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

**CIV 2013-404-003305**
**[2016] NZHC 2712**

| | |
|---|---|
| UNDER | the Companies Act 1993 |
| IN THE MATTER OF | an application under sections 295 and 298 |
| BETWEEN | MARK HECTOR NORRIE AS LIQUIDATOR OF PAKIRI INVESTMENTS LIMITED (IN LIQUIDATION)<br>Applicant |
| AND | TIME3 GLOBAL LIMITED<br>Respondent |

Hearing: On the papers

Counsel: J P Nolen for the Applicant
R B Hucker for the Respondent

Judgment: 15 November 2016

---

**JUDGMENT AS TO COSTS OF ASSOCIATE JUDGE CHRISTIANSEN**

---

*This judgment was delivered by me on*
*15.11.16 at 3:00pm, pursuant to*
*Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*
*Date……*

[1] This case concerned a claim by Mr Norrie who as liquidator of Pakiri Investments Limited (Pakiri) issued a notice setting aside a transaction with the transfer of intellectual property to the respondent company (Time3 Global).

[2] In the High Court an order was made pursuant to s 295 of the Companies Act 1993 (the Act) directing the transfer of certain intellectual property from Time3 Global back to Pakiri. The Court of Appeal quashed that order and with that, the order that costs lie where they fall. The Court of Appeal remitted the proceeding back to the High Court for reconsideration of costs in accordance with the outcome of the Court of Appeal's judgment.

[3] Costs memoranda have been received from Mr Hucker on behalf of Time3 Global and Mr Nolen on behalf of Mr Norrie.

[4] In essence, four issues are raised by those memoranda:

(a) Who was the successful party?

(b) Is this an appropriate case for costs to be awarded against the liquidator in person?

(c) If so, should scale costs be increased or decreased?

(d) If costs are awarded, are there certain steps that should not be allowed?

**Who was the successful party?**

[5] Time3 Global claims it should be treated as the successful party in respect of both the s 295 and s 298 causes of action. For Mr Norrie it is argued the appeal was only partially successful – winning only three of the 10 grounds argued.

[6] It is clear from the decision of the Court of Appeal in *Packing In Ltd (in liquidation) v Chilcott* (2003)[1] that matters of success are better assessed by a realistic appraisal of the end result.

[7] Mr Norrie had sought orders in the High Court under s 295 of the Act directing the transfer back of certain intellectual property and, in the alternative, an order under s 298 of the Act for compensation for the transfer of the property at an under value. In the end result and in the outcome of the Appeal Mr Norrie did not obtain either order.

[8] Time3 Global therefore is the successful party for the purposes of assessing costs claims.

**Should costs be awarded against Mr Norrie, the liquidator in person?**

[9] It is a longstanding principle that costs will not normally be awarded against a liquidator personally when he/she brings a claim in the name of the company for the benefit of the company or its creditors[2]. As the Supreme Court noted in the *Mana Property* case if a liquidator chooses to bring a proceeding or application in his/her name and is unsuccessful, then he/she may be exposed to an award of costs personally irrespective of whether or not he or she is able to obtain reimbursement from the available company assets.[3]

[10] In this case Mr Norrie the liquidator brought the present proceeding in his own name. He was unsuccessful. It would usually follow that costs be awarded against him.

[11] On Mr Norrie's behalf it is argued costs should not be awarded against him personally. Reasons included:

(a) Time3 Global forced the present litigation by failing to object to the notice stating that Mr Norrie wished to set aside the transaction

[1] 16 PRNZ 869 (CA) at 871.
[2] *Mana Property Ltd v James Developments Ltd (in liq)* [2010] NZSC 124, [2011] 2 NZLR 25 at [10].
[3] *Mana Property Ltd* above, at [10].

conveying the intellectual property, and therefore Mr Norrie had a statutory obligation to pursue recovery. [The Statutory Obligation]

