IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-007637

IN THE MATTER OF	Silverdale Developments Limited (2007) Limited
BETWEEN	CALLUM MACDONALD Applicant
AND	ROYDEN BRETT ALLNUT, DIANE PATRICIA ALLNUT AND JANENE MARY OLSEN First Respondents
AND	GARY HUGH CHAMBERS, DENISE CATHY CHAMBERS AND DEVONPORT HARBOUR TRUSTEE (2008) LIMITED Second Respondents
AND	THE IMPORTER BRASSWARE LIMITED Third Respondent
AND	FREDERICK JOSEPH PERVIS AND SUSAN ELIZABETH PERVIS Fourth Respondents

Hearing: On the papers

Counsel: G P Blanchard for Liquidator
J E M Lethbridge for First to Third Respondents

Judgment: 19 October 2011 at 2:15 PM

COSTS JUDGMENT OF VENNING J

This judgment was delivered by me on 19 October 2011 at 2.15 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: George Bogiatto, Auckland

Grove Darlow & Partners, Auckland
Copy to: GP Blanchard, Auckland

Introduction

[1] These proceedings have been discontinued. The Registrar has referred this file to me in relation to costs. The respondents seek costs.

[2] Counsel have exchanged memoranda in accordance with the direction of the Court dated 12 July 2011. In addition the respondents have filed submissions in reply dated 18 October 2011.

[3] I propose to fix costs on the basis of the memoranda exchanged.

Background

[4] The proceeding was issued by Mr Macdonald, the former liquidator of Silverdale Developments (2007) Limited. The respondents own units in a building at Silverdale developed by Silverdale Developments (2007) Limited. They claim the units are defective.

[5] Mr Macdonald took proceedings under s 307 of the Companies Act 1993 to determine the amount sought by the respondents arising out of their claims.

[6] The application was allocated a fixture for 31 October 2011.

[7] On 15 February 2011 Mr Buchanan was appointed as a replacement liquidator to the company.

[8] Mr Buchanan reviewed the matter and ultimately determined that the s 307 procedure was not appropriate. For that reason these proceedings were discontinued. Instead he confirmed he would consent to proceedings being taken against Silverdale Developments (2007) Limited as the most appropriate way of dealing with the respondents' claims.

Respondents' application

[9] The respondents seek costs calculated on a 2C basis with an uplift of 50 per cent or, in the alternative, costs on a 2C basis for all steps taken in the proceeding before it was discontinued.

Liquidator's response

[10] The liquidator accepts in principle that he may be liable to pay costs in relation to steps taken by the former liquidator[1] but submits that both he and the former liquidator have acted reasonably so that no costs order should be made. In the event a costs order is made it should be no more than on a 2B basis in relation to steps taken by the respondents and that only 25 per cent of the expert witness fees claimed as disbursements should be allowed (and the Fraser Thomas account of 20 June 2011 should be disallowed in total).

General principles

[11] The general rule on a discontinuance is that an applicant or plaintiff who discontinues a proceeding must pay the costs of and incidental to the proceeding up to and including the discontinuance: r 15.23.

[12] The overriding rule, however, is that all matters in relation to costs are at the discretion of the Court: r 14.1.

[13] In the case of liquidators who fulfil a public office and perform a statutory duty the fact the liquidator has acted responsibly in the proceeding will be a relevant factor in considering the issue of costs both as to whether an award should be made and the quantum.

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1 *McGechan on Procedure* at HR4.52.04.

Should an order for costs be made?

[14] As noted Mr Blanchard submitted that no costs order should be made because neither Mr Buchanan nor Mr Macdonald have acted unreasonably.

[15] While I accept that the liquidators had not acted unreasonably, nevertheless Mr Macdonald issued proceedings which ultimately have not been pursued and, in relation to which the respondents have been put to costs. The general rule that costs should be payable on a discontinuance apply. The fact the liquidators have not acted unreasonably is relevant to consideration of the quantum and particularly the issue of uplift.

Category/band

[16] There are two aspects to a cost award. In this case there seems to be general agreement that costs category 2 is appropriate. I confirm that it is. This is a proceeding of average complexity requiring counsel with skill and experience considered average in the High Court.

