

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV 2008-485-2190**

IN THE MATTER OF the Insolvency Act 2006

AND IN THE MATTER OF the proposed bankruptcy of PEIFENG  
ZHAO LIU  
Judgment Debtor

MARIA THI SUU DINH AS TRUSTEE  
OF THE MARIA DINH FAMILY TRUST  
Judgment Creditor

Hearing: 26 January 2009

Appearances: B.A. Gibson - Counsel for Judgment Creditor  
G. Robins - Counsel for Judgment Debtor

Judgment: 29 January 2009 at 3.00 pm

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**JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL**

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*This judgment was delivered by Associate Judge Gendall on 29 January 2009 at 3.00 p.m. pursuant to r 540(4) of the High Court Rules 1985.*

Solicitors: Izard Weston, Lawyers, PO Box 5348, Railway Station, Wellington  
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## **Introduction**

[1] On 1 December 2008 the judgment creditor filed an application seeking an order adjudicating the judgment debtor bankrupt. This application related to a judgment for \$99,389.07 obtained by the judgment creditor against the judgment debtor in the Wellington District Court on 30 May 2008 and 14 July 2008. The adjudication application is opposed by the judgment debtor.

## **Background Facts**

[2] The judgment debt in question here arose from proceedings commenced against the judgment debtor as guarantor of the obligations of a company under a lease agreement with the judgment creditor as landlord for premises at 10 Tory Street, Wellington. A director of the tenant company, Mr Wei, who it appears was a friend of the judgment debtor also guaranteed the lease agreement.

[3] The tenant company defaulted on its rental obligations under the lease and apparently Mr Wei returned to China from where he originally came. The judgment creditor then claimed the unpaid rental from the judgment debtor under her personal guarantee.

[4] The judgment debtor claims that although she signed the lease agreement as guarantor she received no benefit whatever from it as she was not involved in the tenant company's business and merely signed as guarantor as a friend and at the request of Mr Wei.

[5] As to the judgment debtor's present personal circumstances, in her affidavit sworn 20 January 2009 and filed in this proceeding, she confirms that she has no significant assets and is unemployed. Her only income is a benefit from Work and Income New Zealand of \$559.00 per week which she deposes is entirely absorbed by *"rental payments for my home and the general costs of running a household and raising a family"*.

[6] The property in which the judgment debtor resides she deposes is owned by a family trust (known as the Victoria and Elizabeth Trust). As to this, the judgment debtor deposes:

- “9. *I am one of the beneficiaries of a family trust that owns several properties. This trust runs at a loss.*
10. *The Trust currently owes me a total of \$23,837.00 – that amount relates to the purchasing of the properties held by the trust.*
11. *My solicitors have told me that the Official Assignee can “call in” debts owed to me as part of the bankruptcy process. Accordingly the debt owed to me by the trust could be treated as an asset to be distributed to creditors.*
12. *Even with that in mind, bankruptcy can only possibly yield an amount in the vicinity of \$25,000.00 for creditors.”*

[7] It would seem the judgment debtor assisted the Victoria and Elizabeth Trust to purchase the property in which she lives (and perhaps other properties) and this accounts for the debt which is due to her. In submissions before me, the judgment debtor’s counsel stated that no gifting had been undertaken by the Trust with respect to any Trust properties.

[8] Despite her difficult financial position, in her affidavit the judgment debtor describes various negotiation attempts she has made to resolve this matter with the judgment creditor. On this she deposes:

- “13. *Despite my strained financial circumstances, I have tried repeatedly to negotiate a settlement of the amount owed by me to the creditor applicant, in excess of what I think the creditor will get through bankruptcy.*
13. *I want to do everything possible to avoid bankruptcy. The standard restrictions that bankruptcy would place on me would be difficult*

*enough, but in addition, it would create huge problems in terms of my real estate agent training. I cannot become a registered agent while I am an undischarged bankrupt – this would put my career on hold for 3 years, and would mean I must continue to rely on the benefit for any income.*

.....

16. *I have recently made arrangements so that I can pay \$50,000.00 to the creditor applicant now. I am borrowing this money from a friend. I can pay off the remainder of the judgment debt by monthly repayments over a period of time.”*

[9] At this point I leave to one side the issue of whether bankruptcy would interfere unduly with the judgment debtor’s training to become a real estate agent – as to this, see in *Re Wong, Ex Parte Turners & Growers (Auckland) Limited*, High Court Auckland, 1 October 1993 B1104/93, Master Kennedy Grant which investigated the possible impact of an order for adjudication on a debtor’s ability to work as a Real Estate Agent.

