

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2006-404-004129

IN THE MATTER OF the Insolvency Act 1967

AND

IN THE MATTER OF the bankruptcy of GR Rees

BETWEEN HOLMES CONSTRUCTION WELLINGTON
LIMITED
Judgment Creditor

AND GARY JAMES REES
Judgment Debtor

CIV 2006-404-004220

IN THE MATTER OF the Insolvency Act 1967

AND

IN THE MATTER OF the bankruptcy of I Laywood

BETWEEN HOLMES CONSTRUCTION WELLINGTON
LIMITED
Judgment Creditor

AND IAN LAYWOOD
Judgment Debtor

Hearing: 3 March 2008

Counsel: D Hughes and M Casey for judgment creditor
R Hucker for judgment debtor

Judgment: 3 March 2008 at 1700

**SECOND INTERIM JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on applications to set aside bankruptcy notices]**

Solicitors: Kensington Swan, PO Box 10 246, Wellington for judgment creditor
Hucker & Associates, PO Box 3843, Auckland for judgment debtors

[1] My judgment of 9 February 2007 dealt with the applications to set aside bankruptcy notices on an interim basis and in reliance on the Court's inherent jurisdiction.

[2] The applications were adjourned to await the outcome of an appeal against the decision of District Court Judge DM Wilson QC given on 5 July 2006. That judgment is the foundation for the issue of the bankruptcy notices which I am invited to set aside.

[3] The appeal was refused by Asher J in a judgment delivered on 13 December 2007. In a further judgment delivered by His Honour on 15 February 2008 he granted the judgment debtors leave to appeal to the Court of Appeal.

[4] The current position differs little from that which I referred to in my interim judgment. It seems to me the conclusion referred to in [34] of that judgment still applies, namely:

.... In my view, the correct approach, if the inherent jurisdiction of the Court is to be invoked, is to do what Master Kennedy-Grant did in *re Wise, ex parte Benecke* and simply adjourn this application to check progress with the hearing of the appeals and on the condition that the debtors take all practical steps to prosecute those appeals diligently. In that way the effect of r 830(2) of the High Court Rules is preserved.

[5] The judgment debtors, in addition to referring to the judgment granting them leave to appeal, add a further ground to their application to set aside the bankruptcy notices. It is expressed as follows:

The second additional ground is that the judgment obtained by the debtor is not a final judgment for the purposes of s 19 of the Insolvency Act 1967 given the status of judgments under the Construction Contracts Act 2002.

[6] Bankruptcy notices are issued for the purpose of establishing an act of bankruptcy pursuant to s 19(1)(d) of the Insolvency Act 1967. Section 19(1)(d) provides:

19 Acts of bankruptcy

- (1) A debtor commits an act of bankruptcy in each of the following cases:

...

- (d) If a creditor has obtained a final judgment or final order against the debtor for any amount, and, execution thereon not having been stayed, the debtor has served on him in New Zealand, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within 14 days after the service of the notice in a case where the service is effected in New Zealand, and in a case where the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained:

[7] Bankruptcy notices are issued on request to a Registrar pursuant to r 826 of the High Court Rules. In terms of s 19(1)(d) of the Insolvency Act 1967 there must be a final judgment before a bankruptcy notice can be issued. In his judgment of 13 December 2007 Asher J was required to consider what the District Court must do when it receives an application pursuant to s 73 of the Construction Contracts Act 2002. In carrying out his review, His Honour records at [45] of the judgment:

The fact that the enforcement process is not intended to transform an adjudicator's determination into a final judgment, and is not intended to prevail over any other dispute resolution procedures, is confirmed by a reading of the select committee report.

[8] His Honour's comments are apparently one of the bases for the amended ground advanced, namely that the bankruptcy notices are not based on a final judgment.

[9] If the judgment debtors are successful in setting aside the District Court judgment then, of course, there is no foundation for the bankruptcy notices and they must be set aside. Accordingly, if that answer is given in the appeal that is decisive of the applications which are before me.

[10] However, if the judgment of District Court Judge DM Wilson QC is not set aside, the question will arise as to whether that is a final judgment for the purposes of s 19(1)(d) of the Insolvency Act 1967.

[11] Because the nature of the judgment or order which is made under s 74 of the Construction Contracts Act 2002, pursuant to the application which is made under s 73 of that Act, is so closely related to the matters which will be argued before the Court of Appeal under the leave application, it is important that the issue referred to in [10] be determined by that Court at the same time. That is because the judgment of Asher J makes it plain that the effect of the order that the adjudicator's determination be entered as a judgment of the Court is not subject to the principle of res judicata.

[12] I inquired of Mr Hucker as to whether the appeal pursuant to the leave had been filed. He told me it had not. A short adjournment was arranged. The appeal was completed and Mr Hucker advised me he had instructions and would undertake to the Court that the appeal would be filed and served forthwith and that the appropriate fees would be paid. I therefore proceed on the basis that an appeal has been filed pursuant to the leave granted by Asher J.

[13] I next invited submissions from counsel as to how the problem of the status of the judgment for the purposes of s 19(1)(d) of the Insolvency Act 1967 might be approached. Mr Hucker submitted that I should refer the matter to the Court of Appeal for determination at the same time as the current appeal. That certainly has considerable attraction because it will ensure that the Court of Appeal is apprised of all aspects relating to the orders which District Courts make pursuant to s 74(4) of the Construction Contracts Act 2002, including the use of such judgments in both personal and corporate insolvency cases.

[14] Two potential approaches were discussed with counsel. The first involved the possible application of s 64 of the Judicature Act 1908 by the removal of the applications which I am now determining from the High Court to the Court of Appeal. I do not pursue that jurisdiction because there may be a case for exploring the existence of a counterclaim which would involve an inquiry as to fact before finally determining the applications to set aside the bankruptcy notices.

[15] A further alternative is to consider the matter by way of determination of a question pursuant to rr 417 and 418 of the High Court Rules.

[16] The question is:

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 purpose of s 19(1)(d) of the Insolvency Act 1967.

[17] Rule 419 of the High Court Rules permits the removal of a question pursuant to rr 417 and 418 into the Court of Appeal for determination.

[18] The process utilising r 419, in my view, is the correct one in this case. That will ensure that all questions relating to the order made by District Court DM Wilson QC under s 74 of the Construction Contracts Act 2002 are before the Court of Appeal when the present appeal is determined.

Orders

[19] Accordingly, I order as follows:

- a) The question of whether an order pursuant to s 74 of the Construction Contracts Act 2002, made by District Court Judge DM Wilson QC, 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 shall be determined separately and before the determination of the balance of the matters required to be determined in the application to set aside the bankruptcy notices;
- b) The determination of the question referred to above is removed into the Court of Appeal for determination with the judgment debtors' appeal from the judgment of Asher J delivered on 13 December 2007; and
- c) The applications are otherwise adjourned to the Miscellaneous Insolvency List at 11.45am on 31 March 2008. It is a condition of such adjournment that the judgment debtors take every step possible to ensure that the appeal is heard and determined promptly.

[20] Because the determination of the question posed and, indeed this appeal, relates to a procedure prescribed in the Construction Contracts Act 2002 which is designed to provide for the speedy resolution of disputes and because the answer to the question posed will have application to every order made under s 74 of the Construction Contracts Act 2002 where the judgment creditor seeks to invoke the insolvency jurisdiction of the Court, a request for the determination of the appeal on an urgent basis is made.

Costs

[21] Costs are reserved.

JA Faire
Associate Judge