5 In *City & Suburban Pty Ltd v Smith*,<sup>3</sup> Merkel J ordered that a liquidator be removed as liquidator of Conpac (Aust) Pty Limited. His Honour allowed the liquidator to be indemnified out of the assets of the company in liquidation in respect of his costs.

His Honour said:

Where a liquidator chooses to defend his conduct, as he or she is fully entitled to do, on a factual basis which is successfully challenged by the applicant for removal, it would be an odd result that the liquidator is able to do so at the expense of the company in liquidation, or more accurately, its creditors.<sup>4</sup>

- 6 Mr Rathner submits that in determining costs, each case is different and should depend on its own particular facts. I accept that submission, but I am of the view that the rules referred to by Finkelstein J have some role to play. In particular, the third rule of thumb raised by Finkelstein J is an important rule of thumb that should be followed. Mr Rathner submits that in the circumstances of this case, he should not be ordered to pay ASIC's costs.

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<sup>2</sup> Ibid [5]-[7].

<sup>3</sup> (Unreported, Federal Court of Australia, Merkel J, 31 July 1998).

<sup>4</sup> Ibid 5.

- 7 On 29 May 2015, there was an application before the Court by ASIC for the appointment of a provisional liquidator. ASIC had applied to have Mr Rathner's appointment declared invalid. Before the Court at that time was also the application by Mr Rathner to validate his appointment. I decided that it was not appropriate at that time to hear the question regarding the validity of the appointment of Mr Rathner as administrator. Mr Rathner opposed the application regarding the appointment of the provisional liquidator being determined first, and the adjournment of the other two applications. He submitted that it was necessary that all of the applications be heard together, or one after the other. After the appointment of the provisional liquidator, Mr Rathner heard nothing about his application until September 2015, stating that his appointment remained in issue. He then attended Court as a contradictor.
- 8 The applications relating to the validity of the appointment of Mr Rathner were not heard because I decided that if a provisional liquidator was appointed, it might have meant that the administration would be brought to an end and that there may have been no need to determine the two applications at all. The only issue that remained was what would happen regarding the period in which Mr Rathner was appointed. The issue before the Court was therefore whether Mr Rathner had a statutory entitlement to his expenses. The parties were given the opportunity to resolve that issue, but did not, and therefore the two applications came back to Court.
- 9 This is not an issue which assists Mr Rathner in relation to whether he should pay the costs of ASIC. He was more than a contradictor before me, as he had an interest in validating his appointment.
- 10 The following matters were put to the Court relating to whether Mr Rathner should pay ASIC's costs or be indemnified for his costs.
- There was no adverse finding regarding Mr Rathner's honesty and integrity;
  - There were no previous dealings by Mr Rathner with the company;

- Mr Rathner was not a friendly administrator;
- Mr Rathner was an independent officer doing an urgent job;
- Mr Rathner did what he was required to do; and
- The company was flagrantly in breach of its duties which was largely the fault of the directors.

11 On 1 April 2016, when I handed down my decision, I made the following findings:<sup>5</sup>

46 I also have no evidence before me that Mr Rathner was told that the company was insolvent or likely to become insolvent. The evidence I have before me is that on 3 May 2015, a Sunday evening, Mr Rathner was contacted by Mr Katz a solicitor for the deed proponents Mr Plevritis and Mr Tenuta. Mr Trimble deposes that Mr Katz said to Mr Rathner words to the effect that:

We have a problem. We have ASIC breathing down our necks and the accountant [Mr Constantine] is controlling the Defendant's accounts and causing damage, and we don't want either of those things to continue. We want to appoint you as the administrator of the company.

47 Mr Trimble further deposes that Mr Rathner asked Mr Katz a few questions, and then said words to the effect that:

I can accept the appointment on that basis. Come and see me tomorrow at my office.

48 There is no evidence before the Court regarding what questions Mr Rathner asked. I am not prepared to draw any inference that the questions were about solvency. I accept the submission of ASIC that either Mr Rathner or Mr Katz could have been called to give evidence about that. The failure to call either of those two witnesses is important and does not lend itself to drawing an inference that solvency was discussed.

...

58 I propose to exercise my discretion to make a declaration in the terms sought by ASIC. In my view, Mr Rathner failed to satisfy himself that the appointment was valid. At the meeting on 4 May 2015, Mr Rathner gave advice that the ASIC proceedings would be set aside and that Mr Trimble should not have any concerns in relation to the ASIC proceedings. He was aware that there was a loan facility in the sum of \$4.7 million which needed to be repaid by late May 2015 and knew, according to Mr Trimble, that the NAB had previously indicated the facility could be extended, provided that Planet

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<sup>5</sup> *ASIC v Planet Platinum and anor* [2016] VSC 120, [46]-[48] and [58]-[60].

Platinum continued to take steps to privatise. At that meeting, when Mr Trimble, Mr Plevritis and Mr Tenuta told Mr Rathner that Planet Platinum could formally defend the allegations made by ASIC, Mr Rathner responded that, 'We don't need to respond to those allegations because they are irrelevant as once the DOCA is accepted ASIC's proceedings will be dealt with'.

59 From the evidence before me, there was not enough information before Mr Rathner to satisfy himself that the company was insolvent or likely to be insolvent. He made no enquiries with the NAB and did not have any accounts before him. I am also concerned about the minutes of the meeting of the creditors on 13 May 2015. I refer to the statement made by Mr Michael Trimble that the company was not insolvent. I have previously expressed my concern that Mr Rathner failed to contradict this statement. He was the chairman of the meeting and when an incorrect statement was made he should have said something. In addition, Mr Sweeney, an associate of Mr Rathner, knew of this statement and allowed it to be put to the creditors.

60 As Mr Rathner did not, in my view, take reasonable steps to confirm the validity of his appointment, I exercise my discretion to make the orders sought by ASIC. Insolvency practitioners must be satisfied of the statutory conditions in s436A of the Act before accepting appointments. On the information before Mr Rathner, he could not be so satisfied.

12 My findings are clear. There is nothing in those paragraphs to indicate dishonesty, but my conclusions make it patently clear that Mr Rathner did not act reasonably, and based on those findings and also on the third rule of thumb referred to by Finkelstein J in *Fernandez*, it is my view that Mr Rathner should pay ASIC's costs.

#### **Mr Rathner's Costs**

13 As I have determined that it cannot be said that Mr Rathner acted reasonably, there is no reason at all why Planet Platinum should indemnify Mr Rathner for his costs or part of his costs.

#### **Planet Platinum's Costs**

14 Planet Platinum was named as a party to the application made by Mr Rathner. The liquidator did not attend the hearing where the two applications were considered. It was appropriate for the liquidator to not be present at that hearing, because the issues were more than adequately addressed by ASIC and Mr Rathner. There was no reason for any submissions to be made by the liquidator.

15 The liquidator's presence was required when this application for costs was made because Mr Rathner sought that he be indemnified out of the assets of Planet Platinum. Mr Rathner has been unsuccessful in that application and joined Planet Platinum as a party in his application. Mr Rathner should therefore pay the costs of Planet Platinum.

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**CERTIFICATE**

I certify that this and the 5 preceding pages are a true copy of the reasons for Judgment of Efthim AsJ of the Supreme Court of Victoria delivered on 4 May 2016.

DATED this fourth day of May 2016.