[17] The next issue is the appropriate time band for the various steps in the proceeding. I agree with Mr Blanchard's submission that the appropriate time band must be considered in relation to each separate step in the proceeding. In relation to that, having reviewed the file, I am satisfied that, given the number of respondents and the issues involved, the time required to take instructions, research the facts and the law and prepare, file and serve the notice of opposition warrants time band C, even though ultimately all that was filed was a notice of appearance for ancillary purposes.

[18] However, I am unable to accept that time band C is required for any of the other steps taken in the proceeding. In terms of preparation of the defendants' affidavits which relate to expert engineering, valuation and real estate evidence, it must be borne in mind that counsel estimated the trial would take two days. In the circumstances a time band C allowance of four days in terms of preparation of the affidavits seems excessive. I consider the two day allowance under time band B to

be more realistic, particularly bearing in mind the allowance of time band C for the initial consideration of the case and that the draft affidavits will no doubt have been, or will be, of use to the respondents in the related proceedings.

[19] The liquidator also challenges an allowance for three memoranda. Three memoranda were filed, one on 3 December, one on 28 January and the other in relation to the discontinuance itself on 6 July. He also queries two appearances at case management conferences. Apart from the appearance on 8 December there was a further telephone conference before Lang J.

[20] Mr Blanchard also challenged the claim for both preparation of memoranda for case management conferences and also preparation for the case management conferences themselves. He submitted that the work covered by item 13 was included in the work covered by item 4.10 and that a claim for item 13 should only be allowed when there is no claim in respect of item 4.10. The respondents accept there is an element of duplication and does not pursue the claim under item 13.

The uplift issue

[21] In her submissions for the respondents Ms Lethbridge submitted that costs should be increased because the liquidator had failed to act reasonably. I am unable to accept that submission. The case was not straightforward. Mr Macdonald was entitled initially at least, to consider the issues between the company or him as liquidator and the respondent could be resolved using the s 307 procedure. That was raised as a possibility by the respondents albeit with the caveats Ms Lethbridge referred to. When the proceedings were reviewed by Mr Buchanan he responsibly advised the respondents the matter was under review. The respondents have been put to costs but they will be compensated by the order for costs. I do not accept that either liquidator has acted unreasonably or has acted in a way such that an increased award of costs is appropriate.

Result

[22] It follows that, with the exception of the commencement of the defence/opposition which I allow on a 2C basis all other costs pursued by the respondents will be on a 2B basis. No uplift is required.

[23] As to disbursements, the respondents seek a full recovery for the costs of their experts, Fraser Thomas and Gribble Churton Taylor Limited. For the liquidator Mr Blanchard submits that no more than 25 per cent of those costs should be allowed as the evidence will be useful in the other proceedings. He also submits that the last invoice from Fraser Thomas of $1,939.91 should be disallowed in its entirety given that the costs were incurred after the current liquidator had advised that he was reviewing the position.

[24] As to the last Fraser Thomas invoice, even though the liquidator had advised he was reviewing the position the parties were subject to orders of the Court in relation to preparation for a hearing scheduled for October. The respondents were entitled to continue with preparation for the hearing.

[25] However, I accept there is some force in the submission that the costs in relation to the experts will be of benefit in the other proceedings between the parties. I consider an allowance of 50 per cent of the costs incurred in relation to those expert reports is reasonable in this case.

Result

[26] The respondents are to have costs against the applicant/liquidator in the sum of $18,424.00 calculated as below together with disbursements being 50 per cent of the expert witness costs in turn totalling $10,683.82.

[27] The total costs and disbursements award in the respondents' favour is $29,107.82.

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Venning J

2	Commencement of defence by defendant (receiving instructions, researching facts and law and preparing, filing and serving statement of defence and notice of opposition	6.0
4.10	Filing memorandum for case management conference and mentions hearing	1.2 (.4 x 3)
4.11	Appearance at case management conference	0.6 (.3 x 2)
7.3	Defendant's preparation of affidavits or written or oral statements of evidence to be used at hearing	2.0
	TOTAL DAYS	**9.8**
	TOTAL COSTS	**$18,424.00**

DISBURSEMENTS

Fraser Thomas – dated 29.04.11	$6,400.91
Fraser Thomas – dated 25.05.11	$10,956.81
Fraser Thomas – dated 20.06.11	$1,939.91
Gribble Churton Taylor Limited – dated 29.04.11	$2,070.00
Total:	$21,367.63
50% =	**$10,683.82**