

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

**CIV 2005-485-1958**

IN THE MATTER OF      of the Insolvency Act 1967  
  
BETWEEN                      NOEL TEMPLETON AND SUE  
   WHITTAKER  
   Judgment Creditors  
  
AND                              VIVIENNE CAROL MCCARTHY  
   Judgment Debtor

Judgment:      26 March 2009 at 3.00 pm

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

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*This judgment was delivered by Associate Judge Gendall on 26 March 2009 at  
3.00 p.m. pursuant to r 11.5 of the High Court Rules.*

Solicitors:              Ball Legal, Solicitors, PO Box 1552, Paraparaumu Beach  
   Langford Law, Solicitors, PO Box 344, Wellington

[1] On 15 November 2005 the judgment creditors filed a petition seeking an order for adjudication in bankruptcy of the judgment debtor.

[2] The amount claimed in the petition totalled \$1,026,088.00. This represented judgments obtained against the judgment debtor in the High Court at Wellington in March 2002 together with costs and disbursements less a sum of \$85,000.00 which had been recovered earlier.

[3] The creditor's petition was opposed by the judgment debtor who filed a Notice of Opposition on 27 January 2006.

[4] This matter was then the subject of a number of calls in this Court subsequent to that time.

[5] The parties then consented to this proceeding being stayed in the mean time to allow an application to set aside the original judgment to be brought. Finally the present bankruptcy application was dismissed on 23 February 2009. This followed a decision of the Court of Appeal which, as I understand it, reduced the amount of the original judgment against the judgment debtor to \$32,000.00 plus interest and costs of about \$65,000.00.

[6] The reduced total debt owing of about \$97,000.00 was paid in full by the judgment debtor on 20 February 2009.

[7] As a result, on 23 February 2009 by consent an order was made dismissing the present proceeding. Costs were reserved, however, as they were still in issue between the parties.

[8] Memoranda as to costs from counsel for the judgment creditor dated 23 February 2009 and from counsel for the judgment debtor dated 10 March 2009 have now been filed.

[9] Neither party has indicated they wished to be heard on the costs question and I now give my decision regarding costs.

[10] The original creditor's petition in this matter was filed by the judgment creditor based upon an unsatisfied bankruptcy notice for \$1,111,088.00. This notice was served upon the judgment debtor on 29 September 2005. As I have noted the amount specified in the bankruptcy notice represented essentially the sum due and unpaid on the final judgment of this Court obtained on 12 March 2002. No application to set aside that bankruptcy notice was made by the judgment debtor. On its face therefore, the bankruptcy proceeding was properly brought by the judgment creditor. As such the starting point on the question of costs must be that the judgment creditor is entitled to an award of costs and disbursements on this proceeding in the usual way.

[11] As I have noted above, the judgment debtor, who acknowledges now that she acted foolishly in about 2001 in effectively walking away from the original proceedings against her, has finally been successful in having that original judgment set aside. In its place, however, a short time ago the Court of Appeal judgment for around \$32,000.00 was issued together with an award of interest and costs of about \$65,000.00.

[12] It was not until about 28 September 2006 that the original judgment upon which the bankruptcy petition was founded was set aside as to quantum by consent of the parties. This, however, was some twelve months after the bankruptcy notice was issued and served. In addition, as I have noted above, this present bankruptcy proceeding by agreement was stayed at the time to await a final determination on quantum.

[13] Given that this rather tortuous matter was stayed but only on the question of quantum which was to be the subject of the re-hearing, and that the judgment debtor essentially admitted liability, as I see it, the original bankruptcy proceedings were properly brought and the judgment creditor is entitled to an award of costs on those proceedings.

[14] As to the judgment debtor's complaint regarding costs, it was always open to her to make an offer in the nature of a "Calderbank Letter" offer (a settlement offer without prejudice except as to costs – R. 14.10 *High Court Rules*) at any time to

protect her position so far as costs were concerned. That she chose not to do this is a matter for her. The consequences of this are simply that the properly commenced bankruptcy proceedings were to remain on foot and finally, but for her prompt payment of the \$97,000.00 judgment of the Court of Appeal, she would have remained open to a possible order for adjudication.

[15] That said, I am satisfied that the judgment creditor is entitled to an award of costs against the judgment debtor on this bankruptcy proceeding calculated on a category 2B basis together with appropriate disbursements.

[16] On this aspect, counsel for the judgment creditor in his 23 February 2009 memorandum has set out a calculation of scale costs on the bankruptcy matters (I exclude the \$650.00 he claims for the charging order) which total \$3,480.00. This is set out at paragraph 21 of his memorandum. In my view costs of that order are appropriate and an order will follow shortly.

[17] So far as disbursements on the bankruptcy proceeding are concerned, again these are set out at paragraph 26 of the memorandum from counsel for the judgment creditor. Disbursements on filing the bankruptcy notices, two applications for substituted service, and the petitions which amount to \$1,470.00 are appropriate and are approved. Turning to the other disbursements sought by counsel, the following amounts at this point are approved:

a)	Process Server Fee	\$ 67.50
b)	Process Server Fee	\$ 67.50
c)	Service Fee	\$ 64.64
d)	Service Fee	<u>\$ 56.25</u>
		<u>\$255.89</u>

It is only those disbursements which are approved at this stage.

[18] The judgment creditors have been successful in their application for costs on the bankruptcy proceeding itself. An order for total costs of \$3,480.00 together with total disbursements of \$1,725.89 is made in favour of the judgment creditor against the judgment debtor.

[19] This deals with the issue of costs concerning the dismissed bankruptcy proceeding.

[20] In counsel's memorandum dated 23 February 2009 the judgment creditors also seek costs and disbursements with respect to the other enforcement step relating to a charging order. As I understand the position these were not the subject of the current proceeding. If, however, costs and disbursements with regard to the charging order are sought, leave is reserved for the judgment creditors within 15 working days of today to file and serve an additional Memorandum of Counsel regarding that aspect. Counsel for the judgment debtor will then have a further period of 10 working days from that date to provide any Memorandum in response.

[21] Those memoranda are then to be referred to me and in the absence of either party indicating they wish to be heard on the matter I will, if appropriate, decide the question of costs on the charging order based upon the material then before the Court.

**'Associate Judge D.I. Gendall'**