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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

B. No. 229/84
IN BANKRUPTCY

921

IN THE MATTER of the Insolvency Act
1967

A N D

IN THE MATTER of NORMAN JOHN KIRK
of 1B Aston Towers,
Abel Smith Street,
Wellington, Member of
Parliament

A Debtor

EX PARTE

TRUSTEEBANK
CANTERBURY A Trustee
Bank established
under the Trustee
Bank Act 1983 and
having its registered
office at Christchurch

A Creditor

Hearing: 30 July 1984

Counsel: K.R. Smith for the creditor
No appearance by the debtor

Judgment: 30 July 1984

Reasons: 31/7/84

REASONS FOR JUDGMENT OF SAVAGE J.

This is a petition by Trusteebank Canterbury, a trustee bank established under the Trustee Banks Act 1983, to adjudge Norman John Kirk bankrupt. The petition is founded on s 19(1)(c) of the Insolvency Act 1967, it being alleged that Mr Kirk, with intent to defeat or delay his creditors, is about

to depart out of New Zealand or, being out of New Zealand, remains out of New Zealand, or has departed from his dwellinghouse, or otherwise has absented himself. The petition came before me on Monday, 30 July and at the end of the hearing I made an order of adjudication and allowed the petitioning creditor costs on the higher scale together with disbursements and witnesses' expenses. I indicated that I would give my reasons in writing later and I now do so.

These proceedings were commenced on 12 July 1984 with a petition by Preston and Company Ltd for the adjudication of Mr Kirk on the basis that he owed Preston and Company Ltd the sum of \$960.77 and with intent to defeat or delay his creditors was about to depart from New Zealand. An application under s 63 of the Act for a warrant for Mr Kirk's arrest was made but was declined by Ongley J., though he did, on 16 July 1984, make an order for substituted service of the petition by way of an advertisement in the "Evening Post" newspaper. The petition then came on for hearing before me on 25 July, at which time Mr Smith informed me that the petitioning creditor, Preston and Company Ltd, did not propose to offer any evidence in support of the petition. He indicated that he was appearing, however, for several other creditors and asked for an order in terms of s 26(9) substituting the present petitioning creditor, Trusteebank Canterbury, for Preston and Company Ltd. An order was made accordingly and at the same time a further order was made for substituted service of the fresh petition by means of an advertisement in the "Evening Post" newspaper on 26 July.

The proceedings themselves were adjourned to Monday, 30 July, and this gave, in effect, three days' notice of the fresh hearing. In view of the previous order for substituted service, and as, in my view, the original proceedings were still extant, this period, though short, was sufficient to give notice of the changes in the proceedings.

The petitioning creditor had three matters to establish before an order of adjudication could be made. They were, first, that the debt relied upon was proved; second, that Mr Kirk either was out of New Zealand and was remaining out of New Zealand or had departed from his dwellinghouse or had otherwise absented himself; and, third, that he had done all or any of these acts with intent to defeat or delay his creditors. It is to be noted that the first ground raised in the petition, which I mentioned earlier in this judgment, is no longer relevant as the original allegation was that he was about to depart out of New Zealand on or about 13 or 14 July. I am satisfied on the evidence disclosed in the affidavits and given orally that the first matter has been proved. The second presented a series of alternatives. I am satisfied that Mr Kirk has left New Zealand and has remained away. He told a Mr Kerse, who gave evidence before me, that he intended to go to the United States for three weeks and, as I mention later in this judgment, a considerable number of enquiries have failed to locate him. I am further satisfied that Mr Kirk has departed from his dwellinghouse, of which fact there is plenty of direct evidence from the witnesses who gave oral evidence.

and that he has otherwise absented himself in the sense that he has absented himself from his dwellinghouse and those places where he might be expected to be.

The third matter is the question of the intent with which the aforementioned acts were done. Mr Smith referred me to R.D. Bryan ex parte L.M.V.D. Finance (N.Z.) Ltd (High Court, Christchurch, B 110/83, 4 November 1983, Hardie Boys J.), where Hardie Boys J. considered the question of the intent necessary to come within the section. He surveyed the authorities and in particular considered the judgments of the Court of Appeal in England in Re a Debtor [1952] 1 AER 519 and the High Court of Australia in Barton v Deputy Federal Commissioner of Taxation [1974] 131 CLR 370. The position, I think, is clear that an intent to defeat or delay creditors is a fact to be proved like any other and each case must be considered in the light of its own facts. It will generally be a matter of inference, and it may also be that a person has more than one intent, but so long as the intent to defeat or delay is established that is sufficient. In my view, on the evidence given here the inference is plain that Mr Kirk left New Zealand and remained away, departed from his dwellinghouse, or otherwise absented himself, for the purpose and with the intent to defeat or delay his creditors, though he may also have had another intent as well, such as to renew overseas business links. The basis for this view is as follows. It is clear that he has a number of creditors for a substantial amount and was being pressed for payment. The material before me showed that apart from the

debt due to the petitioning creditor of \$2,660 there are also debts due to the Bank of New Zealand of \$2,068, Stephen Kerry Ltd of \$1,360, Broadlands Finance Ltd of \$27,493, Michael Kerse of \$5,000 and Westpac Banking Corporation of \$63,000. Oral evidence suggested that there are other debts also. A private investigator gave evidence of the proceedings that he has from time to time served upon Mr Kirk and in particular he referred to an occasion on 25 June when he endeavoured to serve a bankruptcy notice upon Mr Kirk at his home address of 1B Aston Towers, Abel Smith Street, Wellington. Mr Kirk refused to accept the notice, contending that he was a Member of Parliament and was at that point protected by Parliamentary privilege. On that day the private investigator also repossessed an Olivetti computer from Mr Kirk's car. This evidence, together with other evidence, makes it quite clear that Mr Kirk was well aware that he was being pursued by various creditors to recover debts due to them. The evidence established that by 29 June Mr Kirk had left his dwellinghouse, his flat at Aston Towers, and considerable efforts to locate him since then have been of no avail. Mr Kerse gave evidence of conversations that he had had with Mr Kirk, who was a friend of his, in respect of various matters and, in particular, a loan of \$5,000 that was due for repayment. Mr Kirk made various arrangements with regard to that repayment, which he did not carry out. Mr Kerse heard nothing further from Mr Kirk and has not been paid the amount of his loan. Mr Kerse in fact had issued proceedings in the District Court against Mr Kirk

and obtained a warrant for his arrest which was unexecuted, the bailiff dealing with the matter making a return to the effect that he had been advised by the police at the airport at Auckland that Mr Kirk had left New Zealand from the Auckland International Airport on 7 July for Honolulu. Another witness, Mr Jays, gave evidence of arrangements that he had had with Mr Kirk, including one under which Mr Kirk was to assign to him part of the superannuation payment to which he was entitled as a retiring Member of Parliament. Mr Jays then produced a letter from the Superannuation Board which stated that all Mr Kirk's instructions with regard to his superannuation had been carried out; but Mr Jays received no money. The inference to be drawn from all the above matters, as I have said, was sufficient to satisfy me that Mr Kirk had the necessary intent. It follows that the petitioning creditor had proved the necessary matters, and accordingly I made the order of adjudication.