IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000856
[2015] NZHC 1206

UNDER	the Companies Act 1993
IN THE MATTER	of the Companies Act 1993 Sections 287-289 Liquidation Proceedings
BETWEEN	GROYNES DEVELOPMENT (2012) LIMITED Applicant
AND	COLLIS MURDOCH EARTHMOVERS LIMITED Respondent

Hearing:	28 May 2015 (Determined on the papers)
Counsel:	H D P van Schreven for Applicant G J Warren for Respondent
Judgment:	2 June 2015

COSTS JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

---

[1] This is an originating application for an order that a statutory demand be set aside. Initially it was opposed. Before it was due to be heard the applicant, Groynes Development (2012) Limited (Groynes) discontinued. The respondent, Collis Murdoch Earthmovers Limited (Collis) applies for costs. Whilst Groynes accepts that it is liable for an award of costs, it disputes both the basis on which Collis claims, and the amount of the costs award sought. It also opposes an ancillary application by Collis, based on a memorandum from counsel for Collis, for interest on the sum claimed in the statutory demand.

[2] In support of its application Collis says that the sums claimed in the statutory demand represented payment claims under the Construction Contracts Act 2002, that no payment schedules were lodged in response to those claims, and that the sums in

the payment claims are therefore recoverable. It relies on ss 18 to 23 of the Act. It also says that Groynes is prevented from claiming that it has a counterclaim, set-off or cross claim, because of the provisions of s 79 of the Act.

[3] It says, therefore, that Groynes' claim to have a valid dispute over the existence of the debt, and to have a valid counterclaim which would set off or extinguish the sum claimed in the demand, could not succeed.

[4] Groynes then says that it is entitled to actual and reasonable costs of recovery, pursuant to s 23(2)(a)(ii) of the Act.[1]

[5] Groynes claims a total of $102,673.33. Leaving aside as a separate issue, the claim for interest of $16,969.34, the sum claimed for legal fees, ancillary fees and disbursements amount to $85,703.89. No issue is taken in relation to the disbursements of $172.

[6] In response to this, Mr van Schreven for Groynes says that there was no mention of the Construction Contracts Act in the notice of opposition to the application, and that extensive affidavits in opposition engaged in the very issue that Collis now says it is not required to engage in because of the operation of the Act (whether there was a valid dispute or a counterclaim). Counsel rejects the assertion that payment schedules as required by the Act were not filed. Challenges were made to the invoices submitted by Collis for payment and therefore the consequences set out in s 23 of the Act have not come into play.

[7] Counsel also says that under the Act actual and reasonable costs may only be awarded by a court in which the sum in a payment claim is recovered as a debt due, and by implication he says that is not the case here.

[8] Counsel then relies on the established principles for an award of costs on a discontinued proceeding, namely:

---

1 See [25] below.

(a) The Court will not consider the merits of the respective cases for the parties unless they are so obvious that they should influence the costs outcome.

(b) The Court will consider the reasonableness of the stance of both parties: whether it was reasonable for the plaintiff to bring and continue the proceedings, and for the defendant to oppose the proceeding up to the point of discontinuance.

[9] Counsel then says that the Court's general discretion in r 14.1 as to costs can also override the general principles referred to. He says that the applicant elected to pay on a pragmatic basis without any admission of liability, and it denies that the issue of the demand was an abuse of process or, as submitted by counsel for the respondent, a contrived manoeuvre to avoid payment. He relies on the affidavits filed in reply to support that contention.

[10] Finally, counsel says that if actual and reasonable costs are to be awarded, the costs incurred here are not reasonable, that a claim for fees relating to a firm called Merlo Burgess & Co Limited are not shown to be legal expenses, and that there was no indication of the involvement of present counsel for Collis until the claim for costs. Given that his fee is said to be over $51,000, counsel for Groynes reserves a right under the Lawyers and Conveyancers Act 2006 to lay a complaint with the New Zealand Law Society.

Discussion: fees

[11] The two items making up the claim for costs by Collis are legal fees and ancillary fees.

