

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV 2018-404-0957
[2020] NZHC 311**

UNDER THE Companies Act 1993, Part 16 (Liquidations)
IN THE MATTER OF an application pursuant to s 261 and s 266 by
applicants for order to produce AND a cross-
application for directions declaratory orders
against the Applicant Liquidators
BETWEEN SIMON DALTON and MATTHEW KEMP
as liquidators of CHARMING GROUP (NZ)
LIMITED (in liquidation)
Applicants
AND BOON GUNN HONG
Respondent

Hearing: On the papers
Appearances: A Ho for the Applicants
Respondent in person
Judgment: 27 February 2020

RESERVED JUDGMENT (NO.4) OF ASSOCIATE JUDGE SMITH - COSTS

*This judgment was delivered by me on 27 February 2020 at 4.30pm
pursuant to r 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Solicitors / Counsel:
Martelli McKegg, Auckland, A Ho (ah@martellimckegg.co.nz)

Copy to:
B G Hong, Auckland (bghong@hotmail.com)

Case Officer:
Josh Lesa

[1] The liquidators' application for an order under s 266 of the Companies Act 1993 (the Act) has now been dealt with in my three earlier judgments.¹ The only outstanding issue is that of costs.

[2] Both sides have filed submissions on costs. The liquidators asked for a total of \$12,428 for costs, as set out in the table annexed as Schedule 1 to this judgment.

[3] Mr Hong says that he should be entitled to costs. He seeks an award of costs of \$10,516, as set out in the table at Schedule 2 to this judgment.

The liquidators' costs submissions

[4] The liquidators submitted that Mr Hong's initial position was a total opposition to the application. After a defended hearing, the Court ordered the production of some documents and further enquiry as to documents that might be the subject of privilege or confidentiality. Some of the further documents have been found to be protected from disclosure, but a substantial number were not. In those circumstances, the liquidators submitted that they were substantially successful in their application, and are accordingly entitled to costs.

Mr Hong's costs submissions

[5] Mr Hong accused the liquidators of having acted improperly, both in filing and pursuing the application against him and in pursuing a complaint against him to the Law Society. He provided in support a copy of a determination given by Auckland Standards Committee 5 on 13 November 2018, in which the liquidators' complaint against Mr Hong resulted in the Standards Committee determining to take no further action.

[6] Mr Hong referred in his submissions to certain issues which he described as "public and practice issues", including the matter of the complaint to the Law Society.

¹ *Dalton & Kemp v Hong* [2018] NZHC 2266, *Dalton & Kemp v Hong* [2019] NZHC 1473, and *Dalton & Kemp v Hong* [2019] NZHC 2321.

[7] Mr Hong submitted that additional work was required as the clients had intermingled private and confidential affairs with the affairs of Charming Group.

[8] Mr Hong raised the issue of who should bear the costs of vetting his disclosure of relevant documents, suggesting that the costs of the further work he was required to do after the hearing should rest with the liquidators. Mr Hong emphasised strongly the lawyer's obligation to his or her client to protect the client's rights to privilege and confidentiality.

[9] Mr Hong referred in support to the decisions of Lang J in *Walker v Forbes*² and Thomas J in *Henderson v Walker*.³

Discussions and conclusions

[10] I do not need to repeat in full the reasons set out in my first judgment, but it is appropriate to note the following:

- (i) The liquidators' request for the documents of Charming Group (or relating to the business accounts and affairs of Charming Group) was initially met with a blanket refusal by Mr Hong, who simply asserted "Sorry on the litigation files such is legally privileged". Although the liquidators immediately raised the issue of whether any privilege would be owned by Charming Group, and not by its directors, Mr Hong appears to have been more concerned with the liquidators' motives in making the request than he was with their legal entitlement to make it. He asserted in an email dated 20 December 2017 that the relevant litigation file "had nothing to do with property or company's assets and "yes I will litigate over such if only to protect against the intentions for such a request as I have guessed ..."
- (ii) When the liquidators filed their application, Mr Hong strenuously opposed it on the grounds referred to in my judgment given on 30 August 2018. He filed a detailed affidavit in opposition, and made

² *Walker v Forbes* [2017] NZHC 1090.

