

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

CIV 2008-485-2158

IN THE MATTER OF the Insolvency Act 2006

AND

IN THE MATTER OF the bankruptcy of STEPHEN JOHN
WHITE

BETWEEN THE COMMISSIONER OF INLAND
REVENUE
Judgment Creditor

AND STEPHEN JOHN WHITE
Judgment Debtor

Hearing: 17 March 2009

Appearances: D.B. Padmanabhan - Judgment Creditor

Parties: S.J. White – Judgment Debtor in person

Judgment: 17 March 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

Solicitors: Inland Revenue Department, PO Box 1462, Wellington 6140

[1] Before the Court is an application by the judgment creditor for an adjudication order against the judgment debtor.

[2] The application relates to the original sum of \$101,768.68 which is comprised of:

- (a) \$49,565.07 representing a default judgment obtained against the judgment debtor in the District Court at Wellington on 30 August 2007.
- (b) \$51,703.61 for additional taxes assessed and penalties and interest incurred since the date of the judgment.
- (c) \$30.00 for the certificate of judgment.
- (d) \$320.00 solicitor's costs on the bankruptcy notice.
- (e) \$150.00 service fee on the bankruptcy notice.

[3] A late Notice to Oppose the application has been received from the judgment debtor only today.

[4] Effectively the judgment debtor opposes the application on the grounds that he is not insolvent, that the order, if made, would be a miscarriage of justice and "*impacts on the public good*" and arrangement for payment on terms would benefit the plaintiff.

[5] In addition when this matter was called before me yesterday, 16 March 2009 I directed that the judgment debtor, who also appeared in person that day, would file and serve a full verified statement of assets and liabilities by 9.30 am today.

[6] A document setting out assets and liabilities of the judgment debtor has been provided to the Court today.

[7] This lists assets which the judgment debtor contends total \$278,000.00 and liabilities which total \$120,664.54.

[8] In his list of assets the judgment debtor shows a figure of \$200,000.00 for “*Shares 29% in Peddle Thorpe & Montgomery Limited merging companies Design Club NZ Limited and Design at Home Limited with PTM*”.

[9] In addition the list of assets shows “*stock from retail stores/equipment*” at a value the judgment debtor confirms is a wholesale value of \$26,000.00. Business tools and equipment are listed at \$10,000.00 and a Porsche 2002 vehicle is listed at \$42,000.00.

[10] Although this is omitted from his statement of assets, in questioning the judgment debtor I learned that he claims to have outstanding debtors owing to him of \$9,000.00 which should have been added to his list of assets.

[11] So far as these assets are concerned there is no independent verification of any of the figures listed by the judgment debtor. Ms Padmanabhan, counsel for the judgment creditor, contended that the \$200,000.00 figure noted at paragraph [8] above is very much in question as the assets concerned are the subject of Court proceedings relating to a claim involving the judgment debtor.

[12] Turning to the list of liabilities in the judgment debtor’s statement, these are shown as a loan owing to Hutt City Council of \$68,307.78, a loan to GE Finance of \$16,356.76 and vehicle finance on the Porsche of \$36,000.00. These liabilities total \$120,664.54.

[13] Significantly, from this list of liabilities the judgment debtor has omitted the amount claimed against him by the judgment creditor, the Inland Revenue Department. This amounts now to some \$104,924.63. A certificate to this effect has been provided by the judgment creditor.

[14] On this, in response to my question to him, the judgment debtor claimed that this debt is now disputed in the sense that additional income tax returns are to be filed and in his words *“the whole tax position may become clear in the future”*.

[15] It is noted, however, that the bankruptcy notice in this proceeding relies upon a default judgment obtained against the judgment debtor in the District Court at Wellington on 30 August 2007. This is some 18 months ago. No appeal of this judgment nor any application to set aside the judgment have been brought by the judgment debtor.

[16] Further, as I understand the position, the debt claimed by the judgment creditor includes in excess of \$16,000.00 for goods and services tax and in excess of \$2,700.00 for student loan deductions in addition to the amount due for income tax which is about \$60,000.00. No real explanation has been provided by the judgment debtor regarding those additional amounts.

