IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-003878
[2014] NZHC 875

IN THE MATTER	of the bankruptcy of KATHLEEN MARY JAMIESON
BETWEEN	THE OFFICIAL ASSIGNEE Plaintiff
AND	KATHLEEN MARY JAMIESON as trustee of the Spearhead Trust First Defendant/Applicant
	KATHLEEN MARY JAMIESON as trustee of the Castello Trust Second Defendant/Applicant
AND	HAINES HOUSE REMOVALS LTD Non-Party Respondent

Hearing:	15 April 2014
Appearances:	G A D Neil for Official Assignee D W Grove for First and Second Applicants R Mark for Haines House Removals Ltd
Judgment:	1 May 2014

JUDGMENT OF VENNING J
Non-Party Costs

This judgment was delivered by me on 1 May 2014 at 10.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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

Solicitors:	Meredith Connell, Auckland Ellis Law, Auckland R C Mark, Kerikeri
Copy to:	D Grove, Auckland

Introduction

[1] Kathleen Jamieson, as trustee of the Spearhead and Castello Trusts (Trusts), seeks an order that a non-party, Haines House Removals Limited (Haines), pay the Trusts' costs of the substantive proceedings and this application.

Background

[2] In December 2006 Haines obtained a judgment in the sum of $40,487.25 (including costs) against Ms Jamieson. Ms Jamieson failed or refused to pay the judgment sum. On 5 September 2007 she was adjudicated bankrupt on Haines' petition. By that stage the sum due to Haines was $47,215.89 together with the costs of the bankruptcy proceedings.

[3] Both of the Trusts, which were associated with Ms Jamieson, claimed to be creditors of Ms Jamieson. During the course of the bankruptcy the Official Assignee appointed an investigating accountant, Mr Hicks, to analyse material transactions between Ms Jamieson and the Trusts. On 9 July 2011 Mr Hicks concluded that rather than Ms Jamieson owing the Trusts any money, the Trusts owed Ms Jamieson substantial sums. He recommended that demand be made for $147,144 from the Castello Trust, and $93,075 from the Spearhead Trust. The Official Assignee made that demand but Ms Jamieson and the Trusts denied that the Trusts were indebted to her.

[4] On 8 April 2011 Ms Jamieson applied to the High Court to be discharged from her bankruptcy. The Official Assignee opposed the discharge. He had previously filed an objection to her automatic discharge on the basis she had failed or refused to supply all relevant information to him.

[5] In the meantime the Official Assignee had advised Haines, as Ms Jamieson's principal creditor, of the results of Mr Hicks' investigation. Haines supported proceedings being issued against the Trusts to recover the sums Mr Hicks considered due to Ms Jamieson. In April 2011 the Official Assignee and Haines (together with Rodney Haines, as guarantor) entered a Deed of Indemnity pursuant to which, and in consideration for the Official Assignee issuing proceedings against the trustees of the

Trusts, Haines and Mr Haines agreed to indemnify the Official Assignee against all fees and costs involved in the proceedings.

[6] On 25 May 2011 the Official Assignee's solicitors sent Ms Jamieson as trustee of the Trusts a letter before proceeding. Ms Jamieson replied on 3 June 2011 suggesting the demand was wrong and requesting further time.

[7] On 24 June 2011 the Official Assignee issued summary judgment proceedings against the Trusts. The Trusts, acting through Ms Jamieson, filed a defence, a notice of opposition and full affidavits in reply. In those papers Ms Jamieson disclosed for the first time a number of documents relevant to the Trusts' positions. The Official Assignee took further advice. In light of that advice, an amended statement of claim was filed. The claim against the Castello Trust was reduced from $147,143 to $954. That claim was subsequently struck out on 7 February 2012. The claim against the Spearhead Trust was amended from $93,075 to $193,249.

