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

CIV-2011-485-443

IN THE MATTER OF the Insolvency Act 2006
AND IN THE MATTER OF the Bankruptcy of HANS GLAUSER

BETWEEN INCONSTRUCTION LIMITED
Judgment Creditor

AND HANS GLAUSER
Judgment Debtor

Hearing: 13 June 2011
(Heard at Wellington)

Counsel: K. Mortimer - Counsel for Judgment Creditor
H. Glauser - Judgment Debtor in person

Judgment: 14 June 2011 at 3:30 PM

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

*This judgment was delivered by Associate Judge Gendall on 14 June 2011 at 3.30 pm
under r 11.5 of the High Court Rules.*

Solicitors: Gibson Sheat, Solicitors, PO Box 2966, Wellington

Introduction

[1] Before the Court is an application by the judgment debtor, Mr Hans Glauser, seeking an order to set-aside a Bankruptcy Notice dated 10 March 2011 issued against him by the judgment creditor.

[2] The application is opposed by Inconstruction Limited, the judgment creditor.

Background Facts

[3] In 2009 the parties entered into a contract (“the Contract”) for building work on a labour only basis to be carried out by the judgment creditor at the judgment debtor’s residence at 1A Fraser Avenue, Johnsonville. The Contract apparently related to renovations and extensions to the house at the property, the work on which was carried out by the judgment creditor between about September and December 2009.

[4] As work progressed, payment claims by way of invoices were served on the judgment debtor under the Construction Contracts Act 2002. A number of payments were made by the judgment debtor amounting to \$51,180.00 plus GST.

[5] When it seems various invoices for work carried out had remained unpaid for some time, the judgment creditor made a final payment claim on 22 July 2010 for an unpaid balance totalling around \$17,000.00 plus GST. Payment, however, was not made by the judgment debtor and various disputes ensued between the parties.

[6] On 4 November 2010 the judgment creditor served on the judgment debtor a claim for adjudication under the Contract and the Construction Contracts Act 2002 for \$15,323.75 plus GST. That final payment claim by the judgment creditor was determined in an adjudicator’s determination issued on 3 December 2010. On that adjudication application and determination, Mr F Collins acted as counsel for the judgment creditor and Mr J Langford acted as counsel for the judgment debtor.

[7] The determination of the adjudicator Mr P. B. Degerholm on 3 December 2010 provided that the judgment debtor was to pay to the judgment creditor a final

payment claim of \$12,550.85 (plus GST) together with 75% of the adjudicator's fee amounting to \$2,910.94 (including GST) and the sum of \$1,196.08 (including GST) towards the judgment creditor's costs and expenses. The total adjudicator's award therefore amounted to \$18,226.73 inclusive of GST.

[8] Significantly, payment by the judgment debtor of this sum was to be subject to a condition set out at para 18 of the adjudicator's 3 December 2010 decision. Para 18 reads as follows:

18. I determine that Mr Glauser's liability for payment shall arise when Inconstruction's counsel provides written notice to Mr Glauser that the relevant producer statement is held, and will be released immediately upon receipt by Inconstruction of all amounts due in accordance with this determination. Payment of all amounts due under this determination shall then be due two working days after the date upon which such written notice is given.

[9] Before the Court is a copy of a letter dated 3 December 2010 from the solicitors to the judgment creditor addressing this aspect. The letter is to counsel acting for the judgment debtor and confirms that the relevant producer's statement for the waterproofing of the block wall is held in terms of para 18 of the adjudicator's award and this is to be released immediately upon receipt of payment of the sum determined being \$18,226.73.

[10] Payment under the adjudicator's determination was therefore due on about 7 December 2010. On 25 January 2011, as this sum had not been paid by the judgment debtor, the District Court at Wellington on an unopposed application by the judgment creditor, issued a judgment and order enforcing the adjudicator's 3 December 2010 determination. On 10 March 2011, the judgment creditor then requested this Court to issue a Bankruptcy Notice against the judgment debtor. Once this Bankruptcy Notice was served upon the judgment debtor on 31 March 2011 he responded by filing in this Court the present Application to Set it Aside. The application was opposed by the judgment creditor in a Notice of Opposition filed on 5 May 2011.

