IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-786
[2013] NZHC 1133

UNDER	the Insolvency Act 2006
IN THE MATTER OF	the Bankruptcy of LINDA SUSAN GATES
BETWEEN	SIMON CHARLES DENCH Judgment Creditor
AND	LINDA SUSAN GATES Judgment Debtor

Hearing: 13 May 2013

Appearances: L S Gates in person
A E Malone for Judgment Creditor

Judgment: 13 May 2013

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
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Copy for:
Mrs L S Gates, P O Box 47-474 Auckland 1144

[1] Mrs Gates, the judgment debtor, applies to set aside a bankruptcy notice. I have heard the application in court after discussing that with the parties.

[2] The grounds that Mrs Gates gives for setting aside the bankruptcy notice are:

> ... The matter of Sovereign Assurance Company Ltd was not as alleged by the creditor litigated in CIV-2004-044-2821...

[3] The bankruptcy notice is based on an order for costs made in the District Court at Auckland in a proceeding CIV-2012-004-439, in which Mrs Gates was the plaintiff and Mr Dench was the defendant.

[4] On 21 August 2012 the District Court heard an application by Mr Dench to strike-out Mrs Gates' proceeding against him. Judge Dawson granted the application and made an order that Mrs Gates pay Mr Dench costs. The amount of the costs ordered to be paid was $13,991.85. That was assessed as being three-quarters of actual costs. That order striking out Mrs Gates' proceeding and ordering her to pay costs was a final decision of the District Court. There has been no appeal from that decision and there has been no stay of enforcement of the costs order. As it is a final order of the District Court, the order for costs can also be the basis for a bankruptcy notice.

[5] After she was served Mrs Gates filed her application to set aside the bankruptcy notice within time. Under r 24.10, the time for compliance with the bankruptcy notice has been extended until this setting aside application has been decided.

[6] As set out in the bankruptcy notice, there are a number of ways by which a person served with a bankruptcy notice can comply with it:

(a) The debtor can pay the amount of the judgment debt to the judgment creditor;

(b) The debtor can give security or enter into a new formal agreement with the creditor or obtain the Court's approval for terms of payment; and

(c) The debtor must satisfy this court that the debtor has a counterclaim, set-off or cross-demand against the judgment creditor that equals or exceeds the amount claimed by the judgment creditor, and which the debtor could not have put forward in the proceeding in which the judgment or order was obtained.

[7] If the judgment debtor has not done any of those steps within the time for compliance, then the debtor commits an act of bankruptcy. The act of bankruptcy can form the basis for the creditor later to apply for the debtor to be adjudicated bankrupt.

[8] While the bankruptcy notice itself provides that an application may be made to satisfy the court as to a counterclaim, set-off or cross-demand which exceeds the judgment debt and which could not be raised in the original proceeding, the courts have also recognised another ground on which a bankruptcy notice can be set aside.

[9] As a matter of case law, the courts have recognised that there is an inherent jurisdiction to set aside a bankruptcy notice to prevent an abuse of process. The leading decision on that aspect of the law is a decision of Master Kennedy-Grant in *Re Wise*.[1] In that decision, Master Kennedy-Grant said:[2]

(a) I do have jurisdiction to grant relief to the debtors.

(b) The jurisdiction is the inherent jurisdiction of the court to control the abuse of its process;

(c) The grounds on which the jurisdiction may be exercised are:

(i) Procedural defect in the obtaining of the judgment on which the bankruptcy notice is based; and/or

(ii) The existence of arguable grounds of defence to the claim for which judgment was given;

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1 *Re Wise* HC Auckland B227/95 and 228/95, 21 June 1995.
2 At 6.

(d) The grounds on which the jurisdiction may be exercised may extend beyond those stated in (c) to any ground on which the court feels it necessary to intervene to prevent injustice but I make no finding on that point in this judgment;

(e) The correct procedure for invoking the inherent jurisdiction of the Court is not the filing of an affidavit under r 41 but the filing of an interlocutory application to set aside the bankruptcy notice on one of the grounds stated in (c) above or possibly the broader ground stated in (d) above.