[8] Discovery was then undertaken and the file further reviewed by the Official Assignee's advisers. Ms Jamieson was also discharged from her bankruptcy in a decision delivered on 8 May 2012 by Associate Judge Bell.[1] The Judge agreed that Ms Jamieson's bankruptcy should be extended by 18 months, but that extension period had already expired in March 2012. At about this time issues arose between Haines and the Official Assignee regarding payment of the fees incurred by the Official Assignee. The issues were not resolved.

[9] The claim against Spearhead Trust was scheduled for hearing on 11 June 2012. On 24 May 2012 the Official Assignee advised the Court and the Trusts that he had decided to discontinue the claim. Haines challenged the decision of the Official Assignee to discontinue the proceedings. That challenge was dismissed by Duffy J on 28 March 2013.[2] Haines filed an appeal to the Court of Appeal but ultimately abandoned it.

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1 *Jamieson v Official Assignee* HC Auckland [2012] NZHC 949, [2012] NZCCLR 8.
2 *Haines House Removals Ltd v Jamieson & Ors* [2013] NZHC 653, (2013) 21 PRNZ 505.

[10] Following Haines' abandonment of its appeal the Official Assignee immediately filed a discontinuance in these proceedings on 9 October 2013. The Trusts then brought this application for non-party costs against Haines.

A preliminary issue

[11] A preliminary point arises. The application for costs following the discontinuance is directed at Haines, the non-party. Obviously there is also a potential costs issue between the Trusts and the Official Assignee. I raised with counsel whether the Court could deal with the current application without also dealing with the costs issue between the Official Assignee and the Trusts. There could be some commonality of interest between the Official Assignee and Mr Haines on the issue of whether the presumption under r 15.23 of the High Court Rules applies to the Official Assignee's decision to discontinue or whether, despite that presumption, there should be no order for costs or a reduced order against the Official Assignee.

[12] Mr Grove indicated that the Trusts' focus was on the application against Haines. If the Court held Haines was not liable as a non-party, the Trusts would pursue the Official Assignee. On the other hand, if a costs order was made against Haines there would be no need for the Trusts to do so.

[13] Mr Neil acknowledged that the Official Assignee could be bound by certain findings on this application. Mr Neil confirmed the Official Assignee did not wish to be heard on the issue of whether or not Haines might be liable as a non-party funder but did accept the issue of whether the Official Assignee acted reasonably in issuing and continuing the proceedings would be considered by the Court and determined on this application. For that reason the Official Assignee had provided evidence and addressed full submissions.

[14] On that basis I acceded to counsels' request to deal with this application even though the application for costs in relation to the Official Assignee is not before the Court.

Is Haines liable for costs as a non-party?

[15] It is convenient to first consider whether Haines could be liable for costs as a non-party. If it could not, the other issues do not arise.

[16] The principles to apply on an application for costs against a non-party were summarised by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* as follows:[3]

> [25] A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and Their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows:
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> (1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.
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> (2) Generally speaking the discretion will not be exercised against "pure funders", described in para [40] of *Hamilton v Al Fayed* as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the Court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.
>
> (3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence – see, for example, the judgments of the High Court of Australia in *Knight* and Millett LJ's judgment in *Metalloy Supplies Ltd (in liq) v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in *Knight*, provided that he is "a real party in . . . very

[3] *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2004] UKPC 39, [2005] 1 NZLR 145.

important and critical respects" – see *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406, referred to in *Kebaro* at pp 32 – 33, 35 and 37. Some reflection of this concept of "the real party" is to be found in CPR 25.13(1)(f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

(4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests. Since this particular difficulty may be thought to lie at the heart of the present case, it would be helpful to examine it in the light of a number of statements taken from the authorities. First, Tompkins J's judgment in *Carborundum* at p 765:

