IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-006062

IN THE MATTER OF	the Insolvency Act 2006
BETWEEN	UWE BALZAT Judgment Creditor
AND	PENG ZHANG Judgment Debtor

Hearing: 3 April 2009

Appearances: C S Henry for Judgment Debtor
D Bigio for Judgment Creditor

Judgment: 7 April 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 8 April 2009 at 5 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Winston Wang & Associates, PO Box 99974, Auckland
Donnell & Associates, North Shore City, Auckland

[1] At the commencement of the hearing Mr Henry who appears for the judgment debtor asked me to consider recusing myself. He emphasised that he was not making an application for me to be recused from hearing this case, but questioned whether I should hear the case alluding to the fact that I had previously presided over a hearing in which Mr Henry was personally involved.

[2] I decided there were no grounds requiring me to be recused and directed the hearing to proceed. I now set forth the grounds for that decision.

[3] Without going into the details of the proceedings involving Mr Henry personally which came on for hearing before me it is appropriate to disclose that I found against Mr Henry in those proceedings. I cannot recall the date of that hearing. The hearing occurred at least two years ago.

[4] In *Muir v The Commissioner of Inland Revenue* [2007] 3 NZLR 495 the Court of Appeal, in determining the correct approach to be adopted when considering an application for recusal, pointed out that the enquiry is a two stage one. It is first necessary to establish the actual circumstances which have a direct bearing on the suggestion the Judge may be seen to be biased and then to consider whether those circumstances might lead a fair minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the case that is before him or her.

[5] When considering the first enquiry the Court of Appeal stated at paragraph 62::

> This factual enquiry should be rigorous, in the sense that complainants cannot lightly throw the “bias” ball in the air.

[6] At paragraph 35, the Court of Appeal states:

> The requirement of independence and impartiality of a Judge is counterbalanced by the Judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law. This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular Judge or to gain forensic or strategic advantages through delay or interruption to the proceeding.

[7] Thus, if I conclude there to be no basis for recusing myself, there is indeed a duty to preside over the hearing to avoid forum shopping by litigants.

[8] The prior decision I made against Mr Henry personally cannot in itself be sufficient justification for concluding that a reasonable person would question whether I would remain impartial in dealing with the proceedings now before me in which Mr Henry is appearing as counsel. The situation relating to prior rulings as a basis for a conclusion of judicial bias was considered by the Court of Appeal in *Muir v The Commissioner of Inland Revenue* when at page 515, the Court states:

> [98] It has to be accepted that there are occasions when a Judge's prior rulings might lead a reasonable person to question whether he would remain impartial in any subsequent proceedings. That said, this could be relevant to the question of judicial bias only in the rarest of circumstances.
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> [99] The reasons for this are straightforward. It is common sense that people generally hate to lose, and their perception of a Judge's perceived tendency to rule against him or her is inevitably suspect. As Kenneth Davis has said, "Almost any intelligent person will initially assert that he wants objectivity, but by that he means biases that coincide with his own biases"(*Administrative Law Treatise* (2nd ed, vol 3, 1978), p 378). Every judicial ruling on an arguable point necessarily disfavours someone – Judges upset at least half of the people all of the time – and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling. But it is elementary that the Judge's fundamental task is to judge. Indeed, the very essence of the judicial process is that the evidence *will* instil a judicial "bias" in favour of one party and against the other – that is how a Court commonly expresses itself as having been persuaded.
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> [100] The general approach that judicial disqualification is not warranted on the basis of adverse rulings or decisions is also justified by appropriate concerns about proper judicial administration. There is huge potential for abuse if recusal applications were permitted to be predicated on a party's subjective perceptions regarding a Judge's ruling.

[9] My decision against Mr Henry was not based on any personal bias against him. It was a reasoned decision based on the evidence and the relevant law applicable to that evidence. I am confident that there is nothing in the circumstances

of that decision that would cause a reasonable person with possession of all relevant information to conclude I would be biased against Mr Henry and the judgment debtor he represents in these proceedings. Consequently, after considering the circumstances giving rise to Mr Henry's concern and whether those circumstances might leave a fair minded observer to reasonably apprehend that I may be biased against Mr Henry and the judgment debtor, I am satisfied there is no basis for such concern.

[10] Consequently, for the above reasons I have decided not to recuse myself from hearing these proceedings.

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Associate Judge Robinson