IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WAIHARAKEKE ROHE

CIV-2019-406-32
[2020] NZHC 1551

UNDER	the Companies Act 1993
IN THE MATTER	of the liquidation of DIAMOND HOSTEL LIMITED
BETWEEN	SUNGJA KIM Plaintiff
AND	DIAMOND HOSTEL LIMITED Defendant

Hearing: On the papers

Counsel: B J Norling and A A Alipour for Plaintiff
S Kang for Defendant

Judgment: 3 July 2020

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 3 July 2020 at 2.30pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
3 July 2020

[1] In this proceeding, the plaintiff sought the liquidation of the defendant company, following an arbitration award in favour of the plaintiff.

[2] The proceeding was initially (by agreement) put on hold, given there was an application by the defendant for leave to appeal the arbitral award. In addition, the defendant applied to strike out the proceeding on the basis that the proceeding was issued before the statutory demand, relied on in the winding-up application, had run its full 15 working days. There was also an application to restrain advertising. Counsel for the plaintiff responsibly agreed that there would be no advertising pending the hearing of the application for leave to appeal which was heard on 19 March 2020.

[3] I set down the application for stay and to restrain advertising for hearing on 7 April 2020.

[4] As it happens, the hearing set down on 7 April 2020 was lost due to the COVID-19 level four lockdown. A telephone conference was held on 5 May 2020 to address the outstanding interlocutory applications. However, counsel for the defendant advised the Court by memorandum that the application for leave to appeal the arbitral award had been dismissed. This meant the defendant now accepted it was liable to pay the debt and that the defendant wished to withdraw the interlocutory applications.

[5] While there was some delay, the defendant paid the amount claimed in the statutory demand, that being the amount ordered to be paid under the arbitral award. Interest on that sum has also been paid. The dispute on which I am now asked to rule concerns costs.

[6] The lease between the parties contains the following costs clause:

> 6.1 Each party will pay their own costs of the negotiation and preparation of this lease and any deed recording a rent review or renewal. The Tenant shall pay the Landlord's reasonable costs incurred in considering any request by the Tenant for the Landlord's consent to any matter contemplated by this lease, and the Landlord's legal costs

> (as between lawyer and client) of and incidental to the enforcement of the Landlord's rights remedies and powers under this lease.

[7] Counsel for the plaintiff relies on the above clause to seek indemnity costs in respect of the two interlocutory applications and the winding-up proceeding.

[8] Defendant's counsel resists the applications on two grounds. In respect of the interlocutory applications, the defendant says in substance it was successful. In respect of the substantive proceeding, the defendant says it was also successful as the plaintiff no longer pursues the winding-up application (the debt having been paid in full).

[9] Those arguments are not sustainable.

[10] In respect of the interlocutory applications, *McGechan on Procedure* provides:[1]

> An interlocutory application may be "determined" either by decision of the Court or by another mechanism such as agreement of the parties or withdrawal by leave …

[11] Here, the two interlocutory applications were withdrawn by leave. They were therefore "determined" in the plaintiff's favour.

[12] The defendant says in respect of the application for stay, the application served its purpose as the proceedings were not progressed until the Court ruled on the appeal issue. Defendant's counsel submits the defendant's application for stay therefore had some success as it resulted in the proceeding being stayed pending the appeal. I do not accept this. That the proceeding effectively marked time while the appeal was dealt with represented a pragmatic response by the plaintiff, and indeed by the Court. There was recognition if the appeal was successful, then the debt upon which the winding-up application was based would not be owing to the plaintiff.

[13] As to the second interlocutory application, being the strike out on the basis the proceeding was commenced on the 14th working day after service of the statutory

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1 Andrew Beck (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR 14.8.02].

demand, the defendant says because the plaintiff did not provide any reply evidence in respect of this issue:

> … it should be held that the Defendant's evidence was accepted as true, and the Plaintiff did not really oppose this application and is not entitled to costs.

[14] I do not accept this argument. The issue of whether the proceeding being filed on the 14th working day invalidated the proceeding was fundamentally a legal issue.

[15] As to the substantive proceeding, the reality is the proceeding served its purpose in obtaining payment of the amount due under the arbitral award, along with interest. That the plaintiff now recognises the proceeding should be withdrawn because the debt has been paid, does not mean the defendant has been successful in the proceeding.

[16] The plaintiff succeeded in both the interlocutory applications and the substantive proceeding and is therefore entitled to costs.

[17] *McGechan* in discussing the quantum of indemnity costs pursuant to an indemnity costs clause, says:[2]

> The principle that a party may contractually bind itself to pay another's full solicitor/client costs is firmly established: *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA). As the Court of Appeal noted in *Beecher v Mills* [1993] MCLR 19 (CA) "anything less than a full indemnity for costs properly incurred must leave the indemnitee with part of the liability for which the indemnifier is prima facie responsible. In the absence of a contrary indication it is not to be assumed that the parties intended such a result."

Quantum

[18] The plaintiff seeks indemnity costs as follows:

(a) $2,626.00 (exclusive of GST) relating to the two interlocutory applications;

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2 At [HR 14.6.03(3)(e)].

(b) $10,657.00 (exclusive of GST) relating to the winding-up liquidation proceeding itself; and

(c) $892.06 for disbursements.

[19] Starting with the disbursements, such are the standard winding-up disbursements, and they are ***allowed***.

[20] The costs claimed are not excessive. *McGechan* notes:[3]

> It is incorrect in law for the Court to assess reasonableness solely by a comparison of costs charged against the sum at stake – the Court must have regard to the kind of analysis in *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400] in order to satisfy itself that the costs were "reasonably incurred": *Edel Metals Group Ltd v Geier Ltd* [2018] NZCA 494 at [62].

[21] While the amount due as a result of the arbitral award was just under $30,000, the fact is any party who is subject to a solicitor/client costs clause must carefully consider the impact of costs in respect of the decisions they make concerning litigation. The amount claimed by the plaintiff is not excessive when compared to 2B scale costs for the steps involved.

[22] There is judgment for the plaintiff in the sums set out at [18] above.

[23] The plaintiff seeks an order that its winding-up proceeding remain on foot in order for it to provide an incentive to the defendant to pay the costs award. The plaintiff is expressly wanting the liquidation to remain a sword of damocles over the defendant in respect of the unpaid costs. This is not a course I am prepared to adopt. The amount claimed in the statutory demand and in the statement of claim has been paid with interest. The presumption of insolvency that arose from the non-payment of the statutory demand may be rebutted by the payment that has been made.[4] If the defendant does not pay the costs then it may well face a further statutory demand and further costs, but as at this time I am not prepared to adjourn the proceeding further when the amount pleaded as due in the statement of claim has been paid.

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3 At [HR 14.6.03(2)].
4 At [HR 31.24.04].

[24] This proceedings is accordingly at an end.

Associate Judge Lester

Solicitors:
Norling Law Limited, Auckland
Fairbrother Family Law, Napier