

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2012-404-7387
[2013] NZHC 1932**

IN THE MATTER of the Companies Act 1993

BETWEEN BEVERLEY JEAN MONK
 Plaintiff

AND SUISSE INTERNATIONAL LIMITED
 Defendant

Hearing: On the papers

Counsel: PF Dalkie for plaintiff
 AM Swan for defendant

Judgment: 2 August 2013

**JUDGMENT OF ASSOCIATE JUDGE FAIRE
[Costs]**

This judgment was delivered by me on 10:30am on 2 August 2013
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Dyer Whitechurch, Auckland
 Jespersen & Associates, Auckland

[1] The plaintiff filed this proceeding on 10 December 2012. It sought an order placing the defendant into liquidation. The grounds advanced were pleaded as follows:

The defendant company is indebted to the plaintiff in the sum of \$3,212.50 being costs and disbursements pursuant to an Order for Costs dated 8 November 2012 in respect of the proceedings under CIV-2011-470-997 in the Tauranga High Court full particulars of which are known to the defendant company and demand for payment having been made.

[2] There were problems relating to service of the proceeding. That resulted in enlargements of the date of hearing and an order for substituted service on the defendant company's legal counsel. Service was effected on the defendant company's counsel.

[3] As a result of the order for substituted service, appearances for the first time were entered on behalf of the defendant on 21 June 2013. The Court was advised that the order for costs that was the subject of the application had been paid. The Court was further advised that there was disagreement concerning costs. As a result, a direction to file memoranda was issued.

[4] The plaintiff's position has changed in that the plaintiff initially indicated that costs would be sought. The defendant's position is that the statement of claim that was filed was defective in that it did not plead specific grounds that would justify an allegation that the defendant company was insolvent and unable to pay its debts in terms of s 287 of the Companies Act 1993. The defendant's position initially was that no order for costs should be made in the plaintiff's favour and the proceeding should have been agreed to be dismissed once payment of the cost order had been made. That was made on the basis that no appearance on the defendant's behalf would be required.

[5] Having been put to the trouble of an appearance and filing memoranda, however, the defendant now seeks costs on a 2B basis. The sum sought is \$1,592.00.

The principles applicable in awarding costs

[6] Rule 14.1 gives the Court a discretion to order costs in relation to a step taken in a proceeding. That discretion is generally to be exercised in accordance with the specific rules contained in rr 14.2-14.10: *Glaister v Amalgamated Dairies Ltd.*¹ In *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd*² the Court of Appeal said of the costs regime contained in what is now rr 14.2-14.10 that:

there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary

The test to be applied is entirely an objective and not a subjective one. The only reference which it is necessary to make towards actual costs is to be found in r 14.2(f), namely that an award of costs should not exceed the costs incurred by the party claiming the costs: *Glaister v Amalgamated Dairies Ltd.*³ These principles were endorsed by the Supreme Court⁴.

[7] Rule 14.2 lists the principles applying to determination of costs. Subrule (a) affirms the principle that the losing party should pay the costs to the successful party. Subrule (b) requires that the costs reflect the complexity and significance of the proceedings. By inference it refers to the categorisation of a proceeding which is provided for in r 14.3. Subrule (c) requires a consideration of each step for which costs are sought and an application of the daily rate having regard to the appropriate band which is to be applied after a consideration of r 14.5(2) and the Third Schedule to the High Court Rules.

[8] Rule 14.7 sets out the considerations that are apply if there is to be a refusal or reduction in the costs that are ordered.

[9] The plaintiff has been successful in recovering the debt that was outstanding, namely an unpaid order for costs that followed the issue of this proceeding. The

¹ *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 at [19].

² *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 at 668).

³ *Glaister*, above n 1 at 610 [14].

⁴ *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109.

plaintiff's proceeding is clearly defective, but it is not so defective that it could not have been the subject of an amendment that might have allowed evidence of insolvency to have been adduced, had it been appropriate.

[10] When I weigh these factors up, I reach the conclusion that although the plaintiff's shortcomings in relation to the pleadings should disqualify it from an order for costs, the circumstances do not justify an order for costs in favour of the defendant.

[11] Accordingly, I order that there will be no order for costs in this proceeding.

JA Faire
Associate Judge