IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2012-419-907
[2013] NZHC 2557

IN THE MATTER	of the bankruptcy of Christopher Louis Fawcett
IN THE MATTER	of an application pursuant to sections 206 and 207
BETWEEN	JEC NO 2 LIMITED First Applicant
	JEC NO 3 LIMITED Second Applicant
AND	THE OFFICIAL ASSIGNEE AT HAMILTON Respondent

...../continued

Hearing:	On the papers
Counsel:	J Nolan for applicants CT Gudsell QC and PV Cornege for respondent
Judgment:	1 October 2013

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on Costs]

This judgment was delivered by me on 1 October 2013, at 3pm
pursuant to Rule 11.5 of the High Court Rules.

F Davies

Registrar/Deputy Registrar

Date 1/10/13

Solicitors: AJ Nolan, Hamilton
Almao Douch, Hamilton

PHILIP MORGAN QC, GREG THOMPSON, DAVID GASQUOINE, SALLY WOOTTON, RICHARD LUDBROOK, MURRAY GUTRY, LYN HARRIS, KEVIN MORRIS, ANDREW HEDGE, GREGG BROWN and ANDREW JOHNSON as trustees of the Waikato Anglican College Trust at Hamilton
Third to Thirteenth Respondents

KATHARINE TAYLOR
Fourteenth Respondent

EMMALINE ANN FAWCETT
Fifteenth Respondent

CRAIGS INVESTMENT PARTNERS LIMITED
Sixteenth Respondent

CIV-2012-419-904

UNDER the Insolvency Act 2006

IN THE MATTER of an application pursuant to Section 206 and 207 of the Insolvency Act 2006
IN THE MATTER of an application pursuant to section 206

BETWEEN JEC NO 2 LIMITED
First Applicant

JEC NO 3 LIMITED
Second Applicant

AND THE OFFICIAL ASSIGNEE AT HAMILTON
Respondent

PHILIP MORGAN QC, GREG THOMPSON, DAVID GASQUOINE, SALLY WOOTTON, RICHARD LUDBROOK, MURRAY GUTRY, LYN HARRIS, KEVIN MORRIS, ANDREW HEDGE, GREGG BROWN and ANDREW

JOHNSON as trustees of the Waikato Anglican College Trust at Hamilton
Third to Thirteenth Respondents

KATHARINE TAYLOR
Fourteenth Respondent

EMMALINE ANN FAWCETT
Fifteenth Respondent

CRAIGS INVESTMENT PARTNERS LIMITED
Sixteenth Respondent

[1] In my judgment, delivered on 10 June 2013, I dealt with applications by JEC No 2 Ltd and JEC No 3 Ltd to set aside orders that I made on the basis of a lack of appearance by those two companies on 5 November 2012.

[2] The applicant companies filed a number of applications, which are referred to in my judgment of 10 June 2013. The object of the applications was to seek orders setting aside the orders made on 5 November 2012 which declared a number of transactions as illegal transactions and resulted in consequential orders vesting properties in the Official Assignee in the bankruptcy of Christopher Louis Fawcett.

[3] I declined the applications. I dealt with costs in my judgment as follows:

> [60] Counsel requested that I reserve costs. If counsel are unable to agree memoranda in support, opposition and reply shall be filed at five working day intervals. The file shall then be referred to me to consider the question of costs.

[4] The Official Assignee filed a memorandum on 17 June 2013, seeking costs on an increased basis, being a 50 per cent uplift on costs calculated on a 2B basis. The sum sought applying that approach is $14,925.

[5] The file was referred to me, having regard to the fact that no submissions in opposition where filed by the applicant companies. I issued a minute on 16 September 2013 as follows:

> [1] In my judgment of 10 June 2013 at [60] dealing with costs, I recorded the following:
>
> > Counsel requested that I reserve costs. If counsel are unable to agree memoranda in support, opposition and reply shall be filed at five working day intervals. The file shall then be referred to me to consider the question of costs
>
> [2] The Case Officer who has responsibility for this file advises that submissions seeking an order for costs have been filed on behalf of the Official Assignee. There has been no response from the applicant companies. I note that the applicant companies were represented by Mr Nolan at the hearing on 30 May 2013.
>
> [3] Mr Nolan is asked to advise:
>
> (a) If he has received the Official Assignee's submissions; and

(b) If he has any instructions to oppose the application for costs made by the Official Assignee.