> "Where proceedings are initiated by and controlled by a person who, although not a party to the proceedings, has a direct personal financial interest in their result, such as a receiver or manager appointed by a secure creditor, a substantial unsecured creditor or a substantial shareholder, it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently.
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> In many cases a major consideration will be the reason for the non-party causing a party, normally but not always an insolvent company, to bring or defend the proceedings. If a non-party does so for his own financial benefit, either to gain the fruits of the litigation or to preserve assets in which the person has an interest, it may, depending upon the circumstances, be appropriate to make an order for costs against that person. The relevant factors will include the financial position of the party through whom these proceedings are brought or defended and the likelihood of it being able to meet any order of costs, the degree of possible benefit to the non-party and whether, in all the circumstances, the bringing or defending of the claim - although in the end unsuccessful - was a reasonable course to adopt.
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> The directors of a company may frequently be in a position different from other non-parties with a direct financial interest in promoting or defending proceedings. Even where a company is in receivership, directors may have a duty to prosecute or defend a claim through the company in the interests of creditors other than the creditor that had appointed the receiver, or in the interests of the shareholders. Other creditors and shareholders are entitled to expect that those responsible for the management of the company will use all proper endeavours to ensure that their financial interests are protected or that there is a fund out of which such creditors can be paid . . . "

[17] As a preliminary point the Privy Council also noted that causation is generally required.[4] The Court may consider whether, but for the funding, the proceedings would have been commenced, a point also discussed by the Court of

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4 At [20].

Appeal in its subsequent decision of *SH Lock (NZ) v New Zealand Bloodstock Leasing Ltd & Ors*.[5]

[18] The wording of the Deed of Indemnity between the Official Assignee and Haines in both the background and operative sections is relevant to this issue:

> INTRODUCTION
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> ...
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> E The OA is desirous of commencing the Proceedings, but the Estate has no funds to do so, Haines has agreed to fund the costs of the Proceedings and to indemnify the OA against any and all costs incurred by the OA in relation to the Proceedings ...
>
> COVENANTS
>
> 1 In consideration for the OA issuing the Proceedings, Haines agrees to indemnify the OA against:
>
> a) All fees ...
>
> b) All costs, ...

That wording, together with the other exchanges between the Official Assignee and Haines, satisfies me that without Haines' funding the Official Assignee would not have pursued the proceedings. The causation or "but for" test is satisfied in this case.

[19] Next, while costs orders against non-parties are exceptional, the Privy Council said that in this context, "exceptional" means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.[6] In *Mana Property Trustee Limited v James Developments Limited* the Supreme Court confirmed the same approach to "exceptional":[7]

> A non-party like a director or liquidator is not at risk of a costs award in other than exceptional circumstances, that is, circumstances outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.

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5 *SH Lock (NZ) v New Zealand Bloodstock Leasing Ltd & Ors* [2011] NZCA 675 at [15].
6 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*, above n 3, at [25].
7 *Mana Property Trustee Limited v James Developments Limited* [2010] NZSC 124, [2011] 2 NZLR 25 at [10].

[20] This case is exceptional to the extent it is outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense.

[21] Generally speaking, an order will not be made against "pure funders". However, for the reasons that follow, Haines is not a "pure funder" as that phrase is understood. In *Hamilton v Al Fayed (No 2)* the Court of Appeal described a pure funder as:[8]

> ... those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course.

[22] It is clear that Haines had a direct personal interest in the proceedings brought against the Trusts and that it sought as creditor to benefit from those proceedings.

[23] An important consideration is whether Haines substantially controlled the proceedings. Mr Mark submitted that Haines had no control over the decision to issue the proceedings nor any control or influence over the decision whether the merits of the claim warranted the pursuit of the proceedings. Given the wording of the Deed of Indemnity and also the fact the Official Assignee discontinued the proceedings against Haines' wishes I agree that it cannot be said that Haines substantially controlled the proceedings. Clauses 4 and 5 of the Deed of Indemnity confirmed:

> 4 The OA will retain full control of the administration of the Estate, the Proceedings and any ancillary matters at all times. As such, the OA may make any decision he deems appropriate in the circumstances, including but not limited to issuing notices or proceedings, continuing, discontinuing or settling the Proceedings.
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> 5 In determining whether to take any action described in clause 4 above, the OA will take such advice from his legal providers as the OA deems appropriate and may consult with Haines.

