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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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B. 1824/91

LOW PRIORITY

IN THE MATTER of a proposal under Part XV of the Insolvency Act 1967 made by **ALLAN DONALD WEBSTER** an Insolvent

Hearing: 1, 3 March 1994

Counsel: A.E.L. Ivory for Insolvent
T.J. Cooley for Bank of New Zealand

Judgment: 3 March 1994

(ORAL) INTERIM JUDGMENT OF BARKER J

This is an application under S.145 of the Insolvency Act 1967 ('the Act') to cancel or vary a proposal made by the insolvent and approved by this Court on 28 November 1991.

The basis of the proposal was that the insolvent be employed by a company owned mainly by his wife called Wait Investments Limited ('WIL') which at the time owned two small properties; he was also to pay $2,500 per month to the trustee under the proposal with the possibility of a bonus of up to $88,000 per year. The source of these payments was to have been his earnings from WIL. It was also contemplated that WIL would have tax losses. However, WIL was not able to utilise the tax losses which had accrued to other companies of which the insolvent was

a shareholder. He did not disclose his shareholding in his statement of assets made prior to the proposal. He said that the companies were not trading at that time and that their existence was well known to the principal creditor, the Bank of New Zealand ('BNZ').

The insolvent paid the $2,500 per month but the source of that payment has been not WIL but advances from a variety of sources, including another company which carries on property developing called St Mary's Investments Limited ('SMIL').

The proposal required that at the end of its 3 year term, the joint assets of WIL and the insolvent would be distributed - 70% to the creditors and 30% to the insolvent. His assets will of course now include his shareholding in other companies, of which there are several, which the insolvent has used for property developing, in some cases with joint shareholding by various friends, some of whom have advanced money to him.

The proposal also required that the insolvent file accounts with the trustee of the proposal in respect of his trading and of WIL to 31 March in every year. This requirement was obviously to provide an annual check of his affairs. Despite requests from the trustee the insolvent did not file these accounts. It was only a day or so before the hearing commenced before me that totally inadequate and uninformative accounts were filed

showing profit and loss accounts and balance sheets for the insolvent and some of the other companies concerned. WIL has not had any accounts prepared because it is now in liquidation as a result of an unsuccessful property deal.

The insolvent said in evidence that he was of the understanding that he was permitted to undertake property developing, in which he has a special expertise; that he was advised by his solicitor that he should carry out each major investment through a separate company in case a deal went sour; any loss would not then drag down more profitable ventures, as it would if they were operated by the same company.

It seems clear that some of the statutory criteria in S.145 for cancelling or varying the proposal have been made out: (a) the whole basis of the employment of the insolvent with WIL has happened to only a limited extent. In fact he has acted as a freelance property developer using various companies; (b) creditors were never informed of this, nor of the fact that WIL was not available for tax loss purposes; (c) the insolvent has not made proper disclosure of his accounts and financial situation.

I do not think it appropriate at the present time to go into a full review of the evidence and of the various grounds; what I have said makes it clear that at best for

the insolvent, the proposal will have to be varied; the whole substratum on which it was based namely WIL, is now in liquidation.

I am satisfied having listened to the cross-examination of the insolvent on the accounts prepared,that the Court is entitled to have a much clearer picture of this man's trading activities since the proposal was approved.

To that end, counsel are agreed that the hearing should be adjourned to enable an investigating accountant to consider the financial situation of the insolvent, his wife and the various companies to which reference has been made in the course of evidence. Such accountant should receive the full co-operation of the insolvent. It may be that a clearer picture will then emerge than that which is currently before the Court.

Mr Cooley for the creditor mentioned that there is a possibility of undue preference and fraudulent conveyances in a bankruptcy sense. No doubt these possibilities will be investigated. Because the creditors wish a full investigation, they are prepared to pay for it at first instance. I think it appropriate that, if possible, the insolvent make some contribution to the costs because he was obliged to provide proper accounts to the trustee and did not do so.

I do not make the investigating accountant a Court appointed expert because I do not think there is necessarily jurisdiction to do so in this situation. I expect that counsel will be able to agree on a person of suitable experience and ability to conduct such an investigation within a period of one month.

The present application therefore is adjourned to appear before me for mention only when I am duty Judge on Thursday 28 April 1994 at 2.15.p.m; on that date I shall be happy to receive any further affidavits in the matter or make some form of consent order whereby the scheme is varied. In the meantime, the insolvent is to continue paying $2,500 per month.

There was a suggestion that because of the fact that other companies in which he has an interest are operating profitably and have an excess of assets over liabilities that there will be a lump sum available for the creditors on realisation of those assets at the end of the year in the order of $300,000. There were property valuations provided by a land agent. No doubt the investigating accountant will consider the credibility of those valuations and advise the Court as to the real worth of the insolvent - excluding the debts which are the subject of the proposal.

The accountant will also look at contingent liabilities which the insolvent may have accepted in the course of

his property developing. It seems that these could easily imperil the security, such as it is, of the creditors; they should not have been entered into without notification to and approval of the creditors.

If counsel cannot agree as to the nomination of an accountant, I shall be happy to fix somebody; it will be a matter of who is available; somebody with experience in this area is needed, though preferably somebody without a close connection with either party.

A winding-up application in respect of Webster Investments Limited is set down for hearing on 23 March 1994. It is too late to defer that hearing because there may be persons entitled to be heard on that date. However, I approve of the course suggested by counsel that, at the hearing before the Master on 23 March, the application for winding-up be deferred to 28 April 1994 at 2.15.p.m. to be called before me.

In respect of Coform which has not yet got a date of hearing, I direct that the date of hearing be 28 April 1994 at 2.15.p.m. for mention only before me.

All questions of costs are reserved.

R D Barker J

Solicitors: Francis Jew, Auckland, for insolvent
Phillips Fox, Auckland, for Bank of New Zealand