

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

CIV 2007-485-1270

IN THE MATTER OF the Insolvency Act 1967
AND IN THE MATTER OF the bankruptcy of SCOTT CRAWFORD
ANDERSON

BETWEEN NZT1 LIMITED
Applicant

AND OFFICIAL ASSIGNEE IN
BANKRUPTCY OF THE PROPERTY OF
SCOTT CRAWFORD ANDERSON
Respondent

Hearing: 11 February 2009

Appearances: T. Lamb for Applicant
M. Reddy for Respondent

Judgment: 18 February 2009 at 4.15 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 18 February 2009 at 4.15 p.m. pursuant to r 540(4) of the High Court Rules 1985.

Solicitors: Hughes Robertson, Lawyers, PO Box 2513, Wellington
Gibson Sheat, Lawyers, PO Box 2966, Wellington

Introduction

[1] Before the Court is an application filed 12 September 2008 by NZT1 Limited (“the applicant”) for an order that a disposition not be set aside.

[2] That disposition (“the disposition”) represented an Assignment dated 29 June 2006 from Scott Crawford Anderson (“the Bankrupt”) as assignor of his beneficial interest in the Will and any subsequent Will of his father Ian Douglas Anderson (“Mr. Anderson Senior”) to the applicant (as Trustee of the S.C. Anderson No. 4 Family Trust) as assignee.

[3] At the hearing of this matter on 11 February 2009 Mr. Lamb, counsel for the applicant advised that the application was not to proceed and could be dismissed. Accordingly, on 11 February 2009 I made orders with the consent of the applicant and respondent to the following effect:

- “a) The interlocutory application made in this proceeding by NZT1 Limited that the disposition not be set aside was dismissed.
- b) The disposition of the bankrupt’s interest in the deceased estate of Mr. Anderson Senior made by the bankrupt on or about 26 June 2006 to NZT1 Limited was set aside.
- c) Costs and disbursements on the application were awarded against the applicant on a category 2B basis as to costs being the sum of \$4,960.00 and as to disbursements being the sum of \$135.00.”

[4] Before me on 11 February 2009, however, the respondent also sought orders, pursuant to section 58(2)(b) of the Insolvency Act 1967 (“the Act”), that:

“3. *NZT1 Limited pay to the Official Assignee the sum of \$312,497.33 within 28 days of the date of this order; and*

4. NZT1 Limited pay to the Official Assignee interest in the sum of \$41,232.52 within 28 days of the date of this order.”

[5] The respondent’s application for these s. 58(2)(b) *Insolvency Act 1967* orders was strongly opposed by the applicant essentially on the basis that all that was required or appropriate here was the order already made under section 58(2)(a) of the

Act noted at para [3] above. At the hearing on 11 February 2009, I reserved my decision on the respondent's application for the s. 58(2)(b) orders outlined at para. [4] above. I now give that decision.

Background Facts

[6] The bankrupt Mr. Scott Anderson was adjudicated bankrupt on 18 March 2007. On 6 July 2005 his father, Mr. Anderson Senior, signed a Will in which the Bankrupt was left a one-third interest in his estate. On 29 June 2006, as I have noted above, the disposition occurred, whereby the Bankrupt assigned his interest in his father's will to the Trustees of the SC Anderson No. 4 Family Trust ("the Trust"). Mr. Anderson Senior died on 1 November 2007. The applicant, NZT1 Limited, is the current Trustee of the Trust.

[7] On 22 August 2008 the Official Assignee issued a Notice pursuant to sections 54(1) and 58 of the Act, and section 60 of the Property Law Act 1952. The Notice alleged that the disposition by the Bankrupt was either a voidable gift under section 54 of the Act; or alternatively an alienation of property with intent to defeat creditors under section 60 of the Property Law Act 1952.

[8] As I have noted, on 12 September 2008 the applicant filed its application for an order that the disposition not be set aside, together with one supporting affidavit, perhaps curiously, from the Bankrupt himself. On 3 October 2008 the respondent filed its notice of opposition and a supporting affidavit.

[9] The applicant has since effectively agreed to withdraw that application and the orders noted at para. [4] above have been made. I now turn to address s. 58(2)(b) and the further order sought by the respondent under that paragraph.

Section 58 Insolvency Act 1967

[10] Section 58 of the Act provides in part:

58 Assignee may recover property or value thereof

...

