IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2007-419-1691

	BETWEEN	DAVID MURRAY BLANCHETT & ANOR AS LIQUIDATORS OF GENTRY RESIDENTIAL LIMITED (IN LIQUIDATION) Applicant
	AND	THE ROOFING SPECIALISTS LIMITED Respondent

Hearing: 12 February 2009

Appearances: M D Branch and S J Rawcliffe for Applicant
K A van Houtte for respondent

Judgment: 5 May 2009

JUDGMENT OF ALLAN J

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[1] In this application, the liquidators of Gentry Residential Ltd (in liquidation) (Gentry), apply pursuant to ss 292 and 294 of the Companies Act 1993 for an order setting aside certain transactions between Gentry and the respondent.

Background

[2] It appears that Gentry and the respondent had maintained a business relationship for some years. Gentry was a residential construction company. The respondent, as its name implies, installs roofs. For present purposes the narrative commences in about March 2005 when Gentry engaged the respondent to carry out roofing work on five different residences in the Waikato region. That work was undertaken by the respondent between March 2005, and April 2006. Payments by Gentry were typically slow. By May 2006 Gentry was indebted to the respondent in the sum of $51,845.08.

[3] The Managing Director of the respondent, Mr Thomas, and his office manager, Mr Lowry, visited Gentry's office on 10 May 2006 in order to discuss the outstanding debt. They had intended to see Mr Gentry himself, but he was not available. Instead they dealt with Gentry's office manager. The outcome of that discussion was not satisfactory to the respondent. Later that day the respondent referred the matter to its debt collectors who took immediate action. A payment of $10,000 was received from Gentry on 11 May 2006, the day following the meeting, and a further payment of $41,845.08 was made on 19 May 2006.

[4] That satisfied the whole of the amount due. However, the respondent's terms of trade with Gentry required the latter to indemnify the respondent for all costs incurred in recovering payment, and to pay default interest. The amount concerned was $14,124.20. That sum was demanded in a letter sent to Gentry by the debt collectors on 22 May 2006. Subsequently the respondent agreed to accept part payment of this sum in satisfaction of Gentry's liability for costs and interest, but Gentry failed to adhere to the arrangement.

[5] The respondent brought a claim in the Disputes Tribunal for $7,500, being the limit of the Tribunal's jurisdiction. On 10 August 2006 the Disputes Tribunal made an order directing Gentry to pay that sum to the respondent. Payment was made on 25 August 2006.

[6] Gentry was placed in liquidation by virtue of a shareholders' resolution passed on 23 February 2007. The applicants were appointed to be liquidators of the company. On 23 November 2007 the liquidators filed and served a notice to set aside the payments totalling $59,345.08. The respondent subsequently filed and served a notice of objection. The present application was filed by the applicants on 25 June 2008.

Jurisdiction

[7] With effect from 1 November 2007, significant amendments to the relevant statutory provisions were enacted by the Companies Amendment Act 2006. The former s 292 was amended by s 27 of the Amendment Act. S 27(5) provides that nothing in the new section makes voidable a transaction that was completed before the section came into force, if that transaction would not have been voidable if the section had not come into force.

[8] In *TRC Consultants Ltd v Higgs* HC AK CIV 2005-425-290 21 December 2007, Robinson AJ held in a case where all of the relevant events occurred prior to 1 November 2007, that ss 292 and 296 in their earlier form remained applicable. Counsel are agreed that that is also the position in this proceeding, and I proceed on that basis.

[9] Section 294 has also been significantly amended. Previously, a creditor wishing to uphold a transaction impugned as voidable was required to make an application to the Court for an order that the transaction or charge not be set aside. Under the new s 294 it is for the liquidator to make an application for an order setting aside the transaction or charge concerned.

[10] Counsel agree that the newly enacted procedural provisions apply to this case. There is however, a threshold question as to the adequacy of the respondent's notice of objection under the new s 294.

