IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2016-404-002128
[2016] NZHC 2454

IN THE MATTER OF	Part 19 of the High Court Rules and Sections 280 and 286 of the Companies Act 1993
AND	
IN THE MATTER OF	EXLBR LIMITED (IN LIQUIDATION)
AND	
IN THE MATTER OF	of an application by PERI MICAELA FINNIGAN AND BORIS VAN DELDEN for orders that the applicants may be appointed and act, and continue to act, as liquidators of EXLBR LIMITED (IN LIQUIDATION) Applicants
AND	THE COMMISSIONER OF INLAND REVENUE Interested Party

Hearing:	On the papers
Appearances:	T Cooley for the Applicants C Van Der Merwe for the Commissioner
Judgment:	14 October 2016

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

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

Registrar/Deputy Registrar
Date……

[1] The applicants applied without notice pursuant to s 280 and/or 286(4)(b) of the Companies Act 1993 that they be appointed to act as liquidators of EXLBR Limited (in liquidation) (the Company) as from 28 July 2016.

[2] On that date they were appointed liquidators by the company by special resolution of the sole shareholder pursuant to s 241(2)(a) of the Act on 28 July 2016.

[3] The applicants say they consented to act as liquidators of the company in good faith and unaware that they were disqualified under s 280(1)(ca) of the Act from accepting the appointment and acting as liquidators of the company. By that provision a person who has, or who's firm has within two years immediately before the commencement of the liquidation, provided professional services to the company may not be appointed to act as liquidator unless Court orders otherwise.

[4] The applicants assert and the Court accepts they are experienced insolvency practitioners who have been appointed regularly as liquidators by the Court.

[5] The applicants say the professional services provided by them to the company prior to the date of liquidation do not give rise to an actual conflict of interest, or compromise the applicant's independence and ability to carry out their task as liquidators of the company professionally and effectively.

[6] The affidavit filed in support deposes there is an estimated deficiency of approximately $1m as regards unsecured creditors. Of that amount approximately $470,000 is owed to the IRD, of which approximately $290,000 is preferential claim.

[7] The application noted the IRD did not oppose the applicant's appointment as liquidators of the company but reserved its position regarding the applicant's request for an order that their solicitor/client costs of this application be an expense incurred by the applicant's in carryout their duties as liquidators of the company.

[8] By the Court's minute dated 1 September 2016 all applications were granted save that relating to the solicitor/client costs claim. The Court reserved its position regarding that order pending receipt of submissions from counsel. Submissions from

the applicants sought an order that the costs of this application be an expense in the liquidation, the consequence of which would be to provide that those costs be a preferential claim in the liquidation of the company that ranked ahead of the Commissioner's preferential claim.

[9] Counsel stated the liquidators were not seeking an order for costs pursuant to Part 14 of the High Court Rules but rather were seeking the Court's approval that the costs be an expense properly incurred in the liquidation of the company.

[10] It is the applicant's position that the need for this application was due to an innocent mistake; that they inadvertently overlooked the effect of s 280(1)(ca) on their appointment when they consented to act as liquidators. Counsel submits the applicant's actions were not an attempt by them to take advantage of their error and therefore the normal rule that costs should follow should not apply.

[11] Counsel has provided a memorandum with his calculation of legal costs and disbursements incurred by this application. Those amount to $9.804.13.

[12] The Commissioner's position is that it should not be penalised by an award of costs which would provide a preferential claim in the liquidation of the company that ranked ahead of the Commissioner's preferential claim.

Decision

[13] The Court is not prepared to grant an order that costs on a solicitor/client basis are to be an expense in the liquidation.

[14] If, as the Court accepts, the applicant's accepted appointment and due to oversight, they should not nevertheless usually be entitled to recover the costs of rectifying that mistake, if those costs actually or potentially affect the extent of a dividend available to a creditor. Of course in effect that outcome will likely always occur if liquidators accept appointment when they should not have whether by mistake or otherwise. The fact is that in this case the need for an application would not have arisen had not there been any conflict of interest. Also and in this case the

Commissioner had applied to liquidate the company but that application was withdrawn because of the company's appointment of the applicants.

[15] It is the Court's decision that the application for costs be refused. It follows the liquidators cannot include their solicitors expenses/fees in their final account in conclusion of the liquidation process.

[16] The Court appreciates that this ruling provides a stern test for liquidators accepting appointment at the request of a company. That test is however appropriate and perhaps particularly so when that appointment is accepted by persons who have had a continuing business relationship with the company within two years previously and where that company was then presently subject to a creditors application for liquidation.

Associate Judge Christiansen