IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-4866
[2020] NZHC 1506

UNDER	The Companies Act 1993
IN THE MATTER	of the Liquidation of NZ Natural Therapy Ltd (in liquidation)
BETWEEN	NZ NATURAL THERAPY LTD (IN LIQUIDATION) First Plaintiff
	VIVIEN JUDITH MADSEN-RIES AND HENRY DAVID LEVIN as liquidators of NZ Natural Therapy Ltd (in liquidation) Second Plaintiffs
AND	JOHN LAWSON LITTLE First Defendant
	JOHN LAWSON LITTLE AND DEIDRE ANN LITTLE as former trustees of the Woodside Trust Second Defendants

Judgment: 30 June 2020
(On the papers)

COSTS JUDGMENT OF BREWER J

This judgment was delivered by me on 30 June 2020 at 4:00 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Meredith Connell (Auckland) for Plaintiffs
Neilsons Lawyers (Auckland) for First Defendant

Introduction

[1] This is a costs judgment.

[2] The plaintiffs seek costs against Mr Little totalling $252,810.32, comprising:

(a) Scale 2B costs of $151,245.50

(b) Disbursements of $65,124.82

(c) Increased costs of $36,441

[3] Mr Little contends that the conduct of the plaintiffs over the course of the litigation disqualifies them from obtaining any costs, and indeed, they should pay costs to him. As a fall-back submission, Mr Little submits that if the plaintiffs are entitled to some costs then a global figure of no more than $50,000 should be payable.

Procedural history

[4] I will set out the procedural history briefly.

[5] The second plaintiffs are the liquidators of the first plaintiff (the Company). By statement of claim dated 12 November 2013, the plaintiffs sued Mr Little for $1,059,590. The plaintiffs alleged Mr Little owed this sum to the Company.

[6] Mr Little's statement of defence pleaded, inter alia, that the Company was the corporate trustee of a family trust (the Trust) and so there was no debt owing by Mr Little to the Company.

[7] During discovery, Mr Little provided a balance sheet for the Trust as at 31 March 2012 which recorded a current account debt of $323,148. The plaintiffs amended their statement of claim to include an alternative pleading that in the event the Company was a corporate trustee for the Trust, then the Company was entitled to recover the current account debt from Mr Little.

[8] The trial of these causes of action commenced on 29 August 2016. It had to be adjourned part-heard. That is because Mr Little raised for the first time a defence to the current account cause of action that the accounting records were wrong. He did not owe the sum recorded, and in fact owed nothing at all.

[9] I proceeded to determine the first cause of action and adjourned for further hearing, if necessary, the alternative cause of action. I found that the Company was a corporate trustee for the Trust and I dismissed the claim against Mr Little for $1,059,590.49.[1] I reserved the question of costs until the conclusion of the remainder of the trial.

[10] After my judgment had been delivered, Mr Little discovered the deed of appointment appointing the Company as trustee of the Trust. The document was discovered through a supplementary list of documents sworn on 3 October 2016. The deed of appointment itself was dated 19 February 2007. The deed of appointment was in the possession of Mr Little's lawyers but it had been overlooked. Failure to disclose the document prior to the first hearing was an innocent error.

[11] The trial resumed in May 2018. In my judgment,[2] I found against Mr Little. I found Mr Little was liable to pay the Company the current account debt of $323,148 plus interest.

[12] The liquidators had brought a number of other causes of action against Mr Little for breaches of his duties as a director. On all but one of those causes of action I found against Mr Little. However, I reserved the question of compensation because my finding on the current account cause of action meant that Mr Little was already liable to pay a sum well over the approximately $207,000 of debts proved by creditors in the liquidation.

[13] Mr Little appealed my judgment to the Court of Appeal. At the start of the hearing of the appeal, Mr Little conceded liability to pay the current account debt but alleged that a pleaded second affirmative defence (which I had reserved) would mean

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1 *NZ Natural Therapy Ltd (In Liq) v Little* [2016] NZHC 2585.
2 *NZ Natural Therapy Ltd (In Liq) v Little* [2018] NZHC 2164.

his liability was substantially reduced. The Court of Appeal was unable to decide that argument because there was no decision from me in respect of it. The Court of Appeal remitted Mr Little's second affirmative defence back to the High Court for me to determine.

[14] I gave my decision on 29 November 2019.[3] I found against Mr Little.

Discussion

[15] First, I do not accept Mr Little's argument that the behaviour of the liquidators in pursuing him means that the standard approach to awarding costs (i.e. they go to the successful party) should be changed.

[16] Mr Little submits the liquidators should have accepted his offers to settle. The first settlement offer was made one week before the start of the 2016 trial. It was for $50,000 and payable in 90 days. The second settlement offer was made on 25 June 2017 in the sum of $150,000. It was not an unconditional offer and it included existing costs orders against Mr Little which at that time totalled $19,060.25.

[17] Mr Little contends the liquidators acted unreasonably in suing him for amounts far in excess of the approximately $207,000 of creditors' debts proved in the liquidation.

