#36

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV2006-404-4528

BETWEEN	INSITE DESIGN & DEVELOPMENT LTD Judgment Creditor
AND	JOHN CAMERON SADLER Judgment Debtor

Hearing: 25 May 2007 and 1 June 2007

Appearances: M Keall for Judgment Creditor
R B Hucker and Mr Cumming for Judgment Debtor

Judgment: 13 September 2007 at 4.30 pm

RESERVED JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by Associate Judge Sargisson on 13 September 2007 at 4.30 pm pursuant to Rule 540(4) of the High Court Rules

Registrar/Deputy Registrar

Date:.....

Solicitors:
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Draffin Snow Law Solicitors, PO Box 47-290, Ponsonby, Auckland
Hucker & Associates, PO Box 3843, Shortland Street, Auckland

[1] The judgment debtor, Mr Sadler, has made application seeking:

a) An order **recalling** my judgment of 27 April 2007, in which I declined to set aside the bankruptcy notice served on Mr Sadler by the judgment creditor, Insite.

b) In the alternative, the **review** of that judgment and an order setting it aside.

c) In the alternative, an order **staying** the judgment pending determination of any application for review and/or appeal.

d) An order that a transcript of the hearing of the application to set aside the bankruptcy notice be made available.

e) An order that costs be reserved on the application.

Scope of matters for determination

[2] At the mentions hearing on 18 May, it was agreed that I would not deal with the second limb of the application seeking the review of my judgment. In the application, Mr Sadler states that he relies on s 8 of the Insolvency Act and r 61C. While an Associate Judge has power to review under s 8 of the Insolvency Act, the power of review conferred by r 61C of the High Court Rules is not available to an Associate Judge.

[3] It is also not necessary to deal with the fourth limb of the application which requests an order that a transcript of the hearing be made available. In accordance with the Court's usual practice when hearing applications to set aside bankruptcy notices, no transcript of the hearing was made, and Mr Hucker indicated that he did not pursue that part of the application.

[4] That leaves for determination the application for an order for recall of the judgment of 27 April 2007, and if that is not granted, the alternative application

seeking an order staying that judgment pending the determination of the application for review and/or an appeal.

[5] In this last respect, Mr Sadler filed an appeal with the Court of Appeal on 24 May 2007.

Application for recall of judgment

[6] R 542(3) allows for the recall of judgments prior to their sealing. It provides:

> A judgment, whether given orally or in writing, may be recalled by the Judge at any time before a formal record of it has been drawn up and sealed.

[7] At the mentions hearing on 18 May, I was advised that my judgment of 27 April 2007 has not been sealed and that there is agreement between the parties that it will not be sealed until this judgment is issued. I was also advised that that agreement was reached on the basis of the parties' further agreement to the effect that Insite is at liberty to file its petition based on the bankruptcy notice in order to avoid the statutory time limit in s 23 of the Act. I made orders by consent accordingly, in terms that the parties jointly submitted.

[8] It is a serious step to recall a judgment: see *Horowhenua County v Nash (No.2)* [1968] NZLR 632. Wild CJ said at 633:

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty.

[9] His Honour went on to outline three categories of cases in which a judgment may be recalled. These are:

a) Since the hearing there has been an amendment to a statute/regulation or a case of high authority;

b) Counsel have failed to draw the Court's attention to a relevant statutory provision or case;

c) For some special reason justice requires that the judgment be recalled.

[10] This statement was recently re-affirmed by the Court of Appeal in *Unison Networks Ltd v Commerce Commission* [2007] NZCA 49.

[11] Mr Sadler seeks a recall principally to enable him to invite the Court to consider whether or not there should be a stay of his application to set aside the bankruptcy notice and to prevent steps being taken in reliance on the bankruptcy notice pending the outcome of his District Court proceeding. In that proceeding he seeks to advance his counterclaim against Insite.

[12] Several grounds were raised to demonstrate a special reason why justice requires that my judgment be recalled under the third of the categories referred to in *Horowhenua*. Counsel also submitted that the grounds justify an order for recall in the exercise of the Court's inherent jurisdiction.

[13] The grounds raised were:

a) In my judgment of 27 April I made a finding that there is a triable claim that exceeds the amount of the judgment debt. (This is found at paragraph 26 of the judgment which states "I am prepared for present purposes to accept that there is a triable claim that exceeds the amount of the judgment debt)".

b) The Court did not consider whether monies held in Mr Sadler's trust account constituted a compounding of the debt in terms of s 19 and 20 of the Act.

c) The Court did not consider *Holloway v Darby* (HC Hamilton, CIV-2005-419-1085, 8 December 2005) an unreported judgment of Associate Judge Faire. (In *Holloway* the Court exercised its inherent jurisdiction in the context of an application to set aside a bankruptcy notice, to stay further steps being taken in reliance on the bankruptcy notice. The stay was made pending further order. It was subject to conditions which included a condition that the judgment debtor pursue with diligence his District Court proceeding and pay the amount of the

judgment debt into the High Court pending the determination of a substantive District Court proceeding and a condition that adequate security be provided).

