IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-000648
[2014] NZHC 559

UNDER	Section 266 of the Companies Act 1993
IN THE MATTER OF	the liquidation of Capital Hospitality Holdings Limited (in liquidation)
BETWEEN	DAMIEN GRANT and STEVEN KHOV as liquidators of CAPITAL HOSPITALITY HOLDINGS LIMITED (IN LIQUIDATION) Applicants
AND	PRAKASH PANDEY First Respondent
	C P HOTELS LIMITED Second Respondent
	C P INVESTMENTS LIMITED Third Respondent
	C P CARPARKS LIMITED Fourth Respondent
	intituling cont'd ...

Hearing: On the papers

Judgment: 25 March 2014

JUDGMENT OF COURTNEY J

This judgment was deliveredy by Justice Courtney
on 25 March 2014 at 3.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date..............................

C P PROPERTY INVESTMENTS LIMITED
Fifth Respondent

C P ASSET MANAGEMENT LIMITED
Sixth Respondent

J D RAI & SONS LIMITED
Seventh Respondent

ASIA PACIFIC HOTEL INVESTMENTS LIMITED
Eighth Respondent

RAISONS PACIFIC INVESTMENTS LIMITED
Ninth Respondent

BABOO MAHENDRA PRATAP RAI
Tenth Respondent

CAPITAL INVESTMENTS CORPORATION LIMITED
Eleventh Respondent

[1] In my decision 12 December 2013 I determined applications brought by the liquidators of Capital Hospitality Holdings Limited (in liquidation) (CHH) under s 266(1) and (2) of the Companies Act 1993.[1] I determined both applications in the liquidators' favour, making orders under s 266(1) that Prakash Pandey and Baboo Rai attend the liquidators' offices for an interview and orders under s 266(2) requiring the respondents to produce records and documents relating to CHH.

[2] The liquidators have sought costs on either a 2B or 2C basis as if the applications were originating applications brought under Part 19 of the High Court Rules. The respondents resist costs being awarded on that basis on the ground that the application was an interlocutory application and should attract the time band for interlocutory steps under the third schedule.

[3] The liquidators also seek an uplift of 50 per cent to reflect the lack of merit in the respondents' opposition to the applications, which the respondents resist.

Should the applications be treated as originating applications or interlocutory applications for the purposes of costs?

[4] Under r 31.35 of the High Court Rules sub-part 2 of Part 7 (relating to interlocutory applications and orders) applies to a company in respect of which a liquidator has been appointed under s 241(2)(c) of the Companies Act 1993. However, that provision does not apply to any application to which Part 18 or 19 of the High Court Rules apply.

[5] Under r 19.4 a liquidator may seek directions of the Court by way of an originating application. It is not required to be brought in that way, however, and Mr Hucker, for the respondents, has submitted that, because the applications in this case were brought as interlocutory applications pursuant to Part 7, they are not to be treated as originating applications for the purposes of costs. Mr Hucker does not accept that the decision in *Grant & Khov v Stinson*, on which the liquidators rely, is relevant: he considers that it stands only for the proposition that an application for directions may be brought as an originating application, not that an application for

[1] *Capital Hospitality Holdings Ltd (in liquidation) v Pandey* [2013] NZHC 3330.

directions that has not been brought by way of an originating application should nevertheless attract costs as if it had been.[2]

[6] I do not accept Mr Hucker's submission. On a completely literal reading of the rules one would accept that an application for directions under s 266 of the Companies Act should only attract costs on the basis of it being an originating application if, in fact, it has been brought in that way. However, I do not consider that to be the intention of the rules and, in any event, would regard this situation as one justifying a departure from a strict reading of r 14.

