IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2012-485-2591
[2018] NZHC 2570

UNDER	sections 271 and 284 of the Companies Act 1993
IN THE MATTER	of Ross Asset Management Limited (in liq) and related entities
RE	JOHN HOWARD ROSS FISK and MARCUS JAMES MCMILLAN Applicants

Counsel: M G Colson for applicants
Mr D G Dewar for Dr E D Fehsenfeld
Mr P R W Chisnall as Amicus Curiae

Judgment: 1 October 2018

COSTS JUDGMENT OF ASSOCIATE JUDGE JOHNSTON
[On the papers]

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[1] This is an application for costs which is a little out of the ordinary.

[2] The background is the collapse, in late 2012, of the Ross Asset Management group of companies which was found to have been operating a Ponzi scheme. Following the collapse the applicant liquidators were appointed to oversee the winding up of the key entities involved. Ultimately — some five and a half years later — the liquidators sought directions from the Court as to the distribution of the available funds. To cut a very long story short, 639 investors with claims totalling nearly $125 m were entitled to share in a pool for distribution of $17.5 m.

[3] The liquidators sought directions from the Court on a range of matters, most importantly the appropriate basis for distribution.

[4] At the hearing, two distribution methodologies were in play, the net contribution model and an alternative distribution model, the former involving the conventional *pari passu* approach and the latter being based not on the amount of investors' outstanding claims but on the percentage returns of capital already achieved. In my judgment dated 8 August 2018 I directed that the liquidators distribute the available funds on the net contribution model.

[5] The liquidators as the applicants in the case signalled at an early stage that they would be advocating for the net contribution model. But they recognised that a legitimate argument could be advanced in favour of the alternative distribution model and *amici curiae*, Mr Paul Chisnall and Mr Jonathan Haigh of counsel, were appointed to advance the case for that model.

[6] In the lead up to the hearing an application was filed and served by solicitors acting for Dr Eion Fehsenfeld seeking an order joining Dr Fehsenfeld as a party to the proceeding.

[7] Neither the liquidators nor Mr Chisnall raised any objection.

[8] No evidence was filed on Dr Fehsenfeld's behalf. But, at the hearing, Mr Dewar appeared as counsel and made submissions on his behalf.

[9] Mr Dewar now seeks costs on Dr Fehsenfeld's behalf. The liquidators oppose this application. Mr Chisnall takes a neutral position.

[10] One interesting feature of the contest between the net contribution model and the alternative distribution model which emerged on the evidence was that whereas for the bulk claimants the methodology employed gave rise to similar outcomes, there were small groups whose positions were dramatically affected.

[11] Dr Fehsenfeld was the stand out example of this. On the net contribution model he would recover over $600,000. On the alternative distribution method he would recover nothing. It is hardly surprising that he took a close interest in the application.

[12] However, as already indicated, the liquidators signalled at an early stage that they would be advocating for the application of the net contribution model. So, all that Dr Fehsenfeld was ever going to be doing was supporting the liquidators' argument.

[13] Mr Dewar's memorandum outlining the basis upon which costs are sought begins with the proposition that the liquidators invited Dr Fehsenfeld to seek party status. As the liquidators say in their response, that probably overstates the position. The liquidators simply alerted those investors who they perceived would be materially affected by the application of each method that the application was being made. It was up to each individual investor to decide what if any steps to take.

[14] He then emphasises what was at stake for Dr Fehsenfeld saying that "… he had the most to lose … " from the alternative distribution model.

[15] Mr Dewar then says that Dr Fehsenfeld took a full role in the proceeding which is correct in the sense that submissions were made on his behalf.

[16] He then describes Dr Fehsenfeld's position as being that of "… a party who was put to cost in an adversarial setting where he was required to present an argument that has prevailed".

[17] On that basis costs are sought. Mr Dewar informs the Court that Dr Fehsenfeld incurred a filing fee of $500 and solicitor-and-client (as opposed to party-and-party, or scale) costs of $14,996.

[18] Finally, he submits that applying recognised principles "… it can be said that Dr Fehsenfeld was successful in a case which had the characteristics of a test case and where there were elements of public interest involved so that "… in reality Dr Fehsenfeld represented the interests of others who were potentially adversely affected …".

[19] The liquidators oppose Dr Fehsenfeld's application for costs on three bases.

[20] First, they say that Dr Fehsenfeld did not raise any new arguments which prevailed. In relation to this they say that Dr Fehsenfeld produced no evidence and that with one exception his submissions simply supported those made by the liquidators. They add that the submissions advanced on Dr Fehsenfeld's behalf were not influential in the sense that the outcome would have been the same had they not been made. They submit that if Dr Fehsenfeld were to recover his costs "… his involvement will simply have increased the costs in the liquidation, at the expense of other investors and creditors of RAM when his motivation for participating was purely personal".

[21] Second the liquidators submit that Dr Fehsenfeld's primary objective in seeking to be joined was to preserve appeal rights in the event that the Court reached a conclusion adverse to him. In relation to this they point to Dr Fehsenfeld's application for joinder and contend that it is apparent from this that it was made in order to preserve appeal rights. Certainly that was one of his objectives in seeking to be joined.

[22] Finally, the liquidators say that Dr Fehsenfeld was acting in his own interests. Unquestionably, that is true. But that does not take matters very far. The same might be said of most litigants.

[23] In the alternative, the liquidators submit that if costs are to be ordered they should be scale costs.

[24] I began this costs judgment by saying that the application was out of the ordinary, and so it is.

[25] On the face of it Dr Fehsenfeld is entitled to say that he was a party to this litigation and that the outcome was the one that he contended for and in that sense he was successful.

[26] On the other hand, the liquidators, it appears to me, are correct that it was a matter of public knowledge, well before Dr Fehsenfeld applied to be joined, that they would be advancing the net contribution model and that Dr Fehsenfeld applied to be

joined primarily to support them in that argument. It also seems to me to be correct to infer from the circumstances and the terms in which Dr Fehsenfeld sought party status that he did so in large part to preserve appeal rights if the argument went against his interests.

[27] In those circumstances, I do not think there can be any argument that Dr Fehsenfeld ought to recover his party and party costs.

[28] Costs are quintessentially a matter for the court's discretion as acknowledged by all concerned.

[29] In my judgement, bearing in mind all of the matters that I have referred, to but most particularly that Dr Fehsenfeld sought to be joined to support an argument which he and his advisers were aware was already to be advanced by the liquidators; that a key reason for his doing so was simply to preserve appeal rights; that he did not offer any evidence or advance any substantive argument which was different from that advanced by the liquidators; and that any costs award in his favour will be a further impost on the amount to be distributed; and that the outcome was favourable for him, on balance my view is that it would be an injustice to the other investors to award costs in favour of Dr Fehsenfeld either on a solicitor-and-client basis as sought or on any other basis.

[30] The application is declined.

Associate Judge Johnston

Solicitors:
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