(b) This case was outside the ordinary run of cases because a monetary sum was not being pursued and if Mr Norrie had been successful, he would not have received a sum available to pay his fees or the costs of liquidation. [Outside the ordinary run of cases]

(c) The directors of Time3 Global were at all times the directors of Pakiri and they failed to deliver company and accounting records in breach of their statutory obligations, which made the present proceeding more complex and lengthy. [Directors caused difficulties]

(d) Mr Norrie was successful in establishing Pakiri's rights to the intellectual property before the Court of Appeal. [There was some success]

[12] In the Court's view none of these reasons should persuade the Court not to award the costs. Addressing each in turn:

*The statutory obligation*

[13] Time3 Global failed to serve a notice of objection within 20 working days of receipt of Mr Norrie's notice to set aside a voidable transaction under s 292 of the Act. As a result under s 294(3) the transfer the intellectual property was set aside. Because it had been set aside, Mr Norrie was required by law to pursue that transaction and hence his application pursuant to s 295 to have Time3 Global transfer the intellectual property back to Pakiri.

[14] It was at this point that Time3 Global filed a notice of opposition on the basis that it was not a creditor and no transaction had taken place. Counsel for Mr Norrie argues it would be unfair to order costs in the circumstances and having regard to the decision of the Court in *Meltzer v Fastlane Auto Ltd*.[4] However the facts in *Meltzer*

[4] *Meltzer v Fastlane Auto Ltd* HC Auckland CIV 2005-404-3648, 20 September 2006.

are different. There, and after issuing their setting aside notice the liquidators became aware of facts which persuaded them the transaction was not voidable. Because the respondent failed to take steps to set aside the notice the transaction was deemed to have been set aside and the liquidators had an obligation to pursue recovery. The liquidators pursued the s 295 application recognising that the Court had a discretion under s 296(3) to decline relief if it would be inequitable to order recovery. The Judge held that the application would have undoubtedly been avoided had the respondent applied to set aside the liquidator' notice and found that the liquidators initially had reasonably cause to issue the notice. In those circumstances costs were ordered in the liquidators favour. By contrast and in the present case and despite the respondent's failure to serve a notice of objection, Mr Norrie did not come to the realisation that there was no voidable transaction nor made submissions to that effect to the Court and invite the Court to set aside the transaction. Rather he argued for recovery in the High Court and in the Court of Appeal and in the outcome of which it was found there was no transaction for a notice to attach to and that Time3 Global was not a creditor. Therefore even if Time3 Global had responded to Mr Norrie's notice to set aside Mr Norrie did not invoke s 296(3) upon discovering Time3 Global's argument. In the circumstances the respondents actions in this case cannot be equated with the actions of the respondents in *Meltzer*.

*Outside the ordinary run of cases*

[15] It is not accepted that this case is outside the ordinary run of cases because Mr Norrie was not seeking property for himself but rather for the benefit of the company and therefore creditors. The purpose of the voidable transaction regime is not to allow liquidators to obtain funds to pay themselves. As noted by the majority judgment of the Supreme Court in *Allied Concrete Ltd v Meltzer*:[5]

> …a key purpose of the voidable transaction regime is to protect an insolvent company's creditors as a whole against a diminution of the assets available to them resulting from a transaction which confers an inappropriate advantage on one creditor by allowing that creditor to recover more than it would in a liquidation. The pari passu principle requires equal treatment of creditors in like positions (in these appeals, unsecured creditors) and facilitates the orderly and efficient realisation of the company's assets for distribution to creditors.

[5] *Allied Concrete v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [1].

*Directors caused difficulties*

[16] Mr Norrie claims that the directors made the proceedings lengthy and complex. It appears correct that there was little information handed over to Mr Norrie and that accusations were made at first instance of breaches of ss 189, 194 and 261 of the Act. This costs issue however is not about wrongful conduct that should be the subject of separate proceedings. There remains the requirement of the liquidator to prove there was a transaction of a specified kind, and Mr Norrie was aware of that obligation and upon it he brought an application but in the outcome he was unsuccessful.

