

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

**CIV 2008-404-005865**

IN THE MATTER OF      Insolvency Act 2006

BETWEEN                         VICTORIA JANE CARTER  
    Judgment Creditor

AND                                         VIREN PRASAD JHAGROO  
    Judgment Debtor

Hearing:            19 May 2009

Appearances: G C Jenkin for Judgment Creditor  
                      Mr V P Jhagroo in person

Judgment:        19 May 2009

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**ORAL JUDGMENT OF  
ASSOCIATE JUDGE CHRISTIANSEN**

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*Mr V P Jhagroo, 60 Tiger Drive, Botany Downs, Manukau City*

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[1] Ms Carter has applied for an order adjudicating Mr Jhagroo bankrupt. In her bankruptcy notice she refers to Mr Jhagroo's debt as comprising two judgments she has obtained against him, the first for the sum of \$55,000 by order of the District Court at Manukau on 14 March 2008, and the second for the sum of \$23,328.08 obtained on 2 May 2008 in the Manukau District Court.

[2] In response to service of the bankruptcy notice upon him Mr Jhagroo filed an application to set it aside pending determination of his claim against Ms Carter for a division of relationship property under the provisions of the Property (Relationships) Act 1976.

[3] On 6 November 2008 Mr Jhagroo's setting aside application was dismissed by consent when it was realised that the application had been filed out of time.

### **Opposition to the adjudication application**

[4] Upon being served with Ms Carter's adjudication application Mr Jhagroo filed a notice of intention to oppose. By it he claimed:

- a) He was in a de facto relationship with Ms Carter from about February 2002 to February 2006;
- b) He filed an application for orders upon his relationship property claim in the Manukau Family Court on 30 January 2009;
- c) He says his claim will result in Ms Carter being ordered to pay him an amount that is equal or greater than this judgment debt;
- d) He could not use his claim against Ms Carter as a defence to her claim because the Manukau District Court had no jurisdiction to hear a claim under the Property (Relationships) Act 1976;
- e) That it is just and equitable that this Court not make an order of adjudication.

[5] Mr Jhagroo's opposition is supported by his own affidavit and that of his former wife Reana Jhagroo.

[6] Mr Jhagroo's brief affidavit in opposition exhibits a copy of his relationship property application together with copies of the affidavits of both he and his former wife.

[7] His relationship property application calls in aid the provisions of sections 25, 26, 30, 31 and 33 of the Property (Relationships) Act 1976.

[8] Mr Jhagroo's affidavit in support of his relationship property application provides his account of the extent of his relationship with Ms Carter. According to him:

- They met in October 2000 while working as real estate salespersons for Harcourts Howick. At the time Ms Carter was living with her husband and two children.
- In about February 2002 they began living together. Later in about July 2003 they occupied rented premises at Dannemora where they stayed for about six months. Meanwhile Ms Carter's home was rented out.
- Mr Jhagroo returned to live with his former wife in about February 2004 and Ms Carter moved back into her Tuscan Place property. About a week later he went to live with Ms Carter at her property. He said she had purchased the property for \$202,000 in about February 2002 and sold it for about \$420,000 in January 2007. He received nothing from that sale.
- Ms Carter furnished the Tuscan Place herself and retained all of that furniture when they finally separated in about February 2006. He estimated the value of the furniture to be worth between \$30,000 and \$40,000.

- They shared living costs and expenses and household duties. He cooked, cleaned, washed dishes, vacuumed, washed clothes, ironed, mowed the lawns and tidied the garden.
- They worked together continuously at Harcourts until about the end of 2003. Then they both moved to Remax One Tree Hill in early 2004. They worked together, she sharing his client database, he introducing her to prospective vendors and purchasers and letting her look after his listings. This he said enabled Ms Carter to sell a number of homes and to be paid commission.
- They socialised together, went out to dinner frequently and went on holiday together. Friends and colleagues knew, he said, that he was in a committed relationship with Ms Carter. As evidence of that he provided copies of two letters from work associates.
- In March 2004 he said they located and purchased a property at Pakuranga for \$210,000 intending to improve it and to on-sell it. It was agreed Ms Carter would borrow the money needed and that it should be registered in her name alone. He was to take care of minor cosmetic repairs. He arranged for a carpet layer and landscaper, and undertook to do some odd jobs. The renovation finished about mid-2004. It was rented until finally sold on or about 17 January 2006 for \$256,500.
- In late 2003 he obtained the Remax Real Estate Agency franchise in Botany. To help establish the business he borrowed funds from Ms Carter. However the purchase of the franchise did not proceed.
- Regarding the sums for which judgment was obtained against him by Ms Carter he states *“These judgments relate to funds that (Ms Carter) lent to me to settle credit cards and debts that I had incurred during our relationship for the benefit of our relationship”*.

