

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

CIV 2008-404-008532

UNDER of the Insolvency Act 2006

BETWEEN CAROL MARGARET DOWN
Judgment Debtor

AND TVWORKS NEW ZEALAND LIMITED
Judgment Creditor

Hearing: 2 April 2009

Appearances: A D Banbrook for the Judgment Debtor
J S Langston for the Judgment Creditor

Judgment: 2 April 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

Counsel:
A D Banbrook, P O Box 3600, Auckland 1140

Solicitors:
Holmes Dangen & Associates Limited, P O Box 3600, Auckland 1140
Wilson Harle, P O Box 4539, Shortland Street, Auckland

[1] The debtor applies to set aside the creditor's bankruptcy notice. That application was filed on 27 February 2009. On the evidence available I am satisfied service of the bankruptcy notice was deemed to be effective on 12 February 2009. Therefore the debtor's application has been filed out of time, it not being filed within 10 working days of service of the bankruptcy notice. That of itself is enough to dispose of the application.

[2] But, even if it were not, I am satisfied the grounds raised in support have no merit.

[3] The bankruptcy notice concerns a debt for costs arising out of a discontinued defamation claim against the creditor. That claim was prosecuted in the name of the debtor's company which is now called 123 Metals Limited. Upon discontinuance, and following a dispute over costs, Heath J ordered the debtor to pay non party costs because she was the sole shareholder and director and she funded, controlled and was the potential beneficiary of the defamation proceeding.

[4] The debtor will not pay the costs, hence the application for her bankruptcy. In her application to set aside the bankruptcy notice she raises by way of set-off or a counter claim, a claim that her company was inter alia defamed. That claim seeks to establish a breach of a duty of care, formulated on the basis of harm to the business reputation of the debtors company's business. Such a claim is in any event doomed to fail because it is not founded upon a claim of the existence of any special relationship between the parties. Also, a counterclaim/set-off raised by this application could have been raised in the proceeding in which the costs award, i.e. the judgement debt, was obtained. Had it been, and if accepted, then a costs award may not have been made. After all costs awards are discretionary.

[5] In any event the counterclaim raised is an abuse of process, as it arises out of the facts of that proceeding which the judgement debtor funded, controlled and discontinued, from which the relevant costs award arose.

[6] My attention is drawn to an error in the description of the creditor's name. The proper name is TVWorks Limited not TVWorks New Zealand Limited. Pursuant to s 418 Insolvency Act 2006 I make an order amending the name accordingly.

Result

[7] The application to set aside the bankruptcy notice is dismissed. Costs shall be paid to the creditor on a category 2(B) basis.

[8] The creditor's bankruptcy application shall be adjourned to **10.45am, 20 May 2009**. The bankruptcy application and summons is yet to be served. Service of those documents shall be deemed to have occurred at that time delivery of same is made to the offices of the debtor's solicitors.

Associate Judge Christiansen