IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-004219

IN THE MATTER OF	the Insolvency Act 1967
AND	
IN THE MATTER OF	the bankruptcy of G R Rees
BETWEEN	HOLMES CONSTRUCTION WELLINGTON LTD Judgment Creditor
AND	GARY JAMES REES Judgment Debtor

Hearing: 6 June and 13 July 2009

Counsel: R B Hucker (and L Yaqub for hearing on 13 July 2009) for Judgment Debtor
D M Hughes and K A Van Houtte for Judgment Creditor

Judgment: 17 July 2009 at 12:30pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to set aside bankruptcy notice]

This judgment was delivered by me on 17 July 2009 at 12.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: 17 July 2009

Solicitors:
Hucker & Associates, PO Box 3843, Auckland
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[1] This is my third and final judgment on the judgment debtor's application to set aside a bankruptcy notice. The bankruptcy notice was issued on 20 July 2006. It sought payment of $281,721, being the amount due in respect of a judgment obtained in the District Court at North Shore on 5 July 2006.

[2] This is a claim by the contractor against the developer and relies on the construction contract at 2002. My first interim judgment, which was issued following a hearing which concluded on 8 February 2007, set out the background facts. It is not necessary for me to repeat the background facts which are set out in that first interim judgment for the purposes of this judgment. They are nevertheless relied upon.

[3] At the time that the matter was first argued in this Court, an appeal was outstanding against the judgment of the District Court on which the bankruptcy notice was based. I invoked the Court's inherent jurisdiction and adjourned this application so that the appeal could first be determined.

[4] The appeal against the District Court judgment was refused by Asher J in a judgment delivered on 13 December 2007.

[5] The application came back on for hearing on 3 March 2008. I issued my second interim judgment on 3 March 2008. The judgment debtor was granted leave to appeal to the Court of Appeal on 15 February 2008. The judgment debtor had by this time added a further ground to the application to set aside the bankruptcy notice, namely that the District Court judgment was not a final judgment for the purposes of s 19 of the Insolvency Act 1967, given the status of the judgment under the Construction Contracts Act 2002.

[6] The added ground raised two possibilities, namely:

a) If the appeal to the Court of Appeal overturned the District Court judgment then there would be no grounds for maintaining the bankruptcy notice; and

b) Even if the Court of Appeal did not overturn the District Court judgment, but that judgment was held not to be a final judgment, there would exist no justification for the issue of the bankruptcy notice in the first place.

[7] To be sure that all matters would be covered by one appellate review, in my second interim judgment I made an order pursuant to the then r 419 of the High Court Rules for the removal of a question pursuant to rr 417 and 418 to the Court of Appeal for determination. The precise question was:

> Whether an order pursuant to s 74 of the Construction Contracts Act 2002 that an adjudicator's determination be enforced by entry as a judgment of the Court is a final judgment for the purposes of s 19(1)(d) of the Insolvency Act 1967.

[8] My second interim judgment adjourned the application to set aside the bankruptcy notice to await the Court of Appeal decision.

[9] The Court of Appeal judgment was delivered on 25 February 2009. For the purposes of this judgment it is appropriate that I record that the Court of Appeal:

a) Declined the appeal against the judgment of Asher J with the effect that the judgment of the District Court Judge DM Wilson QC on which the bankruptcy notice was based remained in force;

b) Ruled that the judgment of the District Court was a final judgment for the purposes of s 19(1)(d) of the Insolvency Act 1967;

c) Ruled that a party who may have a meritorious counterclaim, set-off or cross-demand which could not be raised in the context of the s 73 process under the Construction Contract Act 2002 because of the provisions of s 79 of the Construction Contract Act, cannot raise the counterclaim, set-off or cross-demand as a basis for the setting aside of a bankruptcy notice pursuant to s 19(1)(d) of the Insolvency Act 1967;

d) Observed that the position that I had recorded in (c) above while applying at the bankruptcy notice stage may not apply at the petition stage (under the 1967 Act) and when the Court is asked to exercise its discretion to adjudicate a judgment debtor as a bankrupt.

[10] The judgment debtor next applied to the Supreme Court for leave to appeal the decision of the Court of Appeal. The judgment of the Supreme Court delivered on 15 May 2009 dismissed the application for leave to appeal. Of particular importance is the endorsement of the Court of Appeal's Reasons for its Judgment. The Supreme Court at [2] said:

> Although the matters in issue are of general practical significance and would otherwise meet the criteria for leave, we find the judgment below compelling and consider that the proposed appeal has no prospect of success on any of the grounds advanced on behalf of the applicants.

[11] It will be apparent the position I have set out in [9] d) above is not presently before the Court. I add the following by way of clarification. I made it clear to counsel in the course of the hearing that there was insufficient evidence before me to enable me to predict what might be the case if the Court was asked to adjudicate this judgment debtor. For example, there is no evidence as to the judgment debtor's means, what transactions that he may have entered into, or any other circumstances that might appropriately be taken into account in the exercise of the discretion which the Court had pursuant to s 26 of the Insolvency Act 1967. I record this position because Mr Hucker had referred me to the judgment of Thomas J in *In re Taylor* [1992] 4 NZBLC 102, 875.

