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MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

B. NO. 1545/96

BETWEEN AN HOLDGATE

Judgment Debtor/Applicant/Bankrupt

A N D JW CAMPIN

Judgment Creditor/Respondent

Hearing: December 9, 1997

Counsel: PAB Mills for Judgment Creditor
JE Long for Debtor/Bankrupt
AD McInnes for Official Assignee

Judgment: 17/12/97

JUDGMENT OF MASTER ANNE GAMBRILL

Solicitors for Creditor

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Solicitors for Debtor

Daniel Overton Goulding
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I have before me an application wherein Mr Holdgate, a bankrupt, has filed an application to annul his order of adjudication made on 20 June 1997 upon the grounds:

(a) The order of adjudication should not have been made.

(b) There has been a substantial change in the financial circumstances of the Applicant.

(c) Appearing from the affidavits of Mr Holdgate and the Official Assignee's report to be filed herein.

The application filed on 17 October 1997 relies on s 119 of the Insolvency Act 1967.

Mr Holdgate swore an affidavit in support on 14 November 1997 describing the present state of his various affairs and noting the amounts that he believed he could use or apply to settle certain outstanding sums. He gives some evidence about some of the aspects of the proposed sale which the Official Assignee sought to conduct on 25 November 1997. The Official Assignee filed a notice of opposition to the application on the basis that:

(i) The order for adjudication was properly made in the circumstances.

(ii) Realistic appraisal of the net position of the bankrupt has replaced speculation.

(iii) The change in financial circumstances of the bankrupt is not favourable to his solvency.

The Official Assignee also filed two reports. The first dated 17 November 1997 before Mr Holdgate's application for an injunction was heard, and one dated 4 December 1997 updating the financial figures. Affidavits in opposition were also filed by Mr Allen and the creditor filed a notice of opposition to an application for further directions. Counsel for the bankrupt had filed an application for directions which resulted in a brief hearing before Master Kennedy-Grant on 5 December 1997. It is I believe important to set out the existing factual background:

Mr Holdgate was bankrupted by this Court on 20 June 1997. He did not appeal the decision but by application dated 25 June 1997 he sought a stay or suspension of the order of adjudication which the Master then refused. His affidavit in support of the stay application identified the wish to keep his business going. He deposed that he tendered the cheque for the sum claimed in the petition which was refused because it was a trust account cheque. The Master was advised the instructions from the creditor client were still to refuse, even if payment was made in cash. I record this evidence as it has been placed again before the Court at this hearing. What is not articulated is that on 20 June 1997 a charge was placed by the Inland Revenue Department over the solicitor's trust account and funds for the solicitor's cheque were therefore not available. It was also conceded Mr Holdgate had filed no personal tax returns since 1994 and there were disputed sums outstanding to the Inland

Revenue Department. He then sought review of the Master's order refusing a stay. In the context of dismissing that application for review His Honour Justice Smellie recorded, referring to the Master:

> "I think she got it right on the adjudication and I think it is time this whole lengthy expensive matter was brought to an end and the Official Assignee got on with the job of attending to the adjudication of someone who it seems to me is hopelessly insolvent."

Mr Holdgate then appears to have taken no steps to appeal the order of adjudication. The next step he took on 17 October 1997 was to file this application for annulment unsupported by affidavit evidence. He then filed an application seeking an interim injunction to restrain the Official Assignee from carrying out the sale of his property on 25 November 1997. His application was refused by Laurenson, J. This left extant only the application for annulment. On 5 December 1997 Master Kennedy-Grant ordered the hearing, which had been set down for 9 December 1997, to proceed. The bankrupt's application for directions filed on 2 December 1997 included an application for an adjournment on the grounds -

> "The issues to be tried by the Court in determining the application and application for annulment have markedly changed. The applicant needs to adduce further and different evidence. The fixture may not be for sufficient time and may need to be heard by Master Gambrill. There needs to be cross-examination of witnesses who will be subpoenaed. The applicant intends instructing Senior Counsel."

The application was supported by a memorandum. The Official Assignee also then sought directions. Master Kennedy-Grant made the following orders:

"1. The application for annulment is to proceed on 9/12/97.

