

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

CIV 2007 404 003653

CIV 2007 404 005594

UNDER the Insolvency Acts 1967 and 2006

IN THE MATTER OF RODERICK NIELSEN a judgment debtor

BETWEEN GREGORY CAMPBELL OLIVER
NIELSEN
Judgment Creditor

AND RODERICK WILLIAM NIELSEN
Judgment Debtor

AND BETWEEN DYSART TIMBERS LIMITED
Applicant

AND GREGORY CAMPBELL OLIVER
NIELSEN AND RODERICK WILLIAM
NIELSEN
Respondents

Hearing: 12 March 2009

Counsel: Edward Grove for Gregory Nielsen
Andrew Swan for Roderick Nielsen

Judgment: 18 March 2009 at 4:00pm

JUDGMENT OF HUGH WILLIAMS J

*This judgment was delivered by
The Hon. Justice Hugh Williams
on
18 March 2009 at 4:00pm*

pursuant to Rule 11.5 of the High Court Rules

.....
Registrar/Deputy Registrar

- A. The judgment creditor's application to bankrupt the judgment debtor on the grounds appearing in s 20 of the 2006 Act is adjourned for the reason and on the terms set out in the judgment.**
 - B. The judgment creditor's application to amend the application for adjudication is granted in the terms sought. Should, as a result of the delivery of this judgment, the judgment creditor seek to amend the way in which the s 20 ground is phrased, a separate application will be required. If the judgment creditor intends to pursue that application, such is to be filed within seven days of delivery of this judgment.**
 - C. Any notice of opposition by the judgment debtor to the application for adjudication, together with any supporting affidavits, are to be filed and served within 21 days of delivery of this judgment.**
 - D. Counsel are to advise the Court immediately the above timetable is concluded as to their estimate of the likely duration of any hearing and the file is then to be referred to Hugh Williams J as Civil List Judge to allocate a fixture.**
 - E. There will be no order for costs arising out of this hearing.**
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Introduction

[1] This judgment deals with an ongoing and lengthy bankruptcy application against Mr Roderick Nielsen, the judgment debtor.

[2] The present matter began when, on 25 June 2007, Dysart Timbers Ltd filed a Certificate of Judgment in this Court and sought a bankruptcy notice against Mr Roderick Nielsen. The judgment was one given in the Court of Appeal on 22 May 2007 allowing an appeal and entering judgment for Dysart Timbers against both Mr Roderick Nielsen and the present petitioning creditor, his brother Mr Gregory Nielsen, for \$213,169.39 plus interest (then \$52,704.63 and \$43.80 per day from the date of judgment) and costs of \$6,000 and disbursements of \$8,593.

[3] The bankruptcy notice was served on Mr Roderick Nielsen by substituted service on Mr Roderick Nielsen's email address.

[4] On 16 August 2007 Dysart Timbers issued a creditors' petition based on the service of the bankruptcy notice on Mr Roderick Nielsen on 26 July 2007. It, too, was served by substituted service on the email address and on Mr Roderick Nielsen's counsel, Mr Swan.

[5] The petition was adjourned on a number of occasions until, on 5 December 2007, Associate Judge Doogue held:

[1] This proceeding was commenced with the filing of a creditors petition and summons to debtor in August of this year. The creditors petition was based upon the failure of the judgment debtor to comply with a bankruptcy notice that the creditor claimed was served 26 July 2007.

[2] The original judgment that was relied upon when issuing the bankruptcy notice was a judgment of the Court of Appeal given 22 May 2007. ... What has happened since is quite complicated and does not need to set it out in any detail in this judgment. Essentially it is that the parties purportedly entered a compromise which overtook their rights under the Court of Appeal judgment and probably also involved the relinquishing of rights to proceed by way of appeal to the Supreme Court. But the very validity of that compromise arrangement itself was soon under attack and the matter came before Priestley J who gave a judgment on the matter 1 November 2007. ... The Judge upheld the compromise. The result was that the present debtor was found to be bound by the compromise arrangements to pay to the judgment creditor the sum of \$250,000.

