IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-001620
[2013] NZHC 2210

BETWEEN	DAMIEN GRANT AND STEVEN KHOV as liquiators of Ellis Construction Limited (In Liquidation) Applicants
AND	ANTHONY JOHN MCCULLAGH AND STEPHEN MARK LAWRENCE Respondents

Hearing: On the papers

Counsel: B J Norling for applicants
D M Hughes/L M Van for respondents

Judgment: 28 August 2013

COSTS JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 28 August 2013 at 4.30pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Waterstone Insolvency, Auckland
Kensington Swan, Auckland

[1] Damien Grant and Steven Khov are the liquidators of Ellis Construction Ltd (in liquidation) (ECL). They have applied for an order for costs against the former receivers of ECL (Anthony McCullagh and Stephen Lawrence) in respect of an application they brought for an order for the receivers to produce documents relating to ECL.

[2] The receivers initially resisted the liquidators' requests (including requests made formally pursuant to notices under s 261 of the Companies Act 1993), contending that they were not obliged to produce the documents which were largely their own working papers.

[3] The liquidators filed their application. The receivers produced some documents but resisted production of others. They then formally opposed the application. However, after further discussions between the parties and provision of further documents by the receivers, the liquidators withdrew their application.

[4] The liquidators say that they have been the successful party, in that they obtained the documents that they were seeking. They seek an order for increased costs. The receivers say that the liquidators cannot be considered the successful party because the question of their obligation to provide the documents was not determined. They maintain their position that they had no obligation to do so, but produced further documents simply to achieve a pragmatic resolution.

[5] For the reasons I will now give, I have come to the conclusion that the receivers should pay the liquidators' costs in relation to the application, but only on a scale 2B basis.

Background

[6] ECL was placed in receivership on 7 May 2009. The respondents, Grant McCullagh and Stephen Lawrence, were appointed receivers pursuant to a general security agreement. The following day, ECL was put into liquidation by order of this Court. Gilbert Chapman was appointed liquidator. On 11 July 2011, Mr Chapman

was replaced by the applicants (Damien Grant and Steven Khov), who remain liquidators.

[7] The receivership was discharged on 10 August 2011, shortly after the liquidators were appointed. The liquidators had some difficulty understanding the receivers' statutory accounts, and verifying the receivers' reports by reference to those accounts. They requested documents from the receivers that they considered belonged to ECL. The documents included copies of the receivers' trust account statements for ECL.

[8] The receivers took the view that they had provided the liquidators with all of ECL's documents.

[9] The liquidators say that they sent the receivers three notices issued under s 261 of the Companies Act 1993 between 21 March 2012 and 15 May 2012, although the receivers say they only received a notice sent on 16 April 2012. The notices all repeated the liquidators' request for a statement of trust account transactions through the period of the receivership.

[10] The receivers did not change their stance and the liquidators filed an application on 18 May 2012 for an order that the receivers produce:

> ...any books, records or documents related to the business, accounts or affairs of ECL in their possession or under their control.

[11] After the application was served, the parties had further correspondence but were unable to resolve their differences.

[12] The application came before the Court for the first time on 6 June 2012. The receivers had not filed opposition and did not appear (as a result of inadvertence). Orders were made in terms of the application, but then set aside on the receivers' application, and the substantive application was set down for a defended hearing.

[13] On 28 September 2012 the receivers provided the liquidators with a copy of their cashbook for the receivership, as a "pragmatic response" to the dispute, at the same time as maintaining their position that documents created in the course of the

receivership belong to them as the receivers. The liquidators reviewed the cashbook, and identified some inconsistencies between amounts that were claimed as having been incurred and what was reported in the receivers' statutory reports. They raised that with the receivers, and on 9 October 2012 the receivers provided the liquidators with subsidiary statements from their client trust account. On the same day the liquidators requested production of further documents and sought clarification of particular transactions.

[14] On 25 October 2012 the receivers filed and served notice of opposition to the liquidators' application, ahead of the defended hearing scheduled for 10 December 2012.

[15] This was followed by a further request by the liquidators for answers to the matters raised on 9 October 2012, and for production of further documents (invoices). The liquidators repeated their stance that they were entitled to trust account statements, but also said:

> Should your clients comply with our requests in this correspondence and clarify the matters specified in our correspondence dated 9 October 2012, we will agree to discontinue the current proceedings with no issue as to costs.