2. The first issue to be argued and determined is to be the bankrupt's standing.

3. If that issue is determined adversely to the bankrupt, the application for annulment will be dismissed.

4. If that issue is determined favourably to the bankrupt, the application for annulment will proceed, in which case:

   (a) the bankrupt may apply for an adjournment to enable him to adduce the further evidence required to substantiate his allegations;

   (b) if that application is successful, the creditor's application for an order for security for costs will be considered.

5. On 9/12/97 the bankrupt may rely on his affidavit of 14/11/97 and Counsel's memorandum of 2/12/97 (without the latter being accepted as probative, the purpose of admitting it being solely to indicate the nature of the bankrupt's case).

6. The bankrupt is not to be permitted to file and serve any further evidence before the hearing on 9/12/97.

7. The Official Assignee's application for costs today is adjourned to the hearing on 9/12/97.

The above orders are made for the reason that I consider them to provide for a course which may result in a speedy determination of the annulment application, speed being in my view important to ensure that, if the annulment application is unsuccessful on the standing point, the Official Assignee is able to proceed with the administration of the bankrupt's estate without further delay. At the same time the orders preserved the other rights of the parties."

The affidavit evidence of the bankrupt filed in support dated 14 November 1997 and 24 November 1997, refers to the events over tendering trust account cheques, agreements Mr Holdgate alleges were made over payment of the sums due after adjudication, and further depositions alleging the transfer of the debt arising out of the original horse partnership. There is also affidavit

evidence alleging that in practical effect many of his debts are no longer his responsibility having been settled or having been satisfied.

The Official Assignee's two reports make the following facts clear. A statement of affairs was only received from the bankrupt on 14 November 1997 which, in the bankrupt's view, showed a surplus. Thirty proofs of debt, many of them disputed by Mr Holdgate, were filed. In simple terms, outstanding though unresolved claims exceeded any assets available. The last report of the Official Assignee makes it clear that there could be $350,000 for creditors, $990,000 of unproven debts, the Official Assignee is owed $33,000 in costs and there is a claim for $20,000 made by auctioneers in connection with the advertised sale of machinery.

At the conclusion of the hearing before this Court, as there had been considerable difficulty during the hearing locating a number of relevant documents and parts of the file, I was not prepared to determine the bankrupt's standing without delivering a reserved judgment. It is the issue of the bankrupt's standing to make an application for annulment to this Court that I now address.

It should also be noted that Master Faire had already made extensive timetabling orders on 19 November 1997 when he allocated a fixture for the hearing of the annulment and the Official Assignee effectively opposed any further adjournment.

The Official Assignee argued that pursuant to s 42 of the Act all the property of the bankrupt including matters in action and equities were vested upon adjudication in the Official Assignee, ie (a) all property; (b) a capacity to exercise and take proceedings or exercise powers in respect or over the property whatsoever. In terms of s 30 adjudication is binding on all parties as to the validity. Counsel recognised certain property did not pass to the Official Assignee, ie rights of action which are personal to the bankrupt, eg defamation claims. Counsel argued that the insolvency legislation in common law limited the status of the bankrupt to bring proceedings "as a person interested in the conduct of the insolvency" to seek vesting of disclaimed property and to dispute the correctness of the judgment debt and thus the adjudication. He referred to two judgments The Auckland City Council v. SC Glucina CA.285/96 dated 26 February 1997; and Boaler v. Power & Ors [1910] 2 KB 229. Counsel argued that the bankrupt is not "a person interested" who could bring the Official Assignee to account under s 86 (page 215 Spratt & McKenzie's Law of Insolvency), nor have the Courts been willing to interfere - see In re a Debtor ex parte The Debtor v. Dodwell [1949] 1 Ch 236. Counsel analysed s 119, the four grounds on which an annulment may be sought and noted that no specific subsection has been relied on in this case. He relied on the evidence which showed that s 119(b) and (c) could not apply as there was no evidence of payment nor a change of circumstances. Subsection (d) could not apply as no composition was proposed or was able to be effected. He suggested the only basis for the application was s 119(1)(a). He said that the opportunity to make the application rested in the hands of the Official Assignee, not in the hands of the bankrupt. The bankrupt's allegation that the order should not have been

made or indeed was made on an improper basis or circumstances had changed since the order was made, are not sufficient grounds to allow the bankrupt to bring this application before the Court in the face of the insolvency and the obligations the Official Assignee has towards the creditors. He relied on Re Guest, ex part BNZ Finance Ltd [1991] 1 NZLR 250. He commented on The Auckland City Council v. Glucina (supra) where the Court stated at page 3:

> ".....it is true that in s119 'any person interested' has long been held to include the bankrupt and enable him to bring an application for annulment.....it would be surprising if the bankrupt could not seek an annulment of adjudication.....
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> .....the provision in question or if, notwithstanding its apparent clarity, a literal application would lead to a result seemingly in conflict with the policies of the Act, that the Court need go further."