³ *Henderson v Walker* [2019] NZHC 2184

detailed submissions at the hearing. Having considered his opposition, evidence, and submissions, I concluded that Mr Hong did have in his possession or control books, records or documents of Charming Group, or books, records or documents relating to the business, accounts or affairs of Charming Group, which he had not delivered or produced to the liquidators.⁴ I concluded that Mr Hong had defined the liquidators' entitlement to the documents they sought in an unduly narrow manner.⁵

- (iii) I concluded that Mr Hong had not adequately identified the documents in respect to which privilege and/or confidentiality was claimed. I expressed the view that it was for him to identify the documents that were said to be confidential and/or privileged, and in each case state the basis for the claimed privilege or confidentiality.⁶
- (iv) I concluded that it was entirely reasonable for the liquidators to have attempted to “reconstruct the directors’ knowledge” by requiring Mr Hong, as Charming Group’s solicitor, to deliver any documents of the company that were in his possession, and to assist by producing documents relating to Charming Group’s business, accounts or affairs.⁷

[11] As events unfolded after the hearing, Mr Hong was directed to produce to the liquidators a number of documents that he had not produced, subject in some cases to minor redactions.

[12] I do not think I can take anything from the Standards Committee’s determination that would assist on the issue with which I am presently concerned (the costs of the proceeding in this Court).⁸ Specifically, I do not consider that the complaint made by the liquidators to the Law Society is a matter justifying either an

⁴ *Dalton & Kemp v Hong* [2018] NZHC 2266 at [89].

⁵ At [85].

⁶ At [113].

⁷ At [92].

⁸ The Standards Committee considered my judgment of 30 August 2018, and decided that the subject of the liquidators’ complaint was not a disciplinary issue. The Standards Committee recorded that Mr Hong had failed to comply with the liquidators’ request for information, but it concluded that the High Court had been the proper forum to deal with the liquidators’ request for the documents.

award of costs to Mr Hong in this proceeding or a reduction in the award of costs to the liquidator.

[13] Nor did I derive assistance from *Walter v Forbes*, or *Henderson v Walker*, the two authorities mentioned by Mr Hong in his submissions.⁹

[14] In the foregoing circumstances, I am satisfied that the liquidators were substantially successful in their application under s 266, and that they should have costs for the period up to the end of the hearing on 31 July 2018. On a 2B basis, costs to the end of the hearing would be \$11,472.

[15] I do not believe the liquidators were sufficiently involved in attendances after the 31 July 2018 hearing that the justice of the case requires any further award of costs for the memoranda filed in December 2018 and May 2019.

[16] Mr Hong's claim for costs cannot succeed, at least to the extent he has claimed. That is primarily because the liquidators were substantially successful in obtaining an order that he produce further documents, and that was the target of their application.

[17] Mr Hong argues that he was obliged to act to defend his (individual) clients' claims to privilege and/or confidentiality, but the extent to which he was instructed by Ms Cheng and/or Ms Li to oppose the application is not clear. In substantial part he appears to have been running his own arguments, driven by his personal views as to the propriety of the liquidators' application and the position generally of solicitors who receive notices under s 261 and/or applications under s 266. To the extent he may have been an "innocent bystander" obliged to participate in a process with which he had no connection beyond having acted as solicitor for the company in liquidation, one can have some sympathy for his position. But one would have expected a solicitor in that position to simply abide the decision of the Court if he or she did not have instruction from the company's former directors to oppose the application for production on the grounds of privilege or confidentiality rights owned by them. But Mr Hong went far

⁹ *Walker v Forbes*, above n.2.
Henderson v Walker, above n.3.

beyond that stance, and he must have been well aware of his prospective liability for costs if the arguments he ran turned out to be unsuccessful.

[18] Nor should the liquidators be further delayed in recovering costs by any argument (not in any event advanced by Mr Hong) that any liability for costs should rest not with him but the directors.

[19] The liquidators had the statutory right to issue the notice they did, and to make the application they did, and the Courts have held that it is not sufficient for the recipient of such a notice to say that it would be inconvenient to comply, or that complying with the notice would cause him or her a lot of work or make him or her vulnerable to future claims.¹⁰ However, there are certain statutory provisions that I think the Court may take into account in partially relieving Mr Hong of the costs burden he might otherwise have faced.