[4] If so, a memorandum shall be filed and served within five working days of this minute.

[5] In the event that no submissions are filed and no memorandum is filed by Mr Nolan, the file shall be referred to me to consider the appropriate order. If a memorandum is filed on behalf of the applicant companies by Mr Nolan, or otherwise, the Official Assignee shall file and serve any reply memorandum within a further five working days of receipt of the opposition memorandum.

[6] The file shall then be referred to me by the Case Officer to consider the appropriate orders.

[6] Mr Nolan, who was counsel for the applicant companies, filed a memorandum in which he advised that his instructions from the companies had been terminated. He also advised that he had handed the file to Mr Spackman. He advised that he had received a response from Mr Spackman indicating that my minute had been received and that he did not have instructions to oppose the application for costs made by the Official Assignee.

[7] A submission was filed by Mr Spackman in which he records that he is acting as a director of JEC No 3 Ltd, acting as corporate trustee of the JEC No 3 Family Trust. In his submission he says that he is authorised by Joanne Winifred Roberts, a director of the first applicant JEC No 2 Ltd, to make the submission on costs on behalf of that company as well.

[8] In that submission, he advises that the applicant companies oppose the order for increased costs. He submits that costs should be limited to costs on a 2B basis. He does not contest the Official Assignee's calculation of the costs in regard to Category 2 Band B.

The principles applicable in awarding costs

[9] Rule 14.1 gives the Court a discretion to order costs in relation to a step taken in a proceeding. That discretion is generally to be exercised in accordance with the specific rules contained in rr 14.2-14.10: *Glaister v Amalgamated Dairies Ltd.*[1] In

[1] *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 at [19].

Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd[2] the Court of Appeal said of the costs regime contained in what is now rr 14.2-14.10 that:

> there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary

The test to be applied is entirely an objective and not a subjective one. The only reference which it is necessary to make towards actual costs is to be found in r 14.2(f), namely that an award of costs should not exceed the costs incurred by the party claiming the costs: *Glaister v Amalgamated Dairies Ltd.*[3] These principles were endorsed by the Supreme Court[4].

[10] Rule 14.2 lists the principles applying to determination of costs. Subrule (a) affirms the principle that the losing party should pay the costs to the successful party. Subrule (b) requires that the costs reflect the complexity and significance of the proceedings. By inference it refers to the categorisation of a proceeding which is provided for in r 14.3. Subrule (c) requires a consideration of each step for which costs are sought and an application of the daily rate having regard to the appropriate band which is to be applied after a consideration of r 14.5(2) and the Third Schedule to the High Court Rules.

[11] Rule 14.6 of the High Court Rules provides:

> **14.6 Increased costs and indemnity costs**
>
> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> (a) increasing costs otherwise payable under those rules (increased costs); or
>
> (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
>
> (2) The court may make the order at any stage of a proceeding and in relation to any step in it.

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2 *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 at 668).

3 *Glaister,* above n 1 at 610 [14].

4 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109.

(3) The court may order a party to pay increased costs if—

(a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) ...

[12] In *Holdfast New Zealand Ltd v Selleys Pty Ltd* the court set out the approach to be adopted in determining whether to order increased costs as follows:[5]

(a) Categorise the proceeding under r 14.3;

(b) Pick out a reasonable time for each step in the proceeding, pursuant to r 14.5. That involves considering the three time bands A, B and C;

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5 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA).

(c) Consider whether a step in the proceeding would substantially exceed the time allocated under Band C (r 14.6(3)(a); and finally

(d) Step back and look at the cost award and determine whether any additional costs should be awarded. Generally, an increase of 50 per cent on scale costs will give the claiming party a fair recovery for any step that is unnecessarily forced on it.