[3] But that judgment in turn is now under attack on two fronts. Mr Gregory Nielsen who is the brother of and co-guarantor with the judgment debtor has sought the recall of the judgment The judgment debtor has in turn filed an appeal to the Court of Appeal against Priestley J's judgment. He has as well taken steps to obtain a stay of execution of Priestley J's judgment.

...

[6] Mr Godinet has submitted that if a stay is to be granted in this case I should direct the payment into Court of the sum of \$250,000. Mr Swan opposes that course. In my view I do not have sufficient material before me to make a decision concerning that aspect of the matter. No doubt the High Court Judge dealing with the wider issue of the stay of execution will have before him/her material that will bear upon what if any conditions should attach to a stay of execution and it might be that in that forum conditions will be attached including the payment in order. ...

[7] ... I therefore make an order staying the present bankruptcy proceedings until further order of the Court.

[6] Priestley J dealt with the matter on 21 and 22 November 2007. On the earlier day, he relevantly said:

This application for recall of my judgment of 1 November 2007 has unearthed a procedural nightmare. Mr G Nielsen ... contends that first he has complete indemnity from his brother and co-judgment debtor, Mr R W Nielsen, and secondly, that para [41](b) of my judgment creates certain difficulties for him in extant bankruptcy proceedings. Mr Patterson's submission would be that the settlement in effect extinguishes the Court of Appeal 's judgment and that to enforce it Dysarts would have to sue on the settlement rather than rely on the varied Court of Appeal judgment.

... Were the Court of Appeal to reverse me then in that situation the leave application to the Supreme Court which was granted on the day of the settlement would lead to the Supreme Court revisiting the Court of Appeal's judgment.

...

My suggestion to counsel is thus that they should confer with a view to my staying execution of my judgment and any extant bankruptcy proceedings until some degree of finality is achieved.

[7] On 30 November 2007 Mr Roderick Nielsen applied to this Court to stay execution of the 1 November 2007 judgment pending the outcome of the Court of Appeal proceeding.

[8] On 7 August 2008 Associate Judge Robinson gave judgment for Mr Gregory Nielsen requiring Mr Roderick Nielsen to buy his 50% beneficial interest in the shares of Queenstown Villas NZ Ltd, with Mr Roderick Nielsen being ordered to pay Mr Gregory Nielsen \$1,800,000 on the latter tendering an executed Deed of Assignment to transfer the beneficial interest in the company to Mr Roderick Nielsen as soon as reasonably practicable after the date of the judgment. Interest, consultancy fees of \$138,000 and costs of \$8560 and disbursements of \$1224.38 were ordered. Mr Roderick Nielsen was also ordered to take all reasonably practicable steps to obtain Mr Gregory Nielsen's release from personal guarantees provided by him prior to 4 April 2007 in relation to a large number of companies and trusts with the judgment saying Mr Roderick Nielsen was "contractually obliged to indemnify the plaintiff in respect of any and all liabilities and legal expenses (on a solicitor and client basis) arising out of any personal guarantees" in relation to those entities.

[9] On 13 August 2008 Mr Gregory Nielsen issued a bankruptcy notice against Mr Roderick Nielsen for \$147,819.38 for the unpaid consultancy fees and costs and,

before it could be served by way of substituted service, namely on 28 August 2008, gave notice of his intention to appear in support of Dysart Timber's bankruptcy application.

[10] On 18 September 2008 the Dysart Timbers matter came before John Hansen J. It is helpful to set out the Judge's synopsis of the procedural history of the matter:

[1] This is a matter with a long and unfortunate procedural history. As long ago as September 2005, Ellen France J in the High Court at Auckland rejected a claim in contract by Dysart Timbers Limited ("Dysart") against the Niensens. That was appealed to the Court of Appeal. On 22 May 2007 the appeal was allowed. Judgment was entered for a sum of \$213,169.39, along with a considerable amount of interest. The position by 9 August 2007 was that the Niensens were judgment debtors to Dysart in the sum of \$314,867.02.

[2] On 3 December 2007, Mr Roderick Nielsen applied to the Court of Appeal for a stay of execution. This was refused by the Court of Appeal. The matter then proceeded further and was before Baragwanath J in December 2007. Ultimately he made an order staying execution on condition that the judgment sum was paid into Court. I note in passing that following the Court of Appeal decision overturning the findings of Ellen France J, there was a compromise negotiated between the parties.