Respondent's notice of objection

[11] Section 294 prescribes an elaborate procedure for the giving of notice by the liquidator, and for notices of objection by a creditor. Section 294 provides:

> **294 Procedure for setting aside transactions and charges**
>
> (1) A liquidator who wishes to set aside a transaction or charge that is voidable under section 292 or 293 must—
>
> (a) file a notice with the Court that meets the requirements set out in subsection (2); and
>
> (b) serve the notice as soon as practicable on—
>
> (i) the other party to the transaction or the charge holder, as the case may be; and
>
> (ii) any other party from whom the liquidator intends to recover.
>
> (2) The liquidator's notice must—
>
> (a) be in writing; and
>
> (b) state the liquidator's postal, email, and street addresses; and
>
> (c) specify the transaction or charge to be set aside; and
>
> (d) describe the property or state the amount that the liquidator wishes to recover; and
>
> (e) state that the person named in the notice may object to the transaction or charge being set aside by sending to the liquidator a written notice of objection that is received by the liquidator at his or her postal, email, or street address within 20 working days after the liquidator's notice has been served on that person; and
>
> (f) state that the written notice of objection must contain full particulars of the reasons for objecting and must identify any documents that evidence or substantiate the reasons for objecting; and

> (g) state that the transaction or charge will be set aside as against the person named in the notice if that person does not object; and
>
> (h) state that if the person named in the notice does object, the liquidator may apply to the Court for the transaction or charge to be set aside.
>
> (3) The transaction or charge is automatically set aside as against the person on whom the liquidator has served the liquidator's notice, if that person has not objected by sending to the liquidator a written notice of objection that is received by the liquidator at his or her postal, email, or street address within 20 working days after the liquidator's notice has been served on that person.
>
> (4) The notice of objection must contain full particulars of the reasons for objecting and must identify documents that evidence or substantiate the reasons for objecting.
>
> (5) A transaction or charge that is not automatically set aside may still be set aside by the Court on the liquidator's application.

[12] Section 294(4) stipulates that the creditor's notice of objection "must contain full particulars of the reasons for objecting and must identify documents that evidence or substantiate the reasons for objecting".

[13] The manifest purpose of s 294(4) is to ensure that liquidators are fully informed as to both the substance and detail of a creditor's objection before determining whether or not to pursue a challenge to the transaction under s 292, or to the charge under s 293. It might be thought that the requirements of s 294(4) will also tend to sift out frivolous objections that have no proper factual or legal foundation.

[14] In the present case, the respondent's notice of objection reads as follows:

> TAKE NOTICE THAT;
>
> 1. The Roofing Specialists Limited, the recipient of a notice issued by the liquidators dated 23 November 2007 to set aside certain voidable transactions specified in the notice, hereby give notice of its written objection.
>
> 2. The recipient does not challenge the liquidators' contention that the transactions set out in clause 1 of their notice occurred within the specified period.
>
> 3. However, the recipient challenges the liquidators' contention that:

a. The transactions were made at a time when Gentry Residential Limited (in liquidation) was unable to pay its due debts.

b. Receiving the payments enabled the recipient to receive more to its satisfaction of the debt owed to it than what it would otherwise have received or be likely to have received in the liquidation.

[15] Mr Branch accepts that the notice was sufficient to serve as a foundation for arguments that:

a) at the time of the transactions, Gentry was solvent;

b) the effect of the payments was not to confer a preference on the respondent.

[16] However, neither of these grounds has been pursued on behalf of the respondent. Rather, Ms Van Houtte argues that the payments concerned were made and received in the ordinary course of Gentry's business and, in the alternative, that the provisions of s 296(3) apply.

[17] Mr Branch accepts that a creditor is entitled to invoke s 296, which is declaratory in character, without expressly referring to the section in the notice of objection, but he contends the respondent cannot now advance an argument that the payments were made and received in the ordinary course of Gentry's business, because that was not a ground set out in the notice of objection.

[18] Ms Van Houtte, while accepting that the notice of objection is defective in that respect, submits that the provisions of r 1.9 are wide enough to permit the Court to grant the respondent leave to amend the notice of objection.

