

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

**CIV-2013-404-004100
[2015] NZHC 637**

BETWEEN AUCKLAND TRANSPORT
 Plaintiff

AND PETER RICHARD PRESCOTT
 Defendant

Hearing: 11 February 2015

Appearances: G Nicholson and E Escott for the Judgment Creditor in support
 Judgment Debtor appears in Person

Judgment: 1 April 2015

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 1 April 2015 at 11.00 a.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors / Counsel:

Auckland Council
Kensington Swan, Auckland

P R Prescott, Auckland

[1] Several matters in this bankruptcy proceeding came before me for hearing on 11 February 2015, including:

- (a) A dispute as to costs - whether Mr Hughes, counsel then acting for the judgment creditor, Auckland Transport, and the judgment debtor, Mr Prescott, settled all costs issues in this proceeding in a discussion that took place between them on 16 July 2014 (as Mr Prescott contends).
- (b) Auckland Transport's application for an order for 2B costs in the proceeding (made in anticipation of a possible finding by the Court that there was no such settlement); and
- (c) A related request for directions for the purpose of keeping alive the proceeding until Mr Prescott pays such costs.

[2] I heard oral evidence from Mr Hughes and Mr Prescott. Both were cross-examined extensively. For reasons I will come to presently I am not satisfied, on the evidence, that there was a settlement. I am satisfied that Auckland Transport should have compensation in this proceeding by way of a costs order. However, I am not satisfied that it should have costs for all steps that it claims for, or in the overall amount that it seeks. Additionally I do not consider that it would necessary or just to make directions of the kind that are sought – the purpose of which is to leave open the opportunity to amend the bankruptcy application against the possibility that any costs ordered are not paid on time.

[3] Before coming to my reasons it is necessary to briefly set out the relevant history. I also pause momentarily to record that, out of an abundance of caution, Mr Nicholson made formal request for leave to appear for Auckland Transport in place of Mr Hughes, which I granted. Mr Prescott advised he had no objections to Mr Nicholson's appearance. It was right of him to do so. No apparent conflict arises by reason of appearance as counsel in substitution for Mr Hughes who has had to cease his role as counsel in order to give evidence. Though Mr Nicholson's firm, Kensington Swan, has been the firm of solicitors on the record for Auckland

Transport throughout, this is not a case of two solicitors in the same firm fulfilling conflicting roles. Mr Hughes has taken up a position with another firm.

History

[4] On 8 May 2014 Auckland Transport filed an application for an order for Mr Prescott's adjudication, pursuant to an order for substitution of the original judgment creditor whose debt of \$4,776 Mr Prescott had paid by then. Auckland Transport's application was founded on a judgment debt of \$11,153.75 awarded against Mr Prescott in the District Court.

[5] The application came before the Court on 25 May 2014. Mr Prescott indicated his intention to oppose an order for his adjudication on the basis that he was not insolvent, and Associate Judge Christiansen directed the allocation a fixture for a defended hearing for 16 July 2014. Mr Prescott filed documents in opposition as directed.

[6] On 2 July counsel for Auckland Transport filed written submissions in support of the application also as Judge Christiansen had directed. That same day Mr Prescott paid the judgment debt of \$11,153.75. This payment cleared all debt that he then owed to Auckland Transport.

[7] On 10 July Mr Hughes filed a memorandum in which he advised that the substantive fixture allocated for a defended hearing on 16 July ought to be vacated in the light of Mr Prescott's recent payment but that Auckland Transport wished to be heard on costs. He indicated that Auckland Transport sought \$14,147.10, by way of indemnity costs. He also indicated that Auckland Transport intended to seek 2B costs in the alternative, should indemnity costs not be granted.

[8] The application came before Associate Judge Doogue on 16 July, and counsel for Auckland Transport made submissions on costs. He also made oral application for leave to amend the application for adjudication so as to enable Auckland Transport to rely upon another debt.