[10] It can be seen from that part of his judgment that Master Kennedy-Grant expressed some confidence that jurisdiction existed where there was a procedural defect in obtaining judgment, or there are arguable grounds of defence. He was more tentative in suggesting that there may be wider grounds for the exercise of this inherent jurisdiction.

[11] It is necessary to put this inherent jurisdiction to prevent abuse of process into context. It is to be seen as an exception to the general principle that in the bankruptcy court, judgments of other courts are final and the court will not reconsider them. When another court has given a judgment or made an order for payment of a sum of money, that judgment or order is final. That means that it is conclusive as to the matters that were in dispute in that case. If a party is dissatisfied with that decision, that party can appeal but, subject to any rights of appeal and review, the judgment stands. The decision binds the parties – that means that they cannot contend that the judgment or order is in error or that they do not need to comply with it. It also means that the parties cannot start a new court case to argue the same matters again. And it also means that other courts have to treat that judgment or order as conclusive. Unless they are hearing an appeal, other courts will not accept arguments that the order or judgment is wrong, or does not need to be obeyed.

[12] That is the approach which this court follows in its bankruptcy jurisdiction. In its bankruptcy jurisdiction, this court does not hear appeals against decisions made in other courts. It treats those decisions as conclusive.

[13] The inherent jurisdiction described by Master Kennedy-Grant in *Re Wise* is an exception to that general approach. In some cases, debtors may have grounds for

suggesting that something went wrong with the process by which judgment was entered against them. These cases more commonly arise when judgment has been given by default – that is, where the debtor did not take any steps to defend the claim against him or her. The judgment debtor may be able to show that the judgment was irregularly obtained. Or, even if the judgment was regularly obtained, the judgment debtor may be able to show that there would be a miscarriage of justice if the judgment were allowed to stand. So when a judgment debtor served with a bankruptcy notice contends that the judgment on which the notice is based should not be allowed to stand because the judgment may have given rise to a miscarriage of justice, the normal approach of this court in its bankruptcy jurisdiction, if satisfied that the debtor has some basis for the argument, is to adjourn any setting-aside application to allow the debtor to apply to the original court to set aside the original order or judgment. In those cases the judgment debtor has to persuade this court that there is at least an arguable case to go back to the court which gave the judgment debt, to reconsider whether the original judgment should be set aside for a miscarriage of justice. That was what Master Kennedy-Grant did in *Re Wise* and it is the course commonly taken in this court.

[14] Once the court that gave the original decision has decided any setting aside application, the bankruptcy court will then either set aside the notice if the judgment has been set aside, or it will dismiss the application because the original judgment has been upheld. The reason why the courts adjourn the matter is to prevent this court, in its bankruptcy jurisdiction, exercising any review or appellate jurisdiction in respect of the judgment of another court. Powers to set aside a decision on review or appeal are matters of statute. This court has not been given a power to review the decisions of other courts by way of review or appeal when it exercises its bankruptcy jurisdiction.

[15] I have addressed these questions of the court's inherent jurisdiction because it seems that Mrs Gates is really relying on that ground to set aside the bankruptcy notice rather than trying to contend that she has some other claim against Mr Dench which she was not able to set up in the original proceeding. She does not seem to be relying on any other ground to set aside the bankruptcy notice.

[16] I consider whether she has any arguable basis for going back to the District Court and inviting the District Court to set aside the order for costs made against her. It is necessary to say something about the earlier litigation.

[17] The decision of Judge Dawson in the District Court shows that Mrs Gates had a disability income policy with Sovereign Assurance Company Ltd. Mrs Gates has confirmed that today, and says that before she was insured with Sovereign she had a similar policy with Tower Insurance. She banks with the ASB and it appears that the insurance was arranged through that bank. In 2002 she lost her job, she suffered depression and she claimed under the policy. Sovereign declined the claim. Sovereign alleged that Mrs Gates had not disclosed an extensive medical history and she had answered questions in the health section of the proposal incorrectly. In saying that, I note that Mrs Gates may not agree with that fully. She has explained to me that her complaint is that Sovereign had acted improperly – in fact she says fraudulently – in dealing with her claim. She says that she signed a 2-page proposal but later pages were added to it so that it became a 4-page proposal, and then later again an 8-page proposal. She says that she has been wrongly adjudged on the basis of an 8-page proposal when she says that she signed only a 2-page proposal. That seems to have been the basis for her complaint against Sovereign's claims staff, against the ASB bank and also against the lawyers who represented Sovereign.

