IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-000579

UNDER	Part 5 of the Insolvency Act 2006
IN THE MATTER OF	a proposal made by Gregory Martin Olliver
BETWEEN	THE NEW ZEALAND GUARDIAN TRUST Creditor
AND	ST LAURENCE LENDING LIMITED Creditor
	COMMONWEALTH BANK OF AUSTRALIA Creditor
	SOUTH CANTERBURY FINANCE Creditor

…………………/ continued

(On the papers)

Counsel: MD Arthur for trustee
DG Dewar for opposing creditors

Judgment: 18 December 2009 at 4:00 pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on costs]

Solicitors: Chapman Tripp, PO Box 2206, Auckland for trustee
Thomas Dewar Sziranyi Letts, PO Box 31 240, Lower Hutt for opposing creditors

TICKETY BOO INVESTMENTS LIMITED
Creditor

SECURED LENDING LIMITED
Creditor

BLACKIE TRUST LIMITED
Creditor

HADLOW TRUST
Creditor

SPEKE DESIGN LIMITED
Creditor

TJ FINANCE LIMITED
Creditor

HENRY GILES & COMPANY LIMITED
Creditor

STRATEGIC FINANCE LIMITED
Creditor

WESTPAC NEW ZEALAND LIMITED
Creditor

AUGUSTE HOLDINGS LIMITED
Creditor

NZ FINANCE LIMITED
Creditor

WIZARD LIMITED
Creditor

PUBLIC TRUST LIMITED
Creditor

[1] In a reserved judgment delivered on 13 May 2009 I made an order approving the proposal of Gregory Martin Olliver as amended by the meeting of his creditors on 5 March 2009. I reserved costs and encouraged counsel to agree, failing which I ordered that memoranda were to be filed in support, opposition and reply at seven-day intervals.

[2] Memoranda have been filed.

[3] The provisional trustee seeks an order for costs in the sum of $5,240. That is calculated taking into account Category 2 Band B for an interlocutory application. The precise calculation, by reference to Schedule 3 of the High Court Rules, is as follows:

Item	**Step**	**Days**	**Amount $**
4.12	Preparing and filing interlocutory application (excluding summary judgment application) and supporting affidavits	0.6	960.00
4.11	Appearance at case management conference	0.3	480.00
4.14	Preparation of hearing of defended interlocutory application (excluding summary judgment application)	1.0	1,600.00
4.15	Appearance at hearing of defended interlocutory application (excluding summary judgment application) for sole or principal counsel	1.0	1,600.00
12	Filing fee	n/a	600.00

Total	$5240.00

[4] The creditors who opposed the proposal advance, in counsel's memorandum, the following matters in opposition:

a) One has not been paid its costs that were awarded against the judgment debtor;

b) The application for approval of the proposal was made after the opposing creditor had filed and served an application for the adjudication of the judgment debtor. Indeed, the first notification the judgment debtor had of an intended proposal was on the morning of the call of the creditor's bankruptcy proceeding against the judgment debtor;

c) The trustee did not comply with the time limits prescribed in s 330 and following of the Insolvency Act 2006; and

d) The proposal made provision for costs. That provision must have anticipated opposition to the proposal

[5] The matters which I have recorded in [4]a) and [4]b) can be answered shortly. The unpaid costs will be subject to adjustment of creditors' claims pursuant to paragraph 5 of the proposal. I therefore do not regard them as being matters which justify an alteration to quantum of costs in the proposal application proceedings themselves.

[6] The matters, however, which are raised in [4]c) and [4]d) do relate specifically to the proposal application.

[7] For reasons which are set out in my judgment, the debtor and the provisional trustee, for that matter, did not comply with the time limits prescribed for proposals set out in the Insolvency Act 2006. I expressed the view that there was no reasonable excuse for the delay. However, I concluded that the delay was not a bar

to declining approval of the proposal. Having said that, it is my view that there should be some discount for the approach adopted by the debtor and the provisional trustee in the handling of the application for approval of the proposal. That is because the delay placed a greater burden on the creditor opposing. It had little time to analyse the various transactions involving the debtor. I need not repeat the matters in this judgment. Suffice to say, I began my analysis of those matters, which the creditor had to consider, at [32] of my judgment and in the following paragraphs.