[12] In that case at 102,879, Thomas J, when concluding the part-heard application to set aside a bankruptcy notice, said:

> For my part, I consider that adjudicating a person bankrupt when that person is essentially a victim of the current downturn in this country's economy may, in certain circumstances, be unnecessarily severe. In Mr Taylor's case I believe that the collapse of his business can be directly traced to the political and economic developments which took place at the time. But for those developments, Mr and Mrs Taylor would probably have a thriving business today. Bankruptcy will not now realise one cent in the dollar for Mr and Mrs Greenwood. Moreover it is difficult to perceive any public interest element which would be served by making Mr Taylor bankrupt. He cannot get a job and it is unlikely that he will get credit. To make Mr Taylor

> bankrupt would be purely punitive and serve no practical or useful purpose. To my mind, sufficient cause exists for no order of adjudication to be made.
>
> The only question, therefore, is whether the issue of bankruptcy should be left to be finally decided at the hearing of the petition, should Mr and Mrs Greenwood decide to pursue that course, or whether I should stay the proceeding now. There is much merit in Mr Sadler's observation that this proceeding should be brought to an end one way or another today. I therefore propose to grant a stay. In the event that Mr and Mrs Greenwood obtain evidence that Mr and Mrs Taylor's fortunes have changed for the better it would be open to them to apply to the Court to uplift this stay. The debt as Mr and Mrs Taylor will appreciate, remains due and owing.

[13] There is simply no foundation for applying the approach adopted by Thomas J to this case for the reasons which I have set out in [11] above.

[14] Having reached the position which I have summarised, one might have concluded that all possible grounds for setting aside the bankruptcy notice had been well and truly spent. Out of an abundance of caution, I convened a conference for 27 May for the express purpose of determining whether there were any issues which required a ruling from the Court, and if there were any, to set a fixture for same.

[15] At that conference, Mr Hucker advised that he considered there were additional grounds on which there had been no specific ruling and which supported the setting aside of the bankruptcy notice. Because there was some lack of clarity as to the precise nature of the grounds, I directed that submissions were to be filed and served by 2 June on behalf of the judgment debtor. I directed that they should set out precisely the form of any amendment to the current application and should also attach relevant parts of any report which the judgment debtor relied upon and which has become available since the original application was filed. Directions were also made for the creditor's submissions to be filed in opposition. The matter was adjourned to be called at the end of the Bankruptcy Miscellaneous List on 4 June 2007.

[16] Mr Hucker submitted that, notwithstanding the determinations made, the High Court still has an inherent jurisdiction to set aside the bankruptcy notice.

[17] Mr Hucker submitted that the inherent jurisdiction should be invoked because:

a) There is a claim before the Weathertight Homes Tribunal; and

b) There is an incomplete arbitration which involves a claim for damages against the judgment creditor.

[18] Mr Hucker, however, properly conceded that there is:

a) Now no remaining challenge in respect of the judgment on which the bankruptcy notice is based; and

b) No basis for advancing a claim that there is or was improper conduct on the part of the judgment creditor in seeking to enforce the judgment by the issue of the bankruptcy notice.

[19] In relation to the incomplete arbitration, I have been provided with no further material than that which I analysed in my interim judgment of 9 February 2007 at para [17]. In that judgment I recorded:

> The request to issue the bankruptcy notice was filed on 20 July 2006 and this application was filed on 7 August 2006. The liquidator, Mr Sargisson, in an affidavit sworn on 1 November 2006, advised that he had instructed solicitors to finalise an opinion as to whether the arbitration is to proceed and as to whether he should consent to the continuation of the arbitration process. There has been no update of that position since Mr Sargisson's affidavit was sworn.

[20] I record further that there has been nothing to change the position which I recorded in my interim judgment since my interim judgment was issued.

[21] In relation to the claim before the Weathertight Homes Tribunal, I was provided with a copy of an assessor's report on the subject property at Willis Street in Wellington. That report states that an application was received by the Department for Building and Housing on 25 November 2007. The claimant in that application, however, is not the judgment debtor, but is the body corporate for the subject building. The report was compiled on 20 June 2008. It identifies the cost of repairing damage caused by water ingress at $709,267.27. The judgment debtor is not identified in the report as a party to the claim. However, Mr Rees and another party, together with Willis Trust Company Ltd, were the developers in the relevant

construction contract. That position was confirmed by Harrison J in his judgment delivered on 25 May 2006.

[22] The position as revealed on the papers in relation to the claim before the Weathertight Homes Tribunal is:

a) The judgment debtor is not named as a party;

b) The judgment debtor's claim for damages would seem to be available if, and only if, the present building owner were to bring a claim against the judgment debtor. Without such a claim the judgment debtor would be able to prove no loss. However, there is no evidence of such a claim having been made by the building owners against the judgment debtor.

c) At the very most, there might be a potential claim against the judgment debtor who might in turn seek contribution or indemnity from the judgment creditor.

