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

**CIV-2014-404-001965**
**[2015] NZHC 1460**

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| BETWEEN | ASIA PACIFIC HOTEL INVESTMENTS LIMITED<br>First Applicant |
| | RAISONS PACIFIC INVESTMENTS LIMITED<br>Second Applicant |
| | SOUTH ISLAND HOTEL INVESTMENTS LIMITED<br>Third Applicant |
| AND | DAMIEN GRANT AND STEVEN KHOV<br>Respondents |

Hearing: 29 August 2014

Appearances: R B Hucker for the Applicants
B J Norling and A Ho for the Respondents

Judgment: 29 June 2015

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**JUDGMENT OF ASSOCIATE JUDGE SARGISSON**

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This judgment was delivered by me on 29 June 2015 at 4.30 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:

Hucker Associates, Auckland
Waterstone Insolvency, Auckland

**Summary**

[1] This is an application for costs. It follows the withdrawal of an application under s 284 of the Companies Act 1993 for orders to have a decision of the liquidators of NZ Properties Holding Ltd set aside and an accompanying application for leave.

[2] The decision of the liquidators was one taken (after the issue of a Court of Appeal ruling in relation to the liquidation) to partially reject three proofs of debt provided by the applicants. Faced with the application the liquidators reconsidered their position and reversed the decision, overturning the need for a ruling on the application.

[3] The only issue that remains is as to costs. The applicants now seek costs against the respondent liquidators personally on a 2B basis, plus an uplift of 50%.

[4] The liquidators oppose costs. In the alternative, they suggest that costs should be added to the applicants' proofs of debt and recovered from the company in liquidation proceedings.

*Background*

[5] The liquidators rejected three proofs (two partially based on quantum and one in full). The proofs had earlier been accepted for voting at the initial meeting of creditors, and the rejection did not occur until over a year later. The reason given for rejection was essentially that some of the debts fell outside the six-year limitation period. The applicants did not accept the rejection decision and therefore were required to apply to set it aside within the statutory time limit of 20 working days.

[6] Faced with the application, which was supported by an affidavit by a Mr Pandey, the liquidators eventually reversed the decision, which they were entitled to do under s 304(3) Companies Act 1993. That reversal effectively brought the proceeding to an end because it gave the applicants the relief that they had been seeking.

[7] Before the liquidators' reversal decision, the applicants made an offer to settle the matter, one condition of which was that consent orders were to be made. The liquidators did not accept that offer. They elected instead to reverse the decision to reject the proofs and to admit the proofs, while reserving their ability to reject them once again at some time in the future. They say that course of action was necessary because the Court of Appeal had indicated in a previous judgment relating to this liquidation that some proofs of debt call for further inquiry.[1]

*The competing submissions*

[8] The applicants say this is a straightforward case of a successful applicant who should have an entitlement to costs. They claim it is a case of capitulation by respondents who were staring in the face of the inevitable - that when faced with the application the liquidators had to reverse their decision because they had no valid basis not to. The applicants say with apparent force that the reversal makes them the successful party.

[9] They also dispute the liquidators' claim that Mr Pandey's affidavit contained material that caused them to reconsider. They say the material had already been provided informally, so the liquidators should have been aware of the factual position before they received the affidavit, and therefore able to make a sound assessment much earlier on as to the date when the six-year limitation period began. Their original position therefore lacked merit.

[10] The applicants argue that the reality is that the liquidators erred unjustifiably in misconstruing the legal position as to the date when the six-year limitation period began, and made a wrong decision before rejecting the proofs. They argue that for this reason, under r 14.6(3) there is a case for increased costs as the rejection of the proofs was an unnecessary step lacking in merit, and having made an incorrect decision, the liquidators should have reversed that decision much earlier. They claim that though the Court of Appeal said the relevant proofs called for further inquiry, the liquidators in fact have never asked for further information, which implies they had all the necessary material to start with. They also say a further reason is that the

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1 *Grant v CP Asset Management Ltd* [2013] NZCA 452 at [16].

liquidators failed without reasonable justification to accept an offer of settlement to dispose of the proceeding and obtain finality for all parties involved.

[11] The applicants also argue they were forced to make their application promptly (because of the statutory time limit), which I accept; and that there was no disentitling conduct on their part.

[12] They add that as the liquidators have reserved their position in order to be able to reject the proofs again in the future, the only way to ensure the liquidators carefully consider the proofs on the next occasion is to impose cost consequences for pre-emptive rejection.

