

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

CIV 2006-404-007056

BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	STEPHEN GLENN HOTCHIN First Defendant
AND	NOIP LIMITED (IN LIQUIDATION AND STRUCK OFF) Second Defendant
AND	OPTICAL SYSTEMS CORPORATION LIMITED Third Defendant
AND	REGISTRAR OF COMPANIES Fourth Defendant

Hearing: by memoranda

Counsel: C K Wood for plaintiff
C T Walker for first, second and third defendants

Judgment: 25 September 2009 at 10:00am

COST JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 25 September 2009 at 10:00am,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Meredith Connell, PO Box 2213, Auckland 1140 for plaintiff
Gilbert Walker, PO Box 1595, Auckland 1140 for defendants

[1] This application for directions in the liquidation of the second defendant NOIP Limited (in liquidation) has been resolved by an agreement to appoint new liquidators in place of the first defendant. The agreement resolved all matters except for costs.

[2] The competing parties (the fourth defendant, the Registrar of Companies, did not take a position on the application) separately seek orders as follows:

- a) The plaintiff (the Commissioner) seeks an order for costs against the first defendant of \$8,480 (calculated on a scale 2B basis) plus disbursements of \$90; and
- b) The first, second and third defendants seek an order for costs against the plaintiff (on a 2B basis as fixed by the Registrar), or alternatively an order that costs lie where they fall.

[3] The Commissioner contends that he should be awarded costs as he achieved what he was seeking, namely the appointment of new liquidators. The defendants say that the Commissioner cannot be treated as the successful party as the agreed outcome was only in respect of one aspect of the Commissioner's application and the agreement to appoint the new liquidators was a pragmatic solution reached without any admission as to liability. The defendants seek costs in their favour on the basis that the matter could have been resolved at any early stage but for the Commissioner taking an intransigent position.

[4] For the reasons I will now give I consider that the Commissioner is entitled to costs of \$4,890 inclusive of disbursements.

Background

[5] The first defendant (the liquidator) was appointed liquidator of the second defendant (NOIP) on 7 June 2005 by special resolution of its shareholder, the third defendant (Optical).

[6] The reason for putting NOIP into liquidation was that it owed the Commissioner a substantial debt for assessments for income tax for the income years 2000-2003 (the sum of \$913,176.07) and late filing penalties for those years and 2004.

[7] The Commissioner filed an unsecured creditor's claim for \$915,911.05 based on his assessments. The liquidator did not accept the claim, and made a decision not to convene a meeting of creditors. The Commissioner took issue unsuccessfully with the liquidator over the rejection of the claim, and his refusal to convene a creditor's meeting notwithstanding notice given by the Commissioner under s 2862 of the Companies Act 1993. The liquidator filed a final report, applied to have NOIP struck off the register, and subsequently destroyed the records of the liquidation.

[8] The Commissioner brought the present substantive application at the same time as applying for orders restoring NOIP to the register and for orders reversing the liquidator's decisions. The substantive application, when originally filed on 15 November 2006, sought orders for the convening of a meeting of unsecured creditors and as to procedure for and voting at that meeting.

[9] On 14 December 2006 the solicitors for the first and second defendants wrote to the Commissioner's solicitors challenging the orders being sought other in the substantive application (with the exception of the order for convening a meeting of unsecured creditors). They said that the Court did not have jurisdiction to make the further orders being sought. The defendants put forward a proposal for resolving the dispute.

[10] The Commissioner rejected the proposal. One of the reasons given was that the Commissioner could not accept the defendants' position on procedure to be followed at the meeting, and did not wish to commit himself to the defendants' proposal to deal with the matters simply by calling of an unsecured creditors' meeting until such time as he had been given a list of unsecured creditors. The reason for this was that he considered it an empty exercise to go to a meeting "without safeguards to ensure genuine arms length creditors are not out-voted by related entities".

[11] The preliminary steps of restoration of NOIP and resumption of the liquidation were agreed. Orders were made on the interlocutory application (including orders that the Commissioner's debt was to be accepted, and for NOIP to pay costs on the interlocutory application).