The Court analysed why a bankrupt in the circumstances before the Court in Glucina could not then be an applicant. The Court held that Mr Glucina had no rights in respect of the substantive action in the High Court (M.931/95) for relief against forfeiture. He applied thereafter to vest the property in himself. The Court's view was the bankrupt himself must have difficulty claiming an interest since the interest was terminated by the bankruptcy. The Court also held that any interest, referred to in particular s 75, referred only to an interest recognised by law.

Counsel argued that the application was based on information the bankrupt alleged had been made available after adjudication, ie the implications or allegations of maintenance which I am satisfied in law could not be sustained and there is no concrete evidence in respect thereof in my view. The Court

was functus officio at the time the order was made. It cannot and should not revisit the grounds of an order for adjudication. The provisions of s 119 of the Act allow the Court only to annul the adjudication if new or other grounds unbeknown to the Court at the date of adjudication are relevant and can affect the previous judgment made. The critical wording under which the debtor must achieve the right to apply herein is "any person interested". I recognise that this may include the bankrupt himself but this status must be established by the evidence in support of the application. The Courts have been prepared to annul or consider annulment where the bankruptcy proceedings have been viewed as an abuse of process. It has been suggested that when the petition is brought on a judgment debt the bankrupt may contest the validity of the debt upon the hearing of the petition but once an order of adjudication is made and the rights of appeal thereafter are exhausted any grounds to have the judgment debt set aside are vested in the Official Assignee who may alone bring the application. See Boaler v. Power (supra).

In support Counsel for the creditor argued the Court should not consider the conduct of the litigation as the order of adjudication puts an end upon the petition on which it is based. See Re Guest (supra). Counsel noted the order is final. The Court cannot by way of an application for annulment rehear argument on the issue which was determined in the hearing of the petition. The Courts have determined that the challenge to the validity of the debt must be made upon the hearing of the petition. Any application to have the judgment debt set aside is vested in the Official Assignee.

It appears Mr Holdgate wishes to raise matters that were raised at the initial bankruptcy hearing "where any remedy in respect thereof lies in an appeal". Counsel noted that in terms of Rawlinson v. Purnell Jenkison & Roscoe CA 128/97 dated 21 October 1997, a solicitor acting in a professional capacity cannot be liable for maintenance. Mr Holdgate's evidence made generalised allegations of maintenance and maintenance and champerty was a ground argued for the bankrupt at the original adjudication hearing. Counsel relied on In re Harry Dunn ex parte The Official Receiver v. Harry Dunn [1949] 1 Ch 640.

Counsel for the bankrupt put before me Wilson v. UDC Finance Limited B.No.348/89 (Christchurch Registry) dated 5 December 1989 and relied on a subsequent statement at page 5. However, Tipping, J noted the applicant effectively wanted to be able to, in her own name, attack the judgment debt. He adopted the statement in Boaler v. Power (supra) that following an order for adjudication the right to attack a judgment debt vests in the Official Assignee in bankruptcy. He said the point was put even more strongly in the judgment of the English Court of Appeal at page 239 where the Court said:

> "It is open to the Court in bankruptcy, if it thinks fit, to allow the debtor to contest in the Bankruptcy Court the validity of the petitioning creditor's judgment on the ground of fraud, collusion, or for any other sufficient reason: In re Flatau (1888) 22 QBD 83. But this is the only way in which the bankrupt can contest it; the adjudication, while it stands, is conclusively binding on him; he cannot contest it in any other Court on the ground of fraud or on any other ground.