[18] In my judgment of 29 November 2019 I said:

> [28] Mr Little criticises the liquidators for not inviting him to endeavour to enter into a settlement with the creditors. He submits the liquidators should have realised that Advanced Lifestyle had ceased to be a functioning entity (having been removed from the Australian Register of Companies) and so would not need to be paid. The liquidators should have determined that BNZ was not interested in obtaining payment from Mr Little personally and so a negotiated settlement was probable.
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> [29] I do not accept these criticisms. The liquidators had admitted debts totalling approximately $207,000. They were obliged to get in the assets of the company to settle them. One of the assets was a current account debt that was clear on its face and of sufficient amount, if paid, to immediately clear the debts and pay the reasonable cost of the liquidation. Mr Little refused to pay.

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3 *NZ Natural Therapy Ltd (In Liq) v Little* [2019] NZHC 3132.

> [30] In my view, the liquidators were entitled to require Mr Little to pay what they determined he owed without incurring delay and possible unnecessary expense by seeking to have creditors who had proofs of debt already admitted reduce or withdraw those proofs of debt.
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> [31] Mr Little further criticises the liquidators for their initial demand that he pay $1,059,590.49. In Mr Little's submission, this precluded any possibility of a commercial or reasonable settlement.
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> [32] The liquidators made this demand because on the face of what few documents were available to them the Company had paid that sum to Mr Little in various advances. Those advances could be characterised as loans due for repayment. Mr Little's position was that the Company traded solely as a corporate trustee. The payment of the monies were distributions pursuant to a trust and so could not be recovered by the Company.
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> [33] In my judgment of 28 October 2016, I gave my reasons for finding in favour of Mr Little on what was then the plaintiffs' first cause of action claiming that sum. I held the Company did trade as corporate trustee.
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> [34] Subsequently, the deed appointing the Company as corporate trustee was located and discovered in the litigation.
>
> [35] I do not accept Mr Little's criticisms. Mr Little had breached his duty to maintain proper records. He did not give the liquidators the deed appointing the Company corporate trustee. He did not accept liability to pay the current account debt.
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> [36] The liquidators were entitled to sue Mr Little. They did not have to confine their suit to the current account debt. They could not be sure it would succeed, or, if it did, what the quantum might be. Further, it was always possible that more creditors might be identified.
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> [37] In one sense, the amounts the liquidators sued Mr Little for did not matter. He could not be liable for a sum greater than the admitted debts and the liquidators' reasonable costs. Any surplus would be returned to him as sole shareholder.
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> [38] I also find that Mr Little unduly contributed to the expenses of the liquidation by the way he defended the current account claim. It was only at the 2016 trial that he unexpectedly raised the defence that the records showing the current account amount were wrong. He wished to call expert evidence to establish that point. The liquidators had no choice but to go to the considerable trouble of examining Mr Little's experts' opinions and to counter them. In the end they were successful.
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> (Footnotes omitted)

[19] It followed from the above that Mr Little's affirmative defence did not succeed.

[20] I therefore approach the question of costs on the usual basis that costs will be awarded to the successful party, namely the plaintiffs.

[21] I am satisfied that scale 2B costs are appropriate subject to how I should treat the success by Mr Little in his defence of the claim for $1,059,590.49 in the first hearing.

[22] In my view, if Mr Little had complied with his obligations to make discovery and had discovered the deed of appointment then the hearing of this cause of action would not have taken place. The plaintiffs would not have proceeded with a claim refuted by an unimpeachable document. On the other hand, the plaintiffs pursued a claim on the information available to them which did not succeed.

[23] In regard to Mr Little's defence of the alternative claim for the current account debt, I have quoted above para [38] from my 2019 judgment where I found Mr Little unduly contributed to the expenses of the liquidation by the way he defended the current account claim.

[24] Balancing these matters, and in the exercise of my discretion, I award the plaintiffs scale 2B costs of $151,245.50, but I decline to award increased costs of $36,441.

[25] As to the disbursements, Mr Little queries:

(a) Costs of $4,142.30 incurred for non-party discovery in respect of Waterstone Insolvency.

(b) Legal costs of $2,032.15 paid to Ms Page for compliance with non-party discovery orders.

(c) $45,655 paid to Mr Mason as expert's fees.

[26] By memorandum dated 12 February 2020, the plaintiffs address these concerns.

[27] The amount paid to Waterstone Insolvency was in respect of an application for non-party discovery made to obtain the financial records of the Trust and to ascertain the identity of the trustee. It is submitted, and I accept, that the application was

necessary because of the lack of records discovered by Mr Little. I am advised Waterstone's initial invoice was for $8,075.88 inclusive of GST and the liquidators negotiated that down to the claimed amount. The payment to Ms Page is related.

[28] I will allow the disbursements.

[29] In relation to Mr Mason, it is submitted the fees charged reflect the fact that Mr Mason had to be briefed for the first trial and then again for the second trial. For the second trial, Mr Mason had to consider all the further information the plaintiffs had obtained in the interim. The fees are properly documented.

[30] Mr Mason was a key witness for the plaintiffs. I relied on his evidence significantly. The fees, in total, do not seem to me to be excessive and I will allow them.

Decision

[31] I award the plaintiffs costs of $151,245.50 on a 2B basis.

[32] Mr Little is to pay disbursements of $65,124.82.

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Brewer J