IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2011-485-1322

IN THE MATTER OF	the Insolvency Act 2006
BETWEEN	BRC LIMITED Judgment Creditor
AND	RATILAL PATEL Judgment Debtor

CIV-2011-485-1323

AND BETWEEN	BRC LIMITED Judgment Creditor
AND	NAGINBHAI GHELABHAI PATEL Judgment Debtor

Hearing:	18 October 2011 (Heard at Wellington)
Counsel:	F.B. Collins and A. Sinclair - Counsel for Judgment Creditor T. Manktelow - Counsel for Judgment Debtors
Judgment:	11 November 2011

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge D.I. Gendall on 11 November 2011 at 3.00 pm under r 11.5 of the High Court Rules.

Solicitors:	Gibson Sheat, Lawyers, PO Box 2966, Wellington Guy & Toby Manktelow, Solicitors, PO Box 31-265, Lower Hutt

Introduction

[1] Before the Court are applications by the judgment debtors in each proceeding, Ratilal Patel and Naginbhai Ghelabhai Patel to set aside Bankruptcy Notices dated 7 July 2011 issued against them respectively by the judgment creditor.

[2] The Bankruptcy Notices each required payment of the sum of $160,103.70. This amount related to a judgment obtained by the judgment creditor against the judgment debtors in the District Court at Wellington on 2 May 2011, confirming an order to enforce an earlier adjudicator's determination under the Construction Contracts Act 2002.

[3] The applications to set-aside the Bankruptcy Notices are opposed by the judgment creditor, BRC Limited.

[4] As I have noted, the original debt in question which totalled $157,295.70 related to a 4 April 2011 adjudicator's determination by Adjudicator Ms B Hunt (the first adjudication) for refurbishment work completed by the judgment creditor for the judgment debtors at their bar at 10 Bedford Court, Cannons Creek, Porirua pursuant to the Construction Contracts Act 2002.

[5] At the outset it needs to be noted that from the total sum of $160,103.70 (which included costs and disbursements) specified in the Bankruptcy Notices, the judgment debtors on 2 August 2011 have paid the sum of $55,561.81.

[6] And, subsequent to the first adjudication, the judgment creditor has now been found liable to the judgment debtors under a determination issued pursuant to the Construction Contracts Act 2002 by a second adjudicator Mr Erne Joyce on 4 July 2011 (the second adjudication) in the sum of $22,108.16.

[7] Accordingly, deducting these amounts of $55,561.81 and $22,108.16 from the amount specified in the Bankruptcy Notice leaves an initial amount claimed by the judgment creditor of $82,433.73. The deductions noted above, as I understand it, have been accepted by the judgment creditor to the extent that initially it is this $82,433.73, subject to further adjustment which I note below, which it now seeks

under the Bankruptcy Notice. As a suggested double-counting of GST in the first adjudication also appears to arise here, I will say more on these actual debt calculations later in this judgment.

Counsels' Arguments and My Decision

[8] As a preliminary matter, I record that it is appropriate here to consider the arguments in both proceedings together. Both Bankruptcy Notices are identical and the arguments regarding each are the same. Counsel agreed to this course, and I proceed on this basis.

[9] Section 17 Insolvency Act 2006 deals with failure by a debtor to comply with a Bankruptcy Notice and provides for the grounds upon which such a Notice may be set aside:

> **17 Failure to comply with Bankruptcy Notice**
>
> (1) A debtor commits an act of bankruptcy if –
>
> (a) a creditor has obtained a final judgment or a final order against the debtor for any amount; and
>
> (b) execution of the judgment or order has not been halted by a Court; and
>
> (c) the debtor has been served with a Bankruptcy Notice; and
>
> (d) the debtor has not, within the time limit specified in subsection (4), -
>
> (i) complied with the requirements of the notice; or
>
> (ii) satisfied the Court that he or she has a cross-claim against the creditor.
>
> (7) In subsection (1)(d)(ii), cross-claim means a counterclaim, set-off or cross demand that –
>
> (a) is equal to, or greater than, the judgment debt or the amount that the debtor has been ordered to pay; and
>
> (b) the debtor could not use as a defence in the action or proceedings in which the judgment or the order, as the case may be, was obtained.
>
> (emphasis added)

[10] Generally, to succeed in an application such as the present one the judgment debtor must satisfy the Court that he has a genuine triable counterclaim, set-off, or cross-demand; and that it is such that he could not have set it up in the action in

which the relevant judgment was obtained: *Clark v UDC Finance Limited* [1985] 2 NZLR 636,637.

