

4. Disbursements

4.1 Filing fees

4.1.1 Notice of proceeding 200.00

4.1.2 Entry of Judgment 90.00 290.00

4.2 Service Fee 138.00

\$6685.78

[4] The registrar wrote to the judgment creditor on 21 April 2016 stating that he had authorised the sealing of this judgment under r 15.7(1) District Court Rules (DCR) 2014. The registrar then stated:

Any costs, interests and disbursements you wish to claim after the sale of the repossessed goods cannot be awarded. This relates to s83ZM of the Credit Contracts and Consumers Finance Act 2003. When a creditor repossesses security goods to pay off some of the defendant's debt, then applies for judgment by default for the remaining debt, they cannot claim any costs and disbursements such as; service fees, filing fees, solicitors costs, costs for preparation after the date of sale of that. The creditor is not entitled to recover more than the balance left after deducting the proceeds of the sale from the outstanding amount.

[5] The registrar then sealed judgment in the amount of claim in the sum of \$6583.92 and did not allow any interest or filing fees, solicitors fees, service fees or entry of judgment fees.

[6] On 6 December 2016 the judgment creditor filed an application seeking a review of the registrar's judgment on the grounds:

- (i) That the registrar has only allowed judgment for the amount claimed;
- (ii) The plaintiff should be able to claim solicitor's costs in respect of filing fees, solicitors fees for preparation of legal documentation, and service fees;

- (iii) Not allowing the judgment creditor to claim costs of issuing legal proceedings is a miscarriage of justice; and
- (iv) Relying on the affidavit filed in support.

[7] The application now seeks judgment against the judgment debtor in the sum of \$8190.42 on the basis of:

Amount of claim	\$6,583.92
Costs of issuing letter of demand	57.50
Filing fee	200.00
Preparing notice of claim or statement of claim	885.00
Service fee	138.00
Filing fee – judgment	90.00
Sealing order or Judgment (9.16)	<u>236.00</u>
	\$8,190.42

[8] The judgment creditor relies on clause 9.1 of the contract between the creditor and debtor, dated 24 January 2014, which states:

You must pay as an amount immediately due: any sum of money paid by creditor to remedy any default, including money paid under clause 3.12; the costs of taking possession of the goods or attempting to take possession of the goods; the costs of tracing or attempting to trace you or any guarantor; and all costs, charges, commission fees and expenses (including solicitor/client costs) which a creditor incurs or becomes liable for because of any default or breach by you.

[9] The judgment creditor now accepts that they were not entitled to claim interest pursuant to s 83ZM of the Credit Contracts and Consumer Finance Act 2003. It says that by not allowing them to have the costs of issuing legal proceedings

claimed, is a miscarriage of justice because the only way the creditor could receive payment from the debtor was to issue legal proceedings.

Discussion

[10] Rule 2.12 of the DCR applies in respect of reviews of the registrar's decision. Under r 2.12(3) of the DCR notice of application for a review must be filed within five working days of the decision if any party was present, or of notice being received if the party was absent. The judgment creditor received written notice of the registrar's decision on or about 21 April 2016. The notice of application for review was not filed until 5 December 2016. The judgment creditor has filed the application out of time and has not complied with r 2.12(3). No explanation has been given as to why there was a delay of over eight months for the review to be filed.

[11] Under s 83ZM of the Credit Contractors and Consumer Financial Act 2003, the judgment debtor's liability to the judgment creditor under the credit contract is limited to the difference between the amount required to settle the contract as at the date of the sale and the net proceeds of sale.

Limit on creditor's right to recover from debtor

[12] Section 83ZM of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) provides:

83ZM Limit on creditor's right to recover from debtor

- (1) This section applies if—
 - (a) consumer goods (or, where multiple goods are subject to the credit contract, any 1 or more of those goods) are sold under this subpart; and
 - (b) the net proceeds of sale are less than the amount required to settle the contract under section 83ZE as at the date of the sale.
- (2) If this section applies, the debtor's liability to the creditor under the credit contract is limited to the difference between the amount required to settle the contract as at the date of the sale and the net proceeds of the sale.
- (3) To avoid doubt,—

(a) after the sale, the creditor is not entitled to, and must not claim, any amounts in addition to the amount specified in subsection (2), including—

(i) any further interest payments that would, had the sale not taken place, have been payable in respect of the credit contract; or

(ii) any interest under the Judicature Act 1908; or

(iii) any other payments that are in addition to the amount required to settle the contract under section 83ZE;

(emphasis added)

[13] Section 83ZM refers to the amount required to settle the contract calculated in accordance with s 83ZE as at the date of sale. Section 83ZE(2) defines the “amount required to settle the contract”:

83ZE Debtor’s right to settle credit contract

(2) In this section, the amount required to settle the contract means the balance of the advance outstanding, together with any interest charges, credit fees, and default fees payable under the credit contract, and includes—

(a) the reasonable costs of the creditor of, and incidental to, repossessing, holding, storing, repairing, maintaining, valuing, and preparing the sale of the consumer goods and of returning them to the order of the debtor; and

(b) the costs reasonably and actually incurred by the creditor in doing anything necessary to remedy any default by the debtor.

[14] Clause 9.1 of the Credit Contract between the creditor and debtor states that the debtor:

Must pay as an amount immediately due: any sum of money paid by Creditor to remedy any default including...all costs, charges, commissions, fees and expenses (including solicitor/client costs) which Creditor incurs or becomes liable for because of any default or breach by you.

[15] Furthermore, s 83ZE(2)(b) CCCFA defines the “amount required to settle the contract” as including the costs reasonably and actually incurred by the creditor in doing anything necessary to remedy any default by the debtor. It is submitted that this definition can be applied to s 83ZM. In order to remedy the default as at the date of sale (22 October 2015), the judgment creditor required its solicitors to make

demand on the judgment debtor for payment. The only way the judgment creditor could remedy the default was by issuing legal proceedings against the judgment debtor.

[16] Therefore it is submitted that the judgment creditor should be able to claim the costs of issuing legal proceedings against the judgment debtor (letter of demand, solicitors costs, filing fees etc.) and that the registrar erred in only awarding judgment in the amount of claim. The judgment may be varied by the Court to prevent a miscarriage of justice: r 15.10.¹

[17] It is not disputed that by virtue of r 83ZM(3), the judgment creditor is unable to claim interest payments pursuant to the credit contract.

Conclusion

[18] The judgment creditor's application for review of the registrar's decision has not complied with r 2.12(3) as it has been filed out of time.

[19] Accordingly, this application is declined in its current form because it has been filed out of time with no satisfactory explanation as to any reason for the delay.

[20] If a satisfactory reason for delay had been filed with the application for review, the Court would have awarded the costs as set out in the material filed on 6 December 2016, but now declines to do so because of the lengthy and unexplained delay.

M J Callaghan
District Court Judge

¹ However, the default fee must still be reasonable: s 41 CCCFA.