*There was some success*

[17] That he may have been successful in part, should that not persuade the Court to overlook the overall unsuccessful claim he made.

[18] In that conclusion of matters it is the Court's view Time3 Global is entitled to costs against Mr Norrie. The question then is whether those should be increased or decreased.

**Should scale costs be increased or decreased?**

[19] Time3 Global argues it is entitled to a 50 per cent increase on the basis that Mr Norrie caused additional costs in respect of aspects of his conduct of the proceeding. The fixture had to be adjourned on two occasions because Mr Norrie wanted to introduce further evidence and because he was endeavouring to obtain counsel for assistance. Time3 Global argues also that Mr Norrie ran points that lacked merit.

[20] It is Mr Norrie's position that he is entitled to a reduction in costs by 50 per cent because it was the respondents who forced the litigation, having failed to provide him with the relevant documents in breach of its obligations. Further he argues he was partially successful in some arguments on appeal.

[21] In the Court's view Mr Norrie's actions do not reach the threshold of impropriety that may lead to increases being granted as might occur if a party invokes the statutory demand procedures in inappropriate cases in the face of a clear warning that the debt is in dispute. On the other hand the Court does not accept Mr Norrie's argument that the failure to object to his notice forced the liquidation in the same way it did in *Meltzer*. It is a fact that Time3 Global could have intervened earlier than it did by issuing a notice of objection.

[22] In balance the Court considers claims for increase or decrease in costs are inappropriate.

**If costs are awarded should certain steps be disallowed?**

[23] Counsel for Mr Norrie contests four aspects of the steps that Time3 Global has claimed in relation to costs.

[24] The first is the claim for costs on the costs memoranda filed. Whilst often costs upon costs memoranda are not allowed that does not mean they cannot be allowed. Although there is no specific provision for the order of costs for filing costs memoranda in Schedule 3 of the High Court Rules, rr 14.5(1)(b) and (c) allow reasonable time for a step to be determined by analogy with the Schedule, or the time likely to be required if no analogy can usefully be made.

[25] It appears from case authority that an allowance of 0.4 days for the filing of costs memoranda has been held an appropriate award for the party who is successful on the costs application.[6] In this case 0.4 days is an appropriate allowance. This will reduce the amount claimed by $892.

[26] The second aspect objected to by Time3 Global's cost claim concerns the double claiming of preparation of written submissions i.e. in respect of the hearing on 29 August 2013 which was adjourned and in respect of the hearing on 18

[6] *Tukuafu v Glenfield Investments Ltd* HC Auckland CIV-2010-404-6628, 29 November 2010 at [37]; *Official Assignee v Black Bag Ltd* [2015] NZHC 1642; *Auckland Regional Council v Arrigato Investments* (2002) 16 PRNZ 217 (HC) at [21].

February 2015. For Time3 Global it is argued there was a need to completely draft new submissions for the February hearing. However this claim overlooks the fact that costs were awarded by Associate Judge Doogue on 29 August 2013 as a result of the adjournment hearing. Legal costs caused by the adjournment therefore have been remedied. In the result this will reduce the costs claim by $3,345.

[27] Mr Norrie also objects to a claim for costs sought in respect of the filing of a joint memorandum of counsel on 5 November 2014. That memorandum contained agreed timetable order suggestions. Those were given effect to by a list minute of Judge Doogue on 7 December 2014. In the Court's view costs should not be payable in respect of this step. That would reduce the amount claims by $892.

[28] The fourth aspect to which objection is made on behalf of Mr Norrie is the claiming of step 38 for the filing of the amended notice of opposition on 23 December 2014. The Court agrees with the submissions on behalf of Mr Norrie that the appropriate step for the amended notice is step 9 of Schedule 3. The claim scale costs should therefore be reduced by $3,262 to reflect this.

**Conclusion**

[29] Scale costs are awarded against Mr Norrie in the sum of $16,585.00 together with disbursements in the sum of $270.00.

**Associate Judge Christiansen**