[11] In the present case there are three issues which require determination. These are:

(a) Are the judgment debtors prevented by s 79 Construction Contracts Act 2002 from raising any counterclaim, set-off or cross-demand they wish to bring here to avoid payment of the amount still owing to the judgment creditor?

(b) Is the fact that GST may have been incorrectly added to an amount which was already GST inclusive in the first adjudication determination (the subject of the judgment upon which the present Bankruptcy Notices were based) sufficient grounds to set-aside those Bankruptcy Notices issued in reliance on that judgment?

(c) Have the judgment debtors met the necessary threshold to satisfy the Court that if they are required to make a payment of the debt in question under ss 23, 24 or 59 of the Construction Contracts Act 2002, the judgment creditor payee is unlikely to pay them back if their counter-claim succeeds later?

[12] I turn now to consider each of these issues in turn.

Are the Judgment Debtors Prevented from Raising a Counterclaim, Set-Off or Cross-Demand due to the effect of Section 79 of the Construction Contracts Act 2002?

[13] Section 79 of the Construction Contracts Act 2002 (the Act) provides:

> In any proceedings for the recovery of a debt under section 23 or section 24 or section 59, the court must not give effect to any counter-claim, set-off or cross-demand raised by any party to those proceedings other than a set-off of a liquidated amount if –
>
> (a) Judgment has been entered for that amount; or

(b) There is not in fact any dispute between the parties in relation to the claim for that amount.

[14] In, *Laywood and Rees v Holmes Construction Limited* [2009] NZCA 35 the Court of Appeal considered that in circumstances such as those presently before this Court, to allow a counter-claim, set-off or cross-demand would undermine the purpose of the Act. In this regard, the Court of Appeal noted:

> [63] If the contrary view were to be adopted, the efficacy of the s 73 process would, in our view, be undermined. Parties to construction contracts could refuse to pay an amount ordered by an adjudicator, and resist bankruptcy notices or statutory demands in relation to the debt, on the basis that they had a counter-claim, set-off or cross-demand. The effect of this would simply be to recreate similar problems to those which led to the enactment of the CCA, albeit in a different context.
>
> [64] We acknowledge that this approach may produce hardship. A party may have a meritorious counter-claim, set-off or cross-demand and may not raise it in the context of the CCA or by means of separate proceedings. Yet that party may be precluded from raising it in an application to set-aside a bankruptcy notice or a statutory demand that follows an unsatisfied judgment issued under s 74. This seems hard. But while the adoption of the alternative view would alleviate this hardship, it would, as we have said, create another hardship – it would keep the party in whose favour the adjudicator had ruled from its entitlement under the CCA, and thereby frustrate its purpose.

[15] The Court of Appeal decision then went on to rule that a party who may have a meritorious counter-claim, set-off or cross-demand which could not be raised in the context of the s 73 process under the Construction Contracts Act 2002 because of the provisions of s 79 could not raise the counter-claim, set-off or cross-demand as a basis for the setting aside of a bankruptcy notice pursuant to s19(d) of the Insolvency Act 1967 (now s 17(1)(d) Insolvency Act 2006).

