

29/9

**LOW
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

B.11/89

1306

IN THE MATTER of the Insolvency Act
1967

A N D

IN THE MATTER of JOHN KEITH EBBETT
of 76 Maleme Street,
Tauranga, Builder
Contractor

Debtor

EX PARTE

MARAC FINANCIAL
SERVICES LIMITED a
company having its
registered office at
Auckland and carrying
on business as
Financier

Creditor

Hearing and
Judgment:

14 September 1989

Counsel:

Miss Bolwell for Fletcher Merchants Ltd

(ORAL) JUDGMENT OF FISHER J

This is an application to review a Master's decision in a bankruptcy matter on 18 July 1989. By that decision the learned Master declined to substitute the applicant, Fletcher Merchants Limited ("Fletcher") as

petitioning creditor in bankruptcy proceedings and she dismissed the bankruptcy petition. The jurisdiction for reviewing that decision arises principally from s 26P of the Judicature Act 1908.

Facts

The debtor owed a debt to Marac Financial Services Limited ("Marac"). On 17 February 1989 the debtor failed to comply with a bankruptcy notice issued by Marac. That constituted an act of bankruptcy. In consequence on 9 May 1989 Marac filed a petition for the bankruptcy of the debtor. In mid-July 1989 the debtor paid the debt to Marac. However the debtor also owed a substantial debt to Fletcher. On hearing of the satisfaction of the Marac debt, Fletcher served a notice of intention to appear upon the debtor on 17 July 1989.

On the following day, 18 July 1989, Marac's existing bankruptcy petition came on for hearing. It being plain that Marac did not by that stage pursue the petition, Fletcher applied to be substituted as the new petitioning creditor pursuant to s 26(9) of the Insolvency Act.

Master's decision

The Master referred to an extract to be found in Spratt & McKenzie's Law of Insolvency 2nd ed p.68. In this passage the learned authors refer to the decision Re J. (A Debtor) [1967] NZLR 763 and then went on to say:

"An application under this subsection [i.e. under s 26(9)] to be substituted as a petitioner in lieu of the petitioning creditor must be made before the period of three months after the act of bankruptcy alleged in the petition has expired."

Unfortunately that appears to have been the only authority on the subject before the Master at that time. Not surprisingly she noted that in the present case the act of bankruptcy relied upon in the Marac petition had occurred on 17 February 1989 and that the application to substitute the new creditor was made outside the three months period from that date. In consequence she refused to substitute Fletcher as the new petitioning creditor and dismissed the petition.

Jurisdiction to substitute petitioning creditors

Section 26(9) of the Insolvency Act 1967 provides:

"If the petitioner does not proceed with due diligence, or if at the hearing of the petition the petitioner offers no evidence, the Court may substitute as petitioner any other creditor to whom the debtor is indebted in the amount required by this Act in the case of a petitioning creditor. The petitioner so substituted shall file a fresh petition, but may rely upon the act of bankruptcy alleged in the original petition."

It is true that in the decision re J adverted to by the Master it had been held that the three months period normally required by s 23(b) as the maximum between the act of bankruptcy and the filing of a petition also represented the maximum period within which a fresh petitioning creditor could be substituted. However it will be noted that that decision was made with respect to the 1908 Act. In the Insolvency Act 1967, s 26(9) repeated the equivalent provision from the 1908 Act but then went on to add the entirely new sentence "The petitioner so substituted shall file a fresh petition but may rely upon the act of bankruptcy alleged in the original petition." The introduction of that sentence entirely changes the requirements as to the time limit. It makes it clear that the act of bankruptcy relied upon in the original petition is still available for the fresh petitioning creditor. The three months time limit is nowhere in the statute said to relate to the date upon which the substituted petitioner files his fresh petition, as distinct from the date by which the original bankruptcy petition must be filed. In that regard s 23(b) merely states:

"A creditor may file a bankruptcy petition against a debtor, if...the debtor, whether before or after incurring the debt, has committed an act of bankruptcy within three months before the filing of the petition;..."

That time limit relates to the filing of the original petition and is not expressly or impliedly stated to have

any application to the fresh petition to be filed under s 26(9).

This interpretation of the section has been confirmed by the New Zealand Court of Appeal in Ronaldson v Dominion Freeholds Ltd [1981] 2 NZLR 132. In that case the judgment of the Court of Appeal can be summed up in the following extract from the judgment of McMullen J at p.137:

"We think that their purpose [these being the added words in s 26(9)] is to enable a substituted creditor to found his fresh petition on the very act of bankruptcy alleged in the original petition even though that was committed more than three months before the substitution."

Unfortunately it appears that Ronaldson v Dominion Freeholds was not drawn to the attention of the Master and she was instead left with the incorrect commentary in Spratt and McKenzie.

Result

It is plain on the authorities that the application for substitution of Fletcher ought to have been allowed and the petition should not have been dismissed. I therefore rescind the order given on 18 July 1989 refusing to substitute Fletcher Merchants Limited as petitioning creditor and I rescind the dismissal of the petition. The

petition being reinstated, I direct that Fletcher Merchants Limited be substituted as petitioning creditor.

A handwritten signature in black ink, appearing to read 'R L Fisher J', written in a cursive style.

R L Fisher J

Solicitors for the Creditor:

Bell Gully Buddle Weir
Auckland