[8] I next consider the provision made in the proposal for payment by the debtor of a separate sum for costs. I called for further submissions on this question and have received a memorandum from counsel for the Trustee and from counsel for the opposing creditors.

[9] Under the proposal, paragraph 15, the debtor is to pay $20,000 plus GST for the trustee's fees in connection with the preparation and approval of the proposal. The balance of the fees and disbursements of the trustees, in respect of preparation of the proposal, the holding of the creditors meeting etc, are to be met from the funds referred to in paragraph 2 of the proposal. The effect of this is that if the costs of the trustee for preparation and approval of the proposal do not exceed $20,000, the only benefiter is the debtor. The Trustee's counsel advises that the Trustee has incurred legal costs of $40,280.14. The Trustee's counsel confirms that the provision for costs to be paid by the judgment debtor pursuant to paragraph 15 of the proposal of $20,000 has been paid. If the Trustee's excess costs are to be paid, they must be met from the payments made pursuant to paragraph 2(a) of the proposal. Any cost order I make will therefore have no benefit for the judgment debtor. I do make it plain, however, that I am now specifically ruling on the reasonableness of the costs charged to the Trustee. Having said that, I am satisfied that they exceed $20,000 and that is why I have concluded that there can be no benefit to the judgment debtor by my making an order for costs on the proposal proceeding.

Principles applicable in awarding costs

[10] Rule 14.1 gives the Court a discretion to order costs in relation to a step taken in a proceeding. That discretion is generally to be exercised in accordance with the

specific Rules contained in rr 14.2-14.10: *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 [19]. In *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 at 668 the Court of Appeal said of the costs regime contained in what is now rr 14.2-14.10 that:

> there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary

The test to be applied is entirely an objective and not a subjective one. The only reference which it is necessary to make towards actual costs is to be found in r 14.2(f), namely that an award of costs should not exceed the costs incurred by the party claiming the costs: *Glaister v Amalgamated Dairies Ltd* at 610 [14].

[11] Rule 14.2 lists the principles applying to determination of costs. Subrule (a) affirms the principle that the losing party should pay the costs to the successful party. Subrule (b) requires that the costs reflect the complexity and significance of the proceedings and refers specifically, therefore, to the categorisation of a proceeding which is provided for in r 14.3. Subrule (c) requires a consideration of each step for which costs are sought and an application of the daily rate having regard to the appropriate band which is to be applied after a consideration of r 14.5(2) and the Third Schedule to the High Court Rules.

[12] Rule 14.7 deals with the refusal of, or reduction in, costs. In this case, the problem is compliance with the statutory requirement to, as soon as practical after the proposal is filed to call a meeting by posting to every known creditor, at the creditor's last known address, the material which is prescribed in s 330 of the Insolvency Act 2006. I expressed the view that I was not satisfied with the reason given for not complying strictly with that provision. Nevertheless, I came to the conclusion that the default was not a bar to considering the application. It is a matter, in my view, however, which can be taken into account by way of reducing the cost order that would otherwise have been granted. I do so by analogy with the matters that are set out in r 14.7(f), but applying specifically r 14.7(g). This is a case not of failing to comply with the Rules or direction of the Court, but the statutory requirement. In *Packing In Ltd (in liq) v* Chilcott (2003) 16 PRNZ 869, the Court of Appeal at [5] gave guidance as to the approach that should be followed. In the

scheme of this case I consider that justice to both sides can best be achieved by my reducing the amount of costs that would otherwise have been awarded by 10%. I intend to proceed on that basis.

[13] In all other respects, the calculation advanced by counsel for the Trustee is appropriate.

[14] I do not overlook the fact that, in the long run, the order in relation to costs may well affect the recovery of creditors. That, in my view, is not the specific point. The creditor who opposed the proposal in this case was placed at a disadvantage because of the trustee's non-compliance with the statutory requirement to post the proposal to every known creditor as soon as practicable.

[15] For the above reasons I order that the opposing creditor pay the trustee's costs and disbursements, which I fix, after making a deduction of 10% , in the sum of $4,716.00 together with disbursements as fixed by the Registrar.

JA Faire
Associate Judge