He noted that if the debt is to be contested, it is the Official Assignee who must do it. He then summarised his views and said:

> ".....that the only way in which an order for adjudication can be attacked is (1) to appeal to the Court of Appeal under s 8(2).....(2) to apply for an annulment under s 119.....".

The judiciary in New Zealand have held that the Courts do not have a power to rescind. When referring to Spicer & Spicer v. Westpac Banking Corporation B. Nos.382 & 383/94 (Wellington Registry) dated 3 May 1995 the Judge relied on the statement of McGechan, J that:

> ".....a Bankruptcy Court could allow a debtor to contest the validity of a judgment debt for sufficient reason. It is a matter which requires leave; but is not totally impossible.....".

The Court in that case indicated that if suitable funding was available to the Official Assignee, it was a matter for the Official Assignee's consideration and discretion whether the Official Assignee should embark upon litigation against the petitioning creditor.

Counsel's argument for the debtor is that the statute, particularly s 119, should not be read down to confine the right of application for annulment to the Official Assignee only particularly under s 119(1)(a). Counsel argued in depth that bankrupts are permitted to make their own applications. What was not distinguished was the factual basis on which these applications for annulment come before the Court. Counsel said the ground in issue, Mr Holdgate's solvency, should not to be addressed at this hearing. It was reserved for a further hearing. What the Court must determine at this hearing was only whether the bankrupt had the right to make the application for annulment. He

acknowledged that the original ground of bringing the application was on the basis of the ability of the bankrupt to compromise his debts and establish solvency. On the Official Assignee's present report it would be extremely difficult, if not impossible, to make out any grounds which would satisfy the Court the debtor is in fact solvent and an order annulling his adjudication could be made. However, the issue Counsel now said is before the Court was whether the debtor was entitled to file this application in the face of the Official Assignee's opposition to such application.

In my view the control of the debtor's affairs (prima facie) and his assets and real property, excluding personal property, have passed to the Official Assignee. The application herein must be based upon grounds that would entitle the Court to consider whether there are grounds for annulling the adjudication. If, as the debtor deposed originally, he is solvent, then the assets should be within the control of the Official Assignee at the time of application or clearly available to the Official Assignee and be supported by the Official Assignee although it is recognised this ground is no longer available. Indeed, it is not uncommon to recognise a debtor can make an application for annulment if an order has been made when he is solvent and the order should not have been made. The basis of an application for annulment is that the adjudication order should not have been made.

I do not see how a bankrupt who has no rights in property, and only limited rights in personal actions, has a right that lets him bring this application at this point in time. He has no rights in property, he has no basis to satisfy the Court

that he is entitled to an order for annulment and the application is misconceived. In the overall context, bankrupts can neither be sued nor institute actions because they have no recourse to property which can be available if the proceedings are unsuccessful, nor can the Official Assignee be liable for their costs. I believe in the general terms of the legislation overall, the rights of action are primarily vested in the Official Assignee and largely the bankrupt cannot have status before the Court because he cannot satisfy the Court as to s 119(1)(b), (c) and (d). If he believes an order of adjudication should not have been made, then he should have appealed the decision and let the Court of Appeal overturn the order. He has pointed to nothing that makes out a ground that the order should not have been made. At best he is attempting to rely on the material before the Court at the date of the hearing of the adjudication. In my view he does not have the status to bring an application under s 119(1)(a) because the application is not based on a ground which the Court may consider in support of any annulment of the order of adjudication.

The other consideration in this matter is the effect of an order to be made under s 119(1)(a). It would effectively annul the adjudication from the date it was made despite the fact that on the record Mr Holdgate at date thereof was, in terms of the Court finding, insolvent. The Court, on the hearing of the application for the annulment, exercises a power which is discretionary. Regard can be had to public interest and to the wishes of the parties to the application. The Official Assignee must be a party to the application - see

Wallace, a bankrupt [1964] NZLR 863, Re Guest v. BNZ Finance Limited (supra). The creditor is entitled to be heard.

In my view the responsibility to establish that he is a party interested and entitled to apply must rest upon the bankrupt. In this case the bankrupt filed the application on 17 October 1997, gave no supporting evidence until 14 November, applied for an injunction to stop a sale on 14 November and then sought adjournment of this hearing to enable him to place further evidence of (a) relating to the judgment debt on which he was bankrupted; and (b) as to solvency. In the judgment of Smellie, J it was made clear to Mr Holdgate there must be an end to the litigation.

