IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2003-404-6485

UNDER	Part 17 of the Insolvency Act 1967 and section 6(2) of the Administration Act 1969
IN THE MATTER OF	THE ESTATE OF SHIRLEY HUIA EDNA ROBERTS late of Avondale Lodge Rest Home & Hospital, 92 Rosebank Road, Auckland, Deceased
AND IN THE MATTER OF	an application by JOHN WILLIAM KNOX of Wellington, Chief Financial Officer

Hearing: 1 April 2004

Appearances: SJ Peacock for Applicant
D Hoskin for JK and KD Roberts

Judgment: 6 April 2004

JUDGMENT OF MACKENZIE J

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[1] This is an application for an order that the estate of the deceased be administered under Part 17 of the Insolvency Act 1967. The application also seeks orders that letters of administration be granted to the alleged creditor of the deceased, and that judgment be entered against the estate in the sum of $29,234.69 plus interest.

[2] The matter had been set down for hearing as a defended fixture on Thursday, 1 April. Counsel for the plaintiff, in opening, indicated that it was proposed to call evidence to support the claim that judgment be entered, and thereby establish the debt which was relied upon in support of the application. I indicated to counsel that I was not satisfied that the matter could properly be dealt with in the way proposed, and I adjourned the proceedings. I indicated that I would give my reasons in writing,

and in doing so would consider whether I should take the further step of dismissing the application.

[3] As I have noted, the application was made under Part 17 of the Insolvency Act. The relevant provision is s155, which provides as follows:

> 155 Application by creditor or beneficiary
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> Any creditor of the estate of the deceased whose debt would be sufficient to support a bankruptcy petition had the debtor been alive, or any person beneficially interested in the estate of the deceased, may apply to the Court for an order under this Part of this Act, if—
>
> (a) The administrator has failed or neglected to make application under this Part of this Act and, on being requested in writing to make such application, fails so to do within 21 days after the date on which he is requested to do so:
>
> (b) For a period of 4 months from the date of the death of the debtor no administrator has been appointed and no application has been filed in the Court under section 154 of this Act:
>
> Provided that, if the Court is satisfied that the deceased committed some act of bankruptcy within 3 months before his death or that the estate of the deceased which should have been available for his creditors is diminishing, it may allow an application under this paragraph to be filed within the said period of 4 months.

[4] To be eligible to apply under that section, the applicant must be a creditor of the estate, whose debt would be sufficient to support a bankruptcy petition had the debtor been alive. That is governed by s23, which provides as follows:

> 23 Petition by creditor
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> A creditor may file a bankruptcy petition against a debtor, if—
>
> (a) The debt owing from the debtor to the petitioning creditor, or, if 2 or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to a sum not less than $200; and
>
> (b) The debtor, whether before or after incurring the debt, has committed an act of bankruptcy within 3 months before the filing of the petition; and
>
> (c) The debt is a liquidated sum payable either immediately or at some certain future time.

[5] There are two relevant requirements of s23, in relation to the debt:-

a) it must be more than $200, and

b) it must be a liquidated sum payable either immediately or at some certain future time.

[6] The existence of a debt meeting the requirements of s23 is clearly a precondition to the right of an applicant to apply under s155. Counsel for the applicant submitted that for the purposes of s155, only the first requirement, namely that the debt be more than $200, is relevant. I do not accept that submission. To be sufficient to support a bankruptcy petition, a debt must meet both requirements. Both must also be met before s155 can apply.

[7] In this case, the "debt" relied upon is pleaded in this way in the second amended notice of originating application dated 4 March 2004.

> 6. The estate of the said deceased is justly and truly indebted to the applicant in the sum of $29,234.69 whether pursuant to contract, quantum meruit or mistake.

[8] The circumstances, as alleged in the application, are that the family of the deceased had requested Avondale Lodge Rest Home Hospital to provide accommodation and care for the deceased, before her death. It is alleged that the family knew or should have known that rest home fees would be payable. It is further alleged that the estate is liable pursuant to the contract to pay a reasonable fee for the deceased's care. It is alleged that the rest home received some payments, being the deceased's national superannuation payments, but that this was not enough to cover actual fees. The applicant seeks judgment, first pursuant to contract, although the particulars of that contract including when and how it was made, are not pleaded. In the alternative, there is a claim based on a quantum meruit, and, as a further alternative, a claim under the Contractual Mistakes Act 1977. The parties are alleged to have made different mistakes about the same matter of fact or law, essentially that the rest home believed the deceased was entitled to a Ministry of Health subsidy and accordingly did not bill for the full amount, whereas the family believed that the only money the deceased needed to pay was the National Superannuation money.

[9] It will be apparent from that very brief description of the claim that the alleged "debt" is not a debt at all. There is currently no liquidated debt, payable now or at any certain time in the future. There will not be a debt unless and until liability for the applicant's claim against the estate is established.

[10] Counsel for the plaintiff submits that it is not necessary, for s155 to apply, that there be a judgment debt. I accept that submission. Where there is a liquidated debt, which is clearly payable, such a debt will support a petition under s23, and an application under s155, whether or not judgment to enforce that debt has been obtained. S157(1) recognises that, by making provision for "proof of the debt" upon the hearing of an application under s155. But that is not the position here. What the applicant seeks to prove here is not the debt, but the claim that he is entitled to damages or similar relief. The amount claimed is not payable unless and until judgment is obtained.