[23] The factual foundation on which the Court is asked to exercise its inherent jurisdiction is, at best, weak. At para [7](a) of my interim judgment of 9 February 2007 I set out what a debtor must do when a conventional application to set aside a bankruptcy notice is made and is based on the existence of a counterclaim, set-off, or cross-demand. I recorded that the debtor must "demonstrate that he has a claim of true substance which he genuinely proposes to pursue". The authority for that proposition is referred to in the interim judgment.

[24] I am not unmindful of the fact that Mr Hucker submitted that he had insufficient time to prepare for this latest hearing. He did not, however, indicate if he desired to adduce additional evidence. Nor did he renew the request for further time to prepare when the hearing recommenced on 13 July 2009. In my view the judgment debtor has had ample opportunity to adduce any evidence that is relevant to the issues raised by this application. Further, the judgment debtor has been given ample time to cover all aspects raised by the application. A review of the history of

this matter, recited earlier in this judgment, discloses that this matter has been extant now for a few days short of three years. That time delay has occurred whilst the judgment debtor has been given the opportunity to pursue (i) the appeal which was heard by Asher J, (ii) the appeal to the Court of Appeal from Asher J's judgment, and (iii) the application for leave to appeal to the Supreme Court.

[25] There is no evidence to suggest that either of the claims identified in para [17] of this judgment have been prosecuted by the judgment debtor.

[26] There is here simply no evidential foundation which would justify the Court setting aside the bankruptcy notice on the grounds which I have set out in para [17] of this judgment.

[27] Quite apart from the fact that there is now no proper factual foundation for the invocation of the Court's inherent jurisdiction, the application to set aside the bankruptcy notice on the theoretical grounds which are set out in para [17] of this judgment has a major problem.

[28] The matters referred to in para [17], if in fact they had relevance, are premised on the basis that they are claims by the judgment debtor against the judgment creditor. They must therefore fall within the definition of counterclaim, set-off or cross-demand referred to in s19(1)(d) of the Insolvency Act 1967. *Re McKenzie, ex parte Leisure Ventures Christchurch Ltd* HC AK B215/90 7 June 1990.

[29] The judgment debtor is therefore inviting the Court to do precisely what the Court of Appeal has ruled cannot be done under the Insolvency Act 1967. In my view this has nothing to do with the processes of the Court, but is an attempt by the judgment debtor to have the Court produce a result which is expressly excluded by the current statute law as interpreted by the Court of Appeal. That is particularly so when one takes into account the fact that Mr Hucker properly conceded that the matters that I have recorded in [18] of this judgment provide no basis for the application. I therefore accept Mr Hughes' submission that in this case the decision of the Court of Appeal is decisive on the matter. The judgment debtor is not

permitted to raise a counterclaim, set-off or cross-demand under s19(1)(d) of the Insolvency Act 1967.

[30] I record, as did the Court of Appeal, that this determination does not cover the wider enquiry that is required at the adjudication stage pursuant to s26(2) of the Insolvency Act 1967. Indeed, the position can best be identified by noting that when the adjudication stage is reached, the Court has a statutory residual discretion. What the judgment debtor is endeavouring to do now, however, is to have the Court apply an inherent jurisdiction to prevent abuses of its processes. The two are different. That distinction has been recognised in a number of judgments, one of which is the judgment of Master Gendall as he then was, in *Singh v Commissioner of Inland Revenue* (2002) 20 NZTC 17,660 at paras [37] and [38].

[31] Mr Hucker referred to a number of authorities which I need not review separately. With the exception of possibly two, none came close to the present position, which involves an attempt to have the Court, in the exercise of its inherent jurisdiction, do that which is expressly excluded by the statute.

[32] One of the cases which might be regarded as an exception is the case *In re Taylor*, which I have analysed in paras [10] and [11] of this judgment. As I recorded in para [12], there is simply no foundation for its application to the facts of this case.

[33] The second case is my judgment in *Holloway v Darby*, HC HAM CIV 2005-419-1085 8 December 2005. I noted in that case that the position raised unusual circumstances. I concluded that it was appropriate to exercise the inherent jurisdiction rather than wait until a creditor's petition. I was able to do that because prejudice to the creditor was minimal as the debt, which was the subject of the bankruptcy notice, was paid into Court pending resolution of the debtor's District Court proceedings against the creditor. The factual situation in the present case bears no similarity whatsoever to that which I had to consider in *Holloway v Darby*.

[34] For the reasons set out in this judgment, I therefore conclude that there is simply no basis for the invocation of the inherent jurisdiction of the Court in relation

to the bankruptcy notice. Accordingly, there is simply no justification for setting aside the bankruptcy notice or staying the action in respect of it.

Orders

[35] The application to set aside the bankruptcy notice is dismissed.

Costs

[36] Counsel were agreed that the appropriate quantum of costs in this case was that which applied on an application of Category 2, Band B of the High Court Rules. The judgment creditor has been successful in its opposition to the application. Accordingly, I order that the judgment debtor pay costs based on Category 2, Band B, together with disbursements as fixed by the Registrar.

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JA Faire
Associate Judge