[9] Associate Judge Doogue delivered an oral judgment on 16 July. Noting that the proceeding had reached the point where the judgment debtor had paid the original debt upon which the application was founded, His Honour gave Auckland Transport leave to amend (as sought) and adjourned the proceeding. In doing so he observed:

[19] I mentioned earlier in this judgment that it would not be possible to bring this matter to a final resolution today ... I believe that Mr Prescott needs to be given a brief time to reflect upon the position that has now been reached and to make arrangements to pay the amount owing under the amended creditor's application. For that reason the proceeding is adjourned to the bankruptcy list at 10 a.m. on 21 August 2014.

[10] There was in fact no other debt owing by Mr Prescott to Auckland Transport at that point in time. However, Auckland Transport anticipated an order for costs in a related judicial review proceeding that Mr Prescott had brought, unsuccessfully, against it and it believed it should not have to abandon the opportunity to bankrupt Mr Prescott until the costs were ordered and unless he paid them.

[11] For reasons that were not explained to me it seems that His Honour was given to understand that the costs order in the judicial review proceeding had in fact been made when it had not. Relevantly, he notes:

... because of continuing litigation between the parties, further expenses have been incurred by Mr Prescott which the judgment creditor now wishes to add into the creditor's application by way of amendment. **Specifically, the judgment creditor seeks to amend the amount claimed to \$2,540, which represents the amount of a costs order made by Cooper J in judicial review proceedings** ... connected with the original circumstances which brought the judgment creditor and the judgment debtor before the Court in the first place.¹

[Emphasis added].

[12] His Honour also dealt with costs but not determinatively. Instead he considered it would assist the parties if he provided guidance on the issue of costs. He said:

... I can deal with the issue of costs and **give a judgment which in principle will provide guidance** to the parties about the basis upon which costs are to be issued.

¹ An order for costs in the judicial review proceeding was made – that was on 4 November 2014 by Lang J

[Emphasis added].

[13] The guidance given was essentially twofold: that on balance Auckland Transport's application for indemnity costs was not justified, but scale costs on a 2B basis seemed unexceptional and appropriate.²

[18] ... Costs are necessarily connected with the way in which a party comports him or herself in the course of proceedings and whether that conduct results in time being wasted and features disregard of Court rules or a failure to obey Court orders. I would see the conduct alleged against Mr Prescott, while undesirable, as being at a step removed from such matters. It is a matter of degree in every case. There is no black or white answer on this issue. The Court has to exercise a discretion which in the end is a matter of inquiring whether the making of such an order would have positive implications for observance of proper Court processes. **In my view the balance comes down in Mr Prescott's favour and I do not intend to make an indemnity order. I see no reason however why he ought not to be ordered to pay costs on a 2B basis together with disbursements to be fixed by the Registrar.**

[Emphasis added].

[14] An adjournment was granted to 21 August and it was left open to the parties to take the opportunity to attempt to agree on costs. Failing agreement Auckland Transport was, as His Honour directed, to file an updated schedule of costs for consideration.³

[20] At the next hearing I will expect the judgment creditor to have an updated schedule of costs that are claimed in the proceeding. I will then decide whether or not the cost of any future appearance (if indeed there needs to be one at the next mention of this matter) should be added to the costs order that will need to be made.

[15] Immediately after the hearing, Mr Hughes and Mr Prescott endeavoured to agree on costs so as to bring all matters between the parties to a conclusion. They were of the same mind over the anticipated costs in the judicial review proceeding – Mr Prescott would pay \$2,450 as part of any costs settlement. But they disagree on the extent of any additional agreement. Mr Prescott says that they reached agreement on the overall amount of costs the he would have to pay: Mr Hughes says the contrary.

² Re Auckland Transport, ex parte Prescott [2014] NZHC 1674, at [18]

³ At 20.

[16] The result was that several adjournments followed, in relation to which each side filed successive memoranda. Materially, Mr Prescott reported to the Court and claimed that the parties had agreed settlement of all outstanding costs issues after the hearing on 16 July. He sought to have the proceeding stayed. Mr Hughes rejected the claim and opposed a stay. On 19 August 2014 he filed a memorandum seeking an adjournment of the call scheduled for 21 August.