[3] The Niensens denied that there was any compromise and the matter came before Priestley J in November 2007. He entered judgment for the applicants. Mr Roderick Nielsen appealed that. Mr Gregory Nielsen applied for a recall on the grounds that those that negotiated the compromise were not in fact instructed to act for him. That recall has simply been adjourned sine die while the appeal was pursued. That appeal against the decision of Priestley J has now been dismissed by unanimous Court of Appeal decision. Mr Roderick Nielsen apparently is seeking leave to appeal to the Supreme Court. ...

[4] There was then a further application that came before Woodhouse J on 4 September 2008. In that decision he refused the stay of execution pending Mr Gregory Nielsen's attempt to obtain leave from the Supreme Court. At that time Mr Godinet applied for an order that the \$260,000 in Court be paid out. Because there was no formal application before Woodhouse J that matter was left in abeyance until an application was filed.

[5] On 8 September 2008 that matter came before me. For the sake of completeness I note that bankruptcy proceedings had been commenced by Dysart against Roderick Nielsen, and those proceedings have remained awaiting the outcome of the appeal. The other respondent in this matter, Gregory Nielsen, has obtained a judgment against his brother in unrelated proceedings and has appeared as a supporting creditor.

[6] When the matter came before me the response from Mr Swan appearing for Mr Roderick Nielsen was a reference to s 24 of the Insolvency

Act 1967, the applicable legislation. That section requires that no execution shall be issued by a creditor against the debtor except with leave of the Court once a petition has been filed. ... Mr Gregory Nielsen wants to continue with his application to be substituted.

[7] It therefore remains the position that Dysart requires leave of this Court to issue execution pursuant to s 24. ...

[8] Accordingly, pursuant to s 24 on Dysart's oral application, there is leave to issue a charging order against the sum in Court forthwith. There will be leave to Gregory Nielsen to substitute as the petitioning creditor, on condition that an application for adjudication is filed within seven (7) days. I understand in relation to Gregory Nielsen's bankruptcy there has been an order for substituted service in relation to the application for adjudication. I would state that it can be substituted service on exactly the same terms.

[11] Mr Gregory Nielsen issued his application for adjudication and summons on 25 September 2008. The acts of bankruptcy alleged were that Mr Roderick Nielsen owed his brother \$2,192,298.88 being the judgment sum of \$1,800,000 plus interest, fees and costs, and Mr Roderick Nielsen had committed the following available acts of bankruptcy:

- a) Having obtained judgment against Mr Roderick Nielsen on 22 May 2007 Dysart Timbers served him with a bankruptcy notice under the 1967 Act on 26 July 2007. That was now timeously satisfied although the proceedings were stayed whilst an appeal against that judgment was pursued. The appeal was unsuccessful and the stay had expired. That aspect of the matter has, however, been overtaken by the Supreme Court granting leave to hear Mr Roderick Nielsen's appeal against the Court of Appeal judgment and the hearing of the appeal itself on 10 March 2009.
- b) "The debtor departed from New Zealand on a date unknown to the creditor and has remained there (refer s 20 of the Insolvency Act 2006)".

[12] It was served by way of John Hansen J's order for substituted service on Mr Roderick Nielsen's solicitors and counsel, Ross and Whitney and Mr Swan respectively, and via email and by leaving copies at Mr Nielsen's address in Nevada in the United States. For reasons which will appear, it is pertinent to note that

whereas all the bankruptcy papers up to Mr Gregory Nielsen's petition had been headed in the Insolvency Act 1967, Mr Gregory Nielsen's papers were headed with the Insolvency Act 2006.

[13] Substituted service having been effected, on 5 November 2008 Mr Roderick Nielsen applied for an order staying out or staying Mr Gregory Nielsen's petition. On 28 November 2008 he amended that application including the following grounds:

- “a) The Insolvency Act 1967 applies to the exclusion of the Insolvency Act 2006 if the issuing of a bankruptcy notice occurred before 3rd December 2007.
- “b) The bankruptcy notice relied on by the creditor was issued by the High Court on 5th June 2007 and renewed on 25 July 2007.
- “c) The proceeding has been brought under the Insolvency Act 2006 and as a consequence the Court has no jurisdiction. In the circumstances the proceeding is an abuse of process.
- “d) The Supreme Court has granted leave for the debtor to appeal the judgment upon which the bankruptcy notice, which is pleaded in the petition, relies on. In the event the appeal is successful there would be no foundation for the bankruptcy notice.”