[12] The parties were unable to agree on how to proceed from there. The liquidator called a meeting of unsecured creditors on 12 April 2007. The issues over voting had not been resolved. The Commissioner did not accept that the meeting had been validly convened, but also continued to take issue over the liquidator's view of voting rights at the meeting. On 18 May 2007, the Commissioner filed an amended statement of claim, seeking a declaration that the meeting of 12 April 2007 was ineffective for confirming the appointment of the liquidator in addition to the orders in relation to the creditors' meeting, but also adding an additional claim for termination of the liquidation and replacing the liquidator.

[13] The parties continued to try to negotiate terms for resolution. The essential points of difference between them became whether the liquidator had acted impartially in his earlier decisions (the Commissioner contending that he demonstrated a lack of willingness to consider the Commissioner as a genuine creditor), and whether there were matters for investigation. The Commissioner was adamant that there were matters for investigation and that that investigation could only fairly be conducted by a new and independent liquidator. The parties also continued to differ as to whether the Court had jurisdiction to make the orders being sought as to conduct of the creditors' meeting.

[14] In an attempt to resolve those conflicts, the defendants made a proposal on 4 July 2007 that the liquidator would resign and the Commissioner, Optical and the other related creditors would appoint a new liquidator who would be free to conduct investigations as he or she saw fit. The application was to be discontinued with no issue as to costs. The Commissioner was to meet the new liquidators' fees and costs. The proposal was made without prejudice save as to costs.

[15] The proposal was made on the basis that Optical saw no reason in principle to depart from its position, but saw no merit in resisting further investigation if the

Commissioner was determined upon that course (the various assessments arose in relation to a period before Optical had acquired shares in NOIP). Optical still maintained that it and another related company were validly entitled to vote at creditors' meetings. For his part, the liquidator did not resign from his position that he had acted entirely impartially, but said that he no wish to become embroiled in the dispute. The defendants expressed the view that a new liquidator would quickly reach the same view as the liquidator that there was nothing in NOIP's history that required further investigation.

[16] Negotiations on the same basis (without prejudice save as to costs) continued until 31 October 2007 at which point the parties agreed to appointment of replacement liquidators and that the defendants would not be asked to assist in any way with costs incurred by the new liquidators, and that the Court would be asked to determine costs. Orders to this effect were made by consent on 15 November 2007.

The plaintiff's application

[17] The Commissioner says that he has, in effect, succeeded on his applications by reason of the consent order appointing the agreed replacement liquidators.

[18] The defendants say that the liquidator's agreement to be replaced (a voluntary resignation) falls short of what the Commissioner was seeking in his amended statement of claim, namely termination of that liquidation and an order replacing the liquidator with liquidators of the Commissioner's choice. They say that the Commissioner could never have achieved what he was seeking in his original statement of claim (namely, orders in advance of the creditors' meeting as to voting entitlements at the meeting).

The defendants' application

[19] The defendants say that they should be entitled to costs on the basis that the Commissioner could not have obtained the orders as to voting entitlements at the creditors' meeting (as sought in the original statement of claim) and was intransigent in rejecting the proposal first made in December 2006 (and repeated in February

2007) whereby the liquidator would remain, the Commissioner's revised proof of debt would be accepted by him, and a meeting of unsecured creditors would be convened, and costs would lie where they fall.

[20] This claim for costs was made in response to the Commissioner's claim. The Commissioner did not seek to respond to it. His position can be inferred from his own claim for costs in his favour.

Discussion

[21] The Court has an overall discretion in relation to costs: r 14.1. That general discretion is exercised within the context of the other rules as to costs, including an assessment of the criteria in r 14.2:

14.2 Principles applying to determination of costs

The following general principles apply to the determination of costs:

- (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
- (b) an award of costs should reflect the complexity and significance of the proceeding:
- (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
- (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
- (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
- (f) an award of costs should not exceed the costs incurred by the party claiming costs:
- (g) so far as possible the determination of costs should be predictable and expeditious.

[22] The only real issues are whether the Commissioner ought to be treated as the successful party, and whether his conduct has been such as to deny him any costs to

which he might otherwise be entitled, or justify an award to the defendant. The same considerations apply to each point.