[16] The receivers responded to the matters requested in the letter of 9 October 2012 by letter dated 8 November 2012. As part of that letter they stated:

> We have undertaken a full review of our files in relation to this matter to respond to liquidators' queries. In the process of doing so, we have discovered that there have been some errors in the coding of cashbook entries. We enclose for your information our amended cashbook and Statement of Receipts & Payments, which correctly records the transactions discussed below. We intend to file an amended Fifth and Final Report with the Companies Office in due course, and will account to IRD for any GST discrepancies that have arisen as a result of the corrections.

[17] The parties continued to seek an agreed resolution, and on 22 November 2012 asked the Court to re-schedule the defended hearing. The application was re-scheduled for a mention hearing on 8 February 2013.

[18] The liquidators wrote again to the receivers (on 9 November 2012) requesting amongst other matters a full copy of the receivership files. The receivers responded

on 27 November 2012 providing copies of documents that had been requested but not previously provided, and also stated:

> For the record we note that we spent a number of days compiling the information included in our previous letter to you. However, it is evident that the liquidators failed to give the information contained therein due consideration. You missed the fact that certain information had already been provided, which you asked for again in your subsequent letter. Your return reply was received within just business hours of you receiving our letter. This in itself is disappointing, as you are putting us to unnecessary time and cost.
>
> ...
>
> The failure by the liquidators to set out their concerns and to consider the material provided, and the continuation of enquiries when there is no real outcome for creditors, makes it difficult not to infer the liquidators are pursuing this simply to be vexatious.
>
> We believe we have now addressed all of your queries, and have provided you with all information within our ability and to which you are entitled. We do not intend to enter into further correspondence with you on this matter, but we still require answers to our questions put to you. We are willing to meet with you at our offices should you have any further reasonable requests for information, or require clarification on any points raised to date.

[19] The parties had not resolved matters by the time the matter was due to come back before the Court. The application was adjourned to allow the parties further time. The liquidators undertook an analysis of the transactions (based on the information received in November 2012), and wrote again to the receivers on 26 February 2013 setting out transactions where they were still unclear as to the nature of the transaction or were seeking supporting documents.

[20] The parties met on 11 March 2013 to discuss these further matters. At the conclusion of the meeting, the liquidators accepted that the receivers had provided an adequate response to the issues raised, and no further enquiries were necessary.

[21] There is an issue as to whether the liquidators conceded in that meeting that they had been "overly robust" in the information they were seeking, and that they were seeking information with a view to bringing a "groundbreaking" application rather than simply to maximise return to creditors. The receivers say that Mr Grant acknowledged in that meeting that he had lacked a full understanding of the information previously provided and apologised for that. Mr Grant has no

recollection of saying that the liquidators had been overly robust in pursuing the information, but acknowledges that he decided in the meeting to take a conciliatory tone and apologised in order to maintain cordial relations, but without admitting that he had had any lack of understanding of the information provided.

[22] The liquidators formally withdrew their application on 13 March 2013. Costs were reserved and directions given for the parties to file memoranda, which they have done.

The respective arguments

[23] The liquidators seek an order for costs on a scale 2B basis, increased by 50per cent, and on the basis that this was an originating application.[1] They say that the application was necessary because of the receivers' refusal to provide the trust account statements, and contend that the receivers did not want to provide the documents because they did not wish to reveal that they had made fundamental errors in their reports. The liquidators say that increased costs are justified because the receivers failed, without reasonable justification, to accept that they had an obligation to provide the requested information, to accept the liquidators' argument, or to articulate any valid basis (including appropriate authority) for their stance that the liquidators were not entitled to request the documentation.

[24] The receivers say that costs should lie where they fall, or alternatively to be granted on a scale 1A basis, only in respect of steps taken before 27 November 2012, and on an interlocutory basis. The receivers reject the liquidators' contention that they refused to provide the documents so as to hide errors in their reporting. They acknowledge that there were some errors but say that they did not have a material impact on the outcome of the receivership. They maintain their position that they had no obligation to provide the information because the documents were their own working papers, and they provided the documents merely as a pragmatic response to resolve the parties' differences. They also said that the trust account statements provided on 27 November 2012 were redacted to such a degree that little meaningful

[1] Relying on *Grant v Stinson* [2013] NZHC 325.

information was added to that already provided on 9 October 2012 (and this information was eventually sufficient for the liquidators).

[25] The receivers also contest the costs being sought on the following bases:

(a) They say that the liquidators cannot claim for legal costs for "in-house" counsel, and challenge the quantum of costs on the basis that actual costs disclosed include legal work relating to the liquidation generally rather than just costs incurred in the application. On that basis the receivers say that the liquidators have established a factual basis only for disbursements.

