IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-002526
[2020] NZHC 1407

IN THE MATTER OF	an application to obtain leave for creditors and other entitled persons, under s 284(1) of the Companies Act 1993, to have the Court give direction to the liquidator of Social Media Consultants Ltd pursuant to ss 284(1)(a) to (h) and s 284(2) of the Companies Act 1993 and for the Court to remove the protection that the liquidator could employ under s 284(3) of the Companies Act 1993 by the Court ruling that an order pursuant to s 284(4) should be made against the liquidator
BETWEEN	FROG ROCK TRUST, BRIAN HENRY, HOWARD TAYLOR, JUANA ATKINS and MARC SPRING (being an authorised person of the prepaid subscription holders) Applicants
AND	VICTORIA TOON (as liquidator of Social Media Consultants Ltd) Respondent

Hearing: (On the papers)

Judgment: 22 June 2020

COSTS JUDGMENT OF VENNING J

This judgment was delivered by me on 22 June 2020 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Nicholls Law Ltd, Auckland
Heaney & Partners, Auckland

Introduction

[1] On 13 November 2019 the applicants issued an originating application seeking a number of orders against the respondent as liquidator of Social Media Consultants Limited, including an order that she resign from that office effective immediately.

[2] On 16 March 2020 the applicants discontinued the application. The respondent now seeks costs. The respondent seeks an order that her reasonable solicitor/client costs of $19,171.65 be paid on an indemnity basis. The applicants accept that an order for costs is appropriate but submit it should be to scale.

[3] The file came before two Associate Judges: Judge Andrew and Judge Sargisson. Judge Sargisson was the last Judge to minute the file. She has now retired. In her absence the Registrar has referred the file to me as Duty Judge. I propose to deal with the issue of costs as provided for by HCR 14.9.

[4] The proceedings were misconceived from the outset. The applicants are stated to be Frog Rock Trust and four named persons. The trustees of the Frog Rock Trust were not identified. It is now accepted that the Frog Rock Trust is not a legal entity. The four other named applicants all signed the application, which was stated to be made under s 284 of the Companies Act 1993 for urgent emergency orders.

Procedural history

[5] The application came before Associate Judge Andrew on 13 December 2019. Mr Spring, one of the named applicants, sought to appear on behalf of all the applicants. The Judge recorded that Mr Spring had no authority to represent parties in this Court and it would be necessary for the applicants to obtain proper legal representation. The Judge also noted there were issues as to whether the respondent Ms Toon had been properly served with the proceedings. She had only obtained copies of the relevant documents by picking up copies from the Registry. Mr Martelli from Heaney and Partners appeared on her behalf.

[6] The Judge observed that the applicants made very serious allegations against the respondent. He considered it essential the applicants obtained legal representation to determine whether there was a proper basis for the application.

[7] By the time the matter next came before Associate Judge Sargisson on 6 March 2020 Mr Nicholls had been instructed by the applicants. Mr Nicholls acknowledged the first named applicant, Frog Rock Trust, was not a legal entity. He also had some difficulty to support the standing of the remaining applicants except for Ms Atkins (who was a director and shareholder of the company in liquidation). Judge Sargisson directed further steps be taken in relation to the standing of Mr Henry, Mr Taylor and Mr Spring if the matter was to be pursued. As noted, shortly afterwards, on 16 March, the proceeding was discontinued.

Indemnity costs

[8] The respondent seeks costs on a solicitor/client basis under HCR 14.6 which provides:

> …
>
> (4) The court may order a party to pay indemnity costs if—
>
> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; …

[9] Mr Martelli submitted the proceedings were vexatious and had no prospect of success.

[10] The application contained a number of extreme allegations against the respondent. The grounds in support of the application alleged, inter alia, that:

(a) Ms Toon had entered secret negotiations and sales contracts with a minor creditor with a joint desire to destroy the value of the company's major asset;

(b) Ms Toon had acted to criminally harass and blackmail other persons wishing to protect the value of the domain name in order to obtain

assets that did not belong to the company in order to destroy the value of the company's assets and reputation;

(c) that Ms Toon had falsely alleged that certain major creditors had filed dishonest claims in order to attempt to intimidate and harass those creditors.

