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note

IN THE MATTER of the Insolvency Act 1967

AND

IN THE MATTER of PETER FREDERICK HOFFMAN
of 18 Croydon Road, New
Lynn, Auckland, Company
Director

Judgment Debtor

AND

THE ANZ BANKING GROUP
(NEW ZEALAND) LIMITED
a duly incorporated
company having its
registered office at
Wellington and carrying
on business there and
elsewhere as Bankers

Judgment Creditor

Hearing: 20th December 1984

Counsel: Bogiatto for Judgment Debtor
Rawnsley for Judgment Creditor
Wardell on behalf of Official Assignee
Skelton for Westpac Finance

ORAL JUDGMENT OF SINCLAIR, J.

This petition for bankruptcy was filed on the 17th September, 1984 in respect of a debt owing to the creditor in the sum of \$37,354.32. But that is not the beginning of the proceedings. The Bankruptcy Notice was served on the 16th June, 1984 and the Debtor then had 14 days within which to satisfy the debt in accordance with the terms of the Notice and having failed to do so then an available act of bankruptcy occurred which resulted in the issue of the petition. So the Debtor has had virtually six months' notice

of what was likely to occur if the debt was not paid. So the date of the filing of the petition, while one incident in the proceedings, only serves to highlight the fact that the Creditor allowed three months to go by before it took the serious step of issuing a bankruptcy petition.

There were adjournments of the petition, one for a reason that the petition did have a defect in it which was duly remedied, but on the 12th December 1984 before another Judge some specific orders were made which required positive steps to be taken by the Debtor and by the Creditor so that this matter could be possibly resolved today.

When the matter came before me in November the question of the sale of the seven sections which have figured so prominently today was raised and an adjournment was granted to enable the Debtor, if he could, to satisfy the Creditor that the sales were genuine. He has failed to satisfy the Creditor and on examining the evidence I have come to the conclusion that one must have grave doubts as to the efficacy or otherwise of these agreements. The Debtor owns seven sections at Glen Massey which he bought in 1982 for \$10,000. There are now seven agreements with a total sale price of \$84,000 with not one shred of evidence that there has been anything occurring in the district which would increase their value from \$10,000 to \$84,000 in that relatively short period, nor is there evidence of any improvements having been done to them. In fact the evidence is to the contrary and no attempt has been made to challenge a valuation made by Mr Clarke of Papakura, who was a registered valuer and who, at the instance of the Creditor, has inspected the property and has

fixed a total value of \$15,000. This Court is now asked to accept, without any evidence at all, that for some reason these sections have suddenly acquired an almost gold-mine like value.

In the absence of any evidence the Court is unwilling to be led along a path which I have a horrible feeling has been somewhat deliberately laid. When one has a look at the seven agreements it will be noted that they are all dated 8th November, 1984; all are for \$12,000; all are unconditional so that each and every purchaser was bound to pay up on the date set forth, namely the 8th December, 1984. The 8th December has gone by and not one step has been shown to be taken by the vendor, namely Mr Hoffman, that he was ensuring that those seven agreements were going to be performed in accordance with the terms in the agreements. Significantly no deposits were required to be paid and, very significantly, Mr Paniora, a purchaser of two of the sections, who made an affidavit in these proceedings, did not appear for cross-examination today so that his affidavit cannot be taken into account.

Mr Garner, who is apparently the purchaser of two of the sections, did make an affidavit and did appear for cross-examination. To say the least of it his evidence is entirely unconvincing as to the value of the land. He bases it on some notion that it is a quiet rural area where one can get peace and quietness and to which he can shift a house from Auckland for the purpose of, as I understand it, retiring there in due course. But he has taken no professional advice at all, nor has he even applied for finance which would enable

him to purchase these two sections if, in fact, a purchase was intended. He states he intends to make an application, but none has yet been made. When one asks the question: "why not?" having regard to all the surrounding circumstances, one is left with the uncomfortable feeling that these agreements are merely shams.

Of further interest is that Fruiterer Sales Ltd, a company in which the Debtor's wife has an interest, is the purchaser of three of the sections. But when one has a look at how the common seal has been affixed by Fruiterer Sales Ltd, one finds it is signed by Mr Paniora who does not describe himself as having any official position at all, and by Mr Garner who describes himself as a Director. A copy of the Company's return was obtained from the Companies Office on the 19th November, 1984 and Mr Garner is not shown to be a Director at all. He does not know how or when he became a Director and no attempt has been made in this Court at this stage to satisfy the Court that he is in fact a Director. Of even greater significance, he does not know what the requirements of the company documents are as to the affixing of the common seal, nor does he know, in fact, on what date he was apparently appointed a Director and whether it was by resolution of the shareholders or by an entry in the minute book.

All of that evidence raises matters of grave suspicion. But over and above that, it is said that an application has been made to enable Mr Garner and the absent Mr Paniora apparently to acquire an interest in Fruiterer Sales Ltd and that an application has been made to Commercial Finance

& Mortgage Ltd for a loan of \$130,000 which would enable the company to pay for three of the sections. Not one document in support of that application for a loan has been supplied to this Court and if there was such a loan applied for one would expect, as this is a matter which involves the Court's discretion, that a copy of the loan application would have been filed together with copies of all supporting documents which have been lodged to support that application, and that there would have been from the finance company involved, if it was seriously considering making the loan, an affidavit stating to what stage the loan application had been processed and the likelihood or otherwise of its being granted.

As Mr Rawnsley correctly submitted, the evidence in this case is so unsatisfactory that the Court cannot have any confidence in what was said by either Mr Hoffman or Mr Garner at all.

It is noteworthy, and I repeat it, that the bankruptcy notice was served on the 16th June, 1984. The Agreements in November have all the hallmarks of being a last ditch attempt to endeavour to put off the evil day of bankruptcy. There had been some months during which Mr Hoffman and his wife, if she was so motivated to help him, and Fruiterer Sales Limited could have done something to raise sufficient to pay off the Creditor. It did not happen and now all that the Court has are some unsatisfactory agreements, unsatisfactorily explained, on which the Court is asked to exercise its discretion to save this Debtor's status.

I accept it is a serious matter to change a person's status from one of solvency to bankruptcy, but because of the state of affairs which has been exhibited here I am of the view that the Court's duty is clear and that the discretion ought not in all the circumstances to be exercised in favour of the Debtor.

In coming to that conclusion I put to one side the fact that the Official Assignee has appeared today and has indicated that it may have a claim against Mr Hoffman in respect of some drawings from a company of which he was a shareholder and I do that for the reason that that is still not in a situation where one can say it is an undisputed debt. Likewise I put to one side the amount which may be owing to Westpac Finance because, once again, any liability that Mr Hoffman may have to that company at the present time must be regarded as being in the disputed class.

There is no doubt in my mind that at the moment Mr Hoffman is insolvent and I have absolutely no confidence in any moneys being forthcoming from the purported agreements which have been put before this Court. It was suggested by Mr Bogiatto that the petition was being used by the Creditor as an instrument of oppression. I reject that submission and again point to the fact that the Debtor had six months to so order his affairs to enable the creditor to be paid off.

Having regard to the matters I have mentioned and realising where the discretion is, there will be an order of adjudication with costs on the higher scale plus any

necessary disbursements.

P. P. W. J.

SOLICITORS:

Anthony Grove & Darlow, Auckland for Debtor
Wood Ruck Gibbs & Co., Otahuhu for Creditor
Official Assignee's Office
Mr Skelton, Auckland for Westpac Finance