

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

**CIV 2008-404-006729**

IN THE MATTER OF     the Insolvency Act 2006  
  
BETWEEN                PAUL EDWARD ROEBECK  
                              Judgment Debtor  
  
AND                       BRADFORD TRUST LIMITED  
                              Judgment Creditor

Hearing:     28 April 2009  
  
Counsel:     No appearance for applicant  
              P G Skelton for respondent  
  
Judgment:   28 April 2009

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**ORAL JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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Solicitors:  
Russell McVeagh, PO Box 8, Auckland

[1] Mr Roebeck has applied to set aside a bankruptcy notice issued against him by Bradford Trust Limited.

[2] The bankruptcy notice was issued to enforce a judgment entered in the District Court on 19 May 2008 pursuant to s 141 of the Employment Relations Act 2000 in respect of a determination of the Employment Relations Authority. That determination, given on 26 February 2008, awarded Bradford Trust damages of \$223,500 together with costs of \$15,000. The award was made against Mr Roebeck jointly and severally with another party.

[3] Mr Roebeck's application to set aside the bankruptcy notice was filed on 9 December 2008. Although it says that it relies on grounds appearing in an affidavit to be filed in support, no supporting affidavit has been filed. The application was given a first hearing on 5 March 2009. At the request of Mr Roebeck that hearing was adjourned until today because Mr Roebeck was recovering from orthopaedic surgery at the time of the original hearing.

[4] Bradford Trust filed notice of opposition to the application before the first hearing. That opposition was supported by an affidavit producing copies of the determination of the Employment Relations Authority and two subsequent interlocutory judgments of the Employment Court (after Mr Roebeck formally challenged the determination of the Employment Relations Authority).

[5] At the same time as filing notice of opposition and the supporting affidavit, counsel for Bradford Trust filed a memorandum asking that the Court to determine the application at the first hearing (on 5 March 2009), contending that the application to set aside was a delaying tactic on Mr Roebeck's behalf. Counsel pointed out that Mr Roebeck had not, at that point, filed evidence in support of the application and, in particular, had not provided particulars of an alleged counterclaim or cross demand which was the primary ground put forward for applying to set aside the bankruptcy notice. As a consequence of the adjournment of the application Bradford Trust's request is only being addressed today. I record that not only has Mr Roebeck not

appeared in support of his application today, but he has still not filed an affidavit in support (notwithstanding the memorandum of counsel for Bradford Trust).

[6] As I have said, Mr Roebeck brings his application on the primary ground that he has a counterclaim, set-off or cross demand which exceeds the amount of the judgment debt. He contends that he could not set this up in the Employment Relations Authority. He also raises other related grounds. For the sake of completeness I set out all of the grounds below:

1. That the judgment debtor has a counterclaim set-off or cross demand which equal or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained in the Employment Relations Authority.
2. That the judgment debtor was prevented from raising issues challenging the quantum of damages awarded in the Employment Relations Authority. If the judgment debtor had been allowed to challenge the quantum of damages in the Employment Court – his challenge would have equalled if not exceeded the amount awarded to the applicant creditor.
3. The judgment debtor would have a set-off to the applicant creditors claim the basis of the bankruptcy notice. [sic]
4. The judgment debtor will be prevented from defending proceedings currently before the High Court at Auckland in CIV 2006 404 7111 where he is named as one of the five (5) defendants in a claim that mirrors the claim brought in the Employment Relations Authority. The judgment creditor is seeking the same relief but against five (5) defendants.
5. The bankruptcy notice should be set aside pursuant to the Insolvency Act 2006, and to prevent an abuse of process occurring should the judgment debtor be bankrupted without having the opportunity to challenge the quantum of damages awarded in the Employment Relations Authority.
6. Appearing in the affidavit of Paul Edward Roebeck to be filed in support of this application.

[7] Bradford Trust's notice of opposition answers and expands upon each of these points. Given Mr Roebeck's non-appearance today, I will also set out the full text of the grounds of opposition:

- a) The judgment debtor does not have a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained.

- b) The judgment debtor was not prevented by the Employment Relations Authority from disputing the quantum of the judgment creditor's loss. He did dispute both liability and quantum before the Employment Relations Authority.
- c) On 25 March 2008, pursuant to section 179 of the Employment Relations Authority 2000, the judgment debtor commenced proceedings in the Employment Court to challenge the determination of the Employment Relations Authority upon which the bankruptcy notice is based.
- d) On 25 March 2008, the judgment debtor applied to the Employment Court for a stay of the Employment Relations Authority's determination pending the outcome of his Employment Court challenge.
- e) By interlocutory judgment of the Employment Court dated 30 May 2008 (AC20/08), the Employment Court ordered a stay or execution of the Employment Relations Authority's orders pending delivery of judgment on the judgment debtor's challenge conditional upon:
  - i) The judgment debtor providing security, or making a payment of \$164,000 plus interest to the Registrar of the Employment Court at Auckland; and
  - ii) The judgment debtor prosecute [sic] expeditiously his challenge.
- f) The stay of execution lapsed as the judgment debtor did not provide security nor make the payment directed within the 30 day time period stipulated.
- g) By interlocutory judgment dated 21 July 2008, the Chief Judge of the Employment Court, pursuant to section 182 of the Employment Relations Authority 2000, made a direction limiting the judgment debtor's rights to challenge the Employment Relations Authority's determination to questions of liability and he disallowed the judgment debtor from challenging the Authority's assessment as to the quantum of loss awarded in favour of the judgment creditor.
- h) The judgment debtor chose not to appeal the Chief Judge's 21 July 2008 order limiting the nature and scope of his Employment Court challenge. He is now well outside the time limit for pursuing any appeal against the 21 July order.
- i) The judgment debtor, in breach of Rule 7.20 (old Rule 241) has not filed any evidence in support of his alleged counterclaim set-off, or cross demand within the 14 day period required after service of the bankruptcy notice.
- j) Appearing in the affidavit of Emma Lucinda Powell filed in opposition to the judgment debtor's application to set aside the bankruptcy notice.