d) Mr Sadler's affidavit evidence set out the basis on which the funds paid into trust were held by the independent solicitor, and my judgment did not accurately reflect that evidence. (The relevant paragraph of my judgment is paragraph 39(d) which states:

> Counsel for Mr Sadler emphasised the payment into the solicitor's trust account. However at the resumed hearing, he made very clear that those monies belonged to a family trust and not to Mr Sadler. He also indicated that the trustees are not willing to make monies available to meet the judgment debt in the event that Mr Sadler's District Court action fails. The payment in these circumstances appears as merely a device to overcome Mr Sadler's difficulty in raising specific grounds under s 19(1)(d) for setting aside the bankruptcy notice. It does not provide the foundation for a finding that this proceeding should be stayed to avoid an abuse of process).

[14] Mr Sadler advanced as a further ground related to the first of the above grounds, that the following factors were not drawn to my attention:

a) The definition of "action" and "civil proceeding" in s 2 of the Judicature Act 1908 and the 1985 amendment.

b) The interpretation of s 19(1)(d) of the Act in respect of those provisions.

c) The judgment of the Court in *Phillpott v Shangri-La Apartments Limited* (HC Auckland, B 7/89, 19 July 1989, Ellis J). (The decision dealt with an application to set aside a bankruptcy notice based on a judgment to enforce an arbitral award. In that case, the Court considered, among other things, the policy implicit in the provisions of s 19(1)(d) of the Act).

[15] None of the grounds relied on give rise to special reason why justice requires that the judgment be recalled, or justify a departure from the general principle that a judgment must stand subject only to appeal. In accordance with established

principle, my judgment must stand for better or worse subject to the appeal that Mr Sadler has filed. If my judgment is wrong, then he will have his recourse in the normal way on appeal, or if appropriate on the application for review.

[16] It follows that I decline to make an order for recall under r 542. I also decline to make an order for recall in the exercise of the Court's inherent jurisdiction. Assuming there is a separate and independent power to make an order for recall in the Court's inherent jurisdiction, no reasons were advanced as to why the Court should reach a different conclusion from that arrived out under r 542.

[17] In reaching my conclusion, I do not overlook the memorandum that Mr Hucker filed after the hearing, drawing to my attention the recent decision of Associate Judge Doogue in *Silverpoint International Limited v Wedding Earthmovers Ltd* (HC Auckland, CIV2007-404-104, 30 May 2007). That decision is concerned with an application to set aside a statutory demand. If the decision adds weight to Mr Sadler's appeal or his application for review, then that is a matter the Court will no doubt take into account.

Stay of execution of judgment

[18] Mr Hucker submitted that in the event that an order for recall is refused, grounds exist for a stay of the judgment refusing to set aside the bankruptcy notice, under r 565 or r 710.

[19] R 565 states:

> **Stay of execution**
>
> Any party against whom judgment has been given may apply to the Court for a stay of execution, or other relief against the judgment, upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were executed, and the Court may give relief on such terms as appear just.

[20] Rule 710 states:

> **Stay of proceedings**

(1) An appeal does not operate as a stay of the proceedings appealed against or a stay of execution of any judgment or order appealed against.

(2) However, pending the determination of an appeal, the decision – maker or the Court may, on application, -

(a) Order a stay of proceedings in relation to the decision appealed against or a stay of execution of any judgment or order appealed; or

(b) Grant any interim relief.

(3) An order made or relief granted under subclause (2) may –

(a) Relate to execution of the whole of a judgment or order or to a particular form of execution;

(b) Be subject to any conditions for the giving of security the decision – maker or the Court thinks fit.

[21] Mr Hucker argued that there should be a stay preventing Insite taking any steps based on the bankruptcy notice, pending determination of the application for review and/or the appeal. It is implicit in the grounds that he also seeks the stay while he pursues his District Court claim.

[22] The grounds raised may be summarised as follows:

a) Under r 565 one of the recognised grounds is where a counterclaim would be defeated unless execution is stayed, for example where the judgment debtor would be bankrupted prior to his counterclaim being heard.

b) A stay would prevent an act of bankruptcy occurring. Once an act of bankruptcy occurs, other creditors as well as Insite may seek to proceed on the petition, and a wider enquiry into the judgment debtor's overall solvency also arises.

c) A stay would allow time for the Court of Appeal to consider the appeal or the High Court to consider the review application.

d) Provisions in the Construction Contracts Act 2002 give rise to a substantive issue to be determined in the appeal or on review and there is adequate security to protect Insite's interests in the meantime.

[23] I am not satisfied that sufficient grounds have been advanced for an order that would prevent Insite taking any steps on the bankruptcy notice. My reasons follow.

[24] I deal first with the application in so far as it relies on r 565, which is distinct from the power under r 710 to stay execution of a judgment pending an appeal.

[25] Under r 565, the onus is on an applicant to show the likelihood of a miscarriage of justice that is substantial. The miscarriage must be more probable than possible: see *Goldsmith v Drummond* (HC Christchurch, Master Venning, CP 201/97, 15 July 1998).