[18] Mr Dench is a barrister. He was instructed to defend the case on behalf of Sovereign. Mrs Gates' proceeding was issued in the North Shore District Court under CIV-2004-044-2821. The proceeding was later transferred to the Auckland District Court. After some adjournments it went to a hearing. On 5 March 2007 Judge Mathers gave a decision in favour of Mrs Gates on liability. But that decision left the parties to reach agreement on quantum and costs, except that it was decided that general damages were not to be awarded.

[19] On 23 November 2007 there was a decision on quantum. The District Court upheld Sovereign's case that Mrs Gates was entitled to $46,138.29 together with interest, and the costs were later fixed by the Registrar.

[20] Mrs Gates was disappointed with the outcome. She appealed to this court in respect of both the liability decision and the quantum decision. In April 2008, Venning J dismissed an appeal against the quantum decision. In September 2008, Andrews J dismissed an appeal against the liability decision.

[21] In March 2009, Mrs Gates began a new proceeding in the District Court against Sovereign and a Ms Masson, one of Sovereign's claims staff. Mr Dench was again instructed to act for Sovereign. On Sovereign's behalf he made an application for summary judgment and to strike out the proceeding. Judge Bouchier heard that application and gave a decision in July 2009. She found against Mrs Gates. She held that the proceeding was an abuse of process, that there was no reasonable cause of action, and that the action was also statute-barred – that means it was out of time. There was a later order for costs given in November 2009 against Mrs Gates.

[22] Judge Dawson's decision goes on to show that Mrs Gates also made a complaint against Mr Dench to the New Zealand Law Society in October 2010. In February 2011 the Law Society Standards Committee rejected Mrs Gates' complaint against Mr Dench. Mrs Gates then applied to the Legal Complaints Review Officer to review that decision. In November 2011 the Legal Complaints Review Officer confirmed the Standards Committee's decision and rejected the application for review.

[23] In March 2012, Mrs Gates filed a fresh proceeding, this time against Mr Dench. That is the proceeding CIV-2012-004-439.

[24] Mr Dench's lawyers applied to strike out. Judge Dawson heard the application in August 2012. A transcript of his oral judgment has been put in evidence and I have drawn on it in giving this decision. The judgment shows that Mrs Gates appeared and did take part in the hearing. Judge Dawson recorded submissions she had made. In this hearing Mrs Gates has confirmed that she did appear, and did take part in the hearing. She says, however, that she did feel unwell at the time and she now says that she has little memory of it. I checked with her whether she felt any similar difficulty in this hearing. She said that she noted that another Associate Judge had originally been assigned to hear this application and the

fact that I was now hearing the matter seems to have confused her somewhat. But I am satisfied that she is not under any disability in conducting this case herself today.

[25] Judge Dawson's decision shows that he took into account the matters on which Mrs Gates was suing Mr Dench. In short, Mrs Gates was suing Mr Dench over what she regarded as dishonest conduct on his part in the way he represented Sovereign to her disadvantage. In submissions today her allegations against Mr Dench went so far as accusing him of actual dishonesty.

[26] Judge Dawson considered her submissions. He found no basis on which Mr Dench could be sued. He followed established authority in the case law that a lawyer engaged in litigation on behalf of a client does not owe a duty to his client's opponent. I regard what Judge Dawson said on that aspect of the case as well-established and applicable in the circumstances of Mrs Gates' case.

[27] The essence of Judge Dawson's decision is caught in paragraph [26] of his decision:[3]

> In her submissions today Mrs Gates has continued to refer to the injustices, as she perceives them to be, in the early decisions of this court and the High Court. She assured me she was aware that this Court cannot review these earlier decisions nor deal with them on an appellate basis but regrettably she does not seem able to let these concerns go. It is quite apparent that her claim against Mr Dench is another attempt to re-litigate her earlier claims. There is no substance to her claim against Mr Dench.

[28] It is on that basis that Judge Dawson was satisfied that Mrs Gates did not have a reasonable cause of action against Mr Dench, and he held the proceeding to be an abuse of process. He also ordered her to pay the costs which are the subject of the bankruptcy notice in this case.

