IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

CIV 2008 442 324

IN THE MATTER OF	THE INSOLVENCY ACT 2006
AND IN THE MATTER OF	THE BANKRUPTCY OF LESLEY VIOLET JARDINE-DENMEAD
BETWEEN	ANNETTE KEITH WALKER Creditor
AND	LESLEY VIOLET JARDINE-DENMEAD Debtor

Judgment: 22 June 2009

(Determined on the Papers)

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Costs

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[1] The creditor applies for indemnity costs or increased costs pursuant to r.14.6 High Court Rules.

Background

[2] The creditor on 15 February 2008 obtained summary judgment against the debtor for a total sum of $55,002.42. Inherently, the debtor in that proceeding had no arguable defence by way of set off or cross-claim such as to constitute a defence in the summary judgment context.

[3] The debtor made no payment on account of the judgment. The creditor obtained a bankruptcy notice which was served upon the debtor on 5 August 2008. The debtor did not apply within the statutory 10 working day period (s 17 Insolvency Act 2006) to set aside the bankruptcy notice either on the grounds of set off, cross demand, or otherwise. The Court has no power to extend the time within which the

applicant must be made: *Russell v Attorney-General* [1995] 1 NZLR 749 at 760, and the authorities reviewed in *Brookers Insolvency Law and Practice* IN 17.04(1).

[4] This history notwithstanding, the debtor on 30 October 2008 applied for an order setting aside of the bankruptcy notice.

[5] In the circumstances, the creditor says that the debtor's application could never had succeeded and that that is a basis for either increased costs or indemnity costs. For the debtor there is no suggestion that the application could have succeeded. Accordingly, as to increased costs, r 14.6(3)(b)(ii) is applicable (the taking of an unnecessary step or an argument which lacks merit) and as to indemnity costs r 14.6(4)(a) is relevant. As to that latter rule, the creditor says that the proceeding in the circumstances should be seen as vexatious, frivolous and unnecessary. I consider that the debtor has acted frivolously in the sense of futilely. The application was also an unnecessary application, so as to bring in within r14.6(4)(a).

[6] The creditor also urges me to consider the lack of merit of the intended cross claim. In support of her application the debtor provided evidence as to a proceeding commenced in the District Court. In that proceeding, a company of which the debtor is a shareholder and in which the debtor and creditor together have with others previously been involved, purported to sue the creditor and others in debt for a sum of $59,000.00. Ms Olsen for the creditor briefly summarised the subsequent events concerning the District Court proceeding in this way:

> The debtor's proceeding in this Court was linked to a District Court proceeding scheduled for hearing on 13 May 2009. The debtor also withdrew her proceeding just prior to that fixture. The debtor's application to set aside the bankruptcy notice was based on the District Court action and could not succeed.

[7] Mr Bellamy for the debtor has not taken issue with that summary. I add that even had the company involved in the District Court proceeding carried on to hearing and succeeded, the judgment would have been for the company and not for any individual.

[8] In this regard, I find that the concept of the application was not only unnecessary or unmeritorious in a jurisdictional sense (the time period for application having elapsed) but it was also unmeritorious in its substance.

Application of law

[9] Decisions relating to the application of the rules as to costs will always turn on particular facts. In this case, however, I draw some assistance from the decision of Harrison J in *Christieson v CIR* (2008) 23 NZTC 21, 851. In that case the hearing (an application for judicial review of a decision of the Commissioner of Inland Revenue) had commenced for some 30 minutes when counsel for the plaintiff abandoned the proceeding. The Court found the truly exceptional circumstances of the case justified an indemnity award, noting that the plaintiff either acted improperly or unnecessarily in issuing the proceeding. An apparent gross lack of care exercised before filing the statement of claim was also seen as fitting within the frivolous category.

[10] As Harrison J did in *Christieson v CIR* above, I view the case before me as in an exceptional category. The application filed in this Court was wholly misconceived having regard to the statutory time limit for such an application. It was also wholly misconceived having regard to the different ownership of the alleged cause of action in the District Court proceeding. Finally, both the High Court application and District Court proceeding, and the way in which they were eventually abandoned without argument, indicate strongly a lack of care in analysis of the substance before either proceeding was issued.

[11] The scale recoveries under the High Court Rules, designed to achieve a contribution to the successful party's costs, proceed upon an assumption that litigation has been properly conducted. The improper initiation or conduct of litigation is an aspect of the Court's jurisdiction to consider ordering both increased costs and indemnity costs.

The costs in this case

[12] Ms Olsen has calculated the scale costs (2B) in this case as $1,760.00 being 0.6 days for preparing a notice of opposition and 0.5 days for preparation for the hearing. To this I would have added as a appropriate:

(a) The appearance at the first mentions hearing;

(b) the appearance for the hearing on 27 May 2009 (the debtor having only the previous day advised that the fixture would not proceed and counsel attending before the Court on the date of the hearing; and

(c) The filing of submissions in relation to costs (as directed by the Associate Judge on 27 May 2009). The allowances I would make for those would be:

(i) Appearance at mentions hearing 28 January 2009 – 0.2 day.

(ii) Appearance at hearing of defended interlocutory application (measured in a quarter day) – 0.25 day

(iii) Filing memorandum as to costs – 0.4 day

[13] Combined with Ms Olsen's calculation of 1.1 days, those attendances increase the Schedule 3 time allocations to 1.95 days. Applying category 2 to that figure ($1,600 x 1.95) the scale 2B would render $3,120.00.

[14] To the date of filing her memorandum on 4 June 2009 Ms Olsen recorded that actual costs incurred by the creditor (including barrister's fees) amounted to $5,906.25.

[15] I have come very close in this case to deciding to award indemnity costs as I do not view the actual costs charged by the creditor's legal advisers in this case as unreasonable. However, I consider I should have some regard to the fact that the

debtor's proceeding in this case was so hopelessly misconceived (as reflected in the briefness of the creditor's affidavit in opposition) that the creditor's case could be kept quite simple. This brings into account the principles set out in r 14.2 and particularly 14.2(b). In my judgment the just outcome is that the creditor should have costs calculated to fall half-way between its scale costs as I have assessed them ($3,120.00) and its actual costs ($5,906.00).

[16] In the circumstances, I order that the debtor pay the creditor's costs in the sum of $4,500.00.

Solicitors
Smythes Lawyers, Nelson for Creditor
Duncan Cotterill, Nelson for Debtor