NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

10/1

IN BANKRUPTCY
B No. 561/90

MEDIUM PRIORITY

IN THE MATTER of the Insolvency Act 1967

A N D

2838

IN THE MATTER of WILLIAM WALTER JONES of Mudie Street, Alicetown, Lower Hutt, Company Director

Debtor

EX PARTE BANK OF NEW ZEALAND at Wellington, Banker

Creditor

Hearing: 16 November 1990

Counsel: J J Cleary for Debtor/Applicant
P C Chemis for Creditor/Respondent

Judgment: 16 November 1990

ORAL JUDGMENT OF GREIG J

This is an application by the debtor for a release from the warrant of arrest issued ex parte by the Court to the creditor. The debtor was arrested and was then released on bail subject to the surrender of his passport and air tickets and other terms as to his residence.

The matter arises out of transactions between the creditor as banker and W T Rawleigh Co. Ltd to which the creditor advanced some monies. The debtor is or has been a consultant and latterly a shareholder of that company attempting, with others, to reconstruct it and set it upon its

feet. He entered into a guarantee, in support of the monies lent by the creditor, dated 18 May 1990. Demand was made under that and judgment was given for a sum just in excess of $1,100,000 on summary judgment proceedings and, following that, the creditor issued a creditor's petition and at the same time brought these ex parte proceedings for arrest, pursuant to s 63 of the Act. The grounds for that were the assertion that there was probable ground for believing that the debtor was about to go abroad with a view to defeating, delaying or embarrassing proceedings under the Act. The particular proceedings were the petition then issued but I accept that the Act has a wider ambit and applies to other than simple creditor's petition proceedings.

There can be no doubt that, on the material before the Court on the ex parte application, there was clear ground for believing that the debtor was about to go abroad. That is not challenged and, indeed, the point of the application now made is to permit the debtor to go abroad. Equally the material before the Court was sufficient to satisfy it that the impending departure was with a view to defeat or delay, at least, the proceedings that were then pending. That is now challenged and the debtor denies that that is his purpose, but there can be little doubt that the absence of a debtor may well cause some difficulty, at least in the processes which follow the issue of bankruptcy proceedings. The immediate defeat or embarrassment of the creditor's petition does not exist because no doubt that has now been served and can, of course, proceed in the debtor's absence. He can be made bankrupt although he is not here. If he is not here, however, he cannot be examined and assuming, of course, an order of adjudication is made the Official Assignee may have some additional difficulty in assessing the position.

In obtaining a warrant ex parte under s 63 all that

the creditor has to do is to satisfy the Court of the probable ground of belief. The debtor is then arrested and is kept in custody until he can find sureties to satisfy the Court that he will appear and attend until he is discharged. I think there must be a presumption that the debtor will be bailed provided adequate sureties or terms can be obtained.

In contrast with that, however, the provisions of subs (2) of s 63 giving the debtor the right to apply for discharge, declare that it is the creditor who is to show cause why he should not be discharged. That seems to imply a presumption in favour of discharge and also clearly, in my view, puts the onus on the creditor to support the arrest or the continued maintenance of the bail provisions. That onus, I think, is to be satisfied on the balance of probabilities. It cannot be sufficient merely to say that there remains a probable ground of belief set out in the first subsection because that would be a circular situation where the original proof would always be sufficient to maintain the arrest or the bail. Something more is required at this stage of the proceedings and that must be at least, I think, that the creditor satisfies the Court that, in the circumstances of the case, the restriction should be maintained upon the debtor.

Reference was made in argument, on behalf of the debtor, to the liberty of the person. Strictly that does not apply. The debtor is free at bail, subject to some restriction of course, but he is not under arrest or detention. In this case, however, the debtor is a United States citizen. He is here on a visitor's permit which has been extended from time to time. He has, I gather, been residing in New Zealand for some little time while he has been attending to the affairs of the Rawleigh Company. But he is not domiciled in New Zealand, is not I gather a New Zealand citizen. He wishes to leave the country as, indeed, he is

bound to do unless he can obtain an extension to his visitor's permit. He has an air ticket. It ought to be mentioned that that air ticket cost no more than $US60 and will carry the debtor from Auckland to Los Angeles. It needs to be mentioned because no considerable sum has been required to buy that ticket. It seems that this very favourable condition was provided because of what is called a 'frequent flier' system operated by the particular airline of which the debtor was entitled to take benefit.

