IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-000648
[2013] NZHC 3323

BETWEEN	DAMIEN GRANT and STEVEN KHOV as liquidators of CAPITAL HOSPITALITY HOLDINGS LIMITED (IN LIQUIDATION) Applicants
AND	PRAKASH PANDEY First Respondent
	C P HOTELS LIMITED Second Respondent
	C P INVESTMENTS LIMITED Third Respondent
	C P CARPARKS LIMITED Fourth Respondent
	intituling cont'd

Hearing:	23 October and 28 November 2013
Appearances:	B J Norling and A Ho for Applicants R B Hucker for Respondents
Judgment:	11 December 2013

JUDGMENT OF COURTNEY J
[Review of Associate Judge's decision]

This judgment was delivered by Justice Courtney
on 11 December 2013 at 4.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

C P PROPERTY INVESTMENTS LIMITED
Fifth Respondent

C P ASSET MANAGEMENT LIMITED
Sixth Respondent

J D RAI & SONS LIMITED
Seventh Respondent

ASIA PACIFIC HOTEL INVESTMENTS LIMITED
Eighth Respondent

RAISONS PACIFIC INVESTMENTS LIMITED
Ninth Respondent

BABOO MAHENDRA PRATAP RAI
Tenth Respondent

CAPITAL INVESTMENTS CORPORATION LIMITED
Eleventh Respondent

Introduction

[1] In this proceeding Damien Grant and Steven Khov, as liquidators of Capital Hospitality Holdings Limited (in liquidation) (CHH) are seeking orders under s 266 of the Companies Act 1993. The tenth and eleventh respondents unsuccessfully protested the jurisdiction of the Court to make such orders.[1] Associate Judge Bell ordered them pay costs on a 2B basis.[2] The liquidators were represented by in-house counsel and there was no evidence regarding the actual cost to the liquidators of that representation. The respondents have applied to review the costs order[3] on the ground that, in ordering costs without such evidence, the Associate Judge failed to apply the principles in r 14.2(f) of the High Court Rules which precludes costs being awarded in excess of the actual costs incurred.

[2] The awarding of costs is an exercise of a discretion and therefore I would only interfere with the Associate Judge's decision on a review if there had been an error of law through failing to take into account a relevant factor, taking into account an irrelevant factor, applying a wrong principle or otherwise plainly being wrong.[4]

[3] Although costs are discretionary under the High Court Rules, it is a discretion to be exercised in accordance with the principles contained in the rules.[5] Under r 14.2(f) an award of costs should not exceed the costs incurred by the party claiming costs.

Costs where party represented by in-house counsel.

[4] In his decision, Bell AJ allocated the time for steps taken in the application as 2.1 days then uplifted it by a further .2 of a day because there was delay by the respondents in filing submissions on time. This produced costs on a 2B basis of 2.3 days at $1,900 per day, totalling $4,370. The issue of Mr Norling's status as in-house counsel for the liquidators was raised and the Associate Judge declined to make any reduction on that account. His reason was:

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[1] *Grant & Khov v Pandey & Ors* [2013] NZHC 2844.
[2] Costs minute of Bell AJ 8 November 2013.
[3] Judicature Act 1908, s 26P. The review is conducted as a rehearing: rule 2.3 High Court Rules
[4] *May v May* (1982) 1 NZFLR 165 (CA).
[5] *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523.

> I note that there is a longstanding practice that the Commissioner of Inland Revenue will employ in-house lawyers in liquidation matters. The Commissioner always obtains standard costs award without any adjustment because the Commissioner has used in-house lawyers. I see no reason to treat the applicants in this case in any different way.

[5] Mr Hucker submitted that, whatever the practice in relation to the IRD, it was an irrelevant consideration in terms of r 14. I agree. This does not, however, mean that the Associate Judge's decision was wrong. The liquidators had prevailed on the jurisdiction argument and, in the usual course, would be entitled to costs under r 14.2. The fact that the liquidators were represented by in-house counsel did not preclude costs being awarded.[6]

[6] The real issue in this case is the basis upon which costs should be awarded where in-house counsel are involved. There is no specific provision in the rules regarding costs where a party is represented by in-house counsel. Previous decisions of this Court have awarded costs on the same basis as would have been awarded to a party represented by external counsel.[7] I note, in particular, the approach and discussion taken by Gendall AJ (as he then was) in *CIR v Harbour City Tow and Salvage (2003) Ltd.* In that case, the defendant opposed any order of costs on the same grounds as are advanced in the present case, namely that the comparable rule to the current r 14.2(f) precluded costs from being awarded which exceeded the actual costs incurred and that there had been nothing before the Court to indicate what the actual costs were in relation to the plaintiff's in-house counsel. The Associate Judge rejected this argument, in part because the costs being sought were based on the "deemed" costs formula then contained in the schedules to the High Court Rules which had been established by the High Court Rules committee after appropriate consultation.