[12] The legal fees comprise two elements. First, the solicitors for Collis have charged $2,737.50. Despite reference in the memorandum submitted in support of its application for costs by Mr Warren, counsel for Collis, to their account being attached as exhibit D to his memorandum, no account was attached. Section 23(2)(a)(ii) of the Act refers to actual and reasonable costs; in relation to the solicitor's fee I am not able to make a careful assessment, but I will take the claimed

fee into account in my overall assessment of the reasonableness of the costs now claimed.

[13] By far the greatest proportion of the fees claimed are the fees of Mr Warren, who was counsel instructed for Collis. His bill of costs dated 11 May 2015 is produced. In total he has charged for 128.75 hours of work at $350 per hour, plus GST, making a total of $51,821.88.

[14] I doubt (without finding) that any exception can be taken to the hourly rate, but I have grave reservations about the reasonableness of a claim that 128.75 hours of work were required to oppose an application to set aside a statutory demand. Beyond the notations of the work said to have been undertaken on some 21 days, it is difficult to assess how much time is said to have been taken in relation to the various steps in the proceeding. I observe, however, that as Mr Warren says that 128.75 hours of attendances took place, he must have charged up an average of over six hours for every one of the 21 days on which he worked on this proceeding.

[15] The register of documents filed in court records that Collis filed the following documents:

> Joint memorandum in relation to extension of time for filing respondent's notice of opposition and affidavits.
>
> Memorandum of counsel for respondent filed 20 January 2015 concerning extension of time.
>
> Affidavit of P E Dormer filed on 16 January 2015.
>
> Affidavit of J Dickson filed on 16 January.
>
> Affidavit of A T Murdoch filed on 16 January.
>
> Memorandum of counsel for respondent relating to extension of time for filing documents, filed on 29 January.
>
> Notice of opposition filed on 29 January.
>
> Affidavit of B T Murdoch filed on 4 February.
>
> Affidavit of R L Merlo filed on 9 February.
>
> Joint memorandum of counsel filed on 13 February.

Memorandum of counsel for the respondent in relation to order for costs filed on 28 April.

Memorandum of counsel for the respondent on costs filed on 13 May (2).

Chronology filed by the respondent in relation to costs on 13 May.

[16] These documents fall into three categories, memoranda on procedural issues including timing for filing of documents (4), a notice of opposition and five affidavits in opposition to the application, and documents filed in relation to this application for costs (3).

[17] On an application to set aside a statutory demand the Court is required only to determine whether a dispute exists in relation to the claimed debt, or a proper basis for a counterclaim, and not to decide the outcome of any dispute raised, or any counterclaim.[2] It is against that principle of law that the actions of the respondent in filing five affidavits must be reviewed, particularly given Mr van Schreven's observation that Collis engaged in the merits of the claim, but now says that the case for Collis was open and shut because the debt related to payment claims under the Construction Contracts Act, in respect of which payment schedules had not been filed. This defence to the application to set aside the demand is not referred to at all in the notice of opposition filed by Collis on 29 January, after three of its affidavits had been filed, and shortly before its final two affidavits were filed.

[18] It is not the task of the Court on this application to reach a conclusion on the strength or otherwise of the positions of the parties to a dispute which is no longer before the Court. The Court has not had the benefit of written submissions, or argument, to the extent which would put the Court in a position to fairly assess the relative merits of the parties' positions in relation to the statutory demands. Having said that, however, certain conclusions can be drawn, because they are evident from the papers filed, and relevant to the issue of costs.

[19] First, if one takes a reasonable achievable number of chargeable hours on any given working day as being seven, over 18 full days were spent preparing a notice of

---

2 *Industrial Group Ltd v Bakker* [2011] NZCA 142.

opposition and five affidavits. By any reasonable standard, that is an enormous expenditure of time, and there is no explanation of why it was thought to be required.

[20] Secondly, the fact that five affidavits were filed by Collis in response to an initial three affidavits filed by Groynes in itself demonstrates that the claim is derived from a factual matrix of some complexity. Experience shows that where there is evidence by affidavit to the extent filed in this case there is likely to be little agreement between the witnesses and therefore, in all probability, a dispute which must be determined at trial, not on a contest over a statutory demand.