[11] The specific grounds advanced by the judgment debtor in support of his Application to Set-Aside the Bankruptcy Notice (outlined in his Amended Application filed 6 May 2011) are stated as:

2. The grounds on which each order is sought are as follows:
 - (a) The Judgment Debtor had a cross-claim or set-off in the adjudication on which the Bankruptcy Notice was based that was equal to or exceed the amount of the Judgment Creditor's claim.
 - (b) The Judgment Debtor could not put forward his set-off or cross-claim in the adjudication.
 - (c) Appearing in the affidavit of the Judgment Debtor filed herein.

[12] Essentially it would appear from the affidavits filed by the judgment debtor here that his complaints are:

- (a) He was inadequately represented by his counsel, Mr John Langford, at the adjudication and subsequent to the adjudicator's decision when he claims he issued instructions to challenge that decision but these instructions were not followed up by Mr Langford.
- (b) The adjudicator did not engage in a mediation process which was unfair under all the circumstances. In addition the adjudicator did not even visit the property to clarify issues raised by the judgment debtor and further, he did not properly address the issue of a warranty for the sealing work carried out on the property which was a requirement for obtaining a Code of Compliance Certificate. This remains outstanding.
- (c) Some \$47,000.00 of the judgment debtor's funds were lost through a defalcation from a solicitor's trust account and thus the judgment debtor is left without funds to settle any debt that may be outstanding.

[13] On several occasions the judgment debtor contends he tried to meet with the judgment creditor to "sort out the issues" but he says any co-operation in this regard was refused.

[14] The judgment debtor in his own words at para [23] of his 6 May 2011 affidavit filed in this proceeding, "is seeking to set-aside the Bankruptcy Notice in order to seek a re-hearing at the District Court to address issues associated (with) his inability to obtain a Code of Compliance and necessary funds from the bank or other sources".

Parties' Arguments and my Decision

[15] The judgment debtor here effectively relies on section 17 of the Insolvency Act 2006, which relevantly provides:

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)

[16] 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.

[17] As I have noted above the judgment creditor's Amended Application to Set-Aside the Bankruptcy Notice here is based on the sole ground that he had a cross-claim or set-off in the adjudication on which the Bankruptcy Notice was based that was equal to or exceeded the amount of the judgment creditor's claim and that he could not put forward this set-off or cross-claim in the adjudication.

[18] The issue for determination here, in my view, is a discreet one. It involves a consideration of the recent Court of Appeal decision in *Laywood & Rees v Holmes*

Construction Limited (2009) NZCA 35 in relation to s 79 Construction Contracts Act 2002.

[19] To recap, in short, the debt which is the subject of the present application is owed to the judgment creditor under the adjudication determination made on 3 December 2010, issued under s 48 Construction Contracts Act 2002.

[20] That adjudicator's determination was then entered unopposed as a judgment of the District Court in terms of s 73 Construction Contracts Act 2002. The application by the Judgment Creditor to the District Court for this to occur once made was not opposed by the judgment debtor within the mandatory 15 working day period provided for in s 74 Construction Contracts Act 2002.

[21] Section 77 Construction Contracts Act 2002 goes on to provide "for the avoidance of doubt" that an adjudicator's determination entered as a judgment (which has occurred here) may be enforced by execution in accordance with the District Court Rules 1992.

[22] Section 79 Construction Contracts Act 2002 provides:

79 Proceedings for recovery of debt not affected by counter-claim, set-off or cross-demand

In any proceedings for the recovery of a debt under s 23 or s 24 or s 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.

[23] Here, from his Notice of Opposition, the judgment debtor is endeavouring to raise a counter-claim or set-off or to belatedly attack the adjudication which unopposed was entered as a judgment of the District Court. The primary issue before me for determination, therefore, is whether the judgment debtor is prevented from doing so by the effect of s 79 Construction Contracts Act 2002?

