IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-000899
[2014] NZHC 2592

BETWEEN	ROSEBUD CORPORATE TRUSTEE LIMITED Plaintiff
AND	PAUL NEVILLE BUBLITZ First Defendant
	CHRISTOPHER GIL COOK Second Defendant
	HUNTER GILLS ROAD LIMITED (in liquidation) Third Defendant

Hearing:	28–31 July and 1 August 2014
Appearances:	A Swan for the Plaintiff J K Goodall for the First and Second Defendants S Barter for the Third Defendant
Judgment:	22 October 2014

[COSTS] JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 22 October 2014 at 2.00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] I refer to my reserved judgment issued on 25 August 2014. I concluded that the Rosebud Trust was a sham trust from the outset, that Mr Nielsen did not enter into the "Hunter Sterling" agreement as agent or trustee for the Rosebud Trust, but rather, in his own right, and that therefore, such property as Mr Nielsen had prior to the "Hunter Sterling" agreement, or that he acquired under the agreement, vested in the Official Assignee. I further found that Mr Nielsen could not, therefore, assign the "Hunter Sterling" agreement to Rosebud Corporate Trustee Limited, and that that company had no standing to sue on the buyout agreement. I held that the defendants were entitled to their reasonable costs and disbursements, and directed that memoranda be filed in that regard.

[2] I received an application for costs on behalf of the first defendant, Mr Bublitz, and the second defendant, Mr Cook. They seek costs on a 2B basis. They also seek that a costs order made by Associate Judge Christiansen on 6 September 2013 be reversed. Further, the first and second defendants seek costs in regard to two discovery applications which were filed in the proceedings, and costs for serving a subpoena on Mrs Nielsen. They also seek disbursements in the sum of $2,479.20.

[3] The first and second defendants in their memorandum observe that the plaintiff company is unlikely to be in a position to meet any costs award without assistance, and they seek the leave of the Court to file an interlocutory application for non-party costs against Mrs Nielsen and Mr Whitney.

[4] The third defendant, Hunter Gills Road Limited (in liquidation), also seeks costs on a 2B basis. In addition, it seeks disbursements of $1,220. Initially, it also sought leave to seek costs against Mrs Nielsen and Mr Whitney. Subsequently, it resiled from that request, and it now simply seeks costs against the plaintiff company.

[5] No memorandum has been filed on behalf of the plaintiff company. Mr Swan, who acted on its behalf at the hearing, has advised that he has no instructions regarding costs, and that he is not in a position to file a memorandum.

Analysis

[6] First, in my view, it is appropriate to set aside the costs order made by Associate Judge Christiansen.

[7] I observe that r 14.8(2) does not expressly apply. Pursuant to r 14.8(3), that provision does not apply to an application for summary judgment. The hearing before Associate Judge Christiansen was an application for summary judgment.

[8] I do not, however, regard this as determinative. The rationale behind r 14.8(3) is to allow the Court to maintain its general practice of reserving decisions on costs in summary judgment proceedings until the final determination of the case, when all the facts are known.[1] In my view, it is not the purpose of r 14.8(3) to restrict the power of the Court to set aside earlier cost awards, where the decision is reversed following the final determination of the case.

[9] Here, Associate Judge Christiansen did not follow the general practice. Rather, he ordered costs against the defendants who had applied for summary judgment.

[10] Given that the defendants have succeeded before me, I am satisfied that it is appropriate to set aside the award of costs made against them when they failed at the summary judgment hearing. While generally, decisions of an Associate Judge are final unless they are reviewed or appealed to the Court of Appeal, I am satisfied that the general discretion conferred by s 51G of the Judicature Act permits me to reverse the earlier costs order. Notwithstanding the absence of any rule directly in point, pursuant to r 1.6, the situation can be dealt with by reference to the closest analogy available under the rules. The closest analogy is the power contained in r 14.8(2) to discharge an order for costs made at an interlocutory stage.

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1 *McGechan on Procedure* (online ed) at [HR14.8.03]; see also at [HR12.12.08]; and see, *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).

[11] Accordingly, I set aside the costs award made at the summary judgment hearing.

[12] The defendants went further and invited me to order costs in their favour for all steps taken in the summary judgment proceeding, notwithstanding that they were unsuccessful in their application. I am not persuaded that it is appropriate to do so. Costs do not always follow the event. I do not know the detail of what occurred at the hearing before Associate Judge Christiansen. It is undesirable for me to now try and revisit costs by belatedly making an award against the plaintiff as the successful party at that stage.

[13] I now turn to the appropriate costs order in the substantive proceedings.

[14] I am satisfied that the proceedings are appropriately categorised as category 2B proceedings, that the steps in respect of which costs have been claimed were taken, and that the appropriate amount has been sought in relation to each of those steps. The costs sought for the two discovery applications, and in respect of the subpoena issued against Mrs Nielsen, are appropriate and the amounts claimed are modest.

[15] Accordingly, and after deducting the claims made in respect of the summary judgment hearing, I award costs against the plaintiff and in favour of the first and second defendants in the sum of $45,372, and in favour of the third defendant in the sum of $31,044.

[16] In regard to the request for leave to bring costs applications against non parties, I observe that the discretion conferred by s 51G of the Judicature Act and in Part 14 of the High Court Rules permits costs against non parties.[2] The power to award costs can extend to solicitors.[3] There is, however, no provision in the High Court Rules that I am aware of requiring the grant of leave before an

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2 *Erwood v Maxted* [2010] NZCA 93 at [18]; *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 (HC) at 763–764; *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 (HL).

3 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 124, [2011] 2 NZLR 25 at [11]; *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (No 2) [2005] 1 NZLR 145 (PC) at [25(3)].

application for costs can be made against a non party. Accordingly, I decline to grant leave as requested by the first and second defendants.

[17] The defendants are entitled to their reasonable disbursements. I exclude the claims for filing the application for summary judgment. Disbursements in the sum of $1,150 are awarded to the first and second defendants. Disbursements of $1,220 are awarded to the third defendant.

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Wylie J