As I say the real point now is the difficulty that may arise in the administration of the bankruptcy by the Official Assignee. The answer that is given by the debtor to that is that that is of no moment because there are no assets and no examination or further inquiry can assist in any way. The debtor has provided evidence by affidavit asserting that he has no assets and calls, in aid of that, evidence which has been given on behalf of the creditor by those who have had dealings with him in recent times. On the other hand there is an assertion, on behalf of the creditor, that there are assets. That is based, in substance, on earlier statements or representations made by the debtor that he did have assets.

The substantial part, if not all, of the assets that have been mentioned, apart from any interest he may have in the Rawleigh Company, are assets overseas, particularly in the United States of America. Reference has been made to real property. That does not fall within the application of an adjudication or the Official Assignee in a New Zealand bankruptcy. That can be put aside. Other assets are references to monies and other interests in chattels and other property. The existence of these depend upon various statements that the debtor made to the creditor in support of applications for banking accommodation and advances. At the least the debtor was gilding the lily. The statements that he

made were incorrect. They omitted to mention that his wife, apparently now estranged from him, was interested, if not solely entitled nominally, to all the property referred to. A false representation, whether deliberate or not, was conveyed to the creditor, no doubt to encourage it to treat the debtor as a man of substance. There is no evidence which would contradict the assertions that the debtor now makes on oath and, indeed, there is some material before me which tends to confirm what he says.

The remaining asset, or possible asset, is based upon another statement that the debtor made to the creditor that he had available upwards of $500,000 NZ currency and possibly $600,000 NZ currency. It is said, on behalf of the creditor, that the representation was that that was immediately available, present in New Zealand. On the other hand the assertion now made is that it was contingently available, never present in New Zealand at all. The creditor is unable to provide any further evidence than the assertion that it makes based on what, I think, was another misrepresentation made by the debtor. That, in any event, is cash or credit not, I presume, specie, and, of course, can be transferred very simply electronically or otherwise anywhere in the world. It would be most unlikely that any such sum would still be available now if indeed it had ever been here.

In the end I am satisfied, on the balance of probabilities if not to a higher standard, that the debtor has no assets of any substance whatsoever in New Zealand. There may be some possibility of some assets overseas. The description of these is now available and these can no doubt be pursued, if it is thought appropriate, at a proper time. In the end the creditor has failed to show cause why the debtor should not be discharged. I see no reason why he should not be discharged and, in justice, indeed he ought to be.

The debtor is discharged and his passport and air ticket will be returned to him.

As I have said the creditor brought before the Court sufficient material to justify the grant of the warrant originally. Although there are suggestions that the creditor has acted, not in all respects in best faith, based upon animosity on the part of one of the creditor's officers involved in the matter, there is no real suggestion of bad faith or improper dealing. At that original stage, therefore, the creditor was I think entitled to proceed. The debtor has then acted to obtain a discharge and has succeeded in that. I see no reason why costs should not follow the event of that proceeding. The fact that the creditor may have been justified in the first place does not mean that it should be entitled to the benefit of costs though it ultimately loses. In the circumstances there ought to be an order limited to the application by the debtor which has now been successfully concluded by him. There will be an order, therefore, that the creditor pay the costs of the debtor which I fix in the sum of $1,000 having regard to the short point involved but the urgency of the matter. The debtor is also entitled to any disbursements. I make that order knowing that a grant of legal aid has been given.

<u>Solicitors</u>: J J Cleary, WELLINGTON, for Debtor/Applicant

Buddle Findlay, WELLINGTON, for Creditor/Respondent