

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

**CIV 2008-441-154**

IN THE MATTER OF the Insolvency Act 1952  
AND IN THE MATTER OF the bankruptcy of ALAN DUFF

AND MUTUAL FINANCE GROUP LIMITED  
Judgment Creditor

Hearing: 27 March 2009

Appearances: J. Waymouth - Counsel for Plaintiff  
P. Ross - Counsel for Defendant

Judgment: 2 April 2009 at 11.00 am

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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 2 April 2009 at  
11.00 a.m. pursuant to r 11.5 of the High Court Rules.*

Solicitors: J. Waymouth, PO Box 33 774, Takapuna, Auckland  
McKay Hill, PO Box 1143, Napier

[1] On 13 November 2008 I gave a decision with respect to an application by the judgment creditor to have the judgment debtor adjudicated bankrupt. In that decision I approved an application by the judgment debtor for a part 5 proposal in terms of s. 333 *Insolvency Act 2006*. In addition I stayed the judgment creditor's bankruptcy proceeding until further order of the Court was made. In that decision I awarded costs on a 2B basis together with disbursements as fixed by the Registrar to both the judgment creditor and to the supporting creditor, Property Finance Funding Nominees Limited.

[2] The judgment creditor, Mutual Finance Group Limited ("Mutual Finance") through its solicitor has now sought, by memorandum dated 23 December 2008, a revised costs order. In particular, costs are sought on a full solicitor-client basis in reliance on provisions in the Loan Agreement signed by the debtor.

[3] There is no such similar application by Property Finance Funding Nominees Limited for costs on a solicitor/client basis.

[4] The order for costs to Property Finance Funding Nominees Limited as supporting creditor on a category 2B basis together with disbursements as fixed by the Registrar stands.

[5] I now turn to the present application by Mutual Finance for costs on a solicitor and client basis.

[6] In this respect, counsel for Mutual Finance has indicated that costs on a category 2B basis here would amount to \$3,520.00. This calculation is set out at paragraph 15 of counsel's memorandum. Disbursements totalling \$2,777.05 which include significant agent's fees are also listed at paragraph 16 of this memorandum.

[7] In place of the earlier costs order, counsel for Mutual Finance now seeks solicitor and client costs on this matter of \$8,260.00 (including GST) and disbursements of \$2,777.05 making a total of \$11,037.05.

[8] Rule 48C of the *High Court Rules* in force at the time deals with indemnity costs. Rule 48C(4)(e) enables the Court to order a party to pay indemnity costs if the party claiming costs is entitled to indemnity costs under a contract or deed. As I understand the position, the judgment obtained by Mutual Finance against the judgment creditor in the District Court at Hastings on 18 January 2008 related to an amount due under a standard Mutual Finance Loan Agreement signed by the debtor. This included a penalty rate of interest for default in payments and a requirement that the judgment debtor would meet Mutual Finance's reasonable legal fees on a solicitor/client basis on "enforcement" of the loan and any security provided. Serious and lengthy default under the Loan Agreement occurred here. The District Court judgment included default penalty interest and an award of significant costs.

[9] In addition there can be no doubt first that Mutual Finance was put to some considerable trouble by the judgment debtor in pursuing this debt and in bringing and arguing the present adjudication proceedings, and secondly that the solicitor/client costs sought here exceed 2B costs by only some \$4,740.00.

[10] Although no order for adjudication has been made at this point these proceedings have resulted in a Part 5 proposal, which the judgment debtor firmly states is likely to result in all his debts including the Mutual Finance debt being cleared.

[11] *McGechan on Procedure* at paragraph HR 48C.01(13) has dealt with Rule 48C(4)(e) and states:

***"Subsection (4)(e)***

The court will always look closely at the wording of the contract or deed to see whether it gives an entitlement to indemnity costs. Examples include: *ANZ Banking Group (NZ) Ltd v Gibson* [1986] 1 NZLR 556 (CA); *Frater Williams & Co Ltd v Australian Guarantee Corp (NZ) Ltd* (1994) 2 NZ ConvC 191,873 (in both cases the entitlement was to "solicitor/client costs"); *A-G v Feary* 7/3/07, Clifford J, HC Wellington CIV 2006-485-610 ("all legal costs" held to provide a full costs indemnity); *Noma Oysters Ltd v Brown* 24/2/98, Master Kennedy-Grant, HC Auckland CP35/96 (a debenture charging "all costs and expenses that may properly be charged by the lender in enforcing or protecting security" held to give an entitlement to party costs only); *Clay Exports Ltd v Waitoto Developments Ltd* 15/2/07, Associate Judge Gendall, HC Auckland CIV 2006-404-7740 ("all sums expended by the mortgagee ... in exercising or enforcing ... any power, right or remedy contained or implied in this mortgage" (held to entitle the plaintiff to full solicitor/client costs)."

[12] In the present case in my view the steps taken by Mutual Finance in both its application to bankrupt the debtor and to consider his subsequent Part 5 proposal are all part of its attempts to “enforce” the Loan Agreement and long-outstanding loan debt it has with the Debtor. As such, it is entitled here to recover solicitor-client costs from the debtor pursuant to paragraph 16 of the Loan Agreement.

[13] As to quantum of those costs, it is clear from *Health Waikato Ltd v Elmsly* (2004) 17 PRNZ 16 (CA) at paragraph 50 that:

“... if a Judge is considering the possibility of making an award of indemnity costs, the actual level of costs incurred might be of some relevance.”

[14] In the present case the actual costs sought by Mutual Finance represents 28 hours of solicitor time charged at \$295.00 per hour (including GST). In my view that hourly rate is appropriate here and given the length of time which has been involved in bringing this matter to its present point, the number of calls it has had both before this Court and in the subsequent negotiations which were required, the time claimed of 28 hours under the circumstances is reasonable.

[15] That said, in my view, this is an appropriate matter for the solicitor/client costs sought to be awarded to Mutual Finance pursuant to the terms of the Loan Agreement between the parties.

[16] An order is now made that the judgment debtor, Alan Duff, is to pay to the judgment creditor, Mutual Finance Group Limited, costs on a solicitor/client basis with respect to this matter totalling \$8,260.00 together with disbursements including agency charges totalling \$2,777.05. The total amount due for costs and disbursements is therefore \$11,057.05.

[17] This order is in place of the earlier order for costs on a category 2B basis and disbursements to be paid by the judgment debtor to Mutual Finance, the judgment creditor.

**‘Associate Judge D.I. Gendall’**