[19] Rule 1.9 provides:

1.9 Amendment of defects and errors

(1) The court may, before, at, or after the trial of any proceeding, amend any defects and errors in the pleadings or procedure in the proceeding, whether or not there is anything in writing to amend, and whether or not the defect or error is that of the party (if any) applying to amend.

> (2) The court may, at any stage of a proceeding, make, either on its own initiative or on the application of a party to the proceedings, any amendments to any pleading or the procedure in the proceeding that are necessary for determining the real controversy between the parties.
>
> (3) All amendments under subclause (1) or (2) may be made with or without costs and on any terms the court thinks just.
>
> (4) This rule is subject to rule 7.18 (no steps after the setting down date without leave).

[20] Where the Court possesses a power to permit amendments, the power ought to be exercised in order to permit the real controversy to be litigated, unless an applicant for the exercise of the Court's discretion was acting in bad faith, prejudice arises that cannot be remedied in costs, or the amendment would cause significant delay. Overall, the test is whether it is in the interests of justice to permit the amendment: *Wright Stephenson & Co Ltd v Copland* [1964] NZLR 673 and *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383.

[21] But the power to permit amendment is subject to the existence of other legislative constraints. In *Richelieu Investments Ltd v McCullagh* (2004 9 NZCLC 263,526 Master Faire (as he then was) declined leave where a liquidator's notice had failed to specify the real matter in dispute between the parties. That was because the notice was not a proceeding in terms of the definition of "proceeding" in the former r 3 because it was not an application to the Court for the exercise of the civil jurisdiction of the Court, other than by way of an interlocutory application.

[22] Ms Van Houtte argues that *Richelieu Investments* is distinguishable, in that the defect there was so significant it was not possible to determine the real controversy by reference to the notice. She argues also that although the notice of objection in the present case is not a pleading, it nevertheless was filed in Court and marked with the Registry number: *Bond Cargo Ltd v Chilcott* (1999) 13 PRNZ 629. She argues further that the notice of objection is part of the proceeding and that the form of the notice of objection falls within the description "procedure" in r 1.9(1). She contends that, if the Court considers the notice of objection to be defective to the extent that the respondent is disentitled from advancing an argument based on Gentry's ordinary course of business, there will be considerable prejudice to the respondent. On the other hand, she says there would be no prejudice to the

applicants because they have been aware of the true grounds of opposition for many months.

[23] Mr Branch points out that the applicants did not deal with the ordinary course of business argument in their affidavits, because at the outset of the proceeding they were not on notice of the respondent's intended reliance on that ground. He says that if the present respondent is permitted to argue the point without specifying it in the notice of objection, then there will be no sanction whatever for non-compliance by a creditor with s 294(4).

[24] Non-compliance with express statutory procedural requirements can give rise to difficult problems, but as was observed in *Carr v New Zealand Refrigerating Co Ltd* [1976] 2 NZLR 135 at 147, the fundamental question will be what Parliament intended the result of the non-compliance to be. That was a case involving a take-over scheme, alleged to have been implemented in breach of the provisions of the Companies Amendment Act 1963. There Casey J held that, having regard to the detail and complexity of the prescribed contents of an offer and accompanying statement, it was impossible to conclude that every non-compliance, no matter how trivial, avoided all subsequent proceedings in the take-over scheme.

[25] In my view a similar approach is mandated here. The interests of justice mandate an approach that permits, in a proper case, a creditor to advance an argument not set out in its notice of objection. It may be that in a given case a liquidator is prejudiced by a late argument to such an extent that the creditor ought not to be permitted to advance the argument at all, but that is not the case here. The respondent filed a very detailed notice of opposition to the applicant's originating application, which plainly set out the respondent's intention to argue the ordinary course of business point.