[17] In addition, in the judgment debtor’s list of liabilities, a further significant omission appears. This is a debt claimed by the liquidator of a company known as Sanne Lara Stephen White Properties Limited (in liquidation) a supporting creditor in this proceeding in which the sum of \$112,886.89 is claimed.

[18] Again, in response to my question of the judgment debtor this morning, he indicated that this debt is disputed but there was no evidence put before the Court of an independent nature to verify this.

[19] If these debts owing to the Inland Revenue Department and to Sanne Lara Stephen White Properties Limited of some \$104,924.63 and \$112,886.00 respectively are added to the judgment debtor’s list of liabilities, these climb to a total of approximately \$338,550.00.

[20] Even given the judgment debtor’s own assessment of his assets as adjusted at \$287,000.00 as noted at paragraph [10] above, there is a significant shortfall of some \$51,550.00 in his equity, given that his liabilities exceed assets.

[21] All this and the extremely late provision of any information regarding the judgment debtor's position is rather unsatisfactory.

[22] In terms of s. 13 *Insolvency Act 2006* there is no doubt that the judgment creditor here is entitled to bring the present application to have the judgment debtor adjudicated bankrupt. There is a debt outstanding to the judgment creditor in excess of \$1,000.00 and the debtor has committed an act of bankruptcy within the period of 3 months before the filing of the present application in that he has not complied with the provisions of the bankruptcy notice issued against him.

[23] On its face therefore the judgment creditor is entitled to an order for adjudication.

[24] As I have noted above this application is supported by the creditor in support Sanne Lara Stephen White Properties Limited (in liquidation).

[25] It is clear, however, from s. 37 *Insolvency Act 2006*, that the Court has a discretion when making a decision on whether to adjudicate a judgment debtor bankrupt. S. 37 provides in part that:

“37 *The Court may at its discretion, refuse to adjudicate the debtor bankrupt if:*

(b) *the debtor is able to pay his or her debts; or*

(c) *it is just and equitable that the Court does not make an order of adjudication; or*

(d) *for any other reason an order of adjudication should not be made.”*

[26] In my view the material before the Court indicates quite clearly that the judgment debtor is not able to pay his or her debts despite his claims to the contrary.

[27] This leaves the Court to consider whether it is just and equitable that an order for adjudication should be refused here.

[28] In considering the Court's discretion the authorities have established that the range of factors affecting the exercise of that discretion are to include the creditor's entitlement to an order, the wishes of the petitioner, the creditors or the debtor, the public interest, whether such discretion is just and equitable and the ability of the debtor to pay his or her debt – *Baker v Westpac Banking Corporation*, Court of Appeal, CA 212/92, 13 July 1993.

[29] Here, the wishes of the judgment creditor and the creditor in support Sanne Lara Stephen White Properties Limited are clear. An order for adjudication is sought especially too as counsel submitted to me today that they have serious doubts as to the accuracy of the judgment debtor's claimed statement of his assets and liabilities.

[30] As I have noted above, it is clear to me that the judgment debtor is unable to pay his debts at the present time. He seeks additional time for payment of the Inland Revenue Department debt, although in the same breath contends that some part of this debt is disputed. No proposals regarding the Sanne Lara Stephen White Properties Limited (in liquidation) debt made.

[31] Weighing up all these matters in my view the eleventh hour attempts by the judgment debtor to stave off the present application by the judgment creditor for an order for adjudication cannot succeed. The interests of the public, the community and the creditors of the judgment debtor require that an order for adjudication is made.

[32] That said the following orders are now made:

- (a) An order for adjudication is made.
- (b) Costs are awarded to the judgment creditor, the Commissioner of Inland Revenue and the creditor in support, Sanne Lara Stephen White Properties Limited (in liquidation) on a category 2B basis together with disbursements as fixed by the Registrar.

(c) This order is timed at 10.08 am today.

‘Associate Judge D.I. Gendall’