[14] He filed affidavits in support, first from his solicitor Mr Whitney which exhibited a judgment of the Supreme Court of 28 October 2008 granting Mr Roderick Nielsen's application for leave to appeal the Dysart Timbers' judgment on the ground:

“Whether the Court of Appeal was correct in deciding that the exchange of emails at 9:23am and 1:12pm on 9 August 2007 constitute a binding contract of settlement.”

The appeal was heard on Tuesday, 10 March 2009. The decision was reserved.

[15] Mr Roderick Nielsen also swore an affidavit in support of his interlocutory applications. He first said that the question of his settlement with Dysart Timbers was going to the Supreme Court. Even though the bankruptcy notice issued by that creditor on 26 July 2007 was still under appeal, he had paid Dysarts \$260,000 for the judgment sum and costs.

[16] In relation to his brother's bankruptcy application, Mr Roderick Nielsen asserted that his brother's personal bankruptcy notice was never served and it is the "Dysart bankruptcy notice that is relied on". He said the proceedings should have been brought under the 1967 Act because the bankruptcy notice on which it was founded was issued in July 2007 and accordingly the proceeding should be struck out for lack of jurisdiction.

[17] His affidavit noted Mr Gregory Nielsen's counsel earlier telling the Court that he, Mr Roderick Nielsen, had committed a further act of bankruptcy in leaving New Zealand and remaining outside the country with the intent to defeat or delay his creditors. On that, he said:

... I travelled to the US on a number of occasions in 2006 with the view to expanding my property development business outside New Zealand. In 2007 I was invited to become the CEO of a London based firm called World Capital Partners ("WCP") which is a large real estate development company with all its development based in the US. I took on this role but continued to split my time between running my company's, Citation Property Group Limited, business in Queenstown and running WCP's office in Las Vegas. Although I have been back to New Zealand this year I have been working on a more full time basis in Las Vegas since the "credit crunch". ...

My interests in property in New Zealand are being slowly sold and I have incurred significant losses because of the recent downturn in the market and the economy. Nevertheless I do intend to travel between the US and New Zealand next year to maintain involvement in my interests and the market. I hope to be residing permanently back in New Zealand in late 2009. Furthermore I am still a director of several New Zealand companies and continue to do business in New Zealand on a daily basis.

In summary I have not left New Zealand to delay or defeat creditors – rather my travels have been as a consequence of pursuing business interests. More importantly when I did leave New Zealand on a more permanent basis in early 2007 my brother Gregory was not even a creditor. ...

[18] Of the debt to his brother, Mr Roderick Nielsen said:

Since the 1990's Gregory and I have been involved in numerous property development companies and property developments. We fell out badly in the mid 2000's and after intense settlement negotiations we settled our differences in 2007. The settlement entered into was at a time when the market and the companies various developments were healthy. The settlement included that I pay Gregory almost \$2,000,000, and endeavour to have him released as a personal guarantor for many of the companies. In turn Gregory was obliged to do all things necessary so as the various companies could continue to transact their business. The fight between us became more vicious to the point where Gregory has now involved my very elderly parents. It has affected their health. The bottom line is that Gregory simply now wants vengeance and not the money.

...

It is for the above reasons that I wish to oppose the proceedings as they are propelled by hatred, vengeance and an ulterior motive and are therefore pointless. Gregory knows my financial position, which at the moment is dire – nevertheless he still wants to continue.

[19] On 11 and 12 December Mr Gregory Nielsen filed the applications to amend his adjudication application and to oppose the striking-out application. The application to amend was to allege a new act of bankruptcy namely non-compliance with the bankruptcy notice served on 3 October 2008 and to correct the entitling to refer to both the 1967 and 2006 Acts. The former was said to be required under the former R 187(5) because the cause of action had arisen since the filing of the statement of claim. The latter was said to be required to correct a slip.

