

#74

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

CIV 2008-485-2613

IN THE MATTER OF the Insolvency Act 2006
AND IN THE MATTER OF the bankruptcy of MARY ANNETTE
FRANKLIN

BETWEEN PLIMMERTON COURTYARD LIMITED
Creditor

AND MARY ANNETTE FRANKLIN
Defendant

Hearing: 1 July 2009

Appearances: S. Brown - Counsel for Judgment Creditor
J.A. Dean - Counsel for Judgment Debtor

Judgment: 2 July 2009 at 3.45 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

*This judgment was delivered by Associate Judge Gendall on 2 July 2009 at
3.45 p.m. pursuant to r 11.5 of the High Court Rules.*

Solicitors: S. Brown, Solicitors, PO Box 12293, Wellington
J. Dean, Solicitors, PO Box 10-107, Wellington

Introduction

[1] Before the Court is an application by the judgment creditor seeking an order to adjudicate the judgment debtor bankrupt in terms of s. 13 Insolvency Act 2006. The judgment creditor contends that the judgment debtor committed an act of bankruptcy by failing to comply with a Bankruptcy Notice served upon her claiming the sum of \$27,663.87. This was based upon a judgment obtained both in the District Court at Wellington on 10 November 2008 and entered in the High Court at Wellington on 21 November 2008.

[2] The judgment debtor opposes adjudication in terms of s. 37 Insolvency Act 2006 upon the following grounds:

(a) She claims that she is able to pay her debts; and

(b) She claims to have a counter-claim and/or set off to the creditor's claim;
and

(c) She claims it is just and equitable that the Court not make an order for adjudication here.

Background Facts

[3] The background facts in this matter were set out in a judgment I issued in this proceeding on 2 April 2009 dismissing the judgment debtor's application to set aside the judgment creditor's Bankruptcy Notice. It is convenient to set out those facts again which I now do.

[4] On 2 September 2007 the parties entered into a contract ("the contract") for landscaping and construction work at a residential property occupied by the debtor at 121 Clyde Street, Island Bay, Wellington ("the property"). Pursuant to the Construction Contracts Act 2002 ("the Act") the creditor issued payment claims for work which it said was completed at the property.

[5] The debtor apparently had concerns about the quality of the work being done, but clearly did not follow the procedure set out in the Act for disputing

payment claims. The debtor did not respond to the payment claims, properly issued pursuant to s. 20 of the Act, thus becoming contractually and statutorily liable for the amount claimed by the creditor pursuant to s. 22 of the Act.

[6] On 21 July 2008, pursuant to an adjudication claim under the Act brought by the creditor, the appointed Adjudicator issued a determination requiring the debtor to pay to the creditor \$22,202.33 together with interest at 0.07% per day. On 10 November 2008 this was entered as a judgment of the District Court at Wellington.

[7] The debtor now claims a set off or counter-claim exceeding this amount. She maintains that she served the creditor with a notice of adjudication regarding concerns she had about the quality of the work at the property carried out by the creditor. She states that the creditor, however, would not consent to this being determined by the Adjudicator at the same time as its claim.

[8] As such, the debtor filed her claim separately on 16 October 2008. On 2 December 2008, it seems the same Adjudicator determined that the debtor had paid the creditor \$51,862.20 for payment claims issued, but for which the Adjudicator said the creditor had not completed the work required under the contract. The creditor however disputes this and claims that this "so-called adjudication" is a nullity.

[9] On 14 November 2008, the creditor registered a charging order against the debtor's property. On 25 November 2008 the creditor filed in this Court a request for issue of a bankruptcy notice against the debtor. The debtor was served with the bankruptcy notice on 27 November 2008.

[10] As I have noted above the judgment debtor's application to set-aside the Bankruptcy Notice failed. In addition, she has failed to comply with the terms of that Bankruptcy Notice within the further period of 10 working days provided for compliance at para. [27] of that 2 April 2009 judgment.

[11] Around that time on 28 March 2009, however, the judgment debtor filed an application in the District Court at Wellington to enforce the adjudicator's later determination dated 2 December 2008 noted at para. [8] above. That matter is apparently still to be heard.

[12] In addition counsel has confirmed that on 28 April 2009 the judgment creditor filed in this Court an application for judicial review of the adjudicator's 2 December 2008 decision. That matter is also still to be heard.

[13] In a recent affidavit sworn 29 May 2009 in support of her opposition to the present application the judgment debtor attaches as Exhibit "A" a statement of her financial position and at paras. 6 and 7 of her affidavit deposes:

“6. As at 19 May 2009 my net financial position was \$625,240.91. Since that date I have received \$50,000.00 in partial payment of my relationship property settlement. I have paid out \$23,000.00 on account of my mortgage and debts 7 and 9 listed in Exhibit "A”.