### **Counsel’s Arguments and My Decision**

[10] The present application is opposed by the judgment debtor upon the grounds set out in a Notice of Intention to Oppose filed on 20 January 2009. These grounds are specifically:

*“It is just and equitable that the Court does not make an order of adjudication in accordance with s. 37 Insolvency Act 2006:*

*A bankruptcy adjudication will ultimately yield less for the petitioning creditor than I am able to pay them in settlement of the judgment debt that is the subject of the bankruptcy application.*

*The bankruptcy application accordingly represents oppressive use of the bankruptcy process.*

*An adjudication of bankruptcy would be contrary to public interest, in the context of commercial morality. As guarantor, I am not morally culpable for the defaults of the applicant creditor's tenant whose obligations I guaranteed ...”.*

[11] It is clear here that the judgment debtor neither disputes the debt outstanding to the judgment creditor nor suggests that the judgment creditor has failed to satisfy the requirements of s. 13 *Insolvency Act 2006*. Clearly the judgment debtor here has committed an act of bankruptcy within 3 months of the filing of the application, the debt is a certain amount and exceeds the threshold amount, and the other requirements of s. 13 are satisfied.

[12] Similarly, the judgment debtor does not suggest that she is able to pay her debts in terms of s. 37(b) *Insolvency Act 2006*.

[13] Instead she relies upon the provisions of s. 37(c) and (d) *Insolvency Act 2006*. Under the circumstances prevailing here, she suggests the Court should exercise its discretion under this section to refuse an order for adjudication on the just and equitable grounds or for “other reasons”.

[14] The principles applicable to the exercise of the Court's discretion under s. 37 (previously s. 26 *Insolvency Act 1967*) were set out in *Baker v Westpac Banking Corporation* CA212/92, 13 July 1993. As to these principles, *Brookers Insolvency Law & Practice Volume 1* at para. IN37.03 makes clear that:

*“The main factors affecting the Court's exercise of its discretion (under s. 37) are:*

- (a) The creditor's entitlement to an order;*
- (b) The wishes of the petitioner, the creditors, or the debtor;*
- (c) The public interest;*
- (d) Whether such discretion is just and equitable; and*
- (e) The ability of the debtor to pay his or her debts.*

[15] I now turn to deal with each of these factors. I remind myself however that the authorities establish that the onus of persuading me to exercise my discretion in favour of the judgment debtor here lies with the judgment debtor. Further, in deciding how to exercise this discretion, putting it at a broad level, I am required to have regard to the interests of the judgment creditor and other creditors, the interests of the judgment debtor and the interests of the public generally.

### **Creditor's Entitlement to an Order**

[16] As I have noted above, there can be little dispute as to this given that the judgment creditor has an unsatisfied judgment obtained from the Wellington District Court some time ago and a significant amount above the statutory threshold is due and remains outstanding.

### **Wishes of the Applicant, the Creditors or the Debtor**

[17] The judgment creditor's wishes here are plain. They seek payment of the sum due from the earlier judgment being nearly \$100,000 and in the absence of this, an order adjudicating the judgment debtor bankrupt.

[18] There is no evidence before the Court of the judgment debtor having any other creditors.

[19] With regard to the wishes of the judgment debtor, she has stated in her affidavit on a number of occasions that she wishes to do everything possible to avoid bankruptcy. She continues to maintain her wish to negotiate what she describes as "*a reasonable settlement*".

### **Public Interest**

[20] In addressing the wider public interest, clearly the Court is required to consider whether adjudication is conducive or detrimental to commercial morality and the interests of the general public. On this it is clear from decisions such as in *Re Aitcheson Ex Parte BNZ* High Court Auckland, 9 July 1999, B1235/98, Salmon J.

that there is commercial importance in holding those who give personal guarantees of leases or loan arrangements to the consequences of their promises.

[21] Further, in the present case it would appear that in the past, the judgment debtor either passed the home in which she resides to the Victoria and Elizabeth Trust or alternatively made funds available for its acquisition. This situation has similarities to that which arose in *Re Pulman Ex Parte The Hire Company Limited* High Court Auckland, 20 April 2007, CIV 2006-404-4697, Lang J. where the debtor resided in a substantial home which was not owned by her personally but by a Family Trust which had been established some years before. There, Lang J. took the view that the creditors of the judgment debtor were entitled to have the Official Assignee investigate the manner in which the Family Trust had acquired the home. Whilst Lang J. noted that he would ordinarily have regarded an immediate order of adjudication as appropriate, in that case he adjourned the proceedings for about one month to give the judgment debtor time within which to place a compromise before her creditors.