[26] I do not accept that Mr Sadler has established the likelihood of a substantial miscarriage of justice if my judgment is not stayed so as to prevent any steps being taken by Insite based on the bankruptcy notice.

[27] The parties have already agreed that Insite is free to file its petition and I have made an order by consent to that effect. A petition has been filed.

[28] The filing of the petition does not of itself prevent Mr Sadler pursuing his counterclaim by way of his claim in the District Court, and since the date of its filing, Mr Sadler has faced no impediment to his taking steps to bring the claim closer to hearing.

[29] The possibility that Mr Sadler's counterclaim will be defeated if an order is made on the petition before the counterclaim is heard in the District Court is a factor that can be considered in an application to stay the petition under s 26(7) of the Act. It may result in the petition being stayed, but not necessarily so. Whether or not the petition ought to be stayed under s 26(7) and whether or not a stay if granted ought to be subject to terms and conditions, is a matter for the discretion of the Court, as is a judgment on whether a debtor is ultimately bankrupted. It ought not to be

overlooked that the Court has a wide discretion on the facts of the particular case under s 26 of the Act.

[30] It also needs to be borne in mind that although Mr Sadler seeks a stay, while he pursues his District Court claim he is not attacking the District Court's decision granting summary judgment against him. He has had the opportunity to appeal that judgment, but has not done so. His application to stay execution of that judgment has failed. Insite has an immediate entitlement to the judgment debt, and Mr Sadler is obliged to pay it. Mr Sadler's clear obligation is reinforced by the provisions of the Construction Contracts Act.

[31] It would be wrong, in my view, to grant a stay under r 565 preventing Insite taking any steps at all on the bankruptcy notice in these circumstances. A miscarriage of justice can hardly be said to result from a refusal to grant such a stay, where the judgment debtor is required to pay to the plaintiff an amount that is owing, and has failed to do so.

[32] Turning to the second of Mr Sadler's grounds it is difficult to see any merit in the submission that a stay would prevent an act of bankruptcy occurring. The suspensory effect of r 830, which Mr Hucker raised, is spent because the application to set aside the bankruptcy notice has been heard and determined, and as r 710 indicates, the mere fact of an appeal does not operate as a stay. In any event, the fact that other creditors may seek to appear on the petition that has already been filed does not amount to a substantial injustice. Nor does the possibility of a wider enquiry into Mr Sadler's overall solvency if the petition proceeds to a defended hearing. How far the petition should proceed pending the outcome of the appeal or review is a matter that should be determined in the Court's discretion under s 26 in the context of the adjudication proceeding.

[33] In so far as the application relies on r 710, the general rule is that a party is entitled to enjoy the fruits of a judgment in its favour. A party seeking a stay is accordingly required to persuade the Court that if it is not granted, its appeal rights would be rendered nugatory: *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Limited* [1977] 2 NZLR 41 (CA). In exercising its discretion, the Court will

engage in a balancing exercise weighing up the position of both parties: *Duncan v Osborne Building Limited* (1992) 6 PRNZ 85.

[34] In balancing the positions of both, it needs to be borne in mind that Insite is a party with an unchallenged judgment debt it is entitled to have paid without set-off under the Construction Contracts Act. There needs to be a cogent case for a stay that would have the effect of depriving Insite of its entitlement to enjoy the fruits of both the judgments in the District Court and my judgment declining to order a stay of the bankruptcy notice. Mr Sadler is accordingly required to establish that if there is not a stay of my judgment his appeal rights will be rendered nugatory.

[35] A stay of my judgment is not necessary to avoid Mr Sadler's appeal rights being rendered nugatory. There is no reason to prevent Insite taking at least initial steps on the bankruptcy notice. As noted, it has filed its petition, and that step has not rendered nugatory Mr Sadler's appeal rights. Whether or not Insite should be prevented from taking further steps on the petition (as opposed to the bankrutcy notice) by reason of his appeal is a question that can be raised and dealt with in the context of a stay application, if one is made, under s 26.

[36] Mr Sadler can also raise, in that context, the potential effect on his application for review and his contention that security is given or is available to protect Insite's interest pending the outcome of review or appeal. Such factors may result in a stay pending the outcome of the appeal or review, but not necessarily so. They are factors to be taken into account as part of the balancing exercise to weigh up the positions of both parties.

[37] For the above reasons, I am unable to accept that grounds exist for a stay of the judgment declining to set aside the bankruptcy notice. I decline to make an order under r 565 and/or r 710 accordingly.

Result

[38] The two applications fail.

[39] That part of the interim order of 18 May 2007 preventing Insite sealing the judgment of 27 April 2007, serving the petition, and otherwise taking further steps on the petition will no longer continue.

Next Event

[40] The date for first call of Insite's petition is 10 October 2007 at 10.45 am.

Costs

[41] Insite is entitled to costs on the application on a 2B basis together with disbursements to be fixed by the Registrar.

Dated at Auckland _____ at _____ am/pm.

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Associate Judge Sargisson