[24] It is apparent from the above clauses that, at most, the Official Assignee had an obligation to consult with Haines as to the conduct of the proceedings. That is quite different to Haines being able to direct the course of the proceedings. Haines' control was limited to bringing the proceedings to an end. Clause 6 provided:

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[8] *Hamilton v Al Fayed (No 2)* [2002] EWCA Civ 665, [2003] QB 1175 at [40].

6 Should Haines at any time desire the OA to discontinue the Proceedings, it shall provide written notice of such desire to the OA and the OA shall use his best endeavours to extricate himself from the Proceedings by way of negotiated settlement. Failing the attainment of a negotiated settlement, the OA will discontinue the Proceedings and will stand indemnified by Haines in accordance with clause 1 above for any award of costs made against him.

As Haines was the funder, if it wished to stop further costs being incurred it could require the Official Assignee to seek to settle, or if that was not possible, to discontinue the proceedings. To that extent only, Haines had limited control over the proceedings. As the facts of this case demonstrate, it could not prevent the Official Assignee from discontinuing the proceedings.

[25] Mr Mark also referred to the case of *Asset Building M Pritchard Limited v Hambeg Limited*[9] as an example of a case where, although the non-party was solely in control of the litigation and stood to benefit from it, those factors alone were not sufficient. It was the steps which suggested an attempt to manipulate the Court system that put the case outside the ordinary run of cases that was relevant. However, each case must turn on its own facts, in light of the considerations discussed by the Privy Council in *Dymocks*.

[26] The principal issue for this case is whether, despite my finding that Haines had limited control over the proceedings, it should be treated as the real party to the proceeding and therefore potentially liable for costs as a non-party.

[27] It is relevant that Haines was the most substantial creditor in the insolvency. Apart from secured creditors, the following claims were made by creditors in Ms Jamieson's bankruptcy:

Haines	$47,215
IRD	$14,894[10]
Castello	$10,456
Spearhead	$6,925
Total:	$79,490

9 *Asset Building M Pritchard Limited v Hambeg Limited* HC Auckland CIV-2008-404-3781, 21 November 2008.

10 Ms Jamieson does not accept the IRD debt is accurate. She considers it to be overstated.

[28] Mr Mark referred to the decision of *Metalloy Supplies Limited v MA (UK) Limited*[11] and submitted that the Official Assignee was acting akin to a liquidator in bringing the proceedings for the benefit of all creditors. However while in that case the proceedings were brought by a company but funded by a director, the company was the real plaintiff and the company was the entity that would substantially benefit.[12] While other creditors (notably the IRD) may have benefited from the proceedings in the present case, as the Privy Council in *Dymocks* noted: [13]

> [it is not] necessary that the non-party be "the only real party" to the litigation ... provided that he is "a real party in . . . very important and critical respects" – *Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation* (2001) 179 ALR 406, ...

I consider Haines was a real party in that sense.

[29] Next, while the Official Assignee had received Mr Hicks' recommendation that a claim be made against the Trusts, the information before the Court makes it clear that Haines also wanted to pursue Ms Jamieson and the Trusts that were associated with her. Given Ms Jamieson's bankruptcy any steps had to be taken by the Official Assignee. Haines funded the Official Assignee to ensure the proceedings were taken.

[30] In my judgment it is fair to describe Haines' involvement in this case as not so much as facilitating access to justice by the Official Assignee as gaining access to justice for its own purposes.

[31] I note that in *Dymocks* the Privy Council approved the observations of Tomkins J in *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* that:[14]

> ... it would rarely be just for such a person pursuing his own interests, to be able to do so with no risk to himself should the proceedings fail or be discontinued. That will be so whether or not the person is acting improperly or fraudulently.

