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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.1855/91

LOW PRIORITY

2570

BETWEEN: FARROW FINANCE LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a Financier

Judgment Creditor

AND JOHN NORRIS MAY of Auckland, Company Director

Judgment Debtor

Hearing: 30 November 1992

Oral Judgment: 30 November 1992

Counsel: A M Dollimore for judgment creditor
R J Warburton for judgment debtor

[ORAL] JUDGMENT OF SPEIGHT J

This is an application by the judgment debtor to set aside a bankruptcy notice. The debt which is the subject of the notice arose from a judgment of Master Towle delivered on 14 December 1991 on a claim for summary judgment. There were several defences put into that claim, one of which was a purported counterclaim arising out of different but somewhat connected transactions between the then creditor and the debtor. Accordingly, as is pointed out now, that this is not strictly speaking one of those cases for setting aside where the counterclaim could have been but was not raised in the original

proceedings. It is clear that the counterclaim was raised in the summary judgment proceedings before the Master but, as is correctly pointed out by Mr Dollimore, in these proceedings the debtor's pleadings attempt to advance additional detail. I will deal with this matter on the basis that this is not a case of a counterclaim which was not raised but one which has been given consideration by the Master in his judgment in assessing whether there was, in the words of ***Clark v UDC*** ((1985) 2 NZLR 636) "a genuinely triable demand at the suit of the debtor".

The opposition by the judgment creditor is on two grounds. One, that contrary to the requirements of s.14 of the Insolvency Act 1967 and the Rules, the application was not filed within the requisite 14 days; secondly, it is said that the counterclaim was before the Master in the proceedings under review and was disposed of by him.

I deal first with the question of expiry of time of the notice. In particular, I have been very much assisted by reference which both parties have made to an unreported judgment of Robertson J. in ***Dillon v Blueprint Developments Ltd*** (B.2164/89, judgment of 27 March 1990). Although unreported this is cited, and appears to be the most relevant case on the topic, in ***Butterworths 3rd series Consolidated Case Annotations***. The learned Judge discussed an almost identical matter at considerable length and followed an earlier decision of Fisher J. Both Judges have construed the time requirement as absolute, and that notwithstanding the provisions of s.10 of the Insolvency Act there is no power of extension. As with Robertson J's case, this is one where there can be considerable grounds for sympathy and arguments of merit on the part of the

debtor. The filing of the necessary application was attempted on the fourteenth day of the statutory period but, because of some misadventure with the documents, did not reach the Court as at the closing time hour and so could not be filed, and was not filed, until the following day. Be that as it may the essence of the matter is that this is not, as Robertson J. said, an "application to extend the time for the doing of an act within the purview of s.10" but is a challenge to the existence of an act of bankruptcy which, by statute, came into force by the effluxion of time and the absence of the challenging notice.

I have listened with sympathy to the submissions put forward by Mr Warburton, who faced the difficulties imposed upon him by the ***Dillon*** case. He submitted, in support, references to a number of Australian cases but I find them of no assistance because, in all those that appeared to me to be relevant, the application had been filed within the appropriate time but not dealt with. The judgment in ***Chinery v Chinery*** [1884] 12 QBD 342 tells us that acts of bankruptcy must be strictly construed, and without repeating matters which have been advanced by Mr Dollimore I accept that his submissions (particularly in his paragraphs 8 and 9 of his written material) are conclusive of the matter. The act of bankruptcy is central to the jurisdiction, much more so than such collateral matters as are dealt with in such cases as ***Guest v Duffy*** (1991) 1 NZLR 183 where compliance with proof of debt forms were held to be directory only. I therefore conclude that Mr Warburton's submission fails in respect of the first matter under consideration.

As a matter of courtesy however I have also considered the second ground advanced by him, namely, that there was a counterclaim which was before the learned Master, has not been disposed of, and raises a genuine challenge. Admittedly the last paragraph of the Master's decision is expressed in somewhat ambiguous terms. While recognising his duty to consider the existence of the counterclaim as then pleaded, he went on to say that the chances of it being sustained were "very slim". The question arises in my mind as to whether or not that should have been sufficient to deter him on the point he was then considering, namely, giving judgment, particularly in a summary judgment proceeding, when the counterclaim was so closely related to the debtor-creditor situation which existed between the parties. I note that in the following paragraph the learned Master's phraseology somewhat contradicts the pronouncement that he had previously made, concerning a "slim chance". He now expresses himself as satisfied that there was no reasonable defence advanced by the debtor and from the context it looks as if the defence he was referring to was not only the Credit Contracts Act question which had been fully explored but also the merits of the counterclaim.

I will discuss briefly the affidavits which have been filed by the respective parties concerning the transactions between them. These relate to the allegation that the creditor had affirmatively committed itself to making finance available for the purchase of the May Road property, failure of which had probably been the key to the debtor's financial downfall. Mr Dollimore has reviewed, at some considerable length, the affidavits filed and has pointed to a number of logical defects in the way in Mr May's affidavits. He also has referred to

the matters that Master Towle particularly emphasised, namely, the quite informal nature of the arrangement upon which the debtor now purports to rely.

Looking therefore at the merits, I think that the phrase that the counterclaim was "very slim", used by the Master, was charitable phraseology. His extensive reference to the familiarity of the parties with the creditors' practice, indicated that if required to do so he would have assessed the chances of the counterclaim succeeding as nil. I conclude, though it is not strictly relevant for the purposes of this decision, that the matters which were set out before the Master at that time failed to establish a genuinely triable demand. Nor is the debtor's position improved by the fact that subsequent affidavits have somewhat changed the ground and have also introduced new matters which were clearly previously available. The debtor can of course still oppose a petition on other grounds, or issue independent proceedings.

The application to set aside is dismissed. There is judgment for the judgment creditor, with costs of $600.00 and disbursements to be certified.

Solicitors:

Buddle Findlay, Auckland, for judgment creditor
Warburton, Auckland, for judgment debtor