[8] These grounds of opposition are supported by an affidavit of Emma Lucinda Powell. Her affidavit and the documents that she has produced establish the following:

- a) Following release of the Employment Relations Authority's determination, Mr Roebeck issued a proceeding in the Employment Court to challenge the determination. He also applied for stay of the Authority's determination pending the decision of the Employment Court.
- b) On 30 May 2008 the Employment Court ordered a stay conditional on Mr Roebeck providing security or paying \$164,000 into Court within 30 days.
- c) Mr Roebeck did not satisfy those conditions, and the stay lapsed after 30 days.
- d) On 21 July 2008 the Employment Court made orders limiting the scope of Mr Roebeck's challenge to issues of liability, and disallowing any challenge to quantum. Mr Roebeck did not appeal against that decision.

[9] Finally, to complete the background, Mr Skelton informs me today that the Employment Court within the last month has dismissed Mr Roebeck's challenge for want of prosecution.

## **Principles**

[10] The bankruptcy notice was issued in accordance with s 17 of the Insolvency Act 2006, which provides in relevant parts:

### **17 Failure to comply with bankruptcy notice**

- (1) A debtor commits an act of bankruptcy if—

- (a) a creditor has obtained a final judgment or a final order against the debtor for any amount; and
- (b) execution of the judgment or order has not been halted by a court; and
- (c) the debtor has been served with a bankruptcy notice; and
- (d) the debtor has not, within the time limit specified in subsection (4),—
  - (i) complied with the requirements of the notice; or
  - (ii) satisfied the Court that he or she has a cross claim against the creditor.

....

- (7) In subsection (1)(d)(ii), cross claim means a counterclaim, set-off, or cross demand that—
  - (a) is equal to, or greater than, the judgment debt or the amount that the debtor has been ordered to pay; and
  - (b) the debtor could not use as a defence in the action or proceedings in which the judgment or the order, as the case may be, was obtained.

[11] The onus is on the judgment debtor to show that he has a genuine triable counterclaim, set-off or cross demand, and that he could not set it up in the action in which the judgment was obtained: *Clark v UDC Finance Limited* [1985] 2 NZLR 636, approved in *Sharma v ANZ Banking Group (New Zealand) Limited* [1992] 6 PRNZ 386.

[12] The inability to set up a counterclaim or set-off is primarily a legal inability: *Hardy v Booth* (1992) 1 NZLR 356.

[13] The grounds put forward in support of the present application come down, in my view, to the following:

- a) That Mr Roebeck has a counterclaim, set-off or cross demand which he could not set up in the Employment Relations Authority.

- b) That he has been prevented from challenging the quantum of the award made by the Employment Relations Authority.
- c) That he will be prevented from defending other proceedings by Bradford Trust currently pending against him in this Court if he is adjudicated bankrupt.

[14] Mr Roebeck has failed to produce any evidence to support his contention that he has a counterclaim, set-off or cross demand. He has the onus of doing so. His application fails on that ground alone.

[15] I am also not convinced that there is any substance to his contention that he has been prevented from challenging quantum. I have read the decision of the Employment Relations Authority. It appears that he was afforded opportunity to raise all of these matters before the Employment Relations Authority. In his memorandum Mr Skelton has referred to three paragraphs in the decision which refer to arguments that Mr Roebeck raised about quantum: being that the profit margin claimed by Bradford Trust was too high, a challenge to the labour costs being claimed, and a contention that the Bradford Trust's trading company would not have secured the work for which it claims to be compensated.

[16] I also take into account that the Employment Court was very clear in its view that Mr Roebeck acted obstructively in the conduct of the case before the Employment Relations Authority, and that it was in the interests of justice to disallow any further challenge to quantum in the Employment Court. Notwithstanding that ruling, Mr Skelton informs me that Mr Roebeck did attempt to advance issues of quantum before the Employment Court, but then has not pursued that challenge.

[17] The last matter to address is Mr Roebeck's claim that he will be prevented from defending Bradford Trust's separate proceeding against him in this Court if made bankrupt. That is more a matter for substantive application than for an application to set aside. However, it still has little merit given that Mr Roebeck was

granted a stay by the Employment Court, but failed to meet the conditions of that stay.

[18] For all of the above reasons I am satisfied that there is no merit to Mr Roebeck's application. I also add that I consider it appropriate to strike the application out in any event given his non appearance.

[19] The application to set aside is dismissed.

[20] Bradford Trust is entitled to costs. Mr Roebeck is to pay costs to Bradford Trust on a 2B basis together with disbursements as fixed by the Registrar.

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**Associate Judge Abbott**