[17] The grounds for the adjournment were twofold: the first was that there was no settlement as to costs, and the second was the candid acknowledgment that Auckland Transport was presently unable to amend its application for adjudication “to admit as a fresh debt” the costs order in the judicial review proceeding as costs were still under determination by Cooper J in that proceeding.

[18] The hearing scheduled for 21 August was vacated and a new call date was allocated for 6 November.

[19] On 19 September 2014 Mr Prescott paid \$7,528 to Kensington Swan, which he contends was consistent with the settlement agreed. The payment, as he saw it, would settle all costs issues in this proceeding and the order anticipated in the judicial review proceeding.

[20] The costs decision in the judicial review proceeding was issued on 3 November 2014 by Justice Lang. It was for \$2,450 as Auckland Transport anticipated.

[21] Mr Hughes filed another memorandum on 4 November for the next call, scheduled for 6 November 2014. The purpose of this memorandum was essentially to:

- (a) Reiterate Auckland Transport’s position that there has been no settlement as to costs:
- (b) Advise the Court of the costs order made by Lang J in the judicial review proceeding and remind it of the order made of 16 July giving

leave to amend the adjudication application to admit as a fresh debt the (then anticipated) costs order;

- (c) Indicate the intention to seek an order for 2B costs in this proceeding and advise that Mr Prescott's payment of \$7,528 for costs would leave an amount outstanding of \$4,975 assuming that a 2B costs award of \$9,353 plus disbursements of \$610 was to be made at the next mention; and
- (d) Indicate the intention to seek an adjournment "to keep the adjudication application alive until such an order is paid in full".

[22] On 6 November Judge Doogue directed that the fixture for 11 February 2015 be allocated for cross-examination on (and determination of) the disputed question of a costs settlement and for such further directions as might be needed to dispose of the proceeding. These matters have come before me following His Honour's direction that these matters need not necessarily be dealt with by him.

[23] I turn first then to the dispute about the existence of a costs settlement.

Did Mr Hughes and Mr Prescott settle all issues of costs in this adjudication proceeding?

[24] It is common ground that in the course of the discussion on 16 July Mr Prescott made known to Mr Hughes that he would pay \$2,540 for costs in the judicial review proceeding and they discussed allowable steps in the High Court scale relevant to this proceeding that could potentially attract 2B costs. Both of them accept that they were of the same view that in principle 2B costs were appropriate. They part company however over whether they actually settled on a sum. Mr Prescott says the discussion concluded with an agreement that he would pay \$7,528 to settle all costs in both proceedings. Mr Hughes says the discussion fell apart before any such consensus was reached. He says he walked away in frustration when Mr Prescott insisted on a written list of all steps being claimed for before he would commit to an overall sum. He acknowledges that he mentioned a sum that

might resolve the matter and that he probably gave the impression that the amount was less than the full amount of actual 2B costs, as he mistakenly omitted to claim for costs in connection with the hearing on 16 July, but he suggests that this is of no consequence as no agreement was reached.

[25] Having heard oral evidence from Mr Hughes and Mr Prescott and had the benefit of their cross-examination, I am not satisfied that there was an agreement as to costs. I find on the balance of probabilities that there was not. In so finding, it is unnecessary to prefer Mr Hughes' account about the exact details of the discussion over Mr Prescott's. This is because Mr Prescott's own account suggests there was no settlement.

[26] Materially Mr Prescott deposes that:

- (a) After going through a list of items, Mr Hughes put to him a precise sum that he claimed was payable for 2B costs and to settle costs, to which he assented by saying, "Yes, OK". Significantly, he volunteered the qualification that Mr Hughes may not have heard him say that.
- (b) He does not now recall exactly what the precise sum was. He says he knows it was around \$7,500 as he wrote it down but that he cannot elucidate further as he cannot read his own writing. He says he thinks the sum recorded is \$7,528, and hence he has paid this amount to Kensington Swan.