[11] A disputed debt will not properly form the basis for a bankruptcy petition. In my opinion, since a disputed debt will not support a bankruptcy petition, it will not support an application under s155. The arguments against this claim being sufficient to support a bankruptcy petition are even stronger, in that what is in issue here is not a disputed debt, but a disputed claim for damages, or similar relief.

[12] Counsel for the plaintiff was not able to refer me to any authority in which a disputed claim of this nature was held sufficient to support a bankruptcy petition, or an application under s155. I am satisfied that it is not.

[13] Counsel for the plaintiff sought, at the hearing, to achieve two steps:-

a) to have the claim against the estate heard, and to obtain judgment for that claim, and

b) to use the judgment debt so created as the foundation for the s155 application.

[14] I am of the view that it would be quite inappropriate to allow an application under s155 to be used as a means of determining the liability of the estate to the claimant. Proceedings must be brought by way of ordinary action, and judgment obtained in that action, before a claim such as that which is made in this case can properly form the basis for an application under s155. There are a number of reasons why that is so.

[15] The first and most obvious reason is that there is no defendant to an application under s155. Section 155 applies where no administrator has been appointed to the estate. The application is for the purpose of appointing an administrator so, to deal with liability under a s155 application would involve the Court considering the plaintiff's claim against the estate, in proceedings in which the estate is not represented and cannot be represented.

[16] In this case, members of the deceased's family have been ordered to be served. They have taken steps in the proceedings, and were represented by counsel. But they are not the estate. The claim is not made against the family members (who would have to be sued in their own right if it were) but against the estate. It would be an abuse of process to determine the liability of the estate in proceedings in which the estate itself is not and cannot be represented. In this case, the applicant's express intention is to have himself appointed as administrator of the estate, so that he can then bring proceedings under the Property (Relationships) Act 1976 in respect of assets which were owned by the deceased but which passed to her husband on her death. It is understandable that the family should seek to be heard in proceedings which might have that outcome. But the fact that they may feel compelled to take a part in the proceedings cannot be used as a basis for assuming jurisdiction over the estate.

[17] Another reason why this procedure is not appropriate instead of an ordinary action is that discovery is not available, or at least has not been made available, in these proceedings. For at least some of the causes of action, discovery of the rest homes' documents would be an essential step. For example, in the claim in contract, discovery would be necessary to identify the documents relied on as the contract. In the cause of action under the Contractual Mistakes Act, correspondence between the

rest home and the Ministry of Health, or internal documentation, concerning the deceased's eligibility for a Ministry of Health subsidy, as alleged under that cause of action, might be relevant to the allegation that the rest home was under a mistake as to that aspect.

[18] There is an additional matter which I mention though I heard no argument on it. The applicant is the assignee of the claim by the rest home. It seems to me that there must be considerable doubt whether the purported assignment is effective. A bare right of action is not assignable (*First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710, 754). At first sight, what has been assigned here would appear, at least arguably, to be no more than a bare right of action. An originating application under Part 17 is not a proper proceeding for resolution of the validity of the assignment.

[19] Counsel for the applicant submitted that it was necessary to have recourse to the procedure under Part 17 of the Insolvency Act, for the reason that, since no grant of administration had been made, the applicant was unable to proceed by way of ordinary action. I am not satisfied that that is the case. I was informed that the deceased had died intestate. In those circumstances, s22 of the Administration Act 1969 would apply. There seems on the face of it no good reason why an ordinary action could not be commenced against the estate, and served on the Crown in accordance with that section. I have not heard argument on the point. Even if that section does not apply, I consider that any difficulty which there may be in commencing an ordinary action does not justify recourse to a wholly inappropriate procedure.

[20] The procedures of the Court ought to be flexibly applied, in a manner which will best achieve justice. The High Court Rules specifically recognise that, for example in Rules 5 and 11. However, that flexibility should not be taken to the extent of permitting a party to adopt a procedure which is wholly inappropriate. I am satisfied that to allow the present proceedings to be used, as an alternative to an ordinary action, to establish whether or not the estate is liable to the applicant would go far beyond the scope of a flexible application of the procedures of the Court to

achieve justice, and would involve an inappropriate application of the procedures in a manner which runs the risk of causing injustice, for the reasons which I have given.

[21] Accordingly, I am of the view that the present proceedings should not proceed. The applicant is not a creditor of the estate whose debt would support a bankruptcy petition. At the hearing, I adjourned the proceedings, but indicated that I would give consideration as to whether I should take the further step of dismissing the proceedings. I am satisfied that the proceedings must be dismissed, because the applicant has no standing to bring the proceedings.

[22] The originating application by the applicant for an order that the deceased's estate be administered under Part 17 of the Insolvency Act 1967, and for other orders, is dismissed.

[23] The parties who were directed to be served are entitled to costs. I award costs against the applicant on a 2B basis.

A D MacKenzie J

Delivered at 11.30 (am)/pm on 6 April 2004.

Solicitors:
Gilbert Swan, Wellington for the applicant
Kidd Tattersfield, Glenfield, for JK and KD Roberts