[16] I also dealt with that issue in some detail more recently in a case involving a similar application to that brought by the judgment debtors in this proceeding, *Re Inconstruction Ltd, ex parte Glauser* HC Wellington, CIV-2011-485-443, 14 June 2011. In doing so, I said:

> [26] The grounds for allowing a counter-claim or set-off set out in s 79 Construction Contracts Act 2002 require the existence of a liquidated sum for which there is either a judgment or no dispute between the parties. In the present case the judgment debtor has not obtained judgment for any amount by way of counter-claim or set-off nor can it be said that there is a "no dispute" between the parties in relation to any claim he may have. Any such claim is clearly disputed by the judgment creditor.

> [27] The Court of Appeal in *Laywood & Rees v Holmes Construction Limited* clearly ruled that a party who may have a meritorious counter-claim, set-off or cross-demand which could not be raised in the context of the s 73 process under the Construction Contracts Act 2002 because of the provisions of s 79 of the Act cannot raise the counter-claim, set-off or cross-demand as a basis for the setting aside of a Bankruptcy Notice pursuant to s 19(d) of the Insolvency Act 1967.
>
> [28] It would seem here that the judgment debtor is inviting the Court to do precisely what the Court of Appeal in *Laywood & Rees v Holmes Construction Limited* ruled cannot be done. In this case, there is no suggestion by the judgment debtor that there are any irregularities in the Bankruptcy Notice which has been issued against him or that it has not been served in compliance with the rules as to service in the High Court Rules. As I have noted above, the judgment debtor provided no opposition to the judgment creditor's application to have the adjudication noted as a judgment of the District Court nor as I understand it have any steps been taken by the judgment debtor regarding this judgment.

[17] Turning now to the present case, it appears that the judgment debtors have recently brought an application to set-aside the District Court judgment as sealed by the judgment creditor here but as I understand it principally with respect to the GST component of the first adjudication decision. This GST amount appears to be some $18,984.41 and it is said that it should also be deducted from the amount claimed in the Bankruptcy Notice.

[18] Before me, it became clear that the judgment creditor now accepts that this GST deduction should be made from the amount claimed as well as the other deductions noted above at para [7].

[19] Otherwise, as I understand the position, the general set-off or counter-claim raised by the judgment debtors here appears to relate first, to the fundamental issue of whether or not the sum charged to them by the judgment creditor for the refurbishment work under the Construction Contracts Act 2002 was a proper price for the work done and secondly, whether or not that work was carried out in a proper and workmanlike fashion.

[20] It seems the judgment debtors have obtained reports from two quantity surveyors which appear to dispute the total amounts claimed here by the judgment creditor. It is partly as a result of this that the judgment debtors have issued District Court proceedings by way of counter-claim.

[21] What is clear in this case, however, is that the counter-claim or set-off amount is not at this point a liquidated sum for which there is either a judgment in favour of the judgment debtors or alternatively an amount for which there is no dispute between the parties. (On the contrary, this counter-claim/set-off is vehemently disputed by the judgment creditor here). Section 79 Construction Contracts Act 2002 therefore clearly applies and in terms of the Court of Appeal decision in *Laywood & Rees v Holmes Construction Limited* I am satisfied that no such counter-claim, set-off or cross-demand can be raised here as a basis for setting-aside the Bankruptcy Notice.

[22] I conclude therefore that the judgment debtors are prevented from raising their suggested counter-claims/set-offs or cross-demands to avoid payment of the balance amount still owing to the judgment creditor under the Bankruptcy Notice.

2. Because GST was incorrectly added to the Adjudication Amount does this provide sufficient grounds to Set-Aside the Bankruptcy Notice?

[23] In the present case both parties appear to accept now that an error was made in the initial adjudicator's determination in the first adjudication in that GST had been added to the amount of that determination but the adjudicator had incorrectly stated the figure was "GST exclusive". The judgment creditor clearly accepts now that this was an error which needs to be rectified in its claim.

[24] Notwithstanding that the first adjudication was entered as a judgment of the District Court including this error, it does seem to me that there is no good reason why the Bankruptcy Notice in question here should not stand for the reduced (and correct) amount properly due from the judgment debtors.