[20] At the hearing on 12 March 2009, Mr Swan for Mr Roderick Nielsen did not oppose leave being granted to Mr Gregory Nielsen to file his amended adjudication application.

[21] Mr Gregory Nielsen supported his opposition to his brother's striking-out application with an affidavit disputing Mr Roderick Nielsen's assertion that Mr Gregory Nielsen was not his creditor when he left New Zealand in early 2007. That, he said, was false because as at 6 December 2006 Mr Roderick Nielsen owed him over \$1.8m. under the settlement deed, a deed which ultimately led to the issue of this litigation against his brother and his obtaining judgment on 7 August 2008 but he pointed to an affidavit sworn by him on 17 September 2007 in the Court of Appeal in support of his stay application where he said that he had "current net

worth in excess of \$5m which is tied up in property” contrary to his assertion that he has not been in a financial position to pay the debt since December 2006.

[22] Mr Gregory Nielsen expressed the view his brother was endeavouring to delay paying the debt because “he is hoping that I will be bankrupted by my creditors before I can enforce the debt”. Apart from Mr Roderick Nielsen not removing Mr Gregory Nielsen as director of a number of the New Zealand companies in which the former remains a director and company creditors becoming concerned about their financial status, Mr Gregory Nielsen put in evidence emails from Mr Roderick Nielsen to him of 19 April 2007 which relevantly said :

... It appears that Greg will NOT be able to meet his demands re obligations to personal guarantees that he has elsewhere around Auckland. My prediction is that it is only a matter of time before he has a judgment entered against him as a result of this he will be insolvent. As a result of this he will no longer be able to act in the capacity of a company director.

I can confirm that I have the financial means to meet ALL my financial obligations. ...

And on 21 June 2007 he said:

“Subject: Caveat: Sent without Prejudice

Due to the fact Mum and Dad have pleaded with me to lift the caveat off your property, I will do so. I am doing this against my better judgment because you fully deserve to feel some pain after what you tried to do to me. You tried, and were willing and able, to try and send me to the cleaners and it didn't concern you one inch.

I will let it be known that I could crush you right now and force you to lose what precious little you have. You all were fully warned a long time ago that I had the ability to do this and it is PURELY due to other people intervention that I have stopped doing what I was intending to do to you. there are a LOT of others who feel you had it coming and I should proceed with forcing you into Bankruptcy as you were trying to do this to me!

You need to get a grip on your life. I hear through the grapevine you look like a wreck and you have zero self-esteem. Pull yourself together as you are wasting your life away. There is no way the company is in any position to pay you out any dollars right now. It completely surprises me how you don't understand this. You left me with more than \$10m of YOUR debts to pay off as you took the chicken shit weak route out and left me to bring it all home. If it want [sic] for me you would have NOTHING, not a single penny to your name !!!!!

If and when, and only AFTER all the debts are paid off would I even consider paying you any money. Until then you can hiss and roar all you

like but I will use ALL my resources to fight you off. If you are not careful you will send yourself broke on lawyers alone. When the time is right I will sit down and look at paying you out.

However, I have a number of avenues available to me to cause you considerable pain, like what you are currently experiencing re the Caveat, and I will not hesitate to finishing you off next time if you continue to try and keep up what you are doing to me! If I hear of one more incident of you even thinking of stirring things up, and I mean ANYTHING, I will inact [*sic.*] my fury onto you.

Take your house back, back right off, wait for your money to arrive and pull yourself together. Until you can afford to get paid, you won't get paid.

This is the only time I will warn you and be so lenient.

[23] After timetabling, all matters came on for hearing on 12 March 2007. On that occasion South Canterbury Finance Limited (formerly Auckland Finance Limited) gave notice of intention to appear in support of the adjudication application. It said Mr Roderick Nielsen owed it \$574,880.76. Mr Bowler for the creditor said the debt arose out of a loan agreement entered into some years ago in which both the Messrs Nielsen were guarantors. Mr Roderick Nielsen settled the proceedings by an admission of liability in what Mr Bowler thought was mid-2007.

