

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

CIV 2006-485-2251

IN THE MATTER OF the Insolvency Act 1967
AND IN THE MATTER OF the bankruptcy of ERNEST WILLIAM
GARTRELL

BETWEEN THE COMMISSIONER OF INLAND
REVENUE
Judgment Creditor

AND ERNEST WILLIAM GARTRELL
Debtor

Hearing: 23 February 2009

Appearances: B.K. Cunningham - Counsel for Judgment Creditor
R. Harley - Counsel for Judgment Debtor

Judgment: 23 February 2009 at 4.00 pm

**JUDGMENT AS TO COSTS
OF ASSOCIATE JUDGE D.I. GENDALL**

*This judgment was delivered by Associate Judge Gendall on 23 February 2009 at
4.00 p.m. pursuant to r 540(4) of the High Court Rules 1985.*

Solicitors: Luke Cunningham & Clere, Solicitors, PO Box 10-357, Wellington
EW Gartrell, Barrister & Solicitor, PO Box 5151, Wellington

[1] On 23 February 2007 the judgment creditor filed a petition seeking an order for adjudication in bankruptcy of the judgment debtor.

[2] This was opposed by the judgment debtor by notice filed 2 March 2007.

[3] In December 2008 the judgment debtor was adjudicated bankrupt in proceedings issued by another judgment creditor.

[4] Counsel for the judgment creditor here has requested that the present proceeding be listed for call before me today 23 February 2009. This occurred.

[5] At the hearing today Mr Cunningham for the judgment creditor first, sought leave to have the proceeding dismissed given that the judgment debtor is already bankrupted and secondly, sought an order for costs in favour of the judgment creditor. The application for costs was opposed by the judgment debtor.

[6] Accordingly, an order was made earlier today dismissing the proceeding. I then went on to hear submissions from counsel for the judgment creditor and counsel for the judgment debtor on the costs issue. Having done that, I reserved the question of costs.

[7] I now give my decision on this costs issue.

[8] The petition filed by the judgment creditor in this matter followed an unsatisfied bankruptcy notice issued against the judgment debtor for \$233,832.97. This amount represented the sum due and unpaid on a final judgment of the District Court at Wellington dated 14 August 2006. No appeal of that judgment or application to set it aside was made by the judgment debtor.

[9] On its face therefore, the current bankruptcy proceeding was properly brought by the judgment creditor. As such, the starting point on the costs issue must be that the judgment creditor is entitled to a usual award of costs and disbursements on this proceeding notwithstanding that the judgment debtor has been bankrupted by another creditor.

[10] Today, 23 February 2009 the judgment creditor has filed a current certificate as to the unpaid debt claimed from the judgment debtor. This certificate claims a total debt owing of \$518,670.42. This represents outstanding Goods and Services Tax, assessments, penalties and interest of \$78,642.07, outstanding income tax assessments, penalties and interest totalling \$180,693.14 and outstanding child support assessment and penalties totalling \$259,335.21.

[11] In opposing the present application for costs by the judgment creditor, Ms Harley for the judgment debtor raised 3 main issues.

[12] First, as to the amount sought by way of child support, she submitted that the judgment debtor had been successful in his application for judicial review of the Commissioner's decision with respect to child support and this amount should therefore fall away.

[13] Secondly, so far as the income tax assessment is concerned, Ms Harley contended that the judgment creditor has a range of tax credits which need to be offset against the assessments made. She suggested that this has not occurred.

[14] Thirdly, so far as the Goods and Services Tax assessments are concerned, Ms Harley contended that these may not have formed part of the original claim against the judgment debtor.

[15] As a result, Ms Harley's broad submission was that the judgment creditor should not have brought the present proceedings against the judgment debtor and therefore should not be entitled to an award of costs.

[16] In response, Mr Cunningham for the judgment creditor noted first, that so far as the child support assessments are concerned, the judicial review decision simply meant that the earlier decision to remit penalties which had been made by the Department at the wrong level has now been made at the correct level and the decision not to remit remains. The child support assessment and penalties, Mr Cunningham maintained, relate to a lengthy period from 30 September 1995 up to 30 November 2008 and they remain outstanding.

[17] So far as the income tax assessments, penalties and interest are concerned, here Mr Cunningham for the judgment creditor maintained that the credits claimed by the judgment debtor have now been investigated by the Commissioner of Inland Revenue and these credits disallowed. He argued that the total income tax assessments, penalties and interest totalling \$180,693.14 (essentially relating back to periods ending 31 March 2004 and 31 March 2005) are still outstanding and overdue.

[18] Lastly, so far as the Goods and Services Tax question is concerned, Mr Cunningham noted that this goes back to the period ending 30 November 2002 well before the 14 August 2006 District Court judgment and the total amount now outstanding remains at \$78,642.07.

[19] Having considered the submissions advanced on behalf of both the judgment creditor and the judgment debtor, I am satisfied that the present bankruptcy proceeding filed by the judgment creditor some 2 years ago was properly brought. Indeed it related to a bankruptcy notice issued on 5 October 2006 which itself was unsuccessfully contested by the judgment debtor in late 2006. There is no doubt in my mind that a debt in excess of the threshold limit was and remains outstanding from the judgment debtor. Indeed in a 25 October 2006 affidavit sworn on behalf of the judgment debtor by his accountant, Carey James Rohloff, in support of the application to set aside the bankruptcy notice, outstanding assessments of GST, income tax, child support and student loan employer deductions were acknowledged although there was some dispute as to quantum.

[20] Given the fact that I am satisfied the present proceeding was properly brought by the judgment creditor and that it was dismissed only because the judgment debtor is currently bankrupted, there can be no doubt in my mind that the judgment creditor is entitled to an award of costs.

[21] An order is now made therefore that the judgment debtor is to pay to the judgment creditor costs on this proceeding and all matters incidental thereto on a Category 2B basis together with disbursements as fixed by the Registrar.

‘Associate Judge D.I. Gendall’