[13] As to the appropriateness of personal liability for costs, the applicants argue that the liquidators are not non-parties to the proceeding, and must expect to pay costs under the statutory costs regime in accordance with the general principle that costs follow the event. They point out that this very approach has been endorsed in proceedings involving these same liquidators.[2] They submit that the liquidators' personal liability is not excluded by Regulation 16 of the Companies Act 1993 Liquidation Regulations 1994, because that regulation does not override the general discretion the Court has in costs matters nor its inherent jurisdiction to control the conduct of its officers,[3] or where the conduct of the liquidator falls short.[4]

[14] In response the liquidators emphasise that the Court of Appeal commented that some of the proofs "call for further inquiry", suggesting that some of the debts could be potentially unrecoverable or questionable, and that was the reason they rejected them.[5] They also say that they reversed their rejection in response to Mr Pandey's affidavit, which included information designed to show why the limitation period might have been extended.

[15] They argue that the applicants should have engaged with the rejection letters informally before filing the application and that bearing in mind the lack of

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2 *CP Asset Management Limited v Grant & Khov* [2012] NZHC 2228 at [17]-[18].
3 Citing *Harley v McDonald* [2001] 2 AC 678.
4 Citing *Mana Property Trustee Ltd v James Developments Ltd (No 2)* [2010] NZLR 25.
5 *Grant v CP Asset Management*, above n 1, at [16].

information and the applicants' failure to attempt to settle on terms that as liquidators they could responsibly accept, that costs should lie where they fall. They contend further that the applicants have a history of obstructiveness which has led to various unnecessary proceedings, and that this is a further example.

[16] In the alternative, the liquidators submit that the costs of the proceedings should be added to the applicants' proofs, which Regulation 16 gives the Court a discretion to do. They submit further that there is a distinction between when liquidators commence proceedings (in which case they are personally liable as they have assumed the risk)[6] and the present case. They say they did not initiate these proceedings, and therefore they cannot be taken to have assumed the risk of an adverse cost award. Additionally, they contend they acted reasonably in the discharge of their statutory duties when they rejected the proofs, and they could not reasonably have accepted the settlement on the applicants' terms, as that would have meant not testing the debts to the standard required by their statutory duties. Therefore they did not take an unnecessary step which lacked merit, and they did not fail to accept a reasonable offer of settlement. Their actions in both respects were reasonable.

**Analysis**

*Personal liability of liquidators*

[17] *Mana Property Trustee* Ltd, a judgment of the Supreme Court, deals with personal liability of liquidators when acting as non-parties in litigation agents of the company in liquidation. The relevant passage is this:[7]

> We deal first with Mana's application for costs against the liquidators personally. The commencement or continuance of a proceeding against a company in liquidation requires the consent of its liquidator or the court but a liquidator has power under para (a) of sch 6 to the Companies Act 1993 to commence, continue or defend a proceeding on behalf of the company in liquidation without any court consent being needed. The party to the litigation is the company, not the liquidator, even in the case of a proceeding commenced against the company after it is in liquidation. It was therefore James itself which was the successful appellant in the Court of Appeal and the unsuccessful respondent in this court. The liquidators were

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6 *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274, *Hart v Stiassny* (1998) 12 PRNZ 240 (HC).

7 *Mana Property Trustee Ltd*, above n 4, at [9]-[10].

> merely its agents in relation to the litigation, having taken over the conduct of its affairs from its director.
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> 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. In the case of a liquidator that is a principle of very long standing. **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**. 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 payment of security for costs.

[18] The liquidators cannot be considered a non-party in this case. When it is the liquidator that is in fact a party to the liquidation rather than the agent of the company, *Hart v Stiassny* applies such that the liquidator is personally liable. The following statement of Lang J on non-party liquidator liability is apposite:[8]

> The obvious difficulty with this argument is that the company was never a party to the proceeding. The respondent was, and has always been, the liquidators. It was necessary for the liquidators to be named as respondent because the applicant sought orders reversing or modifying the decisions they had made rejecting the applicant's proof of debt and refusing to call a meeting of creditors. For that reason the observations of the Supreme Court in *Mana* have no bearing on the issue to be determined in the present proceeding

[19] The result is that the respondent liquidators' argument that they cannot be personally liable fails, regardless of who is considered to have commenced the proceedings. Plainly they can be; whether or not the Court should exercise the discretion not to impose liability on them for costs is a separate matter.