7. Accordingly I believe I am able to pay my debts.

[14] The statement of financial position exhibited to this affidavit shows the judgment debtor's assets and liabilities as at 19 May 2009 as follows:

“Assets

1. 121 Clyde Street, Island Bay, Wellington	\$ 672,000.00
2. Chattels	\$ 1,895.00
3. Cash in bank accounts	\$ 0.00
4. Investment with St Laurence	\$ 35,000.00
5. Funds to come from Relationship Property Settlement	<u>\$ 342,000.06</u>
Total Assets	<u>\$1,050,895.06</u>

Debts and Liabilities

6. Mortgage to Foundation Custodians Limited	\$306,479.07
7. Loan from Aztec Finance	\$ 4,000.00
8. Debt to Plimmerton Courtyard Limited	\$ 22,202.33
9. Debt to Dispute Settlement Associates Limited	\$ 3,847.50
10. Debt for Legal Costs	<u>\$ 89,125.25</u>
	<u>\$425,654.15</u>

NET FINANCIAL POSITION

\$625,240.91

[15] As to item 5 in her list of assets, the judgment creditor also attaches as an exhibit to her affidavit an order of the Family Court at Porirua dated 6 May 2009 requiring her former husband, Kenneth James Franklin, to pay to her sums of \$315,149.68 and \$26,850.38.

Counsel's Arguments and My Decision

[16] The judgment debtor's opposition to the present application relies upon the provisions of s. 37 Insolvency Act 2006. Those provisions state:

"37. Court may refuse adjudication

The Court, may, at its discretion, refuse to adjudicate the debtor bankrupt if:

- (a) The applicant creditor has not established the requirements set out in s. 13; or
- (b) The debtor is able to pay his or her debts; or
- (c) It is just and equitable that the Court does not make an order of adjudication;
or
- (d) For any other reason an order of adjudication should not be made."

[17] Before me counsel indicated that the judgment debtor broadly accepted that the requirements of s. 13 Insolvency Act 2006 were established but she relied principally on s. 37(b), (c) and (d) Insolvency Act 2006 in opposing the present application. I now consider each of these provisions in turn:

Section 37(b) - Debtor Able to Pay Her Debts

[18] As I have noted above, in her affidavit the judgment debtor claims that she can pay her debts. The statement of financial position exhibited to that affidavit showed that as at 19 May 2009 her net assets appeared to exceed her debts and liabilities by \$625,240.91.

[19] Those assets were said to include funds coming to the judgment debtor from her recent relationship property settlement of approximately \$342,000.00. Of this amount the judgment debtor deposes to having already received \$50,000.00 in partial payment of this relationship property settlement.

[20] So far as that settlement is concerned, counsel for the judgment debtor indicated that these funds were coming from investments in the United States presumably held by her former husband, Mr. Franklin. The order of the Porirua District Court for this relationship property settlement, however, made no reference to this fact, but simply required Mr. Franklin to make the payment of \$342,000.00 (approximately) direct to the judgment debtor and effectively without delay.

[21] That the sum of \$50,000.00 as a partial payment under the settlement has already been paid to the judgment debtor, particularly given that the order of the Court requiring payment was issued less than 2 months ago, may provide some comfort in this regard.

[22] The evidence of the judgment debtor as to her assets and liabilities is uncontradicted. Before me, however, Mr. Brown for the judgment creditor contended that the debtor had demonstrated "fiscal irresponsibility" here by committing herself to what he described as the unnecessary luxury of landscaping her property to the extent of over \$268,000.00 when it is suggested she did not have the funds to pay this amount. In my view, however, the decision of the judgment debtor to embark upon this contract was a matter for her at the time. It does seem too that the bulk of the landscaping contract payments (with the exception of this last disputed payment) were made to the judgment creditor (and presumably were made promptly) and as I see it the relationship property settlement monies which are due to

the judgment debtor immediately are more than sufficient to meet the amount due to the judgment creditor. Indeed these relationship property settlement funds would also be sufficient to cover the bulk of the judgment debtor's mortgage and other listed debts.

[23] In addition, the judgment creditor's list of assets shows a \$35,000.00 investment with St Laurence which is now depicted as "frozen". It is reasonable to presume that the judgment debtor may well have regarded this investment at the outset as being available to meet the present payments due under the landscaping contract.