[21] Thirdly, it seems that a great deal of the work undertaken on behalf of Collis could have been avoided if the issue in this case had been confined (as Mr Warren now maintains) to whether or not payment schedules had been issued in respect of the payment claims. If they had, the basis of the notices under s 289 would fall away. If not, there would not be any defence to the claims set out in the notices, because of the provisions of ss 23 and 79 of the Construction Contracts Act.

[22] The costs claimed may be compared to costs which might be awarded on a 2B basis, and on a 2C basis, if application of that scale is found warranted. Mr van Schreven has calculated these to be $6,965 and $17,910 respectively. Rule 14.2 of the High Court Rules sets out the principles which are to apply to determination of costs. Principal (d) is that an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application. Applying that principle suggests that actual and reasonable costs would be in the order of $10,500 if the case is considered to be within Band B, or approximately $27,000 if the case is considered to be within Band C. In this case, the costs charged are at worst some eight times the fees which might normally be expected, and at best, over three times.

[23] In addition to legal fees for solicitor and counsel of nearly $55,000, there is a further claim of $30,972.52 from a firm called Merlo Burgess & Co Limited, which claims to be a firm of insolvency practitioners and management accountants. That firm has charged 69.5 hours for work described thus:

> To the attendance of all matters pertaining to the discussions negotiations between Groynes Development (2012) Limited and Collis Murdoch Earthmoving Limited relating to payment of outstanding invoices, the issuing of statutory demands, assisting with the preparation of and the filing and service of affidavits, memorandums together with all correspondence as required with the Groynes' director and its legal counsel, investigating of funding arrangements, meetings, and negotiations with Groynes and to all incidental matters and attendances, correspondence and services in relation thereto relating to this matter.

[24] Whilst it is unclear from this precisely what was done by this firm, it is tolerably clear that it was involved in the preparation of the affidavits and memoranda, those being tasks on which Mr Warren was engaged for extensive periods of time as well. Whilst it is not possible, as I have already observed in relation to the breakdown of Mr Warren's fees, to determine exactly how much time was spent in relation to each of the steps in this proceeding, it is abundantly clear that in all, allowing just a few hours for the solicitor on the record for whom no fee breakdown has been provided, over 200 hours was spent by one person or another in responding to this application to set aside a statutory demand.

[25] The relevant parts of s 23 of the Construction Contracts Act 2002, on which Collis relies for its claim to actual and reasonable costs, are these:

> **23 Consequences of not paying claimed amount where no payment schedule provided**
>
> (1) The consequences specified in subsection (2) apply if the payer –
>
> (a) becomes liable to pay the claimed amount to the payee under section 22 as a consequence of failing to provide a payment schedule to the payee within the time allowed by section 22(b); and
>
> (b) fails to pay the whole or any part, of the claimed amount on or before the due date for the progress payment to which the payment claim relates.
>
> (2) The consequences are that the payee –
>
> (a) may recover from the payer, as a debt due to the payee, in any court, -
>
> (i) the unpaid portion of the claimed amount; and

(ii) the actual and reasonable costs of recovery awarded against the payer by that court; and

(b) may serve notice on the payer of the payee's intention to suspend the carrying out of construction work under the construction contract.

[26] Neither counsel referred to any authority for the proposition inherent in Collis's claim that the issuing of a notice under s 289 of the Companies Act, and subsequent litigation about its validity in the form of an application to set it aside, can be classed as a proceeding of the kind described in subs (2). As a result I prefer to leave the point open, presume (without deciding) that it can, and decide the claim for costs presented to the Court by reference to whether they fit within the description of the actual and reasonable costs of recovery of the sum claimed.

[27] Where indemnity costs are claimed under a contract, and the Court is required to assess whether they are reasonable, it is required to make an objective assessment of whether the tasks undertaken were reasonably necessary and were covered by the contract, whether the charge out rates were reasonable, and whether any other general contract law principles should deny the claimant its prima facie right to judgment.[3]

[28] The Court may apply a robust judgment on whether the costs are reasonable, in all the circumstances.[4]

[29] In my opinion this principle is equally applicable where the costs are claimed under a statute providing for recovery of actual and reasonable costs.