[25] Section 418 Insolvency Act 2006 appears to allow amendment of a Bankruptcy Notice where there has been an overstated amount due, provided that the error in the notice is not so substantial as to make the proceedings so defective as to be a nullity. See Brookers Insolvency Law & Practice IN 418.07(9) and *Re: Nigro ex P Clayton*, HC, Auckland, 24/5/90, Williamson J B353/90. Here, the Bankruptcy Notice was issued at the time for the correct District Court judgment amount. In my

view under all the circumstances here, s 418 allows an appropriate order for amendment of the amount in the Notice to be made. The part payment of the debt and second adjudication were made subsequently and the resulting adjustments to the amount claimed simply followed as a result. And similarly, the GST error was made by the adjudicator in her first adjudication and recognised only subsequently. Accordingly, an appropriate amendment order to the Bankruptcy Notice is to follow here.

3. Have the Judgment Debtors met the necessary threshold to satisfy the Court that if they make a payment under the Construction Contracts Act 2002 the Judgment Creditor is unlikely to pay them back should their counter-claim or cross-demand be successful?

[26] Under this argument, the judgment debtors appear to be seeking some form of interim relief whereby they should not have to pay the amount owing because of an alleged insolvency risk on the part of the judgment creditor.

[27] His Honour, Associate Judge Bell, recently addressed this issue in *Kariiti v Donovan Drainage & Earthmoving Ltd* HC, Whangarei, CIV-2010-488-613, 19 November 2010. In that case a company responsible to pay under an adjudication decision refused to pay an amount owing under pressure of liquidation proceedings and sought a restraint of advertising claiming that the judgment creditor was insolvent and unlikely to pay them back if they were successful in a final determination they were seeking in the District Court. Associate Judge Bell in dealing with the Construction Contracts Act 2002 pay now argue later principles relating to this issue stated:

> [6] Payers have sometimes asserted that if they pay under ss 23, 24 or 59, the payee is unlikely to pay them back, even though they have good arguments to show that the payee will have been overpaid. At times, they have applied to the Court for interim relief. Cases in which these issues have been raised include *Concrete Structures NZ Ltd v Palmer* [2006] NZAR 513, *Gill Construction Co Ltd v Butler* [2010] 2 NZLR 229 (HC), *Yun Corporation Ltd v YOT Ltd* HC Auckland, CIV-2009-404-7656, 26 February 2010, *Canam Construction Ltd v Ormiston Hospital Investment Ltd* HC Auckland, CIV-2010-404-291, 10 August 2010.
>
> [7] Courtney J gave the justification for providing interim relief in *Concrete Structures NZ Ltd v Palmer* at [17]:

> It cannot have escaped Parliament's notice that one party's position might be irretrievably prejudiced by the time a judicial review application had been determined. It is unlikely that it intended to preclude interim relief where one party faced this danger. In the balancing exercise between the rights of the party with a favourable adjudication to be paid immediately and the rights of the party claiming a breach of natural justice the significant factor must surely be the impact if the strict rights under the CCA prevailed. If the effect would be to permanently prejudice the other party so as to render its application for judicial review worthless, regardless of the outcome, then I cannot think that it was the intention. I do not consider that, as a matter of statutory interpretation, the CAA has the effect of ousting s 8 JAA.
>
> [8] The issue in these cases is whether there should be a departure from the policy of pay now, argue later because any payment made now will not be recoverable later, that is, whether an interim payment will become a final payment.
>
> .....
>
> [10] While each application will turn on its own facts and circumstances, there are two important considerations:
>
> (a) How real is the risk that the payee will not repay once there has been a final determination on the merits under a dispute resolution procedure under s 26(1)?
>
> (b) How strong is the payer's claim that the payee will have to repay under that later determination?