- (2) Subject to the provisions of subsections (4) and (5) of this section, in any case where any such disposition is set aside, the Court may—

- (a) Order that the person to whom the disposition was made, or his personal representative, or any person claiming through him (not being a person claiming through him who received the property comprised in the disposition or any part of it or any interest in it, as the case may be, in good faith and for valuable consideration or who claims through such a person), shall transfer to the Assignee or appointee the property or any part of it or any interest in it retained by him:
- (b) Order that the person to whom the disposition was made, or his personal representative, or any person claiming through him (not being a person claiming through him who received the property comprised in the disposition or any part of it or any interest in it, as the case may be, in good faith and for valuable consideration or who claims through such a person), shall pay to the Assignee or appointee such sum, not exceeding the value of the property when the disposition was set aside, as the Court thinks proper.

...

- (6) Recovery by the Assignee or appointee of any property or the value thereof (whether under this section or under any other provision of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if—
 - (a) The person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer or payment of the property to him was validly made and would not be set aside; and
 - (b) In the opinion of the Court it is inequitable to order recovery or recovery in full, as the case may be.

[11] Pursuant to section 58(2)(b), the respondent now seeks an immediate order that the applicant pay the respondent in cash the value of the property being the Bankrupt's interest in the estate when the disposition was set aside. The respondent calculates this as \$312,497.33 plus interest of \$41,232.52. The applicant in response argues against a remedy being granted under section 58(2)(b) but has no objection to a remedy under section 58(2)(a).

[12] Dealing first with subsection (6), the respondent submits that the applicant bears the onus of proving the three elements of that subsection: that the property was received in good faith; that the applicant's position had been altered; and that it would be inequitable to order recovery: *Re Kerr* [1993] 2 NZLR 378; *Re Barr* (HC WN 30 August 2005 CIV-2001-485-591). The respondent relies on paragraph 30 of *Cook v Official Assignee* (HC AK 27 November 2008 CIV-2007-404-141) which addresses subsection (6) and provides:

“In that case [Re Kerr] counsel accepted that the onus of proving the three criteria rested on the applicant. Given the absence of any words clearly indicating an onus of the type that exists in s 58(2)(b), I do not consider an approach which turns on any legal onus to be necessary. However, there is clearly some evidential burden on a person seeking to invoke the discretion to establish the facts that could lead to its exercise. In the end the Court must be satisfied that the three requirements are established.”

[13] Essentially, however, subsection (6) is not relied on by the applicant here. The applicant is not challenging the respondent's right to recovery, but only requests that such recovery be given under sub-paragraph (a) of section 58(2) rather than sub-paragraph (b).

[14] On this aspect, recovery in *Cook v Official Assignee* was made under section 58(2)(b). However, *Cook* was not a case in which recovery under sub-paragraph (a) was appropriate or suggested. In *Cook*, money which had been disposed to a Trust was still held by the Trustee in the Trust account. In the case at hand, the applicant Trustee claims not to have received any money, and there is no evidence or suggestion to the contrary.

[15] Determining under which sub-paragraph of section 58(2) to grant recovery is a matter of discretion.

[16] The applicant argues that the respondent's interests can be protected by a simple transfer of the applicant's interest in Mr. Anderson Senior's estate to the respondent, pursuant to sub-paragraph (a). In effect, this has already happened as the disposition of the interest in the estate to the applicant has been set aside. The

applicant points out that the estate has not yet been distributed. Apparently, for some time it has been tied down in litigation between various parties. As such, Mr Lamb for the applicant maintained that it would be a breach of natural justice to order the applicant to pay back a sum of money which it has never received.

[17] Further, he noted that there is a risk of 'double-dipping' should an order be made under sub-paragraph (b). Now that the disposition from the Bankrupt to the applicant has been set aside, the respondent will be in a position to receive the Bankrupt's one-third share of the estate when it is distributed. This could well be in addition to his having received payment for the value of that share from the applicant if an order under sub-paragraph (b) had been made. In response, counsel for the respondent suggested that if an order under sub-paragraph (b) is made the beneficial interest in the estate would no longer sit with the respondent, and the respondent would not pursue any claim in the estate.

[18] For the respondent, although it appears that Mr. Anderson Senior's estate has not been distributed, it was contended that the applicant has not proven that it has not received any money from the estate. In the event that the applicant has received money from the estate, or for example, has assigned its interest to a third party or mortgaged it, an order only under sub-paragraph (a) it is said would be unfair to the respondent.

[19] In turn, however, the applicant rejects the respondent's submission that it cannot be sure what has happened to the estate, as the respondent has apparently filed an appearance in the other dispute proceedings against the estate assets. As such, it is suggested that despite the absence of specific evidence on the point, the respondent has knowledge that the estate has not been distributed.