[27] As counsel for Auckland Transport submits, there is too much uncertainty in Mr Prescott's account to identify a concluded settlement. He leaves unclear an essential element of Auckland Transport's alleged offer to settle costs (the amount it would accept to settle costs) and whether his acceptance of such offer was even communicated to it. I cannot discount the possibility, which Mr Prescott himself acknowledges, that the acceptance of what he regarded as an offer was not communicated to Mr Hughes. His evidence on these matters is too equivocal to treat

as wholly reliable. Mr Prescott has the onus to demonstrate that there was a settlement. He has not discharged it.

[28] It falls to me then to deal with Auckland Transport's application for 2B costs for the steps it claims for in the proceeding.

Costs

[29] This proceeding has now reached the point where the full amount originally owed to Auckland Transport has been paid and proper provision has been made for payment of the debt that the amended adjudication application is based upon. Mr Prescott has indicated that he has no objection to the release of money held in Kensington Swan's trust account for that purpose, which will extinguish the remaining debt. Additionally, no other creditors have appeared to claim that Mr Prescott has unpaid debts owing to them.

[30] Putting aside momentarily the request for a further adjournment these factors are sufficient to disentitle Auckland Transport from proceeding with the adjudication application – in which case the appropriate course is for the amended adjudication application to be withdrawn or struck out. The following statement in Brookers citing *Curtis v CIR* is apposite:⁴

... if the full amount owed to the creditor by the debtor is paid after the expiration of the period in the bankruptcy notice and no further sums are owed to the debtor this would disentitle the creditor from proceeding with an application because its debt would have been satisfied.

[31] Given this position, and the fact that I do consider a further adjournment is warranted for reasons I will turn to presently, the only real remaining issue is Auckland Transport's claim for costs.

[32] There is no dispute that this proceeding is to be treated as a Category 2 proceeding for costs purposes. Auckland Transport claims costs on that basis as follows:

⁴ Billie Little Shade & Lisa Willis (eds) *Brookers Insolvency Law & Practice* (loose leaf ed Brookers), IN 13.01, citing *Curtis v Commissioner of Inland Revenue*, HC Wellington B244/97, 12 November 1997; see also *Gitmans v Alexander* HC Auckland B105-IM03, 10 September 2003.

- (a) \$9,353 for steps taken up to and including the hearing on 16 July 2014 (all assessed for time purposes as Band B under r 14.3 and Schedule 2 of the Rules) plus disbursements of \$610; and
- (b) \$6,169 for steps taken since 16 July 2014 up to and including the hearing on 11 February 2015 (also all assessed for time purposes on the same basis as the first claim) plus disbursements of \$50.

[33] In dealing with costs I am not bound by the guidance given in the oral judgment of 16 July, which did not determine costs. My task is not therefore simply a mechanical or arithmetical one of identifying the steps Auckland Transport has taken and applying the Band B daily rate allowed under the High Court Scale to each step. I reject counsel for Auckland Transport's submission to that effect.

[34] Costs are in the overall discretion of the Court.⁵ The normal presumptions are that a creditor that pursues successfully and obtains an order for the debtor's adjudication is entitled to costs⁶ but that a creditor who does not pursue a bankruptcy application and withdraws or whose application is struck out is itself prima facie liable for costs.⁷

[35] There are factors in this case that distinguish it from one where the usual presumptions as to who is liable for costs should stand. These are that:

- (a) Mr Prescott was indebted to Auckland Transport for a judgment debt in excess of \$1,000 that was plainly beyond challenge when the original judgment creditor received payment and elected not to proceed. Auckland Transport was therefore entitled under s 44 Insolvency Act 2006 to rely on the act of bankruptcy that creditor's application was founded upon. Auckland Transport acted entirely reasonably in doing so. At no stage did Mr Prescott file evidence of any substance to prove in a positive manner that he was solvent despite his having the onus. He had ample opportunity.

⁵ Rule 14.1.

⁶ Rule 14.2.

⁷ Faire AJ in r 14.2 and Re Turner HC Hamilton, CIV-2007-419-1518, 27 May 2008, at [6].