[30] I am far from convinced that the work done was necessary. Scant regard, if any, appears to have been paid to the fundamental principles applying to applications to set aside statutory demands. As to the hourly rate, as I have observed, that does not appear to be unreasonable, but that may be for determination on another occasion.

---

3 *Frater Williams & Co Ltd v Australian Guarantee Corp NZ Ltd* (1994) 2 NZ ConvC 191,893 (CA) at 191,887.

4 *Frater Williams & Co Ltd v Australian Guarantee Corp NZ Ltd* at 191,887.

[31] I conclude without hesitation that the costs charged to Collis and now claimed against Groynes are not shown on this application to be reasonable. No observation by the Court could underscore the apparent unreasonableness of the fees charged more starkly than the figures do themselves. By its very nature, an application to set aside a statutory notice raises a single narrow issue. Resolution of that issue is not, on occasion, without complexity, but it remains confined. No attempt was made by Collis to explain why the charges of its lawyers which, on their face, well exceed any figure that might be considered reasonable, should nonetheless be so classified. Accordingly the application for costs on an actual and reasonable basis is rejected.

[32] Mr Warren did not submit, in the alternative to his claim for costs on an actual and reasonable basis, that costs should be awarded on any other basis. Nonetheless, Collis is plainly entitled to an award of costs, and Mr van Schreven did not suggest otherwise. An award of costs on scale should be made. In my view this case is within Category 2, as a proceeding of average complexity requiring counsel of skill and experience considered average in the High Court.[5] The only issue remaining for decision, therefore, is whether costs should be awarded in Band B or Band C. The former applies if a normal amount of time is considered reasonable, the latter if a comparatively large amount of time is considered reasonable.

[33] Based on the experience of the Court on applications to set aside statutory demands, it would be an unusual step to award costs in Band C. Nonetheless, it would be appropriate to do so if a review of the file shows that it would be reasonable for a comparatively large amount of time to be spent.

[34] Groynes filed three affidavits in support of its application containing 27, eight and 18 paragraphs respectively. It produced just seven exhibits.

[35] Collis responded with four affidavits containing 33, 28, 17 and 152 paragraphs respectively. It produced 46 exhibits. In so doing it produced evidence which took issue across a broad spectrum with the evidence filed in support of the application.

---

5 Rule 14.3.

[36] It was a matter for the judgment of the solicitors and counsel for Collis whether to present their client's case in this way or whether to withdraw the notice under s 289 and sue for the sums claimed to be owing. Given the contention now made for Collis that its claim was relatively open and shut, because of s 23 of the Construction Contracts Act, the reason for proceeding as it did is not immediately apparent. Further, by so doing, it filed a substantial body of evidence in conflict with that for Groynes, a conflict which, on the ordinary principles applying to assessment of evidence given by affidavit, could not be resolved.[6]

[37] These points lead me to the conclusion that the case for Collis lacked the requisite degree of analysis before the course adopted by Collis in this case was launched into. It does not seem to me that, in terms of r 14.5(2)(c), that it is reasonable for a very large amount of time to have been spent in the preparation of the case for Collis. I am not, therefore, prepared to award costs in Band C.

Claim for interest

[38] In addition to the claim for costs Collis also claims interest in the sum of $16,969.34 relying, according to counsel, on the Judicature Act.

[39] The Court is without jurisdiction on this proceeding to award interest. The proceeding has been discontinued. It was, in any event, an application by Groynes to set aside a statutory demand, not a civil proceeding to recover a debt said to be due and owing, brought by Collis. The claim is outside the provisions of s 87 Judicature Act 1908, relied on by Mr Warren. Had Collis wished to claim interest, the appropriate proceeding would have been a civil claim for judgment, interest and costs, but it elected instead to issue notices under s 289 of the Companies Act, which were met with this proceeding in response.

[40] The application for an award of interest is dismissed.

---

6 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307.

Outcome

[41] Groynes will pay Collis costs on a 2B basis plus disbursements fixed, if necessary, by the Registrar. This will not include costs for any attendances in relation to Collis' application for costs.

J G Matthews
Associate Judge

Solicitors:
Clark Boyce, Christchurch.
Dyer Whitechurch (Bharat C Bhanabhai), Auckland.