[13] Mr Cornege, for the Official Assignee, in his memorandum set out in paragraph 9 the procedural background which I adopt:

> (a) The application which was ultimately determined by the Court was the third form of the application. Previously, the applicants filed an interlocutory notice by respondents to review the orders made by Associate Judge Faire on 5 November 2012. On 9 November 2012, the applicants filed an interlocutory application on notice, seeking review of the orders made by the Court. On 12 November 2012, the applicants filed an amended interlocutory notice against seeking review. Both applications referred to the rules relating to both applications for review, and applications to set aside;
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> (b) At the first mention of the amended interlocutory application, on 21 November 2012, Priestley J directed that the matter was to be listed for further mention on 5 December 2012, and counsel for the applicants was to advise the Court whether, amongst other things, this was to be an application to review (Mr Nolan's stated preference) or whether "he [sought] to persuade Associate Judge Faire to set aside his orders";
>
> (c) At the 5 December 2012 mention, counsel for the applicants advised the Court that his preference was to apply to have the order set aside. The following timetable directions were then made:
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> (i) A complying application to set aside and supporting affidavit were to be filed and served by Friday 14 December 2012;
>
> (ii) The Official Assignee's notice of opposition and any affidavits were to be filed and served by Friday 25 January 2013; and
>
> (iii) Any reply affidavits were to be filed and served by Friday 8 February 2013.
>
> (d) On 18 December 2012, the applicants filed a further amended application to set aside the Court's orders 5 November 2012. That was the application ultimately determined by the Court. Filed in support were affidavits of Steven Spackman and Christopher Fawcett;

(e) On 25 January 2013, the Official Assignee filed and served his notice of opposition together with a supporting affidavit of Mr Currie;

(f) No affidavits in reply were filed and served by Friday 8 February 2013;

(g) When the applicants filed their casebook, included was a further affidavit of Mr Fawcett, sworn 16 May 2012. In addition, Mr Fawcett filed another affidavit, sworn 29 May 2013. The applicants sought to place reliance on this affidavit;

(h) The casebook failed to include a number of relevant documents. In particular, a number of affidavits (including those filed in support of the Official Assignee's originating application), and exhibits, were not included; and

(i) On Friday 31 May 2013, the day after this application was heard, further material was filed by Mr Fawcett, necessitating a teleconference with the Court.

[14] He submitted that that created the first basis for an increased cost award here because there had been a failure to comply with the rules and directions of the court. He submitted that that contributed unnecessarily to the time and expense of the proceeding. He submitted that the Official Assignee had been required to consider and make submissions in respect to the material filed by the applicant and Mr Fawcett. Also, when it came to completing the casebook, further time was required.

[15] Mr Cornege, for the Official Assignee, referred to negotiations that were designed to achieve a settlement of the dispute. I do not regard this aspect justifying either an increase in costs or a reduction in costs. However, the first matter, which is summarised in the procedural background, in my view, does require an adjustment when one applies r 14.6(3). Having said that, I do not consider that it impacted directly on the hearing time and on the ultimate preparation for disposal of the applications in the form that I had to determine in my judgment of 10 June 2013. I will return to this aspect shortly.

[16] When I apply the approach identified in *Holdfast NZ Ltd v Selleys Pty Ltd* I note that there is no opposition to the categorisation of the proceeding as a Category

2 proceeding.[6] Counsel's calculations have proceeded on the basis that it is Band B that is the starting point for each of the steps that were taken. If that were applied to each of the steps that were taken, including the time for the defended hearing, a figure of $9,950 would be an appropriate award of costs. I have already concluded that I do not consider the application of r 14.6(3) to the actual argument before me is justified.

[17] There is a need, however, to compensate for the additional time spent in dealing with the other applications that were effectively abandoned. On a 2B basis, two days is allowed for those steps. I consider that that should be increased by 50 per cent, so that an additional day be allowed for. The effect of that is to increase the cost order by $1,990. So that the appropriate cost award is $11,940. I adopt that calculation.

[18] Accordingly, I order that the applicant companies pay the Official Assignee's costs in the sum of $11,940 together with disbursements as fixed by the Registrar.

JA Faire
Associate Judge

6 *Holdfast NZ Ltd v Selleys Pty Ltd* above n5.