IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2017-404-2721
[2019] NZHC 656

BETWEEN	APOLLO BATHROOM AND KITCHEN LIMITED (IN LIQUIDATION) First plaintiff
	CRAIG SANSON AND DAVID BRIDGMAN Second plaintiffs
AND	SHAN LING Defendant

Hearing: On the papers

Counsel: M J Tingey and JEM Lethbridge for the Plaintiffs
G D Wiles for the Defendant

Judgment: 3 April 2019 at 2:00pm

JUDGMENT OF JAGOSE J
[Costs]

This judgment is delivered by me on 3 April 2019 at 2.00 pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel/Solicitors:
Murray Tingey, Barrister, Auckland (Plaintiffs)
Lowndes, Auckland (Plaintiffs)
Geoffrey Wiles, Barrister, Auckland (Defendant)

[1] My 22 February 2019 judgment upheld the second plaintiffs' (the liquidators) recovery of $400,000 (plus interest) from the defendant (Ms Ling) as a transaction at undervalue under s 297 of the Companies Act 1993. I reserved costs.[1]

[2] The liquidators now calculate 2B scale costs at $51,736, and claim a 50 per cent uplift to $77,604 as increased costs. No disbursements are claimed. Ms Ling agrees with the liquidators' 2B calculation, and accepts she should be liable to pay that amount. But she resists their claim for the uplifted amount.

Increased costs

[3] The liquidators claim increased costs under each head of rule 14.6(3)(b) of the High Court Rules 2016 (HCRs):

> The court may order a party to pay increased costs if—
>
> (a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
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> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> (i) failing to comply with these rules or with a direction of the court; or
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> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
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> (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
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> (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
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> (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
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> (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

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[1] *Apollo Bathroom and Kitchen Ltd (in liq) v Ling* [2019] NZHC 237 ("Substantive judgment").

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[4] The liquidators' counsel, Murray Tingey, complains Ms Ling:

(a) did not provide proper discovery;[2]

(b) did not comply with timetable orders for filing of evidence;[3]

(c) filed and served substantially inadmissible hearsay evidence;[4]

(d) failed to make out her positive defence "by a considerable margin";[5]

(e) maintained she did not know of critical facts established in evidence;[6]

(f) did not comply with discovery orders;[7] and

(g) did not accept the liquidators' offer to settle the proceeding.

[5] Ms Ling's counsel, Geoffrey Wiles, responds:

(a) discovery was informal and complicated by the liquidators being in possession of the company's records, and only pursuing her contended outstanding discovery minutely before trial;

(b) no objection to Ms Ling's evidence was raised until I queried its admissibility at trial;[8] and

(c) the parties came close to settlement.

Discussion

[6] As is clear from the prefatory words of HCR 14.6(3)(b), the matters raised by Mr Tingey are material to my consideration of increased costs only to the extent each

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2 At [39] and [41].
3 At [18].
4 At [14]-[16].
5 At [38].
6 At [41].
7 At [39].
8 At [17].

"contributed unnecessarily to the time or expense of the proceeding or step in it".[9] Such unnecessary contribution logically must be of steps not otherwise required to be taken in the proceeding, or materially in excess of the scale time allowed for each such step to the party claiming costs, such being how costs usually are calculated.[10] The liquidators bear the burden of establishing such qualification:[11] "[c]lear cause must be shown to justify an increase".[12]

[7] HCR 14.6(3)(b)(i) inferentially must exclude those matters specified in subpara (iv), for which "reasonable justification" may afford a ground for resistance. Orders amending the date for Ms Ling's evidence, with which she complied, were obtained by consent.[13] The inadmissible content of that evidence was addressed between the parties in the course of trial. No claim is made Ms Ling's non-compliance with the rules made any material unnecessary contribution to the time or expense of trial. There is no foundation for increased costs under subpara (i).

[8] Neither is there any assertion Ms Ling's s 296(3) defence contributed to the time or expense incurred by the plaintiffs. Plainly it did make a contribution, in the sense it was one aspect of Ms Ling's defence, and lacked merit.[14] But "not every losing argument justifies an award of increased costs"; the issue is whether the Rules' "predictable costs regime" should be disrupted.[15] The liquidators do not point to any consequential increase in the time or expense of any step in the proceeding. I infer the defence may have been of marginal unnecessary contribution. I will not uplift costs under subpara (ii).

[9] Subparagraph (iii) requires the liquidators to establish some threshold qualification for admission of the requisite item, rather than just facts found against Ms Ling. But, again, the liquidators do not assert any such requirement of Ms Ling,

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9 See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [165], citing *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].

10 HCR 14.2(1)(c), and see both HCR 14.6(3)(a) and *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [43]-[44].

11 *Corrick v Silich* [2018] NZCA 221, (2018) 24 PRNZ 210 at [60].