In the evidence put before the Court the bankrupt deposed that he attempted to pay the debt on the day the adjudication order was made. That evidence does not refer to the fact the Inland Revenue Department had placed a charge over the moneys in a solicitor's trust account on which the trust account cheques, which did not fully cover the debt, had been drawn. That charge was made because no tax returns have been filed since 1994 and it was clear that if Mr Holdgate's evidence was correct on that occasion, he had been earning income in the interval. The evidence he puts before the Court relating to the judgment debt relates primarily to his efforts to settle it after the order of adjudication. The debt was valid, due and owing based on a judgment at the date of the order and it is not open for this Court to give consideration to the subsequent matters if s 119(1)(a) is to apply.

Secondly, Mr Holdgate is insolvent if one accepts, which the Court does, the Official Assignee's two reports filed before this Court in respect of both the injunction application and this hearing.

I have treated the case on the particular facts as I believe it would be wrong to say a bankrupt may not be a party interested. It is an issue where one looks at the wording as to whether he is the party interested in seeking the annulment and it is my view that he can only be the party interested if he can make out the grounds for annulment. I would not be prepared to rule that a bankrupt cannot apply. I believe each case must be evaluated on the facts. I believe further, to apply in the face of the Official Assignee's clear opposition, could, if the application is continued with, amount to an abuse of process. If the Court is to exercise its discretion under s 119(a) it will rely heavily on the Official Assignee's reports and view of the matter. It will consider public interest which exists in this adjudication as evidenced by the 30 proofs of debt and it will consider the bankrupt's conduct and compliance with the provisions of the Insolvency Act 1967 which has been dilatory.

For these reasons I believe the application is ill-conceived, mis-founded, has not been advanced expeditiously and has not established a ground on which Mr Holdgate can be heard in this Court. He has had since 17 October 1997 to put supporting evidence before the Court and although Master Kennedy-Grant said at the time of the application for adjournment on 5 December 1997 that no more affidavits were to be filed at that date, he has had ample opportunity prior to that date.

Counsel have an obligation to put supporting material before the Court when filing the application for annulment. I have already referred to the late filing of the bankrupt's affidavit when a substantial sale of his assets was imminent. It is not in public interest for bankrupts to initiate applications for which they cannot put forward supporting evidence and which cannot be dealt with expeditiously. If Mr Holdgate's status was to be recognised, this matter would then be adjourned for a further substantive hearing which it is clear is the basis of the application for further directions filed on 2 December 1997. This delay is unacceptable and outside the generally recognised statutory provisions and conventions applicable to bankruptcy jurisdiction.

I am not prepared to find Mr Holdgate has made out a status to enable him as a bankrupt to be heard in this Court. This will determine the substantive application and the other interlocutory applications by the bankrupt on file are therefore at an end. The application for annulment is refused.

Costs

As Mr Holdgate is bankrupt generally no effective orders as to costs can be made and the costs issue highlights the difficulty of the Court is faced with in an application of this nature without it being brought with the support, if not approval, of the Official Assignee. The Official Assignee sought an order that the costs on the application by the bankrupt for adjournment on 2 December 1997 and the cross-application by the Official Assignee be paid by the

bankrupt as if a debt due to the Crown and personal to the bankrupt. The assets of the bankrupt are subject to a primary charge in favour of the creditors not to be used for litigation in this Court. I understand Mr Holdgate is not legally aided yet he has been represented by Counsel on four occasions in this Court in the recent months. The Official Assignee is entitled to his costs as per his normal charges for the work carried out in respect of this hearing. An application for security for costs was properly made by the creditor. I am prepared to so order costs in favour of the Official Assignee of $1,000 and judgment creditor of $750 plus disbursements as fixed by the Registrar to be paid by the bankrupt personally. The creditor is entitled to $250 on the application for security.

Even though this application of Mr Holdgate's will fail I am prepared to order, on the creditor's application for security, that if any further steps are taken under bankruptcy file B. No. 1545/96, security has to be given on Mr Holdgate's behalf by an independent party for the sum of $5,000 in favour of the creditor if Mr Holdgate wishes Counsel to represent him in this Court.

MASTER ANNE GAMBRILL