IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-4271
[2014] NZHC 389

UNDER	the Insolvency Act 2006
IN THE MATTER OF	the bankruptcy of ALAN JOHN LAURENSON
BETWEEN	SMITH AND PARTNERS (a firm) Judgment Creditor
AND	ALAN JOHN LAURENSON Judgment Debtor

Hearing: 6 March 2014

Appearances: A Priaulx for Judgment Creditor
No appearance for Judgment Debtor

Judgment: 6 March 2014

COSTS JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **6 March 2014** at **4:30pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors:
McElroys (P Hunt/A Priaulx) Auckland, for Judgment Creditor

[1] This bankruptcy application had its first call on 6 March 2014. At the end of February the debtor paid the creditor $14,223.00, the amount of the debt claimed in the application and in the creditor's bankruptcy notice. The debtor did not pay anything towards the creditor's costs on the bankruptcy application. Before the debtor paid the creditor, the creditor's lawyers emailed the debtor advising that the creditor reserved the right to claim costs on the bankruptcy application.

[2] The creditor now seeks leave to withdraw the application under s 15 of the Insolvency Act 2006 on the ground that the debt the subject of the bankruptcy application has now been paid. It also seeks costs on the application. The withdrawal of the application is not contentious, but the question of costs requires consideration.

[3] Although counsel for the creditor did not refer to it, there is authority that costs cannot be awarded to a creditor in the circumstances of this case. That is *Re Peacock*:[1]

> I do not think that there is any case here for an award of costs. A judgment creditor who files a petition in bankruptcy, on having tendered to him the bare amount of the judgment debt without costs, may take either one of two alternative courses. He may refuse the tender and proceed on his petition unless costs are paid. If he does this, it would be for the Court to decide whether in the circumstances an order for adjudication will be made, but the petitioning creditor will in this case keep his petition alive and may place before the court arguments supporting his claim to costs. Or, on the other hand, the judgment creditor may elect to take the money offered. In my opinion, if he does this, he cannot keep his petition alive after the receipt of the money so as to preserve any claim to costs. It is true that the petition does not absolutely lapse; for the Court may consider the interests of other creditors, and may in a proper case allow some other creditor to carry the petition forward. But so far as the petitioning creditor himself is concerned, by accepting the money, he engages that he will not proceed further upon a petition, and I think that he cannot after such acceptance be heard on an application for costs.

[4] Under this decision a creditor, offered payment in full of the debt stated in the bankruptcy application, must choose between accepting payment and thereby losing the right to claim costs, or declining payment so as to continue with the application

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1 *Re Peacock* [1956] NZLR 365 (SC) at 367.

and keep the claim for costs alive. This position is unique to bankruptcy applications. It does not apply in liquidation applications.[2] Similarly, in an ordinary civil proceeding for the recovery of a debt, if a defendant pays the plaintiff the amount of the debt but not costs, the plaintiff will be able to recover costs on the proceeding. In those proceedings questions of election are not said to arise when the debtor company or the defendant tenders payment of the sum in issue without also paying costs.

[5] If *Re Peacock* were slavishly followed, its application would give rise to problems. Like the debtor in this case, many debtors served with a bankruptcy application are keen to avoid bankruptcy. One effective way of doing this is to attack the applicant's status as a creditor by paying off the debt the subject of the application. Those debtors would be very puzzled if a creditor, who has gone to the trouble of issuing a bankruptcy application, were then to refuse payment, even if it does not meet all the relief sought in the application. Similarly, creditors who have been put to the trouble of applying for a bankruptcy adjudication would prefer not to be creditors. When a debtor offers to pay off the debt in a bankruptcy application, a creditor would find it odd to be told by his lawyer that if he wants to keep his claim for costs alive he should decline the payment and press on with his bankruptcy application.

[6] In practice, *Re Peacock* is not followed. In the bankruptcy court, applications are regularly withdrawn after payment is made, while orders for costs are made at the same time. I have not heard a case where a creditor has spurned a debtor's tender of payment and pressed for adjudication instead.