[26] There has been sufficient compliance with s 294(4) to justify the grant of leave to the respondent to advance the proposed argument. This case is to be distinguished from *Richelieu Investments* as there, the creditor's application was a direct response to the form and contents of the notice served by the liquidator which was the very foundation for the proceeding. Here it is the creditor's response which

is in issue, not the liquidator's notice. Moreover, in *Richelieu Investments* there was a fundamental omission in the liquidator's notice which meant that the real issue between the parties could not be wholly resolved in the proceeding as then constituted. Additionally, the refusal of leave gave rise to no prejudice save for some self-induced cost and delay on the part of the liquidator. It was open to the liquidator to withdraw the notice and issue a fresh one.

[27] Those considerations do not apply here. I am satisfied that the respondent ought to be permitted to pursue its ordinary course of business argument, despite the omission of any reference to the point in its notice of objection.

Ordinary course of business

[28] Section 292 in its earlier form provided:

> **292. Transactions having preferential effect 26 April 1999 to 31 October 2007**
>
> (1) In this section, transaction, in relation to a company, means—
>
> (a) A conveyance or transfer of property by the company:
>
> (b) The giving of a security or charge over the property of the company:
>
> (c) The incurring of an obligation by the company:
>
> (d) The acceptance by the company of execution under a judicial proceeding:
>
> (e) The payment of money by the company, including the payment of money under a judgment or order of a court.
>
> (2) A transaction by a company is voidable on the application of the liquidator if the transaction—
>
> (a) Was made—
>
> (i) At a time when the company was unable to pay its due debts; and
>
> (ii) Within the specified period; and
>
> (b) Enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation—

unless the transaction took place in the ordinary course of business.

(3) Unless the contrary is proved, for the purposes of subsection (2) of this section, a transaction that took place within the restricted period is presumed to have been made—

(a) At a time when the company was unable to pay its debts; and

(b) Otherwise than in the ordinary course of business.

(4) For the purposes of this section, in determining whether a transaction took place in the ordinary course of business, no account is to be taken of any intent or purpose on the part of a company—

(a) To enable another person to receive more towards satisfaction of a debt than the person would otherwise receive or be likely to receive in the liquidation; or

(b) To reduce or cancel the liability, whether in whole or in part, of another person in respect of a debt incurred by the company; or

(c) To contribute towards the satisfaction of the liability, whether in whole or in part, of another person in respect of a debt incurred by the company—

unless that other person knew that that was the intent or purpose of the company.

(5) For the purposes of subsection (2)(a)(ii) of this section, specified period means—

(a) The period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and]

(b) In the case of a company that was put into liquidation by the Court, the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which[, and at the time at which,] the order was made; and

(c) If—

(i) An application was made to the Court to put a company into liquidation; and

(ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

> the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.
>
> (6) For the purposes of subsection (3) of this section, restricted period means—
>
> (a) The period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and
>
> (b) In the case of a company that was put into liquidation by the Court, the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which, and at the time at which, the order of the Court was made; and
>
> (c) If—
>
> (i) An application was made to the Court to put a company into liquidation; and
>
> (ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—
>
> the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

[29] A transaction that took place in the ordinary course of business is not caught by s 292. It is therefore necessary to consider whether, as Ms Van Houtte argues, the three payments made by Gentry to the respondent were made in the ordinary course of business. The concept, while easily stated, is often difficult to apply in practice.

[30] In *Waikato Freight and Storage (1988) Ltd v Meltzer* [2001] 2 NZLR 541, the Court of Appeal said at [31]:

> [31] In our view the judicial approach has become over-complicated and over-refined. The question is whether, at the time it was made, the relevant transaction was made in the ordinary course of business. That is a question of objective fact. General business practices are relevant to that question, as are any particular customs or practices within the field of commerce concerned. So too is the previous commercial relationship between the parties. The observer spoken of in the Privy Council is in reality the Court

> which must look at the circumstances, as objectively apparent at the time of the transaction. The ultimate question is whether on the evidence before the Court the transaction or payment can be said to have been made in the ordinary course of business. Was it in its objective commercial setting an ordinary or an out of the ordinary transaction for the parties to have entered into?

