

NZLR

MEDIUM  
PRIORITY

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

B. NO. 1406/97  
IN BANKRUPTCY

IN THE MATTER of the Insolvency Act 1967

A N D

IN THE MATTER of GD HEARD

Debtor

EX PARTE

ABCOM INVESTMENT  
FINANCE LIMITED

Creditor

Hearing: March 13, 1998

Appearances: Debtor in Person  
Personal representative of company Mr Donoghue (Jnr)

Judgment: March 13, 1998

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(ORAL) JUDGMENT OF MASTER ANNE GAMBRILL DATED 13 MARCH 1998  
ON THE DISMISSAL OF THE BANKRUPTCY PETITION AND REASONS FOR  
DECISION

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The proceedings herein have been filed by a debt collecting company. No solicitor is endorsed on the record and no solicitor appears to be acting for the petitioning creditor.

The bankruptcy notice did not disclose there was any security for the debt. However, in the creditor's petition the petitioning creditor states that it "has a security for the said debt being a guarantee by Judith Heard of 37A Arthur Street, Onehunga, supported by a caveat over her interest in the house property at 37A Arthur Street, comprised in CT 447/86". There is nothing before me to suggest that that is not a valid or good security.

If there is security given for the debt it is doubtful whether a creditor can petition. I believe whilst the creditor holds the security, it is not entitled to bankrupt the debtor unless the debt exceeds the value of the security by \$200 as it has already accepted this security for the benefit of securing the debt.

As to the summons, it should read:

"This summons is issued out by the petitioner in person or by the solicitor for the petitioner."

The endorsement reads

"This summons is issued out by Abcom Investment Finance Limited".

The company cannot represent itself in this Court as of right. See Re GJ Mannix Limited [1984] 1 NZLR 309 and GB & JZ Chambers v. AEL Corporation Ltd (1994) 7 PRNZ 635 and in the light of those cases, in my view Mr Donoghue cannot represent the company on a matter such as a bankruptcy petition in the High Court. The Court and the law recognise a company acquires a legal personality created by statute but the company is

a commercial entity using the quasi criminal jurisdiction of the Court to obtain either an investigation of the debtor's affairs or a change in his status.

I turn to the reasons

It is the creditor's petition with which I have the difficulty as to why the petitioning creditor should have been allowed to proceed on such an inadequate and ill-prepared set of documents and why the Court office should be obliged to accept and present such documents to the Judiciary.

1. The petition is defective as it is not witnessed nor is the company attestation properly signed.
2. The petition is defective in that the company has security for the said debt although it is described as "that I have secured for the said debt being a guarantee and a caveat over a property at 37A Arthur Street, Onehunga".
3. There must be a debt of not less than \$200 owing to the petitioning creditor. This is not referred to, vis a vis the security, nor is the security valued.
4. The format of the proceeding. It was drawn up and breaches the High Court Rules in the format of the documents and the presentation. The margins are inadequate. The affidavit of service is handwritten and should have been typed. The affidavit verifying the petition had no proper

endorsement for the deposition to be made. The request for the issue of the bankruptcy notice has no endorsement in terms of the High Court Rules as to the party by whom it was issued. The jurats have obviously been written up in the Court office, probably by the Deputy Registrar to allow the depositions to be completed which is a wong use of Court time. The Court staff should not have to direct their energies to correcting the petitioning creditor's papers or completing them and it is not a service to which the public is entitled. The bankruptcy notice fails to identify the costs on the judgment and the filing fee on the request to issue the bankruptcy notice.

5. As the Department of Courts management now seems unwilling to undertake the costly responsibility of rejecting incorrectly prepared civil proceedings, maintaining the responsibility for the documents rests with the solicitors or the party filing (unlike the former standard), the Court itself is often left with the growing responsibility for rejection or striking out a proceeding. In the last two days I have struck out six proceedings in bankruptcy and liquidation alone for for failure to comply with the statutory time limits for issue.

6. The very poor quality of the papers herein supports the rationale in the judgment of Re Mannix (supra) which orders that a company cannot represent itself in this Court. If these papers had been prepared by Counsel they would not have been accepted nor would the Court have had to give the time to in depth consideration of the papers and the recording of these

reasons. Whilst a creditor in person may petition, and there is good reason why that should be so permitted, a company must be represented by Counsel in this Court who takes the responsibility for the carriage of the case. The company has made the advance to the debtor, the company must, if it is choosing to adopt these practices expend the funds to obtain Counsel to represent it in this Court. The very reason for the proceeding shows the petitioning creditor company is not impecunious. It has not addressed the legal issue of security for debt and the Director must be the witness as to the sum owing; these matters require the Director to be both witness and advocate.

I turn to the issue of secured creditor issuing a petition for bankruptcy. If the petitioning creditor is secured the Court cannot make an order of adjudication against the debtor unless the creditor satisfies the Court the amount of the debt exceeds the value of the security by at least \$200. See definition of "Secured Creditor":

"A secured creditor means a person holding a mortgage, charge, lien or secured on all or part of the debtor's property as security for the debt due to him or her from the debtor. This is so whether the security was given directly or indirectly through another person as security for a debt due to the creditor."

There has been no evidence to support this petition. The debtor informed the Court and I would expect it was correct, that the interest in the property exceeded the value of the debt substantially. Nor is the Court informed

whether this charge was taken as security for the loan which I suspect it was. If the debt is secured it is unlikely this petition could proceed.

It also seems clear that Mr and Mrs Heard would be able to apply to the Court to sever the joint tenancy and free the property for the debtor to discharge his liability. The petition if it shows a debt is secured must, therefore, satisfy the Court and in practical terms it would be advisable for there to be incorporated in the body of the petition a statement that the value of the security does not exceed the amount claimed.



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MASTER ANNE GAMBRILL