[22] In the present case the judgment debtor maintains that the reason for her present financial plight is simply that she agreed to provide a personal guarantee for no personal gain and simply to help out a friend and as such it is not just and equitable to make an order for adjudication based upon that debt.

[23] Mr. Gibson for the judgment creditor takes issue with these claims. He argues that in situations such as the present where the judgment debtor has provided no financial accounts or independent evidence of her financial position, where she resides in a property owned by a Family Trust for which she is both a trustee and a beneficiary and where that Trust owes her a substantial sum of money, the broad interests of the commercial community and the wider public require a full investigation of all these aspects and it is necessary that this should be carried out by the Official Assignee once an order for adjudication is made.

[24] I will return to this aspect later in this judgment.

### **Ability of Judgment Debtor to Pay Her Debts**

[25] In her affidavit, the judgment debtor confirms that she is unemployed, receiving a benefit, and has no significant financial assets of any kind other than the debt owed to her by the Trust of some \$23,837.00.

[26] Notwithstanding this, as I have noted at para. [8] above, the judgment debtor at para. 16 of her affidavit confirms that recently arrangements have been made to borrow \$50,000.00 from a friend and this is available to be paid to the judgment creditor. She goes on to say that she can “*pay off the remainder of the judgment debt by monthly repayments over a period of time,*” although she does note that these monthly payments cannot be large.

[27] From her own evidence therefore it is clear that the judgment debtor is not able to pay the outstanding debt to the judgment creditor from her own assets although she may have access to assistance from others to settle a substantial part of the debt now and pay the balance over time. In my view this is significant.

### **Whether Such Discretion is Just and Equitable**

[28] Finally I turn to the issue of whether the exercise of the Court’s discretion in favour of the debtor might be seen as “just and equitable”. Essentially here, the Court is required to balance the various considerations I have noted above to determine if the judgment debtor has satisfied the onus on her of persuading the Court that an order for adjudication ought not to be made.

[29] The debt here in question which is almost \$100,000.00 has been outstanding for some considerable time and the judgments upon which the present proceeding are based were given in May and July 2008.

[30] There is a significant lack of relevant information first, as to the specifics of the judgment debtor’s financial position, secondly, over arrangements for the property in which she resides owned by the Trust, the position of the Trust itself and her loan to the Trust. The judgment debtor is both a trustee and beneficiary of the



Trust and she acknowledges that she assisted the Trust to purchase property with this \$23,837.00 loan which is still owing to her. All these matters require further investigation.

[31] For these reasons, in my view the judgment debtor has not discharged the onus upon her to persuade the Court to exercise its discretion in her favour in terms of s. 37 *Insolvency Act 2006*.

[32] Notwithstanding this, in submissions advanced on behalf of the judgment debtor by Mr. Robins and in her own affidavit, the judgment debtor confirms that she has arranged a loan of \$50,000.00 from a friend and can pay this amount “now”, and she is willing to pay the balance of the judgment debt by monthly instalments over an agreed period of time. As I understand the position, this does not take into account the one asset held by the judgment debtor being the debt of \$23, 837.00 owing to her by the Trust which would also presumably be available.

[33] With these matters in mind, and given the strong wish by the judgment debtor to have a last opportunity to negotiate a settlement of what appears to be her only debt to avoid bankruptcy, in my view a short period of time should be allowed to give her the opportunity to endeavour to put acceptable arrangements in place. This is in line with the approach taken by Associate Judge Christiansen in *Colson v Salter* High Court Auckland, 12 July 2007, CIV 2006-404-7479. There, the proceeding was adjourned for a period of about 3 weeks for settlement arrangements to be reached with the Judge noting that if these were not in place by that time an order for adjudication would be made. In my view a similar approach is appropriate in the present case.

[34] That said, this proceeding is adjourned until a call at 10.00 am on 23 February 2007. At that time an order for adjudication will be made in respect of the debt owing by the judgment debtor unless counsel for the judgment creditor confirms that a satisfactory settlement arrangement has been entered into. As I see it such an arrangement is possible here and is likely to entail first, immediate payment to the judgment creditor of the \$50,000.00 “*loan from a friend*” by the judgment debtor, secondly a possible further payment to the judgment creditor of the

\$23,837.00 owing by the Trust to the judgment debtor or some appropriate security arrangement for this amount, and thirdly, a realistic and reasonably acceptable secured instalment payment arrangement for the balance debt.

[35] As to costs on this application, the judgment creditor is entitled to an order for costs which are fixed on a Category 2B basis together with disbursements as fixed by the Registrar.

[36] As I have noted above, I confirm that this matter is adjourned to be disposed of at a final call on 10.00 am on 23 February 2009.

**‘Associate Judge D.I. Gendall’**