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11 *Metalloy Supplies Limited v MA (UK) Limited* [1997] 1 WLR 1613 (CA).
12 At 1620.
13 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*, above n 3, at [25].
14 At [25], citing *Carborundum Abrasives Ltd v Bank of New Zealand (No 2)* [1992] 3 NZLR 757 at 765.

Their Lordships also adopted the comments of Fisher J in *Arklow Investments Ltd v MacLean* to the same effect that:[15]

> ... the overall rationale [is] that it is wrong to allow someone to fund litigation in the hope of gaining a benefit without a corresponding risk that that person will share in the costs of the proceedings if they ultimately fail.

[32] That point was also referred to with approval by the Court of Appeal in *SH Lock (NZ)*.[16]

[33] Mr Mark made the point that there are other factors which militate against an award, including namely Ms Jamieson's failure to comply with her obligations as a bankrupt which contributed to the proceedings being issued. However, to the extent those considerations are relevant, they are more relevant to whether an order for costs ought to be made at all (and if so, how much) rather than whether Haines is potentially liable as a non-party.

[34] In relation to the overall justice it is also relevant that if there is to be an award of costs, the Trusts cannot have a double recovery. Mr Grove accepted the Trusts could only ever be paid one award of costs, even if Haines and the Official Assignee were ultimately to be jointly and severally liable for that payment. To the extent the Official Assignee may be liable for costs, he is indemnified by Haines in any event. I consider that to be a further factor which supports the Trusts' argument that Haines as a non-party should be directly liable for costs.

[35] In conclusion on this point, I find that the non-party Haines could be liable for the trustee's costs in the circumstances of this case. The next issue is what, if any, effect the presumption under r 15.23 has on Haines' position.

The effect of the discontinuance

[36] The starting point is the presumption in r 15.23:

> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs

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15 At [26], citing *Arklow Investments Ltd v MacLean* HC Auckland CP49/97, 19 May 2000 at [21].

16 *SH Lock (NZ) v New Zealand Bloodstock Leasing Ltd & Ors,* above n 5, at [16].

> to the defendant of and incidental to the proceeding up to and including the discontinuance.

[37] The rule confirms the prima facie position that a discontinuing plaintiff is liable to pay the defendant's costs. This is consistent with the object that costs awards should have certainty and predictability, but is ultimately subject to the Court's overriding discretion in relation to costs as confirmed by r 14.1.

[38] Although there is a general presumption against the Official Assignee being liable for costs, that presumption is limited to circumstances where proceedings are brought against the Official Assignee or the Official Assignee is made a party to the proceedings: r 24.53. If the Official Assignee initiates the proceedings he faces the same consequences as to costs as any other litigant, and is liable for the costs awarded to the extent the bankrupt's estate is insufficient.[17] So the presumption applies to the Official Assignee as a discontinuing plaintiff. Whether the presumption would be displaced in this case is potentially relevant to Ms Jamieson's application for costs against Haines, given my conclusions above that Haines could be liable for non-party costs as the driving force behind the Official Assignee's proceedings.

[39] The presumption may be displaced if, in all the circumstances, it is just and equitable not to apply it. The onus is on the party seeking to displace the presumption to satisfy the Court that because of the particular circumstances the presumption of costs in favour of the defendant should not apply. A Court will not speculate on the respective strengths and weaknesses of the parties' cases but the reasonableness of the stance of both parties is to be considered.[18] It may also be relevant to consider whether a plaintiff has acted reasonably in discontinuing the proceeding, and particularly in this case, whether the proceeding was discontinued as promptly as it should have been.[19]

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17 *Official Assignee of Banks v Banks* (1894) 12 NZLR 298, 302 (SC).

18 *Kroma Colour Prints Limited v Tridonicatco NZ Limited* [2008] NZCA 150, (2008) 18 PRNZ 973 at [12].