[9] Mr Jhagroo's former wife Reana disposed that they were divorced in 1991. They have two children aged 19 and 16. They have remained friends "*mainly for the benefit of the children*".

[10] She says to her knowledge Mr Jhagroo and Ms Carter lived together between 2002 and 2006. She was unhappy when he started the relationship with Ms Carter. From that time Mr Jhagroo did not support her and the children financially, to the same extent. She said he often talked about Ms Carter and that made her feel unhappy. She said she remembered he often went away with Ms Carter, that they socialised as a couple and that they worked and lived together.

[11] She says she knows Mr Jhagroo helped Ms Carter a lot with her real estate career and "*I have no doubt she made a lot of money with his help*".

[12] More recently they have been trying to repair their relationship but pain has been caused by Ms Carter's claims against him. She says "*I understand (Ms Carter) owes him money from deals they did while they were together*".

### **Evidence of the judgment creditor**

[13] Ms Carter's affidavit provides a rejection of pretty much all Mr Jhagroo asserts in support of his claim. She says in 2005 and 2006 she lent him a total of \$75,000 which he agreed in writing to repay, and also to pay interest at an agreed rate. When he refused to pay her she sued him to recover the money due. He had made some monthly payments totalling about \$7,500 but stopped those in June 2007. She annexes Mr Jhagroo's written acknowledgement of debt in relation to the first loan of \$60,000 to him in December 2005.

[14] When she filed her summary judgment claim in the Manukau District Court Mr Jhagroo responded with a notice of opposition and affidavit in opposition. In his notice, he claimed "*This Court does not have jurisdiction to hear relationship matters*". In his affidavit he maintained she had given him \$55,000 but no more, implying that it was not a loan.

[15] In his affidavit he maintained they had lived in a de facto relationship for a period of five years beginning 2001 and ending in February 2006.

[16] Ms Carter disputes a claim of a de facto relationship. In an affidavit sworn at that time she deposed:

- On 16 August 2007 after the summary judgment proceedings had been served, he telephoned her and asked whether she would accept \$2,000 per month to pay off the debt.
- They started going out together in about March 2002. At that time he was still living with his former wife.
- They had an on and off relationship over a period of about five years. Usually and after being thrown out of his own home he would come live with her for a few days and borrow money and then would move into a flat. He did not want to live with her nor she with him.
- He jointly owned with his wife a property at Bucklands Beach until September 2005 when they sold it.
- If all the nights that he stayed at her place were added up it would be no more than three months. He never moved into her place, just “*used to stay over from time to time*”
- She paid all outgoings and never shared any expenses with him. They kept their finances “*totally separate*”. There was no public aspect of their relationship because they never went out together where they could be seen locally. They never purchased anything together.
- Each Christmas he would take an overseas trip with his wife and his children for one to two months. He avoided her family like the plague. She never met any of his friends, nor he hers.

- Not until the summary judgment proceedings had he ever asserted a claim in respect of a relationship property settlement.
- He remained with his wife from November 2002 up until June 2005 when they separated again.

[17] Shortly before the summary judgment hearing he filed an application for dismissal of her summary judgment application. He claimed the District Court did not have jurisdiction to hear the claim; that the Family Court was the proper forum; and that the application was an abuse of process. His affidavit and that of his former wife which were filed at the time cover those same matters contained in his opposition to adjudication.

[18] When the summary judgment application, and his application for dismissal, were heard, his was dismissed and judgment upon hers was granted. Before then the jurisdiction question had been argued in full.

### **Considerations**

[19] Mr Jhagroo has offered no evidence of his financial ability to meet payment of Ms Carter's debt. His opposition is premised either upon the grounds that it is just and equitable that an order of adjudication not be made, or because there are other reasons why it should not be made. Mr Jhagroo's position is that his Relationship Property application will or ought to succeed to an extent to provide an offset to the amount due under Ms Carter's judgments.