[28] Associate Judge Bell then went on to look at the onus of establishing whether there was a risk that a payee would not be able to refund the payer on a final determination and said this:

> **Risk of non-payment**
>
> [11] The risk must be more than nominal. It is not enough for the payer simply to express a concern about the payee's ability to repay. .....
>
> .....
>
> [13] So, if the payee is in substantially the same financial position as it was when the payer chose to engage it under the construction contract, the payer can hardly complain about the risk of non-payment, because that is a risk the payer took when he entered into the contract with the payee. Similarly, when a payee's weakened position is attributable to a significant degree to the payer's failure to pay sums due under ss 23, 24 or 59, that is not a [be] good reason for relieving the payer from its obligation to pay.

[29] In *Chow Group Limited v Walton* HC, Auckland, CIV-2011-404-3148, 9 June 2011, Rodney Hansen J approved *Kariiti* and said:

[7] I extract the following principles from the judgments in *Concrete Structures* and *Kariiti* and had this to say:

(a) As with any application to stay execution of a judgment or determination, the onus of establishing that the right of review or appeal may be rendered nugatory is on the applicant.

(b) The applicant must show a real risk that the payee may not be able to repay. The risk must be more than nominal. It is not enough for the payer to simply express a concern about the payee's ability to pay. There needs to be "a high degree of likelihood that the payee will not be able to repay if a determination ... goes in the payer's favour.

(c) Even if the applicant is able to reach the required threshold, relief will not automatically follow. It will also be necessary to show that the applicant has a good arguable case for relief in the substantive claim.

[30] At the outset I note that any suggestion in this case that the judgment creditor is a credit risk is strongly denied by the judgment creditor.

[31] It is also not entirely apparent in my view whether the judgment debtors procedurally have the right to advance an argument here as to whether they can set-aside the Bankruptcy Notices on the basis that the judgment creditor is a credit risk – see *Kariiti* above.

[32] But, assuming that they do have this right, in any event here, the judgment debtors' evidence on this issue is sparse and generally unhelpful. It seems to be limited principally to allegations against the sole shareholder of the judgment creditor and his alleged history gleaned from certain Companies Office records.

[33] The judgment creditor itself has been incorporated since March 2001. There is no real evidence of any kind produced here to show that it is any way a credit risk. Whilst the onus is on the judgment debtors to establish that any final determination here may be rendered nugatory, it is clear they have failed in this case:

(a) to seek a final determination in the District Court at an early opportunity;

(b) to provide any evidence of substance to show that the judgment creditor is a real credit risk which, I have noted above, in any event is denied; and

(c) to explain why the adjudicators' comprehensive determinations in both adjudications are wrong and why they have a strong case to support their claim that they would be due a refund on a final determination in the District Court.

[34] Taking all these circumstances into account, but especially the absence of any real holding that the judgment creditor would not be able to repay, and the absence of any real evidence as to the strength of the judgment debtors' claims in the District Court proceeding, I see no basis for setting-aside or staying in some way the Bankruptcy Notice here.

Conclusion

[35] For all the reasons outlined above, the applications by the judgment debtors to set-aside both Bankruptcy Notices must fail. They are dismissed.

[36] An order is now made, however, amending the amounts due under the Bankruptcy Notices in each case to the sum of $70,371.91. (Calculation of those amended Bankruptcy Notice amounts of $70,371.92 is to take into account first, deduction for the total amount repaid of $55,561.81, secondly, deduction for the second adjudication amount of $22,108.16, thirdly, deduction for the double charged GST sum of $18,984.41 and finally, the agreed adjustments between the parties, acknowledged at the hearing before me, for interest and costs).

[37] A further order is now made in each proceeding that the judgment debtors are to have a further ten (10) working days from the date of this judgment to comply with the amended Bankruptcy Notices.

[38] As to costs, under s 59(2)(a)(ii) of the Construction Contracts Act 2002, the judgment creditor is entitled to recover its actual and reasonable costs of recovering

the sums payable under the adjudication. That includes its costs in opposing the present application.

[39] The judgment creditor has sought actual solicitor/client costs on this application in the sum of $7,527.00 plus GST. The judgment debtors are ordered to pay the judgment creditor costs on this application totalling $7,527.00 plus GST together with disbursements (if any) as approved by the Registrar.

'Associate Judge D.I. Gendall'