[20] Section 261(5) of the Act empowers the Court to order that a person who has acted as solicitor for a company in liquidation, who receives a liquidator's notice under s 261 of the Act, is to be reimbursed for expenses incurred by him or her in complying with the liquidator's notice. While that provision does not apply to a liquidator's notice issued under s 261(1) of the Act,¹¹ s 261(1) is concerned only with books records or documents "of" the company. In this case, the liquidators' request of Mr Hong appears to have gone beyond documents "of" the company.¹²

[21] Under s 261(2), (3) and (5) of the Act, the former solicitor may be awarded "reasonable remuneration" for complying with a liquidator's request to "provide the liquidator with such information about the business, accounts or affairs of the company as the liquidator requests".

¹⁰ *British & Commonwealth Holdings plc (joint administrators) v Spicer & Oppenheim (a firm)* [1993] AC 426 at 339 - 440

¹¹ *Petterson v Gothard (No.3)* [2012] NZHC 666, at [12]: "In general terms, s 261(1) evidences a Parliamentary intention that a liquidator is entitled to obtain delivery of books, records or documents of the company as of right, without the need to expend liquidation funds to pay remuneration or expenses of the person required to comply with the obligation".

¹² The liquidators' originating application under s 266 referred to the production of "books records or documents relating to the business, accounts or affairs" of Charming Group.

[22] Mr Hong did not put his claim for “reasonable remuneration” under these provisions – he simply made a costs claim on a 2B basis, under Schedules 2 and 3 of the High Court Rules. And the costs in issue are concerned with an application made under s 266, and not directly with costs incurred in complying with a s 261 notice. But I think I can take into account the provisions of s 261(2)(f), (3)(b) and (5) of the Act by way of analogy, in assessing the overall justice of the costs position (and in particular the fact that, although Mr Hong did substantially fail on the matters he argued at the hearing, he was later obliged to spend time complying with Court orders that did substantially require him to provide the liquidator with requested information about the business, accounts of affairs of Charming Group). I think Mr Hong should be entitled to some credit for the time he had to spend attending to a matter that did not concern him personally. That credit should be set off against the liquidators’ costs claim.

[23] It is impossible to be precise in assessing a fair credit to Mr Hong for the costs of compliance with the Court orders, but weighing the considerations to which I have referred as best I can, I consider that Mr Hong could not be entitled to a credit of more than \$3,000, limited to the steps taken by him in complying with the Court orders. On that basis, the liquidators would be entitled to a costs award of \$8,472 (2B costs to the end of the hearing less a \$3,000 credit to Mr Hong for subsequent compliance steps), plus disbursements as fixed by the Registrar. I think an award at that level will fairly reflect the overall justice of the matter, and I make orders accordingly. There is no basis for any costs award in Mr Hong’s favour.

Result

[24] Mr Hong is ordered to pay costs to the liquidators in the sum of \$8,472 plus disbursements as fixed by the Registrar.

[25] Mr Hong’s claim for costs is dismissed.

Associate Judge Smith

Schedule 1

Step		Allocation	Costs
Based on Category 2B proceedings at \$2,390 per day pursuant to Schedule 2 of the High Court Rules			
37	Originating application	2.0	4,780
12	Appearance at mentions hearing 22 June 2018	0.2	478
40	Preparation of written submissions	1.5	3,585
41	Preparation by Applicant of bundle for hearing	0.6	1,434
42	Appearance at argued hearing (½ day)	0.5	1,195
36	Memorandum to the Court, 18 December 2018	0.2	478
36	Memorandum to the Court, 20 May 2019	0.2	478
TOTAL			\$12,428

Schedule 2

Category of proceedings (r 14.3)		1	2	3
Appropriate daily recovery rate (\$)			\$2,390.00	
<i>Originating applications</i>		<i>A</i>	<i>B</i>	<i>C</i>
38	Filing note of opposition and supporting affidavits		2	\$4,780.00
39	Case management (as for ordinary proceeding)			
	Memorandum 18 Dec 2018		0.2	\$478.00
	Memorandum 20 May 2019		0.2	\$478.00
40	Preparation of written submissions		1.5	\$3,585.00
42	Appearance at hearing for sole or principal counsel		The time occupied by the hearing measured in quarter days	0.5 \$1,195.00
TOTAL				\$10,516.00