[20] The judgment creditor identifies three bases upon which it says Mr Jhagroo's opposition can be rejected. They are:

- a) There is no substance to Mr Jhagroo's cross-claim based on his Relationship Property application.
- b) The alleged cross-claim issue has already been litigated.
- c) There are no just and equitable grounds.

[21] Dealing with each in-turn.

*Whether there is substance to a cross-claim based on a Relationship Property Application*

[22] As previously noted Mr Jhagroo's Family Court application calls in aid certain provisions of the Property (Relationships) Act 1976. Mr Jenkin submits only (s25) and (s33) are relevant and that the latter (s33) claim contains power to make orders that are ancillary to substantive orders made under the former (s25). Also the success of any claim is founded upon an applicant satisfying the Court of the existence of a de facto relationship of more than three years, a proposition absolutely rejected by Ms Carter.

[23] Mr Jhagroo claims an interest in Ms Carter's Tuscan Place property which was sold in January 2007 for \$420,000. He says he has received nothing of the proceeds, but has made no attempt to trace those. Also he says the date of separation was February 2006, i.e. nearly one year before the property was sold.

[24] He has estimated the value of contents as between \$30,000 and \$40,000 but no particulars of furniture or other contents, or value of them has been provided.

[25] He says that due to his contacts she earned commissions amounting to \$59,500 but has provided no evidence as to what has become of those commissions and no attempt has been made to trace them.

[26] He refers to an investment property purchased by Ms Carter in March 2004 for \$210,000 and which was sold in January 2006 for \$256,500. He said she retained all the sale proceeds but he provides no evidence about those nor efforts made to trace them.

[27] Mr Jenkin identifies a conflict in Mr Jhagroo's accounts of how he incurred his debt with Ms Carter. In the District Court proceeding he said that at best she may be entitled to a half share of money she gave him to start the Remax business. In this proceeding, as earlier adverted to, he acknowledged incurring the debt to



repay outstanding credit cards and debts he had incurred during the relationship and for the benefit of the relationship.

[28] Also, and it appears unchallenged that the second loan of \$15,000 to Mr Jhagroo was made on or about 28 April 2006, namely after that date it is acknowledged by him they separated.

[29] Mr Jenkin submits that under the Act, the Family Court is charged with the task of determining what assets are to be divided at the date of separation. Before then the property investment property had already been sold. Regardless in respect of each property identified by Mr Jhagroo there is no evidence of what happened to the proceeds of sale nor of any attempt by him to trace those proceeds i.e. there is no evidence of their existence.

[30] Mr Jenkin submits that the orders a Court can make under s25 are orders that relate to specific items of relationship property or separate property. There is power under s33 (3)(i) of the Act to make a money payment order, but that is only an order that is ancillary to substantive orders made under the other provisions of the Act. Therefore, there is no power that Mr Jhagroo might be able to rely upon in the Act that would enable the Court to order that Ms Carter pay him compensation with respect to the proceeds of the assets that he refers to. Even if the proceeds could be identified and are represented in some asset held in her name the Court's powers to make orders in respect of those assets and such an order would not enable Mr Jhagroo to raise a cross-claim in respect of the judgment debts. He could only succeed to claim a share of the particular asset in which he makes a claim i.e. he is not entitled to a compensation payment in lieu.

[31] Even if the Court could make an order that the debt or part of them was relationship property at most Mr Jhagroo could hold back 50% of that debt. He would still be liable to pay the other half which is at least \$40,000.

*Whether the cross-claim has already been litigated*

[32] When Ms Carter's summary judgment application was heard, Mr Jhagroo was represented by counsel, Mr Twigley. In paragraph 14 of his submission Mr Twigley stated:

"... If that is the case then the starting point must be that all joint property, property held as tenants in common, and separate property, is prima facie relationship property subject to equal sharing. This includes assets and liabilities. The plaintiff may therefore not be entitled to repayment of the sum claims as it could be subject to an adjustments claim by the defendant and otherwise, if subject to equal sharing, could be categorised as a contribution to the relationship."