Submissions

[24] For Mr Gregory Nielsen, Mr Grove submitted his client was currently unable to proceed to adjudication on the Dysart matter pending delivery of the Supreme Court's judgment on Mr Roderick Nielsen's appeal against the Dysart Timbers judgment. He made the point that the judgment debtor had filed no Notice of Opposition to Mr Gregory Nielsen's adjudication proceeding and submitted it was possible to construe the material before the Court so as to lead to the conclusion the judgment debtor had been proved to have left New Zealand and remained out of the country with the intention to defeat his creditors. He presented a careful argument in support of that submission based principally on the email exchange mentioned, the terms of Mr Roderick Nielsen's affidavit and the history of this matter.

[25] As to the application for leave to amend the adjudication application, he submitted the failure to include both the 1967 and 2006 Acts in the entitling was a mere slip readily correctable and occasioning no prejudice. If, however, his

argument on the grounds set out in s 20 of the 2006 Act was not upheld, Mr Grove accepted a timetable would need to be set for further steps on the amended application.

[26] He made the point the s 20 ground specifically invoked the 2006 Act, as did the entitling, and that at all times Mr Roderick Nielsen was aware Dysart Timber's bankruptcy notice had been issued under the 1967 Act.

[27] Mr Swan submitted the conflict in the affidavits was such that caution would be required in drawing any inferences. and that if no conclusion could be reached to satisfy the s 20 ground it would not be made out.

[28] Mr Roderick Nielsen's explanation he left New Zealand to further his business interests militated against a finding in relation to him under s 20.

[29] As to the Dysart Timbers' bankruptcy notice, Mr Swan drew attention to s 444 of the 2006 Act under which he submitted proceedings had been wrongly brought. They should be struck out on that basis. Section 444 reads:

444 Transitional provisions

(1) In this section, -

1967 Act means the Insolvency Act 19067 as if it had not been repealed by this Act, and any rules or regulations made under that Act

commencement means the commencement of Parts 1 to 7 of this Act

past event means any of the following that has occurred before commencement:

- (a) issuing a bankruptcy notice:
- (b) filing a petition for adjudication:
- (c) filing an application for a summary instalment order:
- (d) the making of a proposal:
- (e) the making of a compromise:
- (f) filing an application for an order for the administration of an insolvent deceased estate.

- (2) The 1967 Act continues to apply, to the exclusion of this Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after commencement.

Discussion and Decision

[30] In relation to the s 20 ground, the first point to be made is that Mr Roderick Nielsen must be incorrect in saying he owed his brother nothing when he left New Zealand in late 2007. His indebtedness to his brother which ultimately formed the basis of the judgment entered on 7 August 2008 arose from the deed of 17 November 2005.

[31] However, whether he left New Zealand with intent to defeat his creditors or has remained outside this country for that purpose is rather more difficult to decide.

[32] In the first place, Mr Gregory Nielsen's adjudication application is incorrectly phrased. It merely asserts the judgment debtor departed from New Zealand on an unknown date and has remained there since. Though it refers to s 20 of the 2006 Act, it fails to assert that his departure from New Zealand or his remaining out of this country was "with intent to defeat or delay his or her creditors". That is an integral part of the act of bankruptcy constituted by s 20 and the failure to include that phrase in the creditors' adjudication application or seek to add it in the amending application would mean, if adjudication followed, that the debtor had been bankrupted on materially defective pleadings omitting an essential component. On that ground alone, despite Mr Grove's careful argument, the adjudication application, so far as it is based on s 20, cannot currently succeed.

[33] While an intention to defeat or delay creditors need not be the sole reason for a person leaving New Zealand or remaining out of this country for adjudication to follow (*Re Wills ex parte Worldwide Sports International Ltd* HC AKL B80 and 91/93 Master Kennedy-Grant, 24 February 1993 pp2-3) and while Courts are not bound to accept uncritically all statements in affidavits and should try to resolve conflicts in a "robust and realistic" way (*Eng Mee Yong v Letchumanan* [1980] AC 331, 341; *Bilbie Dimock Corporation Limited v Patel* (1987) 1 PRNZ 84, 85-86).

Mr Swan is right that a cautious approach is mandated in the circumstances of this case.