[7] It is therefore appropriate to consider whether *Re Peacock* should be followed. Any enthusiasm to depart from the decision should be tempered by the consideration that the judge in *Re Peacock* was none other than Turner P. Ordinarily it would be prudent to await a ruling from a higher court. It is, however, unrealistic to expect that this matter would ever find its way to an appellate court. Costs awarded on withdrawn bankruptcy applications are relatively insignificant and would not warrant running an appeal. Because it is so improbable that *Re Peacock*

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2 See, for example, *Re Yana Fashions Ltd* SC Napier M7-75, 18 April 1975.

would ever be considered on appeal, it is appropriate to reconsider the matter in this court.

[8] The ratio of *Re Peacock* is that a creditor is put to an election between maintaining his application so as to keep alive a claim for costs on the one hand and, on the other, accepting payment of the principal debt and thereby abandoning any claim for costs. In my judgment, the better position is that an order for adjudication and an order for costs are not inconsistent and it is not necessary to choose between them. A creditor is entitled to pursue either or both heads of relief.

[9] The creditor's application in this case follows Form B3 of Schedule 1 of the High Court Rules and complies with r 24.11 of the High Court Rules. The application notifies the debtor that at the hearing of the application, the creditor will ask the court to make orders adjudicating the debtor bankrupt and for costs. The fact that the form provides that the court may make both orders shows that there is no inconsistency between them. When starting an application, a creditor is not required to choose between the two remedies. If a creditor succeeds on an application, the court will typically make an adjudication order as well as an order for costs. No question of election arises. If the debtor pays part and not all of the debt, the creditor is still entitled to maintain his application and seek both an order for adjudication and an order for costs. The creditor is not required to elect when a part-payment is made. It is only when a debtor pays in full that *Re Peacock* says that an election arises.

[10] But for *Re Peacock*, a creditor applying for an order of adjudication is likely to reason that, upon the debtor paying only the debt, no useful purpose would be served by an order for adjudication but that he should still have his costs, having been put to the trouble of bringing the application. He may therefore choose to seek only one of the two heads of relief in his application. The fact that when he filed his application he sought two heads of relief - an order for adjudication and an order for costs – and that he now seeks only costs, does not mean that he has abandoned his application in its entirety. He has abandoned only one head of relief, an order for adjudication, but the rest of his application remains alive.

[11] Since the remedies sought in the application are not inconsistent, there cannot be any basis for requiring a creditor to elect between them. The question of election can arise only if a creditor is seeking inconsistent remedies (for example, in intellectual property proceedings, damages or an account for profits and in vendor-purchaser claims, specific performance or damages in lieu). Even then, a plaintiff is not put to an election until he has made out his right to relief.[3]

[12] According to *Re Peacock*:

> ... by accepting the money, he engages that he will not proceed further upon a petition.

This "engages" is fictitious. A creditor does not actually undertake that he will no longer proceed with the application. Instead, under *Re Peacock*, that intention is imputed to the creditor. There is no good reason why the court should attribute to a creditor such a fictitious intention.

[13] In these days of electronic transactions, payments may be made unilaterally, that is, a debtor may pay a debt into the creditor's bank account (using information typically supplied on an invoice) without the creditor's prior knowledge or assent. In such circumstances a creditor is faced with a fait accompli. His receipt of the payment is passive. The creditor has not elected anything.

[14] In this case, the creditor did receive payment by prior arrangement with the debtor, but when doing so expressly reserved its right to seek payment of costs on the application. In doing that, it was not electing to proceed no further with its application. It chose to maintain its application for costs, while no longer seeking an order for adjudication in bankruptcy.

[15] It is necessary to add that where a creditor has genuinely settled with a debtor on the basis that the creditor will not look to the debtor for costs, the creditor cannot

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[3] *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30 per Lord Atkin:
I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action in both will then be merged in the one.

later seek costs. That has not occurred here, because the creditor expressly reserved its right to seek costs.

[16] In my judgment, the creditor is entitled to maintain its application for costs, even though it no longer seeks an order for adjudication. It is entitled to take that course, because it has not "engaged" that it will not seek costs. I decline to follow *Re Peacock.*

[17] I find that the creditor is entitled to costs on the application as it has overall succeeded.[4] The costs sought are appropriately calculated under rr 14.3-14.5 and I approve the disbursements.

[18] I make these orders:

(a) The application for adjudication is withdrawn.

(b) The debtor is to pay the creditor costs of $1,592.00 plus disbursements of $907.00, a total of $2,499.00.

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Associate Judge R M Bell

[4] High Court Rules, r 14.2(a).