[24] All these factors lead me to the conclusion that with the pending proceeds of her relationship property settlement the judgment debtor now will be able to pay her debts within a reasonable time of them falling due – *Holdgate v Blocassa Limited and The Official Assignee* [2007] NZCA132. That she has shown a marked reluctance to pay the debt for which the judgment creditors have judgment against her does not, however, change the position that she is able to pay her debts as they fall due – *Re Stirling* [1990] 1 NZLR569. As Brookers Insolvency Law & Practice at para. IN37.1 notes:

"In considering whether the debtor is "able to pay her debts" this does not require consideration of the willingness of the debtor to meet the debt in question."

[25] In my view the judgment debtor here has the capacity to pay the judgment creditor's debt from the proceeds of the relationship property settlement and to do this now within a reasonable time. I find therefore that she has done enough to show that she is "able to pay her debts" in terms of s. 37(b) Insolvency Act 2006.

[26] That is sufficient to dispose of the present application before me.

Section 37(c) - Just and Equitable Not to Make an Order

[27] Notwithstanding this, I will turn briefly to consider the "just and equitable" ground advanced by the judgment debtor to justify the refusal of an order for adjudication in terms of s. 37(c) Insolvency Act 2006. In doing so, I will also briefly

consider these matters which were raised as well in terms of the “for any other reason” ground under s. 37(d).

[28] As to these aspects, the judgment debtor’s first claim is that she has a counter-claim or set off against the judgment creditor to the extent of \$51,862.20. This is the amount which she says the adjudicator’s determination dated 2 December 2009 found in her favour. She contends this amount represents settled payment claims made by the judgment creditor under the Constructon Contract but for which it had not completed the work required under the contract.

[29] The judgment debtor, as I have noted above, has applied to the District Court to enforce this 2 December 2009 adjudicator’s determination. In addition, the judgment debtor draws attention to a further claim that the amount she says is required to complete the contract by the judgment creditor and to rectify defects is in fact \$101,649.10.

[30] Although the Court of Appeal decision in *Laywood and Rees v Holmes Construction Wellington Limited* [2009] NZCA35, signalled that in Construction Contracts Act cases it might be seen on the one hand as appropriate in considering a bankruptcy adjudication application such as the present application to take into account counter-claims or set-offs like the claims made by the judgment debtor here, whereas on the other hand a party is likely to be precluded from raising these matters in an earlier application to set-aside a Bankruptcy Notice, in the present case I need not make a decision on the judgment debtor’s strongly contested counter-claim or set-off, given my findings above as to the judgment debtor’s ability to pay her debts at the present time.

[31] And finally, one further matter requires mention. This is also involved in a consideration by the Court of the exercise of its discretion to refuse an order for adjudication under s.37 Insolvency Act 2006 on either just and equitable grounds or for some other reason. In the present case, as I have noted, once the judgment creditor had entered its adjudicator’s determination as a judgment of the District Court on 14 November 2008 a charging order for the debt was registered against the title to the judgment debtor’s property.

[32] Although a charging order may not fall within the definition of “charge” for the purposes of the Insolvency Act 2006 in terms of s. 3, it is sufficient at this time to note that in the present case the judgment creditor’s position would appear to be protected to a certain extent by the presence of this charging order against the judgment debtor’s title. The judgment debtor would appear to have significant equity in her property. And as I see it, since the registration of this charging order, there would seem to be no impediment to the judgment creditor’s exerting pressure upon the judgment debtor by bringing enforcement action under the charging order. As I understand it, that has not occurred. It does, however, provide the judgment creditor with an alternative remedy rather than the present course on which it has embarked in endeavouring to bankrupt the judgment debtor.

Conclusion

[33] For the reasons I have outlined above, I am satisfied that the judgment debtor has done enough here first to show that she is able to pay her debts in terms of s. 37(b) and secondly, that it would not be just and equitable to bankrupt her and thus the Court should exercise its discretion to refuse the order for adjudication sought.

[34] That said, the present application by the judgment creditor must fail. An order is made dismissing that application.

Costs

[35] In the normal course, costs here would follow the event. In the present case, however, I am of the view that it is appropriate that costs should lie where they fall.

[36] I reach this conclusion bearing in mind that the judgment debt which is the subject of the present application has been outstanding for some considerable time and that on the basis of her own evidence the judgment debtor has assets and more than sufficient equity in her property to settle the debt. And, in passing I need to record my concern too that the growing legal and other costs involved in the lengthy legal wranglings between the parties both in this Court and elsewhere may well be

reaching the point where those actions are simply out of all proportion to the overall amounts at stake.

[37] On this basis costs on the present application are to lie where they fall.

‘Associate Judge D.I. Gendall’