

NZLR

**LOW
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY
IN BANKRUPTCY

4/6

B. NO. 127/92

803

IN THE MATTER of the Insolvency Act
1967

A N D

IN THE MATTER of WAYNE MICHAEL
RENNER

Debtor

EX PARTE

THE NATIONAL BANK
OF NEW ZEALAND
LIMITED

Creditor

Hearing: 21 May 1993

Counsel: A C Balme for the Debtor/Applicant
S Thomas for the Creditor
H M Nathan for the Official Assignee

Judgment: 21 May 1993

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

This is an application by Mr Renner for the annulment of an order adjudicating him bankrupt made by Master Gambrill on 22 April 1993.

The facts are that:

- (1) The applicant was bankrupted in his absence on that day (I will return to the circumstances in which that occurred).
- (2) The petition had been before the Court twice before 22 April 1993. The first occasion was on 18 February 1993, the second on 25

March 1993. On 18 February 1993 Ms Nathan appeared, as it happens, for the debtor. She informed me that an informal scheme had been proposed, that there had been some support for that and that if this was successful a formal scheme would be filed and the steps required in respect of it taken. I adjourned the matter on that date to 25 March, to enable steps to be taken for a formal scheme. I reserved the question of costs. On 25 March 1993 the matter was called before Master Feenstra. On that occasion Mr Savage appeared for the National Bank and Ms Nathan for the debtor. Master Feenstra adjourned the matter to 22 April 1993. He made no note as to the reasons for the adjournment.

- (3) On 17 March 1993 the applicant filed a Part XV proposal in the High Court at Tauranga.
- (4) On 8 April 1993 the proposal was advertised and notice of a meeting of creditors on 16 April 1993 given.
- (5) On 16 April 1993 the meeting of creditors was held. There were ten creditors present. The biggest creditor by far was Unity Mutual Financial Services Limited whose debt was stated at the meeting to be over \$300,000. Four creditors including the National Bank voted against the proposal. Five creditors voted for it. The value of the four creditors who voted against the proposal - the National Bank, the ANZ Bank, the ANZ Group Credit Cards and Amalgamated Finance - greatly exceeded the value of the five creditors who voted in favour of it. Unity Mutual Finance represented by a Mr Eide did not vote on that day. According to the minutes of the meeting taken by the then proposed trustee, Mr Grace, Mr Eide asked that the meeting could be adjourned until 5 pm, Monday 19 April, so that he could check his files for verification or otherwise of responses given by Mr Renner. The meeting could then be

completed by telephone. Mr Renner and the other creditors present being in agreement with this, the chairman reluctantly agreed to do so.

- (7) On the same day the National Bank applied to the Court for a charging order in respect of funds to be received by Mr Renner from the sale of a certain property.
- (8) On 19 April Mr Eide telephoned Mr Grace shortly before 5 pm. Mr Grace's note of what happened at that time, contained in the minutes of the meeting, is as follows:

At 4.57 pm on Monday 19 April the chairman and Jim Eide completed the meeting by phone. Jim Eide stated that having considered all of the information he had voted for the proposal. The chairman then said that as in excess of 75% of the votes by value and 50% by number had been received for the proposal that the resolution proposed was passed. There being no further business the meeting closed at 4.58 pm.

- (9) On 20 April 1993 the charging order sought by the National Bank was made.
- (10) On 22 April 1993 the petition to bankrupt Mr Renner was called, as I have already stated, before Master Gambrell. The Master was advised by counsel for the creditor that the proposal had not been approved. In the circumstances the Master made an order of adjudication.
- (11) On 23 April 1993, within one day, the applicant filed this present application for annulment.

The application is based on two grounds:

- (a) That the Court had been misled as to the fate of the proposal; and
- (b) That the applicant had not appeared nor arranged for representation because he had erroneously believed it was unnecessary and that

the bankruptcy proceeding had been stayed as a result of the favourable vote of the creditors' meeting on his proposal.

It is clear that the Court was misled. It is also clear that that occurred inadvertently so far as the creditor, the National Bank, is concerned. There can be no criticism of what counsel for the creditor said or did on that day. It is apparent also that the debtor's non-appearance is excusable if perhaps foolish.

