IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001074
[2016] NZHC 515

BETWEEN	WAIWERA WATER LIMITED Applicant
AND	LINK INTERNATIONAL LIMITED (IN LIQUIDATION) Respondent

Hearing: (On the papers)

Judgment: 23 March 2016

COSTS JUDGMENT OF VENNING J

This judgment was delivered by me on 23 March 2016 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date..........

Solicitors: Lowndes Jordan, Auckland
Anthony Harper, Auckland
Copy to: B Gustafson, Auckland

[1] The Registrar has referred this file to me this week as Duty Judge. Costs were to be dealt with by way of an exchange of memoranda in August 2015. Memoranda were filed in August and September 2015. It is not acceptable that the matter has been left as long as it has without being addressed. However, as Duty Judge I propose to deal with the matter on the papers.

[2] Link International Limited (in liquidation) (Link) issued a statutory demand against Waiwera Water Limited (WWL). Link's statutory demand was signed by the liquidator, Mark H Norrie. WWL applied to set aside the statutory demand. Following a telephone conference on 13 August 2015 Link agreed to withdraw the statutory demand. The parties agreed to exchange memoranda as to costs. WWL intended to seek costs against the liquidator Mr Norrie personally.

[3] WWL was to file its submissions by 26 August 2015. It failed to do so but filed them on 1 September 2015. The solicitors for Link and Mr Norrie opposed the late filing of the memoranda for costs. They had filed submissions as directed. However, given the passage of time and that Link and the liquidator have had a full opportunity to address this issue in the late submissions, both prior to the memorandum from WWL and subsequently (in a memorandum of 4 September 2015) I propose to deal with the costs on the basis of the memoranda exchanged and the material on the Court file.

[4] The starting point is that WWL is entitled to costs. Link and the liquidator agreed to withdraw the statutory demand. However, Link seeks costs (in part on a timeband C basis) and also on an increased basis, and against the liquidator Mr Norrie.

[5] I am not prepared to allow costs on a timeband C basis for the preparation and filing of the originating application. The only complication was the involvement of Russian directors of WWL and the historical nature of this matter. It does not warrant time band C.

[6] Nor does the file support the application for costs on an increased basis. WWL argues for costs on an increased basis because:

(a) Link took an unnecessary step or argument lacking merit;

(b) Link failed without reasonable justification to admit facts, evidence, documents or acceptable legal argument;

(c) Link failed without reasonable justification to accept an offer of settlement.

[7] Ultimately when the full evidence was before the Court Link and the liquidator Mr Norrie chose not to oppose the application to set aside the statutory demand and withdrew it. In the circumstances it cannot be said that they took an unnecessary step in the proceeding or failed without reasonable justification to admit the facts. The real challenge is to their actions in relation to the issue of the statutory demand in the first place

[8] As to the suggestion Link and Mr Norrie failed to accept an offer of settlement, the offer in the open letters initially related to an offer of settlement of all issues, including another and separate claim. Other offers as to costs suggested costs at an increased scale. Ultimately as I have determined increased costs are not appropriate. The offer to settle on the basis of increased costs itself cannot be used as justification for obtaining an order for increased costs.

[9] That leaves the issue of whether the costs are recoverable against the liquidator Mr Norrie personally. The Supreme Court outlined the position where costs are sought against a liquidator in the case of *Mana Property Trustee Limited v James Developments Limited* as follows:[1]

> [10] A non-party like a director or liquidator is not at risk of a costs award in other than exceptional circumstances, that is, circumstances outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.[5] In the case of a liquidator that is a principle of very long standing.[6] There is certainly jurisdiction to order a liquidator as a non-party to pay costs personally but such an order will not be made unless there has been some relevant impropriety on the part of the liquidator.[7] The courts recognise that the other party can protect its position, should it be successful, through its ability to seek in advance an order for

1 *Mana Property Trustee Limited v James Developments Limited* [2011] 2 NZLR 25.

payment of security for costs. In *Metalloy Supplies Ltd v MA (UK) Ltd* Millett LJ summarised the position:

> The court has a discretion to make a costs order against a non-party. Such an order is, however, exceptional, since it is rarely appropriate. It may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit. It may also be made where the third party has been responsible for bringing the proceedings and they have been brought in bad faith or for an ulterior purpose or there is some other conduct on his part which makes it just and reasonable to make the order against him. It is not, however, sufficient to render a director liable for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified.

The position of a liquidation is a fortiori. Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. … If he brings the proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay their costs as well as his own if the proceedings fail. It may be commercially unwise to institute proceedings without the means to provide any security for costs which may be ordered, since this will only lead to the dismissal of the proceedings; but it is not improper to do so. Nor (if he considers only the interests of the company, as he is entitled to do) is it necessarily unreasonable.

[11] That passage has the approval of the Privy Council in what is now the leading case in this country on costs orders against a non-party, *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*. The Privy Council recognised that in some cases where a non-party may have both controlled the proceeding and funded it, or is to benefit from it, justice will require that if the proceeding fails, the non-party will pay the successful party's costs:

> The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.

Such a person is the real party to the litigation. But that is not ordinarily the position of a liquidator, although it may be the position of a creditor or shareholder who funds a liquidator. As the Privy Council remarked, where the non-party is a liquidator, he or she can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his or her own interests. The reluctance of courts to make awards against liquidators who are non-parties is for the very good reason that otherwise they may not be prepared to take on the role and enter into litigation that may be beneficial for the company and thus for creditors.

[10] Mr Norrie issued the statutory demand on 1 May 2015 despite the fact that there had been detailed correspondence passing between WWL's solicitors and Mr

Norrie prior to that date regarding the disputed debt. In light of the matters raised in the correspondence an application to set aside the statutory demand was always going to succeed as was ultimately acknowledged by Mr Norrie after he took the appropriate legal advice.

[11] It is a serious matter to issue a statutory demand where there is clearly a dispute: *Rembrandt Custodians Limited v Pro-Drill (Auckland) Limited*.[2] There was no proper basis for the statutory demand to be issued in this case. Mr Norrie was responsible for making that decision. It is improper for a liquidator to issue a statutory demand with full knowledge that the debt is genuinely disputed. Liquidators are officers of the Court and should not issue statutory demands in such circumstances without taking advice. There is no suggestion Mr Norrie did so.

Result

[12] WWL is to have costs on a 2B basis together with disbursements against Link International Limited (in liquidation) and Mark H Norrie jointly and severally. I fix those costs in the sum of $13,826 and additional disbursements of $721.41.

Venning J

[2] *Rembrandt Custodians Limited v Pro-Drill (Auckland) Limited*. HC Auckland M337-IM03, 13 June 2003.