- (b) It was not until 2 July that Mr Prescott paid the original debt. By that stage Auckland Transport had been put to the trouble of preparing for hearing and filing its submissions, as it was required to do by the Court's directions.
- (c) Mr Prescott's pursuit of the argument that there was a costs settlement was not supported by the evidence and Auckland Transport has had to incur the associated costs of preparing submissions for the hearing on 11 February and appearing at the hearing.

[36] Mr Prescott concedes that there is a case for him to give a proper measure of compensation for the time and cost that Auckland Transport has been put to. His dispute is with the fairness of the amounts claimed. He submits there should be not any award for the preparation of submissions for the hearing on 16 July 2014 or for the appearance on that day. He contends essentially that the submissions dealt with the substantive merits of the adjudication application and were unnecessary as he had paid all amounts owing by the time they were filed; and that the hearing was largely taken up with Auckland Transport's unsuccessful application for indemnity costs.

[37] I do not agree with Mr Prescott that there should be no award for preparation of the written submissions. These were filed on the same day that he paid the original debt. If Mr Prescott had made the payment before counsel had spent time preparing the submissions, he might have had a point.

[38] I accept nonetheless that Mr Prescott is correct about the hearing itself for these reasons:

- (a) The hearing did not deal with the substantive merits –that was unnecessary. It was largely concerned with the unsuccessful argument about indemnity costs. Auckland Transport cannot reasonably expect to be compensated for the time spent on this argument at the hearing.

- (b) It was also concerned with the request for leave to amend the adjudication application in the future because of Auckland Transport's concern about a possible future debt in the nature of an anticipated costs order in the judicial review proceeding. There seems no real reason why Mr Prescott should compensate Auckland Transport for the time spent in seeking and obtaining an adjournment for that purpose. There was no actual sum owed and the adjournment was essentially sought as an indulgence to keep alive the proceeding for the benefit of Auckland Transport.⁸

[39] I also take in account that Auckland Transport did not make clear to the Court on 16 July that the anticipated order for costs had not in fact been made. While that may indicate nothing more than an oversight, the omission is further reason why the hearing should not attract adverse costs consequences for Mr Prescott.

[40] Costs for that hearing should therefore lie where they fall. An appropriate reduction should be made to the costs claim accordingly. The reduction is \$796 for 0.4 of a day's appearance (being the 2B allowance).

[41] I am also satisfied that there are there some other adjustments that are warranted to Auckland Transport's costs claims. These are as follows:

- (a) I make no allowance for the preparation and filing of the brief memorandum of 19 August 2014. This gives notice of the existence of a dispute in relation to Mr Prescott's assertion about a costs settlement and it asks for an adjournment of the call scheduled for 21 August 2015 on the ground that Auckland Transport "is unable to amend its application" for adjudication to admit as a fresh debt the costs order still under determination by Cooper J in the judicial review proceeding. The adjournment was again essentially for Auckland Transport's benefit because it was waiting for a future debt to materialise. Were it not for the desire to keep the opportunity to amend alive, the issue of costs could have been dealt with without

⁸ See *Curtis v CIR*, above.

further adjournments. I do not think in these circumstances there should be any award for this memorandum.

- (b) I am satisfied that there should be a reduction in the amount claimed for steps taken at the commencement of Auckland Transport's involvement in the proceeding. It has claimed 0.4 of a day for two memoranda filed on 4 and 7 April 2014 in respect of its substitution. The documents filed are brief and uncomplicated. They do not warrant a time allowance of 0.4 of a day each. I allow 0.2 of a day for each on the basis that a Band A time allocation rather a Band B allocation is appropriate. (Band A is appropriate where a "comparatively small amount of time is considered reasonable", while Band B which is appropriate where a "normal amount of time is considered reasonable").
- (c) I am also satisfied that the same approach should be applied to the memorandum dated 30 April – this memorandum deals with the case for substitution and repeats a good deal of what was covered by the memorandum of 7 April. When this is taken into account, I am satisfied that a comparatively small amount of time is reasonable.
- (d) I am satisfied a Band B time allocation is not warranted for the brief memorandum dated 28 May 2014. Its main point is to seek the allocation of a fixture as the parties had attempts at resolution through discussions had failed. I consider a comparatively small amount of time for this memorandum is reasonable and therefore that Band A should apply.
- (e) I make no allowance for the brief memorandum dated 4 November 2014. Its content is limited. Advising of the newly released costs award in the judicial review proceeding, it impliedly signalled the end of Auckland Transport's desire for an ongoing adjournment to keep alive the ability to amend. It also signalled Auckland Transport's intention to pursue its application for 2B costs