[24] Although as Brookers Insolvency Law and Practice at para IN17.10(p) noted, there was originally some disagreement between the authorities regarding the effect of s 79 Construction Contracts Act 2002 leading up to the decision of the Court of Appeal in *Laywood & Rees v Holmes Construction Limited*, there can be no doubt now that this decision provides an unequivocal resolution of the principles which are to apply in situations such as the present one facing this Court.

[25] In this regard the Court of Appeal in *Laywood & Rees* stated:

[61] We emphasise at this point the distinction between an application to set aside a bankruptcy notice or a statutory demand on the one hand and an adjudication of bankruptcy or order to wind up a company on the other. The question we are asked to resolve concerns the former. In that context, we prefer the view expressed by Randerson J in *Volcanic Investments*. We find some assistance in the exceptions provided for in s 79. Under that section, a set-off may be taken into account in debt recovery proceedings (including the s 73 process) if it relates to a liquidated amount and either judgment has been entered for that amount or there is no dispute between the parties in relation to the claim for that amount. Absent that, a determination can be entered as a judgment under s 73 and enforcement proceedings taken through the District Court, and any counterclaim, set-off or cross-claim must be pursued through separate proceedings.

[62] If that is the position in relation to the enforcement processes available through the District Court, or where there is a charging order under the CCA, there seems in principle to be no reason why it should not apply in respect of a bankruptcy notice under s 19(1)(d) of the Insolvency Act or a statutory demand under the Companies Act. It is true that such processes have an additional dimension to them, in the sense that ultimately they lead to a process which focuses on liquidity and asset worth. It is also true, as Associate Judge Doogue said, that bankruptcy and liquidation proceedings have a broader objective than simply ensuring that a particular creditor is paid. Despite that, bankruptcy notices and statutory demands are, in a practical sense, important enforcement mechanisms, as Randerson J recognised. And in the present case, the debt which Holmes Construction seeks to recover has the force of a court judgment behind it. This is not a case where a creditor has sought to use bankruptcy or liquidation proceedings to recover a small amount from a person or company which can plainly afford to pay it.

[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 counterclaim, 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 counterclaim, 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.”

[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 “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 counterclaim, 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.

[29] The judgment creditor says he has real complaints against the counsel who acted on his behalf in the adjudication and subsequently, but these are obviously separate matters to be pursued elsewhere.

[30] I conclude that, applying the Court of Appeal decision in *Laywood v Holmes Construction Wellington Limited* the judgment debtor has been unable to show in terms of s 17(7) Insolvency Act 2006 that he has a cross-claim against the judgment creditor that he could not use as a defence in the action or proceeding in which the adjudication and judgment were obtained.

[31] As I noted in reasonably similar circumstances at para [19] in my decision in *Plimmerton Courtyard Limited v Franklin* HC, Wellington, 2 April 2009, CIV-2008-485-2613:

But, I remind myself first that the present application before the Court is one to set aside a bankruptcy notice and this must be distinguished from a bankruptcy adjudication, and secondly, in any event as *Laywood & Rees* notes at para [64], “the adoption of an alternative view, (to the conclusion noted above) would create another hardship” in that it would keep the creditor who has received a favourable adjudication with the force of a Court judgment behind it from its entitlement under the Act and thereby frustrate its purpose. For these reasons the debtor’s application to set aside the bankruptcy notice must fail. The application is dismissed.

[32] For all these reasons the application by the judgment debtor to set-aside the Bankruptcy Notice must fail.

[33] An order is now made that the judgment debtor is to have until 5.00 pm on 21 June 2011 to comply with the Bankruptcy Notice served upon him.

[34] As to costs the judgment creditor has succeeded in opposing the present application and I see no reason why it should not be entitled to an order for costs in the usual way. Costs are therefore awarded to the judgment creditor against the judgment debtor on this application on a Category 2B basis together with disbursements as fixed by the Registrar.

‘Associate Judge D.I. Gendall’