19 *Anglesea Medical Properties Ltd v Braemer Hospital Ltd* HC Hamilton CIV-2006-419-1492, 9 October 2007 at [41].

[40] The first consideration is whether it was reasonable for the Official Assignee to have issued the proceedings in the first instance. It is convenient to also consider the related issue of whether, in light of the information Haines had, it was reasonable for Haines to have agreed to fund those proceedings given the finding that "but for" Haines funding the proceedings would not have been issued.

[41] Following Ms Jamieson's bankruptcy the Official Assignee reviewed her affairs. Ms Jamieson's relationship with the Spearhead and Castello Trusts was an issue the Official Assignee was required to consider as those Trusts had lodged claims as creditors of Ms Jamieson's estate. The Official Assignee appointed an experienced investigating accountant Mr Hicks to inquire into Ms Jamieson's affairs and relationship with the Trusts. On the information that Mr Hicks had available to him he was satisfied that the Trusts owed Ms Jamieson significant sums of money, and that it was appropriate for demand to be made of the Trusts for repayment.

[42] Counsel referred to the email exchanges between the parties. The Official Assignee made demand on several occasions in relation to the debt Mr Hicks said was due. Mr Grove criticised the letters of demand as lacking detail. Although no details of how the sums made up were provided, Ms Jamieson's initial response on several occasions was that there was no further relevant information available in relation to the affairs of the Trusts. She also disputed the accuracy of some of the accounts of the Castello Trust. Ms Jamieson had the opportunity to provide further detail of the Trusts, indeed she was obliged to, but she declined to do so.

[43] For example, Mr Hicks observed that Ms Jamieson had failed to provide accounting records and financial statements for the Castello Trust from 1 April 2006 and for the Spearhead Trust from 1 April 2004. The Official Assignee sought that documentation from Ms Jamieson by way of email on 12 June 2009. Ms Jamieson did not respond by 8 July so Mr Hicks proceeded to provide the memoranda advice on that basis. When Ms Jamieson did respond on 12 July 2009 she still failed to provide the information that was sought. Further email exchanges followed. The short point is that the information the Official Assignee required from Ms Jamieson was not provided.

[44] Mr Grove submitted that the assertion that Ms Jamieson and the Trusts were not co-operative was flawed. He suggested she was prompt and did her best to provide the information that was being sought. On the email exchanges in evidence before the Court I do not accept that submission. The matter is best summarised by Associate Judge Bell in his decision on Ms Jamieson's application for discharge from bankruptcy:[20]

> Her grudging and minimal co-operation with the Official Assignee, her limited disclosure of her affairs and her feeding the Official Assignee with misleading information fall well below what is required of an undischarged bankrupt. It is serious misconduct. It was also deliberate. It was calculated to prevent Haines receiving anything from her bankruptcy.

[45] While those statements were made in relation to Ms Jamieson's approach generally, they are also applicable to her response on behalf of the Trusts in relation to the claims which were the subject of the proceeding.

[46] The full detail of the claim and how it was made up was set out to Ms Jamieson for the Trusts in a letter dated 25 May 2011 from the Official Assignee's solicitors. That letter set out a full explanation of the sums demanded and how they had been arrived at.

[47] Mr Grove submitted that there was insufficient time for Ms Jamieson and the Trusts to respond in the period between that explanation to the issue of the proceedings almost a month later. There would be more force in that submission were it not for the fact that the obligation was on Ms Jamieson as a bankrupt to provide further details, and for the Trusts as creditors claiming in her estate to provide information supporting their claim and respond to the Official Assignee's requests.[21] It is not enough, as Mr Grove suggested, for Ms Jamieson to have simply disputed the amounts were due as she did. Ms Jamieson said on several occasions that there was no further information available yet once the proceedings were issued she was able to provide such further information by way of defence to the claim.