[20] Should an order for payment of the value of the interest in the estate be made under paragraph (b), in addition to the order for transfer of the interest itself under paragraph (a), an issue also arises as to quantum. The claimed figure of \$312,497.33 is derived from a schedule of the assets owned by Mr. Anderson Senior at 31 October 2007, apparently prepared by the Bankrupt at the request of the administrator of his late father's estate. At 31 October 2007, this shows assets of \$937,492.00. The amount sought is one-third of this total, equivalent to the

Bankrupt's one-third interest which was disposed to the applicant. As to the interest rate, this is calculated at 8% per annum, being the same rate the deceased Mr. Anderson Senior used with respect to loans made to his daughter, referred to in his will. In *Cook v Official Assignee* it was found that an order for interest under section 58(3) was appropriate. In that case a rate of 7% per annum was adopted.

[21] The valuations on which the \$937,492.00 figure was based are now over a year old. The main asset of the estate is a house, whose value at \$600,000 in October 2007 may no longer be accurate. To place an accurate monetary value on the one-third interest in the estate in my view would require new valuations. It is also distinctly likely that some of the total value of the estate will be dissipated in the current litigation which surrounds it.

[22] In light of the real lack of evidence before the Court regarding Mr. Anderson Senior's estate and its administration (evidence which presumably is available to the applicant), I have some sympathy for the case advanced here by counsel for the respondent. However, I am of the view that an order under section 58(2)(b) is inappropriate in a case such as this. Here, the setting aside of the disposition means that the Bankrupt's interest in the estate has effectively passed to the respondent, the applicant it seems has not received any payment from the estate, and the value of the interest concerned is itself unclear and a matter of some dispute.

[23] It must be said, however, that there is a strong presumption in this case that the disposition was an "alienation of property with intent to defeat creditors" pursuant to section 60 of the Property Law Act 1952. As such, in my view, an additional order to that under section 58(2)(a) of the Act is warranted, pursuant to section 58(3) of the Act which states:

"(3) For the purpose of giving effect to any order under subsection (2) of this section the Court may make such further order as it thinks fit."

[24] *Heath and Whale on Insolvency* in dealing with similar provisions in the *Insolvency Act 2006*, states at paragraph 24.118:

"While the range of orders under s 207 of the Insolvency Act 2006 are not as extensive as s 295 of the Companies Act 1993 it is submitted that the orders

available under s 295 are equally available under the personal insolvency regime, as neither section represents a code of liquidators remedies.”

[25] Section 207 of the *Insolvency Act 2006* is a modified version of section 58 of the *Insolvency Act 1967*, with which we are concerned in the present case. Section 295(f) of the *Companies Act 1993* enables “*an order requiring security to be given for the discharge of an order made under this section*” to be made as ancillary to an order setting aside a transaction. In addition to an order under section 58(2)(a) of the Act, as I see it, under the circumstances prevailing here, an order requiring the applicant NZT1 Limited to provide a security over its assets to the respondent Official Assignee, to secure to the Official Assignee the bankrupt’s interest in the estate is appropriate.

Result

[26] Pursuant to section 58(2)(a) and section 58(3) of the Act, I make the following orders:

- (a) The applicant NZT1 Limited is to transfer to the respondent, Official Assignee all its interest in the estate of Ian Douglas Anderson and, if required by the Official Assignee is within 10 working days of the date of this order, to complete a Deed in a form satisfactory to the respondent to this effect.
- (b) Within 10 working days of the date of this order the applicant NZT1 Limited is to complete and pass to the respondent a duly registerable First Debenture charge over all its assets in favour of the respondent as security for a total amount representing the Bankrupt’s interest in the late Mr. Anderson Senior’s estate (noted in the First Debenture at this point as a notional amount of \$344,000.00) repayable either upon the date that distribution of the said estate is to take place or on such other date as this Court on application made for the purpose may order. This First Debenture security is to be prepared and registered by the respondent at the cost in all things of the applicant. The Debenture is to provide that it may be released when the respondent

receives from the late Mr Anderson Senior's estate the bankrupt's actual entitlement as a beneficiary in the estate.

- (c) Leave is reserved for any party on 48 hours notice to approach the Court if any further directions or orders may be required or any clarification of the orders outlined in this judgment is sought.
- (d) The respondent has succeeded here. As I have noted at para. [3](c) above, costs and disbursements on this proceeding totalling \$5,095.00 are awarded to the respondent against the applicant.

'Associate Judge D.I. Gendall'