at the call on 6 November 2014 on the ground that there was no settlement as to costs, and its newfound desire to keep the substantive application alive pending payment of costs in full on the basis that Mr Prescott's payment of \$7,528 to Kensington Swan would leave an amount outstanding of \$4,975, assuming that a 2B costs award of \$9,353 plus disbursements of \$610 would be made at the next mention. Had I been satisfied that costs were warranted, I would have applied Band A on the basis that a comparatively small amount of time was reasonable. I think the fairer course is to decline any award because this memorandum was essentially for Auckland Transport's benefit to keep the opportunity to adjudicate alive at a time when the new costs debt relied upon was merely anticipated and not owing or due.

[42] On the basis of these findings I propose to make an overall deduction for 2.2 days or \$4,378 from the claims of \$9,353 and \$6,169. The overall amount is therefore adjusted downwards to \$11,144.

[43] Taking into account that Kensington Swan holds a credit of \$4,988 after payment of the costs award in the judicial review proceeding, the additional amount that Mr Prescott must pay is \$6,156, plus disbursements of \$660 (the total being \$6,816).

Reasons for declining an adjournment to keep proceeding alive

[44] I turn now to my reasons for declining an adjournment pending payment of costs. The purpose of such an adjournment is, it seems, to keep the threat of bankruptcy hanging over Mr Prescott by leaving open the opportunity to amend the application if any costs ordered are not paid on time. I do not consider that course is necessary or just, for these brief reasons:

- (a) Mr Prescott's previous failures to meet his debt obligations have cost him dearly, and it is reasonable to assume that he will by now understand only too well the ramifications of ongoing failure to pay his debts (including the costs award I am about to make).
- (b) Mr Prescott has demonstrated that understanding by certain steps he has taken, the first being on 2 July 2014 when he met all of his (then existing) debt obligations to Auckland Transport. Then he made a payment to Kensington Swan in September 2014 which effectively secured in advance what he anticipated by way of costs in the judicial review proceeding, with a sum to spare for costs in this proceeding. He has responsibly agreed that those monies should be applied to the costs order in the judicial review proceeding and towards such costs as he is ordered to pay in this proceeding.
- (c) Mr Prescott should also be given some credit for responding to the guidance given by the court on 16 July 2014 by trying to engage with Mr Hughes and resolve the question of costs by agreement. Mr Hughes may have had some cause for frustration on that day but Mr Prescott's insistence that he wanted a list of the steps claimed for was not in itself unreasonable. The fact that the discussion broke down because of that request cannot be taken as an indication that Mr Prescott will avoid his obligations to meet the costs order that I have made.
- (d) His misguided argument that costs were settled on 16 July 2014 is not enough to justify my reaching a contrary conclusion. What it does indicate to me is that he may have saved himself the costs he now faces had he taken proper advice.
- (e) The amount that is held in trust will cover a significant portion of the costs award.

[45] It should also not be overlooked that if Mr Prescott does not satisfy the award within the time allowed, then it will be open to Auckland Transport to serve a bankruptcy notice and to commence a fresh proceeding.

Result

[46] I make orders as follows:

- (a) Auckland Transport's adjudication application is now struck out.
- (b) The sum of \$7,523 held by Kensington Swan is now to be paid to Auckland Transport.
- (c) Mr Prescott is ordered to pay an additional sum by way of costs and disbursements of \$6,816 inclusive of disbursements within 20 working days of the date of this judgment.

Associate Judge Sargisson