[11] The allegations were purportedly supported by affidavits from Mr Spring, Ms Atkins and Mr Cunliffe. The allegations are serious, particularly when made against a professional person such as Ms Toon acting in the course of her profession. If made publicly and found to be wrong they would support a claim in defamation. Allegations made in Court proceedings are privileged. With that privilege comes a responsibility to ensure that allegations of fraud or dishonest behaviour have a proper basis.

[12] A solicitor associated with such pleadings or allegations has an additional responsibility and can be the subject of disciplinary proceedings if the allegations are made without a substantive basis.[1] Quite apart from the solicitor's responsibility, a party who wrongfully makes such allegations is at risk of sanction by an adverse costs award.

[13] Mr Nicholls submitted that the situation fundamentally arose from lay people attempting to avert what they honestly believed to be an injustice. The application was not intentionally vexatious. While he argued that no more than scale costs were appropriate, if there was to be an uplift, it should be no more than 25 per cent.

[14] I accept that once Mr Nicholls became involved the matter was very quickly brought under control and the discontinuance filed but by then the respondent had been put to the trouble of responding to the salacious allegations. Sensational allegations of the type made in the present case can attract the attention of the media. In this case an application was made by the media to search the Court file, which Ms Toon's solicitors had to respond to.

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.8.1.

[15] I am satisfied that the criteria for indemnity costs is made out in this case. The proceedings were vexatious and improperly brought in the form they were commenced. They wrongly alleged fraud, criminal harassment and blackmail without any proper basis for such scandalous allegations. Such serious allegations against a professional person in the role of liquidator required a serious and detailed response.

[16] In bringing the proceedings the applicants acted improperly and unreasonably.[2] To exacerbate matters, it appears the proceedings were brought with the intention of preventing Ms Toon from carrying out her proper functions as liquidator. The proceedings were hopeless and on the information before the Court would never have succeeded.

[17] As noted, the costs sought are $19,171.65. By comparison, costs on a scale 2 basis would amount to $9,082.00 calculated as:

Notice of opposition and affidavit in opposition	2.6 days	
Two memoranda (1 case management, 1 in response to the application for a search of the file)	0.8 days	
Two hearings/call-overs	0.4 days	
Total: 3.8 days @ $2,390.00 a day	3.8 days	**$9,082.00**

[18] Mr Nicholls submitted that in respect of some steps the costs claimed were not reasonable as they were excessive. He refers to a number of items in particular. I have reviewed those items. I consider the attendance and the costs associated to be reasonable in the circumstances of this case.

[19] I also note that as late as 21 February Mr Spring was still purporting to file memoranda on behalf of the applicants repeating the allegations of harassment and attempted intimidation by the respondent. Further, until the discontinuance, the respondent and her advisers were entitled to properly prepare to meet the serious allegations maintained by the applicants.

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2 *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400.

[20] Mr Nicholls properly makes the point that costs of $1,434.00 were awarded by Associate Judge Sargisson on the call before her on the 6 March. Those costs represent one memorandum, (0.4) and call-over (0.2), (0.6 x $2,390 = $1,434). They have been paid and have been dealt with. The respondent is not entitled to claim the actual costs for those attendances to the extent they may exceed that sum as the Court has already fixed the costs for the memorandum and the call. It appears the costs of the memorandum (filed 21 February) were included with preparation of Ms Toon's affidavit in reply. A total of $2,815.50 is claimed as the actual costs for the memorandum, affidavit and associated attendances. I estimate one third of that ($938.50) as reasonable for the memorandum. A separate sum of $862.50 is claimed for the preparation for the mention and attendance at Court. On that basis $1,801.00 ($938.50 + $862.50) should be deducted from the actual costs claimed (as opposed to the $1,434.00 awarded by the Court previously).

[21] Deducting the costs paid from the amount claimed by the respondent and also deducting the costs associated with drafting the memorandum for costs, which I disallow, leaves a balance of actual costs claimable of $15,983.15.

Result

[22] The respondent is to have costs against the applicants Brian Henry, Howard Taylor, Juana Atkins and Marc Spring, jointly and severally, in the sum of $15,983.15.

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Venning J