[29] From what I have heard from Mrs Gates today, and from what appears in Judge Dawson's decision, this was a conventional application to strike out a proceeding. It was brought on notice, and Mrs Gates appeared at the hearing of the application. She was heard and the Judge took her submission into account. While she was unsuccessful in opposing that application, there was nothing in the way that

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[3] DC Auckland CIV-2012-004-439, 21 August 2012 at [26].

the strike-out application was brought or heard or decided that would suggest that there was anything in the way of a miscarriage of justice. Mrs Gates was acting in person – that is without legal representation. I am conscious that when people appear in proceedings in person without legal representation they are at a disadvantage because of a lack of legal experience and legal knowledge. But that factor is not enough to suggest that was any miscarriage of justice in the way that the District Court heard and decided the case, and ordered Mrs Gates to pay costs.

[30] Faced with that, I can see no good reason why I should give Mrs Gates the opportunity to go back to the District Court for a re-hearing of the strike-out application. Frankly, that would be a wasted exercise. There was an inevitability about the decision of Judge Dawson. I agree with Judge Dawson that Mrs Gates' claim against Mr Dench was misconceived. While disappointed litigants often feel anger towards opposing counsel for the way they have conducted the case, Judge Dawson was correct that opposing counsel do not owe any duty to a litigant in person. If this matter were to be re-heard, a District Court Judge would undoubtedly give the same decision as Judge Dawson gave at his hearing.

[31] For these reasons this is not an appropriate case for this court to exercise its inherent jurisdiction. I am not persuaded that there has been any abuse of process which requires this court to exercise its inherent jurisdiction under *Re Wise*. The District Court should not be required to reconsider Judge Dawson's decision of 21 August 2012 on any re-hearing application.

[32] I appreciate that Mrs Gates has been disappointed at the outcome of the litigation against Sovereign. She had partial success, but she has been disappointed that she was not as successful as she would have hoped. However, that litigation is now at an end. It is not open to her in the context of her application to set aside a bankruptcy notice to complain about the way the litigation against Sovereign was conducted. Accordingly, I dismiss the application to set aside the bankruptcy notice.

Costs

[33] On behalf of Mr Dench, Mrs Malone asked me to make an order for indemnity costs under r 14.6(4)(a) on the grounds that Mrs Gates has acted vexatiously, frivolously, improperly or unnecessarily in commencing and continuing the application to set aside the bankruptcy notice.

[34] I look at the matter this way. Mrs Gates is a litigant in person. She is also a judgment debtor. She has taken a step to resist enforcement steps taken by the judgment creditor. She has tried to take steps that appear to her to be available, although she has not been able to make out the ground for setting aside. However, when enforcement action is taken against a judgment debtor one has to exercise some understanding that the judgment debtor may want to take steps that seem to be available under the law to resist enforcement. I regard Mrs Gates as doing no more than seeing an opportunity to test the validity of the bankruptcy notice, trying to exercise that right, and she has exercised that right unsuccessfully. In acting that way, I do not regard her as being vexatious. Accordingly, I will not order increased costs or indemnity costs, but she will be required to pay costs according to scale.

[35] I fix costs as follows:

(a)	Step 22, opposition to application Category B	.6 day
(b)	One appearance at a mentions hearing	.2 day
(c)	Step 24, preparing submissions Category A	.5 day
(d)	Step 25, preparing bundle Category A	.4 day
(e)	Step 26, hearing	.25 day
(f)	Step 29, seal order	.2 day.

[36] Mr Dench will have costs for 2.15 days at the category 2 rate of $1990 per day giving a sum of $4,278.50.

[37] The dismissal of Mrs Gates' application to set aside the bankruptcy notice means that under r 24.10 the setting-aside application has been determined and that the time for compliance with the bankruptcy notice has now expired. That means that if the sum in the bankruptcy notice is not now paid, Mr Dench may be able to apply to the court for an adjudication order. Mrs Gates has raised the possibility of the order for costs being met out of payments that she receives from Sovereign. It remains open to her to still have discussions with Mr Dench's lawyers as to how the order for costs can be met. It is not something I can give a direction about today.

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Associate Judge R M Bell