

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

CIV-2009-409-002728

BETWEEN	F M CUSTODIANS LIMITED Plaintiff
AND	COUSINS & ASSOCIATES First Defendant
AND	DOMINION FINANCE GROUP (IN RECEIVERSHIP AND LIQUIDATION) Second Defendant

Appearances: J V Ormsby for Plaintiff
M Gilbert for First Defendant
P Murray for Second Defendant

Judgment: 21 April 2010

JUDGMENT OF ASSOCIATE JUDGE DOHERTY

Introduction

[1] The Court's minute of 30 March 2010 identified an issue as to an outstanding costs application between the plaintiff and the second defendant. Counsel have been unable to agree on the issue and have filed memoranda in respect of it. The minute provided the issue be dealt with by the Court at a telephone conference held on 19 April 2010. At that conference counsel agreed I could determine the issue on the papers.

The application

[2] The plaintiff is not a creditor of the second defendant, but alleges priority as a mortgagee over a mortgage held by the second defendant. It was obliged to seek

leave to continue the proceeding against the second defendant pursuant to s 248(c)(i) of the Companies Act 1993, unless the liquidator of the second defendant consented.

Chronology

[3] The proceeding was filed on 19 November 2009 and served on the second defendant on 23 November 2009. In mid-December there was correspondence to and from counsel for the plaintiff and the second defendant as to whether the liquidator would consent. In short, that exchange related to the liquidators seeking time to consider the issue. The plaintiff's counsel indulged and intimated that if they had not heard by 15 January 2010 then they were instructed to make an application for leave. The second defendant advised it would not be able to meet that timetable, but proposed a response by 22 January 2010. On 19 January 2010 the second defendant filed and served its statement of defence, but reserved its rights in relation to the issue of liquidators' consent. On or about 26 January 2010 the plaintiff filed its application for leave. The application was served on the second defendant on 2 February 2010.

[4] Ultimately, consent was given following the issue of an unless order on the basis that no opposition to the application had been filed.

The argument

[5] The plaintiff says the second defendant's belated consent meant there was an unnecessary application (application for leave) compounded by the plaintiff having to take an unnecessary step in the proceeding ("unless order" application). It submits the combination means an award of costs in its favour, increased on a r 14.6 basis.

[6] The second defendant says that all it sought was a reasonable time for the liquidator to consider the matter; even after the application was made the liquidators were not obliged to oppose the application; nor was it obliged to consent; and it was quite within its rights to allow the application to be determined by the Court.

[7] It appears common ground that all parties anticipate that leave would have been granted on the merits (*Fisher v Isbey* (1999) 13 PRNZ 182).

[8] Throughout, there had never been an indication that there would not be consent forthcoming from the liquidator, but merely that the liquidator required time to consider the position.

[9] I think the liquidator ought to have had a reasonable time to consider the position, given the duty to act in the best interest of both the second defendant and its creditors. The deadline came and went but the plaintiff filed its application with some haste; within 4 days. The proceeding is hardly one which attracts inordinate need for expedition or urgency. Ultimately, the liquidator did consent. Even though it was filed without prejudice to the issue of consent, the filing of a defence by the second defendant was a pretty good steer that consent would ultimately be given.

[10] It seems to me that the plaintiff was not “forced to seek an unless order to get a response from the liquidators of the second defendant” as submitted by counsel for the plaintiff. It chose to take that step notwithstanding it could have come to the Court and obtained leave on the basis that no opposition had been filed.

[11] I think in the circumstances that, notwithstanding the plaintiff’s application has elicited consent, costs should lie where they fall.

Solicitors:
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