[23] I regard it as too simplistic for the defendants to say that the Commissioner did not succeed at all on his original statement of claim. The orders sought were directed towards getting a liquidator appointed who was prepared to negotiate issues raised by the Commissioner. The defendants' first response (proposing reinstatement of the liquidation and holding of a meeting of unsecured creditors) was an implicit acceptance of a least part of the Commissioner's position. The fact that the matter did not settle at that point cannot simply be put down to intransigence. In my view the Commissioner had reason to lack confidence in the liquidator:

- a) He had rejected the Commissioner's claim (but was prepared to recognise that as part of the proposal after issue of the proceeding) and had rejected the formal request for a meeting.
- b) He was unwilling to provide a list of unsecured creditors as part of his compromise proposal (although I accept that he was not required to do so under any express provisions of the Companies Act).
- c) Instead, and although the matter was before the Court on the Commissioner's application, he proceeded unilaterally to convene a meeting, and at that meeting accepted that two related companies (having combined debts of just under \$11,000) were able to out-vote the Commissioner (with his very substantial debt).

[24] In those circumstances it was unsurprising that the Commissioner elected to amend his statement of claim and seek removal of the liquidator. Although the consent order ultimately made was not exactly on the terms sought in the amended statement of claim, its effect was what the Commissioner was seeking. In other words, the Commissioner secured reinstatement of the liquidation, his acceptance as a creditor in the liquidation, the calling of a creditors' meeting (even if there were issues with that), and ultimately replacement of the liquidator. Whatever the

defendants' reasons for agreeing to replacement of the liquidator, that prima facie puts the Commissioner in the position of the successful party.

[25] The defendants argue that it was reasonable for them to oppose the Commissioner's application for orders as to the voting entitlement at the meeting. They say that even if the Court might have been minded to have considered this after the meeting (due to the impending introduction of s 245A of the Companies Act 1993) there was no power to make those orders before the meeting.

[26] I accept that submission, notwithstanding the counter argument of counsel for the Commissioner that the Court had a wide discretion under s 284. However, that was not all there was to it. The defendants were unwilling initially to reserve the issues of costs. Before the matter could be resolved, the further issues had arisen in relation to the meeting of 12 April 2007. (I note that the Commissioner had earlier raised concerns about the voting entitlements of the related parties).

[27] The defendants have also said that the Commissioner has been unreasonable in pursuing his claims without having particular matters to investigate. However, the issue here is his right to have a proper investigation rather than attempting to predict the outcome to the investigation itself.

[28] The defendants point to the Commissioner's ultimate acceptance that the defendants should not be required to contribute to the costs of the (reinstated) liquidation as another element of intransigence. The defendants took that position because they had already funded one liquidator, and NOIP had no assets from which to pay the fees of a further liquidator. There is some justification for the view that the Commissioner could have avoided further costs incurred after this proposal was put to him on 4 July 2007.

[29] The Commissioner also claimed that the Court should have regard to the fact that the liquidator had caused NOIP to be struck off the register (by filing his final report) even though the Commissioner was still in correspondence with him, and had then destroyed NOIP's records and the records of the liquidation. The defendants have contested these points. I have not taken them into account in this decision, save

for recognising that the destruction of the records has contributed to issues that arose over discovery.

[30] The defendants have not specifically contested any aspects of the quantum being sought, other than to submit that a deduction should be made to reflect that the Commissioner chose to file an amended statement of claim. However, if he had not done so, there is no certainty that he would have obtained the outcome he did. I am not prepared to discount an award on that basis. I also note that the Commissioner has not claimed for an amended pleading.

[31] I come to the view that the Commissioner should be entitled to costs up to the time that the defendants made their offer of 4 July 2007, and the defendants should be entitled to avoidable costs from that point onwards (this excludes the costs of preparation for and attendance at a final case management conference, which would still have been needed).

[32] I allow the Commissioner costs for commencing the proceeding. He has claimed costs for discovery. Although an order for discovery was made, neither party filed an affidavit of documents. I disallow this claim. I also disallow the Commissioner's claim for two of the three case management conferences after 4 July 2007, and award them to the defendants. The net effect after off-setting the defendants' entitlement is that I allow the Commissioner 3 days at the daily rate of \$1600.

Decision

[33] The defendants are to pay costs to the plaintiff in the sum of \$4,800, being the net costs identified in the previous paragraph, together with disbursement of \$90.00.

Associate Judge Abbott