

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

B175/97

IN THE MATTER of the Insolvency Act 1967

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IN THE MATTER of CLARENCE JOHN
FALOON of 73A Pope Street,
Camborne, Mana, Porirua,
director of TRADE LINES
LIMITED, patentee

Judgment Debtor

A N D

BANK OF NEW ZEALAND

Judgment Creditor

Hearing: 7 August 1997

Counsel: Judgment Debtor in Person
J. Toebe for Judgment Creditor

Judgment: 12 AUG 1997

JUDGMENT OF ELLIS J.

Solicitors:

Buddle Findlay, Wellington for Judgment Creditor

Mr Faloon applies to set aside the Bankruptcy Notices issued by this Court at the instance of the Bank of New Zealand. The grounds upon which this may be done are set out in s19 of the Bankruptcy Act 1908 which defines acts of bankruptcy. It is the fourth ground that is relevant.

Section 19(1)(d) thus:

“(d) If a creditor has obtained a final judgment or final order against the debtor for any amount, and, execution thereon not having been stayed, the debtor has served on him in New Zealand, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within fourteen days after the service of the notice in a case where the service is effected in New Zealand, and in a case where the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained.”

When this matter was first called before me I drew this to Mr Faloon's attention and told him the “counterclaim, set off, or cross demand” must be against the Bank, not some third party. I adjourned the matter for him to consider and discuss with Mr Toebes.

He has now filed an affidavit annexing an affidavit by his wife which he asks to be treated as a Draft Statement of Claim. In it he correctly claims the debt by his wife and himself arises out of guarantees of the indebtedness of Trade Lines Limited. No issue has ever been taken that Trade Lines Limited did not owe the money or was in default. Nor is issue taken with the guarantee. All turns on his claim arising out of work done by his father and perhaps himself on the land in connection with the diversion of the Kawau Stream. He claims an incorporeal hereditament. This has been canvassed in several caveat proceedings in this Court and in particular in *Bank of New Zealand v Trade Lines Limited* (Wellington Registry, CP65/93, unreported 18 October 1996, Goddard J). Mr Faloon submits this Judgment was obtained by fraud. I can see nothing to substantiate this at all. He also submits the application was not procedurally correct and relies on s143 of the Land Transfer Act 1952. There is no need to pursue that, as it is not a matter that impinges on the rights of the Bank against Mr and Mrs Faloon.

As I have said, Mr Faloon's claims centre around his claim relating to the diversion of the stream which is adjacent to the Palmerston North Airport and formerly owned by Trade Lines Limited. The claims are directed to the Palmerston North City Council, Palmerston North Airport Limited and the Crown. Perhaps others are involved, but not the Bank.

He attempted to raise these claims in opposition to the Bank's application for summary judgment heard in the District Court on 9 December 1996. The Judge pointed out that these claims are nothing to do with the Bank. At most they could produce money to pay the Bank. This being the case, the claims cannot avail Mr and Mrs Faloon in the present situation, as they do not constitute a counterclaim, set off, or cross demand.

The applications must be dismissed and I fix costs in favour of the Bank at \$250 in respect of each application.

Andrew J
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