[31] Later, in *Carter Holt Harvey Ltd v Fatupaito* [2003] 9 NZCLC 263,285, the following appears:

> [21] What the creditor has to show in order to prevent the payment being set aside is that an objective observer would have seen nothing abnormal about the transaction in the commercial context as it existed for the company at the time when the payment occurred: *Waikato Freight and Storage (1988) Ltd v Meltzer* [2001] 2 NZLR 541 at paras [19] and [22]. Where the impugned payment was made as part of an ongoing business relationship, rather than being a one-off event, the hypothetical observer – who is in reality the Judge – should primarily have regard to the prior course of conduct of the company towards the recipient creditor and towards its creditors generally. The normality or abnormality of the payment, in the particular circumstances in which it occurred, also falls to be examined against the practices of solvent companies engaged in similar businesses, but it would not necessarily follow that because other such companies sometimes make payments of the same character, that in itself means that the subject payment can be considered ordinary in the course of the subject company's business at the time at which it was made. It is to be stressed that the comparison is with the behaviour of solvent companies. As the Privy Council said in *Countrywide Banking Corporation v Dean* [1998] 1 NZLR 385 at 394, while there is to be reference to business practices in the commercial world in general, the focus must still be the ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties.
>
> [22] The business context of course includes the particular contractual context. It is therefore necessary to take account of the circumstances in which the company became obliged to make the payment. It is necessary to ask why the payment was made when it was: can it be described simply as a routine payment which, though made late, was in fulfilment of the company's contractual obligation rather than a response to its current situation of insolvency? This question is to be answered without regard to any subjective intention or purpose of the company to prefer the creditor unless that intention or purpose was known to the creditor: s292(4). We have already recorded that it is common ground that Carters was unaware of the debtor company's insolvency and of any intention that it be preferred.

[32] In this case there was a shifting onus of proof. The last payment of $7,500 occurred during the restricted period of six months referred to in s 292(3) and (6)(a). so the respondent bears the onus of proving that this payment was made in the ordinary course of business. But the first two payments were made prior to the

commencement of the restricted period, and so the applicants bear the burden of proof.

[33] Central to a determination of this issue is a consideration of the events of 10 May 2006 when Mr Thomas and Mr Lowry visited Gentry's office premises. Mr Gentry was not there but his office manager was. It seems that the meeting did not go well. The inference from the evidence is that the office manager resented what she regarded as undue pressure on the part of the respondent. For their part Messrs Thomas and Lowry thought they were being treated discourteously. They each swore affidavits and were cross-examined by Mr Branch. Their evidence is consistent.

[34] Mr Gentry had been overseas and had just returned to New Zealand, but staff at the Gentry office were unable to contact him. Mr Thomas and Mr Lowry were told that Gentry staff were concerned that they might not be paid. Mr Gentry was the only authorised signatory for the accounts, and invoicing had not been conducted for the previous billing monthly period. As a result, Messrs Thomas and Lowry were told there was little income to pay creditors and cover overhead costs for that month.

[35] Mr Thomas and Mr Lowry say that Gentry's payment record in the past was unsatisfactory, in that payments were always late. They both said that Gentry was known for its disorganised management style. Each of them says further that he did not believe that Gentry was unable to pay its debts; during 2006 Gentry was continuing to carry on its business, and in particular, it was starting new jobs in a manner that suggested a business in satisfactory financial circumstances.

[36] Yet, on the very day of the meeting with Gentry management, the respondent instructed debt collecting specialists to recover the whole of the sum of $51,845.08, even though an amount of $15,460.88 was not then due for payment, having been invoiced only on 24 April 2006. The debt collectors took immediate action. That produced a rounded payment of $10,000 the next day. A further payment of $41,845.08 was received on 19 May 2006.