[48] As Mr Kahn (the principal Insolvency Officer who dealt with Ms Jamieson) deposed it was only during the course of a public examination, in affidavits filed in

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20 *Jamieson v Official Assignee,* above n 1 at [55].
21 Insolvency Act 2006, s 234(2).

the proceeding and through the discovery process that Ms Jamieson disclosed additional information to the Assignee that had a bearing on the claims that he had brought. It was that information that substantially altered the merits of the Assignee's amended claim.

[49] From Haines' point of view the Official Assignee advised it by letter of 16 November 2010 that, in light of Mr Hicks' report, there were reasonably good claims against the Trusts and that both Trusts owned property which could be executed against to enforce any judgment obtained. Following that, and after further negotiations with the Official Assignee about the terms of the Deed of Indemnity, Haines agreed to enter the Deed of Indemnity. On the basis of the information the Official Assignee had it was reasonable for him to issue the proceedings. It follows I accept it was also reasonable for Haines to have funded the commencement of the proceedings given the advice it received from the Official Assignee and the knowledge it had of Ms Jamieson's affairs.

[50] The issue then is whether it was reasonable for the Official Assignee and Haines to have maintained the proceedings once the Trusts, through Ms Jamieson, finally provided the further information.

[51] Mr Grove submitted that when Ms Jamieson provided the further information, the Official Assignee should not have left the proceedings on foot with the impending trial date and that he only did so because of the dispute with Haines regarding the funding. Ms Jamieson and the Trusts were not aware of the funding agreement at the time. Mr Grove suggested that a memorandum filed on behalf of the Official Assignee on 18 May 2013 was misleading. I reject that submission. The memorandum explained the Official Assignee's default in relation to the timetable for trial. In it counsel said inter alia:

> Unfortunately, given the time taken to review and consider the further evidence *and other matters*, issues have arisen with the plaintiff's preparation for trial. ...
>
> (emphasis added)

[52] The reference to "other matters" was a reference to the issues the Official Assignee had in dealing with Haines. By this time issues had arisen between the Official Assignee and Haines in relation to Haines' continued funding of the proceedings. That is an issue to which I shall return. However, it is first necessary to address the consequences of the disclosure of the further information by Ms Jamieson throughout the course of the proceeding.

[53] I note here that during the course of his submissions Mr Grove also referred to the related injunction application and liquidation proceedings between Ms Jamieson and Haines. However, those matters have been the subject of costs awards and are not relevant to the present issue.

[54] Mr Kahn confirms that, in light of the additional information provided by Ms Jamieson on behalf of the Trusts in opposition to the Official Assignee's application for summary judgment, the Official Assignee sought to have the fixture vacated and adjourned for review in the new year.

[55] It was reasonable for the Official Assignee to take time to have his advisers consider the further material raised by Ms Jamieson. It was the first time she had disclosed it. At about the same time Ms Jamieson's application for discharge from bankruptcy was before the Court which also provided the Official Assignee with further information.

[56] The review of the further material disclosed that an amended claim was warranted. The Official Assignee filed an amended statement of claim and a second affidavit of Mr Hicks in support on 6 December 2011. On the new information the Official Assignee considered the amount of the claim against the Spearhead Trust was $193,249 but the claim against the Castello Trust was negligible at $954. I do not consider anything turns on the slight delay in finally dealing with the Castello Trust claim. In the circumstances it became de minimis and of no consequence. The focus was on the amended claim against the Spearhead Trust.

[57] On 10 April 2012 Ms Jamieson filed a statement of defence to the Official Assignee's amended statement of claim and a further affidavit in reply. Those

documents were also referred to Mr Hicks for analysis. Following that review the Official Assignee's solicitors advised on 3 May 2012 that, taking all the matters into account, including the fresh information, the claim against the Trust was now finely balanced. While there was a basis to continue to pursue the claim the outcome was not certain.

