

7/11

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY
IN BANKRUPTCY

B. No. 338/89

1636

IN THE MATTER

of the Insolvency
Act 1967

AND

IN THE MATTER

of ELIZABETH ELLIS
of Christchurch,
Company Director

Judgment Debtor

**LOW
PRIORITY**

EX PARTE

N.Z.I. FINANCE
LIMITED a duly
incorporated
company having its
registered office
at Auckland,
Financier

Judgment Creditor

B. No. 339/89

IN THE MATTER

of the Insolvency
Act 1967

AND

IN THE MATTER

of GEOFFREY NORMAN
ELLIS of
Christchurch,
Company Director

Judgment Debtor

EX PARTE

N.Z.I. FINANCE
LIMITED a duly
incorporated
company having its
registered office
at Auckland,
Financier

Judgment Creditor

Hearing: 30th October, 1989.

Counsel: N.R. Rout for Plaintiff Creditor
C.B. Atkinson Q.C. for Judgment Debtor
Mr Reid for Supporting Creditor

ORAL JUDGMENT OF MASTER TOWLE

After refusing an application on behalf of the Debtors for an adjournment this morning, I took the evidence on behalf of the Petitioning Creditor to establish that the debt of approximately \$330,000.00 is still owing by the two Debtors and had submissions made to me by counsel. The Debtor, G.N. Ellis, gave evidence on the basis of a prepared affidavit, and submitted himself to cross examination by the two Creditors. During the luncheon break I have had the opportunity of looking at the decision of Hardie Boys J., a case B.5/83 given on the 2nd September, 1983 in Re Meates Ex Parte Bank of New Zealand.

The sole question that I have had to determine is whether or not the Court should exercise its discretion in favour of these two Debtors, whose insolvency and inability to pay has not been in question. Their indebtedness is large. There is a substantial debt due to the Petitioning Creditor, and the petition is supported by another creditor in respect of a separate guarantee.

Both claims arise from a reorganisation of the Debtors' companies in 1986, involving a company called Tourplan Pacific Limited, and another company called Tourcorp Holdings Limited. The actual Judgments on which these petitions are founded relate to guarantees given of the obligations of the former company, but it is clear that the Defendants were engaged in not insubstantial business and involving ordinary commercial

business risks. The two ventures failed, and the Debtors now put the prime blame upon an accountant who advised them in 1986 over the company reorganisation.

It is noteworthy that the Judgment upon which the Petitioning Creditor brings its case was given some 18 months ago, and yet even now, although proceedings have been drafted against the accountant, those proceedings have not yet got off the ground. The claim against the accountant is directed not only to the loss sustained through the guarantees of Tourplan Pacific Limited, but also relates to the failure of the other company. It is impossible for me to assess the likelihood of success of such a claim, but it would clearly be hotly contested, and there is no realistic possibility of it being heard for a long time.

I have been referred to a decision of In Re Twidle (1916) NZLR 748, which is authority for the proposition that the mere fact that there is another action pending which might produce funds for the Debtors if it were to succeed is not in itself good grounds for depriving a Creditor of his normal rights. There is nothing before me to suggest that the Petitioning Creditor here has done anything other than exercise its rights in a lawful way. Although much was made that the petitioner had not given detailed reasons for its decision to continue with the bankruptcy proceeding, despite proposals having been put to it on behalf of the Debtors, there is no question of there being any abuse of Court procedure. In its assessment of ordinary commercial risk, the Petitioning Creditor is entitled to pursue its remedies in this way.

I am, of course, concerned at the personal circumstances of both Mr & Mrs Ellis. He is occupying a position of responsibility with the Christchurch Arts Centre, for which he is paid a salary, and there is a risk he may lose this position if he is adjudicated. That would be a matter for his

employers, but he has made frank disclosure of his asset position, and there has been no suggestion made that he has in any way acted improperly in the conduct of his previous business. Mrs Ellis is undergoing studies and adjudication would have no appreciable affect on these.

The decision which Mr Atkinson has referred me to from Greymouth is of some help as showing the various factors which were weighed up in that case, and to some of which I have already referred. It is perhaps noteworthy however, that of recent times there has been a greater emphasis placed upon the public interest to be recognised by the Court when considering the question of the exercise of its discretion, and recently there have been two cases in Auckland of which I am aware, one involving a Debtor named Fidow that came before Fisher J., and a more recent one again before Robertson J. in the case of a Debtor named Nathan. In each case the learned Judges weighed up the question of public interest, and took this into account as a major factor to be weighed in the exercise of discretion.


This failure is not simply the failure of a small family company, for the scale of the operations goes something beyond that. There have been many failures attributed to the share market crash, and instances where guarantors have been called upon to repay to lending institutions the amounts which their companies have failed to provide. There have been many hard luck stories put before the Court; if only to cite the example of instances involving guarantors of kiwi fruit farming ventures, goat farming ventures and the like.

This bankruptcy is not of a minor scale. The total indebtedness is of the order of \$350,000.00, and although there are no other Creditors than the two represented today, I believe it is proper that the outcome of the petition should be against them and that they should both be adjudicated. I hope this will not mean the loss of a worthwhile position held

by Mr Ellis, but I believe that it is proper that the order be made and their affairs should be investigated in a routine way by the Official Assignee.

There will be an order accordingly adjudicating them both bankrupt.

The Petitioning Creditor is entitled to costs in the ordinary way, which I have fixed at \$400 plus disbursements on each petition. I think it is a proper case to allow costs to the Supporting Creditor, and I fix those at \$250.



R. J. Jones
A.

Solicitors for the Plaintiff Creditor: Rhodes & Co.,
Christchurch.

Solicitors for the Judgment Debtor: Parry Field & Co.,
Christchurch.