(b) The liquidators had indicated by their letter of 3 November 2012 that costs would not be sought if responses were provided to the letter of 9 October 2012.

(c) Any delays in resolving the matter were attributable to the liquidators: the receivers had offered to meet in a letter dated 27 November 2012, that offer was not taken up until February 2013, and the view expressed in their letter (that the liquidators had not reviewed documents provided to them with sufficient care) was ultimately accepted.

(d) The requests for information made after the correspondence of 27 November 2012 fall outside the ambit of the application, and were in reality a fresh request under s 261 of the Companies Act 1993.

(e) Lastly the receivers seek an account of actual costs to ensure that any costs award does not exceed the actual costs incurred. They maintain a hearing is required to address this.

[26] The liquidators responded to the additional matters advanced on behalf of the receivers (in other words the matters going beyond their primary contention that the

liquidators were requesting documents that belonged to the receivers) with the following:

(a) They are entitled to seek costs for legal work undertaken by their in-house counsel. His employment requires him to provide legal services to the liquidators, and he was therefore acting at all times as agent for ECL.

(b) They charge for these legal services separately in the liquidation only if there is recovery or success, and the reports that the receivers rely on as showing that the services were for work other than the application are irrelevant as they are statements of realisations and distributions, rather than a record of the costs of the liquidation.

(c) The matter was not settled in terms of the liquidators' letter of 3 November 2012 as the receivers rejected that offer.

(d) The letter of 26 February 2013 was not a fresh request for information, but was simply an extension of the original request; but in any event costs are not sought in respect of that letter.

(e) A further hearing would simply be a waste of resources.

Analysis

[27] I have set out the background to the dispute over costs in some detail, because it has obviously been a matter on which the parties hold strong views, and the facts need to be considered in addressing the appropriate incidence of costs. However, this is not a claim for indemnity costs under any contractual arrangement, so the starting point must be the basis on which costs can be awarded under the High Court Rules, and the principle that determination of costs should be predictable and expeditious. To that end the High Court Rules provide a scale based on the nature of the application and the level of experience required to advance it. The rules allow the

Court to increase the costs assessed as payable in the usual course if the applicant demonstrates any factors[2] that justify an uplift from the costs otherwise payable.

[28] The questions that the Court must address on the present application are:

(a) Should an award of costs be made, having regard to events leading up to the bringing of the application and, subsequently, to its withdrawal, and also to the fact that the liquidators were represented by in-house counsel.

(b) The basis on which any award should be made in the ordinary course having regard to the relevant criteria in the High Court Rules.

(c) Whether any award should be increased for any reason.

Should an award of costs be made?

[29] It is a fundamental aspect of the High Court Rules that the party who fails with a proceeding on an interlocutory application should pay the costs of the successful party.[3] In particular, where a proceeding is withdrawn (discontinued) before it is determined, the rules provide expressly that the discontinuing party pay costs unless the parties agree or the Court orders otherwise .[4].

[30] The principles that the Court applies when determining costs following discontinuance of a proceeding are:

(a) The presumption may be displaced if the Court finds that there are circumstances which make it just and equitable that it should not apply.[5]

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[2] In terms of r 14.6(4).
[3] High Court Rules, rr 14.2(a), 14.8 and 15.23.
[4] Rule 15.23.
[5] *North Shore City Council v Local Government Commission* (1995) 9 PRNZ 182 (HC) at 188; *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 at [12].

(b) The Court is not limited in the factors that can be taken into account when considering whether the presumption is displaced, but the following are matters which are taken into consideration:

(i) As the general rule the Court will not consider the merits of the respective cases (unless they are so obvious that they should influence the costs issue).[6]

(ii) The Court will consider the reasonableness of the stance of both parties in the proceeding (whether it was reasonable for the plaintiff to bring and continue the proceeding, and for the defendant to oppose and continue to oppose it, up to the point of discontinuance).[7]

(iii) Conduct prior to the commencement of the proceeding may be relevant (for example, if any conduct by a defendant has precipitated the litigation), as may be the reason for discontinuing (for example, where a change of circumstances has made the proceedings unnecessary).[8]

(c) The Court's general discretion in relation to costs[9] can also override the general principles in relation to discontinuance.[10]

[31] Although those principles were stated in relation to discontinuance of a proceeding, there is no reason not to apply them also to withdrawal of an interlocutory application (with any appropriate modification).