[7] Further, I consider that Mr Hucker's reading of *Stinson* is too narrow. In that case, the liquidators brought an application under s 266 by way of an interlocutory application. Precisely the same issue arose in that case as arises here; counsel (Mr Hucker as it happens) argued that the application fell within r 31.35(1) and was to be dealt with as an interlocutory application. Associate Judge Abbott rejected that argument on the basis that the application could have been so brought under Part 19 by virtue of r 19.4 and that, given the nature of the application and the opposition to it that would have been the appropriate course. For that reason, the Associate Judge considered it right to treat the application as falling within r 31.35(4) i.e. as if it were an application brought under Part 19. There was never any argument, it would seem, that the liquidators could not have brought the application under Part 19 had they wished. The complaint simply was that they had not done so. So Mr Hucker's submission in this case that *Stinson* "simply stands for the proposition that a liquidator may bring an application for s 266 orders as an originating application" is not right.

[8] Nor do I accept that *Sargison v McCabe*, on which Mr Hucker relied, assists in any way.[3] Mr Hucker submitted that the Court in that case had accepted that the s 266 application should be treated as an interlocutory application for the purposes of costs. Although this is true in a strict sense, as Mr Norling, for the liquidators, pointed out, the issue was not argued; the application had actually been brought as an

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2 *Grant & Khov v Stinson* [2013] NZHC 325.

3 *Sargison v McCabe* [2012] NZHC 3194.

originating application but, as was recorded in the judgment, counsel agreed for the purposes of costs that it be treated as an interlocutory application.

[9] The present case is far removed from a straightforward and uncontested application for directions which is not contested. The issues were hard fought, with the respondents taking every conceivable point in opposition to the liquidators' applications. This was a case that might properly have been brought as an originating application and which, in substance, the parties treated as such. In these circumstances I am satisfied that if, in a strict sense, the liquidators' application cannot be treated as an interlocutory application for the purposes of costs because it was not brought as such, then it is a situation that warrants departure from the rules, as is envisaged by r 14.1(2).

Should costs be uplifted?

[10] Under r 14.6 the Court may make an order increasing the costs otherwise payable. The grounds on which such an order may be made include taking or pursuing an unnecessary step or an argument that lacks merit[4] and failing, without reasonable justification, to admit facts, evidence, documents or accept a legal argument.[5]

[11] The liquidators point to the sustained effort by the respondents to distance themselves from CHH, notwithstanding advice from C P Group's corporate counsel on 8 August 2012 confirming that the documents would be provided (impliedly acknowledging that the respondents had control or possession of the documents). In relation to the tenth respondent, Mr Rai, time was taken up with an argument over jurisdiction which had essentially been advanced and rejected in another related proceeding.[6]

[12] I was satisfied at the time I delivered my decision that the respondents had maintained unmeritorious arguments and in doing so had essentially wasted the liquidators' and the Court's time in doing so. I do not accept the suggestion in Mr

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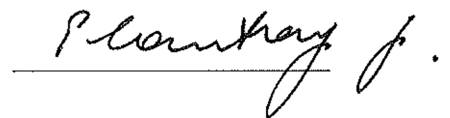
4 Rule 14.6(3)(b)(ii).
5 Rule 14.6(3)(b)(ii).
6 *Grant v Pandey* [2013] NZHC 2844.

Hucker's memorandum on costs that the respondents were merely seeking to define or clarify the scope of documents the liquidators were seeking. This is a proper case for an increase in costs and I accept that an uplift of 50% is reasonable.

Result

[13] I consider that costs should be awarded on a 2B basis as if the application had been brought as an originating application under Part 19 and, further, that the costs should be uplifted by 50 per cent to reflect the factors I have discussed. This means that the calculation shown at the end of paragraph 3 on page 8 of Mr Norling's memorandum dated 20 January 2014 represents the correct calculation. There will be costs to the liquidators of $28,059 as shown in that table and disbursements of $50 for the filing fee.

[14] Finally, the liquidators applied for and obtained an order for substituted service on the tenth respondent in August 2013. They seek costs of $2,189 and disbursements of $200 in respect of that application, which I grant.



P Courtney J