The reason the application for annulment is now opposed is that Unity Mutual Financial Services Limited, in the person of Mr Eide, now says that it opposes the proposal and explains its vote in favour of the proposal on 19 April as having been made to ensure that the funds which were due to Mr Renner and which, if the proposal was accepted, would be paid to his trustee, should be paid to his trustee and therefore susceptible to the charging order which Mr Eide knew was being sought by the National Bank. Mr Eide's evidence is as follows:

- 1. I am a director of Unity Mutual Financial Services Limited, the largest of the Debtor's creditors.*
- 2. I confirm that I had previously informed Messrs Gibson Sheat, solicitors for the National Bank, that Unity Mutual Financial Services Limited intended voting against the Debtor's proposal under Part XV of the Insolvency Act.*
- 3. AT the time I was aware that the Debtor had disposed of his interest in a company (Scarab) for nil consideration. I was aware that the company owned a valuable asset being a commercial building which had been sold and believed it likely that the Debtor had entered an arrangement to defeat creditors including my company.*
- 4. I subsequently became aware that the recipient of the Debtor's shares in the company Scarab had paid funds to the provisional trustee under the Part XV Proposal and feared that if creditors voted against the Part XV Proposal those funds would be dissipated by or on instructions of the Debtor. I was also aware that the National*

Bank of New Zealand had applied for a charging order in respect of the money held by the provisional trustee but that there was a delay in obtaining that order by reason of the relocation of the High Court's offices at Wellington.

5. THE creditors meeting had been adjourned previously. I decided that I would register a vote provisionally in support of Mr Renner's proposal to prevent a vote rejecting the proposal causing the dissipation of funds. This was because the charging order had not been sealed and served. Now that it has been and I believe that the funds are secured it is the intention of my company to withdraw its support from the Part XV Proposal. Mr Renner is insolvent. He has attempted to dispose of his assets and I do not think that the Court should either annul the order for his adjudication or condone the Part XV Proposal he intends advancing to the Court.

It seems to me that the decision whether I should grant or refuse the application for the annulment of the order bankrupting Mr Renner depends upon the attitude that the Court should take to Mr Eide's actions and, secondly, upon the likely result of the application to confirm the proposal which will obviously follow if I grant the application for an annulment.

The grounds on which the Court, when asked to approve a Part XV proposal, may refuse to do so are set out in s143(3) of the Insolvency Act 1967:

The Court may refuse to approve the proposal if it is of the opinion:

- (a) That the provisions of this part of this Act have not been complied with; or*
- (b) That the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors; or*
- (c) That for any reason it is not expedient that the proposal should be approved.*

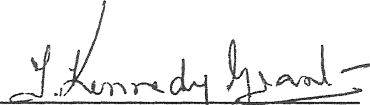
It seems to me that, in this particular case, it is only under (c) that the Court would refuse to approve the proposal. There is no suggestion that the provisions of the relevant part of the Act have not been complied with nor, I think, could it be said that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors as opposed to the one particular creditor.

Against that background I turn to consider the effect of what has happened. The effect, in my view, is that the creditor has taken a particular course with the purpose of benefiting the creditors by securing additional funds and has achieved that course. Those funds being available to the general creditors they respectively get, if I am right, something over 10% of their debt on any distribution. The evidence establishes, contrary, it seems to me, to the case now being put forward by Mr Eide, that some two weeks after his crucial vote in favour of the proposal he was corresponding with the trustee on behalf of his company in terms of the proposal and in the knowledge by then that the charging order had been obtained. In my view, it is by no means certain that the Court would refuse to approve the proposal voted on on 19 April.

I therefore consider it appropriate to grant the order annulling the bankruptcy of Mr Renner. The order will be granted on the conditions set by the Official Assignee in her report.

I fix the costs of the application at \$750 and reserve them. Application can be made by any party on 7 days' notice, if it is considered appropriate to do so after the Court has disposed of the application for approval of the Part XV proposal.

The application for the approval of the Part XV proposal should now be set down for hearing at the earliest possible date. The Registrar should consult with counsel to see what time needs to be allowed before the hearing for the filing of further affidavits by any party.


MASTER T. KENNEDY-GRANT

Solicitors

Gibson Sheat, Lower Hutt, for the Creditor
A C Balme, Tauranga, for the Applicant
The Official Assignee, Hamilton