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[6] *North Shore City Council*, above n 5, at 186 and *Kroma Colour Prints Ltd*, above n 5.
[7] *North Shore City Council*, above n 5, at 187 and *Kroma Colour Prints Ltd*, above n 5..
[8] *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194, quoted in *North Shore City Council*, above n 5, at 187. See also Andrew Beck and others (ed) *McGechan on Procedure* (looseleaf ed, Brookers) at [HR15.23.01], cited in *Vector Gas Ltd v Todd Petroleum Mining Company Ltd* HC Wellington CIV-2004-485-1753, 7 December 2010.
[9] High Court Rules, r 14.1.
[10] *Oggi Advertising Ltd v McKenzie* (1998) 12 PRNZ 535 (HC) at 536; *Kroma Colour Prints Ltd*, above n 5.

[32] It follows from these principles that where an application is discontinued because the party applying has achieved what was being sought in the application, prior to hearing, the Court has discretion to treat it as a successful application.

[33] In this case there was clearly an arguable basis for the liquidators to bring the application. They have a statutory responsibility to investigate the company's affairs. Events in receivership are part of that investigation (at least to the extent of investigating what funds were received and applied in the receivership, and hence whether there is any money then available for other creditors). The liquidators must have the right to call in all documents belonging to the company as part of this exercise.

[34] The essential issue in this case, whether the documents that the liquidators were seeking were the property of the company or of the receivers, has not been determined. The merits of that dispute are not so obvious that they should determine the outcome on costs.

[35] Although the liquidators' application was expressed in wide terms, the focus was on the information in the receivers' trust account for the company, and documents on which those records are based. Whether the receivers eventually produced those statements for pragmatic reasons or because they accepted they were ECL's documents, does not alter the fact that provision of the (redacted) trust account statements was ultimately a significant factor in the withdrawal of the application. That is sufficient, in my view, to rebut any presumption that on withdrawal of the application the liquidator, or party withdrawing, should pay the costs of the other party (the receivers). The receivers have not advanced any such claim.

[36] I see the critical question in this case as whether it can be said that the application was reasonably necessary and, if so, whether it achieved its purpose. If so, the liquidators are to be considered successful in terms of the rules as to costs.

[37] I am satisfied that there was a reasonable basis for the liquidators to the information that the receivers ultimately provided, and that the provision of that information makes the liquidators the successful party.

[38] I also find that the liquidators are entitled to costs, notwithstanding that the application was brought by in-house counsel. If they had not used in-house counsel, they would have had to engage a law firm and/or counsel, and would have been entitled to an award of costs to reflect those costs. Those costs would be an appropriate disbursement in the liquidation. I see no reason to distinguish the case of work done by in-house counsel on a specific application such as this.

On what basis should an award be made?

[39] In my view the appropriate starting point is an award on a scale 2B basis. The application raised a significant issue. It required counsel of reasonable experience of High Court matters, and a normal amount of time for a significant disputed matter in the High Court. Upon that basis scale 2B is clearly appropriate.

[40] The liquidators' contend that the application is an originating one rather than an interlocutory application, relying on my decision in *Grant v Stinson* (an application for an order under s 266 of the Companies Act 1993).[11] Even if that is the case (and I note that it is not one of the applications listed in r 19.2, and is called an interlocutory application), I am not persuaded that the time allocation for an originating application is appropriate in this case. It is essentially an interlocutory process in the course of the liquidation.

[41] The liquidators sought to justify their claim, and indeed their claim for increased costs, on the basis of actual time expended. There is an issue as to whether they have identified time just on the application or whether it includes other aspects of legal advice to the liquidators. However, unless indemnity or increased costs are appropriate (and I will come back to the matter of increased costs) the High Court Rules require costs to be fixed according to scale rather than actual costs.

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[11] *Grant v Stinson*, above n 1.

Should increased costs be awarded?

[42] The Court can award increased costs under r 14.6(3). I am not persuaded that this is a matter where the nature of the application has required more than the usual amount of time, or that the receivers have contributed unnecessarily to the time and expense of the application. The point that they raised was not clearly without merit, and that extends to their refusal to accept the proposal advanced by the liquidators on 3 November 2012. I bear in mind that at that point the liquidators were still pursuing more information than they ultimately received.

[43] I consider that the liquidators will be compensated appropriately (in terms of the criteria under the rules) by an award on a scale 2B basis.

Costs greater than actual

[44] I am satisfied from the evidence before the Court that the liquidators' actual costs are likely to be in excess of costs on a 2B basis as awarded, so that this award does not offend against the principle in r 14.2(f).

Decision

[45] The respondent receivers are to pay the applicant liquidators' costs calculated on a scale 2B basis, and on the basis of an interlocutory application, in accordance with the relevant items of cost set out in schedule 3 to the High Court Rules.

Associate Judge Abbott