[58] I consider that it would have been reasonable at that stage for the Official Assignee to have negotiated a settlement or to have discontinued the proceeding. The reason he did not do so was primarily because of the issues raised by Haines when Haines was advised of that position. However Haines itself was not advised of the revised advice until 17 May 2012 when an expurgated version of the advice was provided to it.

[59] By 17 May a decision was required. There were outstanding accounts that Haines had not paid under the indemnity and the issue needed to be addressed if the trial was to take place in June.

[60] On my review of the evidence I am satisfied that it was reasonable for the Official Assignee to have sought to resolve issues with Haines first so that his decision to discontinue which was confirmed to the Court and Ms Jamieson on 24 May was reasonable.

[61] However, even though the Official Assignee acted reasonably in leaving the proceedings on foot until 24 May 2013, that is not conclusive. A party acting reasonably may still be responsible for costs on a discontinuance.

[62] The underlying feature of this case is that the proceedings were issued and continued on the basis of the information the Official Assignee and Haines had at relevant times. When that information changed the Official Assignee then determined it was not appropriate to continue with the proceedings any further. The party that effectively controlled that information and its release was Ms Jamieson. To the extent Ms Jamieson and the Trusts have incurred costs in opposing the claim they were the authors of the situation. It is not as though the proceedings were

issued hastily or continued unreasonably. Shortly after receiving advice on the new information the Official Assignee indicated he would discontinue.

[63] I am aware of the authorities that confirm costs are not to be used to punish a party for his or her conduct outside the proceedings.[22] However, two points can be made in response. First, costs are not sought against Ms Jamieson. The question is whether Official Assignee (or Haines) should bear Ms Jamieson's costs. Second, it is not so much a case of punishing Ms Jamieson for her failure to provide information outside the proceedings, rather it is recognising that the actions of the Official Assignee (and Haines) in issuing and pursuing the proceedings were reasonable in light of the information they had at relevant times. Ms Jamieson was responsible for the provision of that information. I conclude that the presumption under r 15.23 should be displaced in this case insofar as that is relevant to Ms Jamieson's application for costs against Haines.

[64] I turn to Haines' position. The overarching consideration in relation to Haines' position is whether it is just and reasonable that as a non-party they pay or contribute towards Ms Jamieson's costs.

[65] For the reasons given above, I consider that on the basis of the information available to the company, it was reasonable for Haines to have funded the issue of the proceedings.

[66] However, it was unreasonable of Haines to have refused to accept that the proceedings should be discontinued once it had received the expurgated advice on 17 May 2013. The unreasonableness of that decision was confirmed by Duffy J in her decision.

[67] On my review of the file and in light of the further evidence adduced for this hearing, it is also apparent that at least part of the delay in the Official Assignee confirming his decision to discontinue was caused by the issues between him and Haines over costs. This appears to have been a factor in the decision to delay

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[22] *Thames-Coromandel District Council v Coromandel Heritage Protection Society Inc* [2009] NZCA 204, (2009) 19 PRNZ 365 at [13].

advising Ms Jamieson and her advisers of the intention to discontinue. So, while it may have been reasonable for Haines to have awaited the provision of the expurgated solicitor's advice, before it should have agreed to discontinue, part at least of the reason that advice was not provided earlier was due to Haines' default in its arrangements with the Official Assignee.

Conclusion

[68] The result is that I am satisfied that Ms Jamieson should have a modest amount of costs against Haines. She is not entitled to costs associated with the issue or initial course of the proceedings until after the Official Assignee and Haines had the opportunity to consider the discovery. However equally, I consider Ms Jamieson would have unnecessarily incurred some costs in preparing for the trial which was close at hand when she was advised the claim was to be discontinued. I do not however accept that the full claim for preparation of six days can be justified.

[69] Having regard to the above factors I consider it reasonable for Haines to pay Ms Jamieson's costs for wasted preparation of three days or $5640. Order accordingly.

Costs

[70] Given that each party has had a measure of success and also given the very lengthy background to this matter, the costs of this application are to lie where they fall.

Venning J