12 *Bradbury v Westpac Banking Corp*, above n 9, at [28].

13 Substantive judgment at [18].

14 Substantive judgment at [35]-[36].

15 *New Zealand Carbon Farming Ltd v Mighty River Power Ltd* [2016] NZCA 624, (2016) 23 PRNZ 789 at [40], citing *Bradbury v Westpac Banking Corp*, above n 9, at [94].

and do not in any event claim any unnecessary contribution to their time and expenses in the proceeding. Rather, they say the unnecessary contribution was in requiring me to determine those matters. But my time is not material to any costs calculation. I also will not uplift costs under subpara (iii).

[10] I already have found Ms Ling's discovery was "incomplete".[16] Mr Wiles says the informality of discovery led to shortcomings on both sides. (Some of the liquidators' assertions of Ms Ling's discovery failures, resulting in my minute of 1 February 2019, may also have been overstated.) I do not need to decide if such is reasonable justification for any failure, because no unnecessary contribution is claimed here by the liquidators. The failures instead were pursued in Ms Ling's cross-examination, any consequent extension to the time of trial being marginal. Trial concluded within its allotted three days. I do not uplift costs under subpara (iv) either.

[11] That leaves the question of uplift under subpara (v), in relation to the justification for Ms Ling's failure to accept the liquidators' settlement offer. The liquidators expressed confidence in, and would have accepted $200,000 in full and final settlement of, their claims (for $400,000, plus interest). Ms Ling counteroffered she would accept it, "provided payment of that sum also operates to discharge her liability for tax on the sum originally paid by the company on her behalf to the IRD". She indicated any settlement would need to be subject to payment terms.

[12] Within HCR 14.6(3)(b)'s express qualifications for increased costs is the broad expectation "increased costs may be ordered where there is failure by the paying party to act reasonably".[17] Under subpara (v), 'reasonableness' is to be viewed against:[18]

> … a requirement of fairness that litigants … have some economic means of limiting their exposure to the risk of costs; and secondly the Court itself must ensure … an effective encouragement to settle.

A "steely" approach is required:[19]

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16 Substantive judgment at [39]-[40].
17 *Bradbury v Westpac Banking Corp*, above n 9, at [27(b)].
18 *Moore v McNabb* (2005) 18 PRNZ 127 (CA) at [58], about *Calderbank* offers under HCR 14.10.
19 *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20], citing *Health Waikato v Elmsly* [2004] 1 ERNZ 172 (CA) at [53].

> … the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.

[13] From that perspective, faced with a substantive liability of over twice the offered amount, Ms Ling's counteroffer for her personal tax benefit is strikingly unreasonable, in unprincipled manipulation of potential money flows. She was saying the liquidators effectively should fund her tax liability. Notably, that is a tax position very belatedly adopted for consistency with her defence.[20] Her response to the liquidators' offer also is consistent with the last-gasp opportunism illustrated in that defence.[21] It was not reasonably justified even at the time it was made. By failing to accept the offer, without reasonable justification, Ms Ling contributed unnecessarily to the liquidators' time and expense subsequently incurred in successfully prosecuting their claim. The liquidators are entitled to increased costs under subpara (v).

[14] By 'increased costs' is meant an uplift from scale, the Court of Appeal accepting the uplift "logically" should not be more than 50 per cent.[22] Mr Tingey says that should apply here, as I had applied in another case of an unaccepted settlement offer.[23] But in that case – of a single cause of action, the core element of which another judge held could not fairly be determined – I considered "[t]he benefit of walking away without a costs liability from a flawed proceeding conducted over half a decade was obvious".[24] That obviousness was my reason for applying the 50 per cent uplift.[25]

[15] Here the company failed in its claim for money had and received,[26] and I would not have upheld the liquidators' claim to a voidable transaction.[27] And there was some foundation for Ms Ling's resistance on the liquidators' successful claim: at least two aspects of her ultimate liability turned on the particular construction I gave key aspects of the statute.[28] The benefits of the liquidators' settlement offer were not as 'obvious'

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20 Substantive judgment at [13].
21 At [23] and [37(b)].
22 *Holdfast NZ Ltd v Selleys Pty Ltd*, above n 10, at [46]-[48].
23 *LHL Leasing Solutions Ltd v Pinto Ltd* [2018] NZHC 2019.
24 At [10].
25 At [11].
26 Substantive judgment at [26].
27 At [45(b)].
28 At [28] and [35].

as in the other case, although on any objective view Ms Ling's failure to accept the offer was not reasonably justified. I will uplift costs by 25 per cent.

Result

[16] I order Ms Ling to pay the liquidators increased costs in the amount of $64,670, being the agreed sum of 2B costs at $51,736, uplifted by 25 per cent.

—Jagose J