[37] A number of features point to the conclusion that these two payments were not made in the ordinary course of Gentry's business. First there is the significant pressure applied by the respondent in that it instructed debt recovery agents on the very same day as the meeting with Gentry's manager. In my view it is inconsistent for the respondent's officers to say on the one hand that they had no cause to believe that Gentry was in financial difficulties, and on the other, that they considered it necessary to instruct debt recovery agents forthwith. The fact that the payments were made as a result of significant pressure deprives the payments of their ordinary business character: *Chatfield v Mercury Energy Ltd* (1998) 8 NZCLC 261,645. Further, payment of a rounded sum of $10,000 in reduction of the amount owing, rather than payment of the whole sum, suggests a departure from the ordinary practice of the parties: *Watchorn Transport Ltd v Blanchett* HC HAM CIV 2004-419-165 23 November 2004. Moreover, the respondent sought through its debt collecting agents payment of a sum of approximately $15,000 that was not then due. That strongly suggests that Messrs Thomas and Lowry were aware of Gentry's financial difficulties: *Steel & Tube Holdings Ltd v Design (2000) Homes Ltd (in liq)* HC DUN M116/95 7 April 1998, and *Mainland Medical Supplies (Waikato) v Cann & McLean* HC HAM M112/96 7 July 1998. Mr Thomas also gave evidence of having been told by Mr Gentry that he was selling part of the business, a step that might be indicative of financial distress.

[38] Mr Thomas said in evidence that he was not unduly concerned about Gentry's financial position, given that company's habitual slowness, and indeed the pattern of late payments in the construction industry. But the actions of the respondent in instructing debt recovery agents speak for themselves.

[39] I am satisfied that the first two payments were not made in the ordinary course of business. The position in respect of the third payment of $7,500 is even clearer. Here the onus lies upon the respondent. The payment was made pursuant to a decision of the Disputes Tribunal and represents costs and interest arising out of Gentry's failure to pay the earlier debts. Given my finding in respect of those debts, a conclusion that the payment of $7,500 was not in the ordinary course of business is inevitable.

Section 296

[40] Ms Van Houtte submits that, even if the Court should rule the disputed payments to constitute voidable transactions for the purposes of s 292, nevertheless the respondent is entitled to relief under s 296. That section provides:

> **296 Additional provisions relating to setting aside transactions and charges**
>
> **(**1) The setting aside of a transaction or an order made under section 295 of this Act does not affect the title or interest of a person in property which that person has acquired—
>
> (a) From a person other than the company; and
>
> (b) For valuable consideration; and
>
> (c) Without knowledge of the circumstances under which the property was acquired from the company.
>
> (2) The setting aside of a charge or an order made under section 295 of this Act does not affect the title or interest of a person in property which that person has acquired—
>
> (a) As the result of the exercise of a power of sale by the grantee of the charge; and
>
> (b) For valuable consideration; and
>
> (c) Without knowledge of the circumstances relating to the giving of the charge.
>
> (3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (A) proves that when A received the property—
>
> (a) A acted in good faith; and
>
> (b) a reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
>
> (c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.
>
> (4) Nothing in the Land Transfer Act 1952 restricts the operation of this section or sections 292 to 295 of this Act.

[41] Ms Van Houtte submits that the respondent falls within s 296(3) and that the Court ought not therefore to order recovery by the applicants of the sums earlier paid to it. I reject that submission. The requirements of s 296(3) are cumulative. The respondent does not fall within s 296(3)(c). It gave no value for the property. Nor has it altered its position in the reasonably held belief that the payments were valid and would not be set aside.

[42] The respondent argues that in reliance upon assurances that it would be paid in due course, it continued to perform roofing work for Gentry. But s 296(3)(c) requires the alteration in position to have occurred after the payments were received. In order to qualify for consideration under s 296(3)(c) the respondent would need to show that it had taken or omitted some step, after receipt of the payments. There is no such evidence. Accordingly, s 296 does not apply.

Result

[43] There will be orders directing the respondent to pay to the applicants:

a) The sum of $10,000 paid by Gentry to the respondent on 11 May 2006;

b) The sum of $41,845.08 paid by Gentry to the respondent on 19 May 2006;

c) The sum of $7,500 paid by Gentry to the respondent on 25 August 2006.

[44] The applicants are also entitled to interest at the rate of 7.5% per annum on each of these sums for the period between the dates of the respective payments to the respondent and the date of this judgment.

[45] The applicants are entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J