[34] Though the judgment creditor and debtor are brothers, there is clearly deep enmity between them and the litigious fallout resulting from the dissolution of their property development and other businesses has been bitter.

[35] While his financial situation including the debt owed to Dysart Timbers and its ongoing bankruptcy proceedings are most unlikely to have been absent from Mr Roderick Nielsen's mind when he left New Zealand in late 2007, he was taking steps to challenge the compromise from which the bankruptcy proceedings issued. From the information given by Mr Bowler, it seems likely the South Canterbury Finance Ltd judgment had been given by the date of Mr Roderick Nielsen's departure and he is highly likely to have been aware of that. He must also have been aware of the money he owed his brother. And at one point in these bankruptcy proceedings, counsel for Bridgecorp Limited (In Receivership and Liquidation) appeared, asserting Mr Roderick Nielsen owed his client some \$10m. However, no formal step has been taken in the bankruptcy by that creditor to date.

[36] Taking all those matters into account, while the tone of his correspondence with his brother in mid-2007 is such as to bear the inference that one of the reasons for Mr Roderick Nielsen leaving New Zealand at the end of that year and remaining outside this country since was to defeat his creditors – though his affidavit says he continues to have business in New Zealand and hopes to return here – it could not with confidence be concluded that the evidence as yet establishes that fact to the standard justifying Mr Roderick Nielsen's adjudication in bankruptcy.

[37] However, rather than dismiss the s 20 ground, the preferable course is to adjourn it with the other matters concerning this file and timetable any amendments and further affidavits in order that a final conclusion can be reached on the s 20 ground in due course.

[38] As far as s 444 is concerned, the relevant sections of the 2006 Act came into force on 3 December 2007. Accordingly, the 1967 Act, not the 2006 Act, applies to

any “past event and to any step or proceeding preceding, following or relating to that past event” with “past event” being as defined.

[39] Given that Mr Gregory Nielsen’s bankruptcy application is in part based on the service of Dysart Timbers’ bankruptcy notice on 26 July 2007 and Mr Gregory Nielsen has been substituted as creditor in the Dysart Timbers’ petition issued on 16 August 2007 and all the documents filed since that date are based on and accordingly relate to past events, it must follow that Mr Swan is correct and that the whole of this proceeding is governed by the 1967 Act.

[40] Lest that be thought to be incorrect, however, as a matter of prudence it would be preferable to list both the 1967 and the 2006 Acts in the entitling. In that regard Mr Grove is correct, that Mr Roderick Nielsen can never have been under any misapprehension arising solely out of an incorrect entitling as to what was sought and leave will be granted to amend the proceedings in that respect.

[41] There being no opposition, leave will also be granted to amend the proceedings in the other respects sought.

[42] Those orders effectively dispose of both Mr Roderick Nielsen’s application to strike out or stay proceedings and they are accordingly dismissed.

Result

[43] In the result:

- a) The judgment creditor’s application to bankrupt the judgment debtor on the grounds appearing in s 20 of the 2006 Act is adjourned for the reason and on the terms set out in the judgment.
- b) The judgment creditor’s application to amend the application for adjudication is granted in the terms sought. Should, as a result of the delivery of this judgment, the judgment creditor seek to amend the way in which the s 20 ground is phrased, a separate application will be required. If the judgment creditor intends to pursue that

application, such is to be filed within seven days of delivery of this judgment.

- c) Any notice of opposition by the judgment debtor to the application for adjudication, together with any supporting affidavits, are to be filed and served within 21 days of delivery of this judgment. While that may seem a short period for a person residing outside New Zealand, Mr Roderick Nielsen is well aware of the issues and is in contact with his solicitors and counsel and has been in such contact since these matters began. So the time allowed appears reasonable. Any papers filed by the judgment debtor should assume that an amendment has been sought to align the s 20 pleading with the statute and that such amendment is likely to be granted.
- d) Counsel are to advise the Court immediately the above timetable is concluded as to their estimate of the likely duration of any hearing.
- e) The file is then to be referred to Hugh Williams J as Civil List Judge to allocate a fixture.
- f) In the circumstances of this matter there will be no order for costs arising out of this hearing.

.....
HUGH WILLIAMS J.

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