[7] The Associate Judge referred to the Court of Appeal's decision in *Glaister v Amalgamated Dairies Ltd* which emphasised the deeming nature of the costs regime:[8]

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6 *Henderson Borough Council v Auckland Regional Authority* [1984] 1 NZLR 16 at 23 (CA).

7 See e.g. *Commerce Commission v Caltex NZ Ltd & Ors* (2000) 14 PRNZ418 at [21] (HC); *Commissoner of Inland Revenue v Harbour City Tow & Salvage (2003) Ltd*, HC Wellington CIV-2006-485-2002, 12 February 2007; *Chang-Hooker v Rooke* [2013] NZHC 1677; *Grant & Cove v McCullagh & Lawrence* [2013] NZHC 2210.

8 *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA).

> [14] The new (and statutory) High Court Scheme has at its heart the proposition that a successful party should receive a reasonable contribution towards his or her costs being two-thirds of the costs deemed (under the new scheme) to be reasonable in a proceeding (or for that matter on an interlocutory application) having regard to the complexity and significance of the matters which were at issue and the time which was reasonably required to be taken. Rule 47(c) and (d) expressly uses the term *"considered reasonable"* and that reference is to the statutory scheme. And Rule 47(e) expressly provides that what is an appropriate daily rate and a reasonable amount of time does not depend on the skill or experience of the actual solicitor or counsel involved or *on the costs actually incurred by the party claiming the costs*. The only reference which it is necessary to make towards actual costs is to be found in r 47(f), namely that "an award of costs should not exceed the costs incurred by the party claiming costs". This of course reinforces the thesis underlining the new scheme: that the test is entirely an objective and not a subjective one.
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> (emphasis added)

[8] In *Harbour City* the Associate Judge did have some information about the actual costs to the plaintiff in the form of the approximate hours counsel had spent, which he considered to be substantial and, on his assessment, would easily have exceeded the scale costs. However, it seems very likely that the outcome would have been the same without that information because of the deeming nature of the costs regime.

[9] The objective nature of the costs scheme, with the consequent effect that the actual costs are of very limited relevance, is reflected in observations by the Court of Appeal in *Health Waikato Ltd v Elmsly*:[9]

> [50] Under the current High Court costs regime the actual costs incurred by a successful party have limited relevance. There is an overarching principle that a costs award should not exceed the actual costs incurred by the successful party. As well, if a Judge is considering the possibility of making an award of indemnity costs, the actual level of costs incurred might be of some relevance. But for general purposes associated with the costs regime, the actual costs incurred by a successful party are irrelevant and ought not to be referred to the Judge in the course of submissions.

[10] Mr Hucker invited me to take the approach evident in two Employment Court decisions, *MacIntosh v Air New Zealand*[10] and *Aarts v Barnados NZ*.[11] In both cases the Judges referred to the fact that a party represented by in-house counsel cannot

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9 *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA).

10 *MacIntosh v Air New Zealand* Emp C Auciland AC 9/01, 22 February 2001.

11 *Aarts v Barnados NZ* [2013] NZ EmpC 145.

expect to make a profit but merely recover actual salary costs plus something for overheads. However, I do not accept that this observation means that a party represented by in-house counsel must produce evidence of salary and overheads.

[11] In *MacIntosh* the Judge rejected the hourly rate sought by the appellant's advocate in favour of a "broad view" based on the Judge's assessment of what was an appropriate level of costs for the nature of the case. In *Aarts* the party claiming costs did not provide evidence of salary and overhead costs but simply a notional fee produced as if the party had been a client. This would not, of course, have assisted in in determining the actual salary and overhead costs to the party. Nor did the information seem to form the basis for the costs awarded, which were a little less that the scale calculation.

[12] Mr Hucker relied, in part, on Chief Judge Colgan's observation in *Aarts* that lower rates for in-house counsel has generally been allowed. However, that observation does not, in my view, impose any onus on parties in the position of the liquidators in this case to actually produce evidence about the salary and overheads connected with in-house counsel. Mr Hucker's approach, I think, proceeds on the flawed assumption that the costs deemed by the Rules Committee to represent an appropriate level of time and cost for certain types of work are somehow different when applied to in-house counsel as to external counsel. In general, there is no reason that the statutory regime ought not operate effectively for both in-house and external counsel.

[13] I further note that, as Mr Hucker himself observes, it is incumbent on all counsel, in-house or external, as officers of the Court not to seek costs in excess of the level of actual costs.

Result

[14] Although the Associate Judge appeared to take into account an irrelevant consideration I am satisfied that his decision was right. The application for review is dismissed.

[15] The liquidators are entitled to costs. Mr Norling has sought increased costs on the basis that the application was without merit and, further, that the respondents have failed to comply with directions regarding the service of submissions. This latter point related to the failure to serve the submissions for the respondents for some nine days after they were filed in court. As is evident I consider that the application for review was without merit. There is no excuse for withholding submissions from another counsel. There will be costs to the liquidators on a 2B basis with an uplift of 50%.

P Courtney J