*Appropriateness of a costs award*

[20] I agree with the applicants' response that conduct in earlier litigation should have no effect in the assessment of costs in current litigation but the respondents did not place significant reliance on this ground. I attach no weight to this point.

[21] The Court has discretion on all matters relating to costs.[9] The discretion is to be exercised in a principled manner, the general presumption being that costs should

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8 *CP Asset Management Limited v Grant* [2012] NZHC 2573 at [7].

9 High Court Rules, r 14.1.

follow the event.[10] Rule 15.23 of the High Court Rules provides that unless the Court orders otherwise, a plaintiff that discontinues a proceeding must pay costs of and incidental to the proceeding up to and including discontinuance. For the purposes of costs, then, a choice to discontinue is comparable to being unsuccessful in a proceeding.

[22] The presumption may be displaced, but there must be good reason. In such a case it has been said that the presumption of costs on a discontinuance is not necessarily displaced merely because the plaintiff acted reasonably in bringing and discontinuing the proceeding, though these are relevant factors.[11]

[23] The applicants have been the successful party in this proceeding in the sense that they have had the result they originally sought, being the reversal of the decision to reject the proofs of debt. I am satisfied, following the principle that costs follow the event, that the applicants are entitled to an award of costs. I am not satisfied that this is a case for adding the costs to the proofs. For obvious reasons that course could leave the applicants exposed:

> [9] I do not consider it open to me to make an order under reg 16(a). If I was to direct that the costs were to be added to the applicant's proof of debt, the award of costs would effectively become the responsibility of the company. The order would therefore alter the incidence of costs as finally determined by the Court. Depending on the extent to which the liquidators are able to realise funds for the benefit of unsecured creditors, it would also leave the applicant exposed to the risk that they would not be paid their costs either in full or in part.
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> [10] The same risk arises in relation to any order that the Court might make under reg 16(b) directing the costs to be paid out of the assets of the company. The applicant would, however, be in a slightly better position than it would be if it was the recipient of an order under reg 16(a). This is because liquidators' expenses are paid in full before any payment is made to the unsecured creditors.

[24] However I do not accept that the liquidators' conduct reaches the threshold for increased costs. The liquidators' decision to reject the proofs was not the only decision available to them, as their reversal shows. But that does not mean that it so lacked merit that I should exercise my discretion to make an award for increased

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10 Rule 14.2(a).

11 See *Vector Gas Ltd v Todd Petroleum Mining Company Ltd* HC Wellington CIV-2004-485-1753, 7 December 2010 at [18].

costs. The Court of Appeal's indication must have reinforced for the liquidators the need to take care not to accept the proofs too readily. It must be remembered that the Court of Appeal's reservations were expressed in reasonably strong terms, and that the liquidators in such circumstances cannot be criticised for making an assessment on the legal position which they later accepted they might have cause to reconsider. I do not accept as unreasonable their claim that Mr Pandey's affidavit gave them cause for reconsideration. Though they are officers of the Court, it would be unreasonable to expect them to be a model of perfection when it comes to making judgment calls on the correct legal position with respect to limitation issues.

[25] Where I think there is some cause for criticism is the delay on the part of the liquidators in reaching a firm position. If, as the liquidators say, they retain reservations because of the Court of Appeal's judgment, they should call for further information (assuming they still need further information), but if the position is simply that they need to undertake further assessment of the information they already have, they should get on with it (and if need be, they should seek legal advice). In either case, they should do so without protracted delay. But the decision to reject, followed by the decision to reverse is understandable in all the circumstances.

[26] In terms of the settlement offer, I also recognise the effect of the Court of Appeal judgment must have been to make the liquidators more cautious about accepting proof of the debts on terms that required a definitive ruling. Therefore, the refusal of a settlement offer which contained consent orders seems to me a reasonable justification in terms of r 14.6(b)(v).

[27] It is also the case that whether or not the conduct of the liquidators calls for increased costs is a matter of discretion, and in my assessment in this case it is a step removed from justifying increased costs. The balance does not come down in favour of increased costs.

*Result*

[28] For the above reasons I find that a 2B award is appropriate, without any uplift. I find further that the respondents' alternative suggestion of adding the respondents' costs to the applicants' proof of debts under s 284(1)(b) of the Companies Act 1993) is not appropriate.

[29] The applicants are to have from the respondents personally costs of and incidental to their application (including the leave application) on a 2B basis together with disbursements as fixed by the Registrar.

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Associate Judge Sargisson