[33] Regardless of whether this was a correct exposition of the law this was the basis of Mr Jhagroo's challenge to the jurisdiction of the District Court i.e. that in the end there will need to be adjustments that give rise to a cross-claim.

[34] Mr Jenkin refers me to s4 (4) of the Property (Relationships) Act 1976 which provides:

**"Act a Code**

(4) Where, in proceedings that are not proceedings under this Act, any question relating to relationship property arises between spouses or de facto partners, or between either or both of them, and any other person, the question must be decided as if it had been raised in proceedings under this Act."

[35] Mr Jenkin submits the subsection contemplates that proceedings between spouses and/or de facto partners can be commenced and continued in a Court other than the Family Court. Therefore, if a question relating to relationship property arises in those proceedings then the question must be determined as if those proceedings were proceedings under the Act.

[36] Mr Jenkin submits that section (4) enabled Mr Jhagroo to raise that issue in the District Court proceeding and he did so, albeit in a slightly different way. We do not have the Judge's reasons, but it is clear the Learned Judge rejected the alleged defence, as the Judge was entitled to do. Mr Jhagroo had a right of appeal but never pursued it.

[37] Thus far, the judgment creditor's case is that a relationship property claim by Mr Jhagroo could not succeed and certainly not on the basis of the information before the Court. The reason is that to the extent Mr Jhagroo can identify the existence of property against which claim could be made then in the outcome that claim was successful he could only recover at best half of that property. He will recover nothing at all if that property no longer existed. Therefore there is nothing by that exercise which would provide him with a set-off or cross-claim in respect of the judgment against him.

[38] I expressly defer from making any ruling upon that claim because I am satisfied Mr Jhagroo's opposition to the adjudication application must fail for reasons that the issues raised by his opposition have already been determined, and because neither justice nor equity supports his opposition.

[39] In his opposition to the summary judgment application and in his own application to dismiss the summary judgment application he provided a case, mirrored by his current opposition to the adjudication application. Regardless of the claim that the District Court did not have jurisdiction to deal with a relationship property issue the fact is had the Judge dealing with a summary judgment application been persuaded that there was an arguable case triable before another court then summary judgment would have been refused. It is clear at that summary judgment hearing that it was submitted for Mr Jhagroo that he did have an arguable case triable before the Family Court. It is implicit in the judgment which followed that that argument did not succeed.

### **Just and equitable grounds**

[40] As earlier noted he has not pressed a claim of an interest in relationship property until himself pressed for payment of a debt he has acknowledged he has incurred for himself and that he had promised to repay. In spite of this and after making some payments he now claims only to be liable for half of the debt he incurred because of claims of contribution to a de facto relationship property. His relationship property claim appears weak. Details of his contributions lack specifics. Claims against property sold appear to be an after thought and suggestions of

contribution under value the extent of what is expected if such a claim is to be accepted i.e. he undertook minor cosmetic repairs; he arranged for people to do work etc. etc. This Court is used to relationship partners providing in detail evidence of claimant parties and description of contributions in a common cause. By contrast what Mr Jhagroo has provided suggests recourse to trivia, and descriptions of little of substance.

[41] Mr Jhagroo has already raised a so called cross-claim in the District Court albeit he has framed it as a jurisdiction argument.

[42] His first attempt to raise that argument in the High Court was upon an application to have a bankruptcy set aside. That effort failed because his application was out of time.

[43] Usually it is difficult in this Court to attempt, much less evaluate the affidavit evidence of a deponent who acknowledges incurring a debt with another, who agrees to repay that debt at a prescribed rate and to make some payments to that end; who has provided no equity in the property of the person with whom he has formed a relationship save to promote a concept of contribution personally and professionally by that relationship; where the details are barely credible to support such a claim; in circumstances which suggest little more than a rearguard defence of the inevitable.

[44] Mr Jhagroo has tried to do this before. He has not previously succeeded nor can he now avoid payment of what is, in reality, a commercial loan.

[45] As previously noted no offer of payment has been made nor security offered. There is no evidence of an ability to pay. There is no reason for the Court to consider invoking its jurisdiction to do other than what is expected by the judgment creditor's application.

## **Decision**

[46] There is an order for adjudication. It is timed at 11.08am on this date. The judgment creditor is entitled to costs on a **2B basis**, together with disbursements as fixed by the Registrar.

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**Associate Judge Christiansen**