IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-004175

IN THE MATTER OF	the Insolvency Act 2006
AND	
IN THE MATTER OF	the bankruptcy of SN Pillay
BETWEEN	SATAYA NANDAN PILLAY Judgment Debtor
AND	ANZ NATIONAL BANK LIMITED Judgment Creditor

Hearing: 2 December 2009

Counsel: ASR Kashyap for judgment debtor
RJ Gordon and JM Blythe for judgment creditor and for additional creditors in support - BNZ Bank Limited and Boston Securities (2006) Limited
EC Gellert for Westpac New Zealand Limited, ASB Bank Limited and the Public Trust

Judgment: 2 December 2009 at 11:25 am

Reasons: 3 December 2009 at 4pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for adjudication order]

Solicitors: Araron Kayshap, PO Box 26 596, Auckland for judgment debtor
Buddle Findlay, PO Box 2694, Wellington for judgment creditor and additional supporting creditors
Simpson Grierson, Private Bag 92 518, Auckland for Wespac NZ Ltd, ASB Bank Ltd and Public Trust Ltd

[1] On 2 December 2009 at 11:25 am I made orders:

a) Refusing the judgment debtor's application to halt an application for an adjudication order; and

b) Adjudicating Sataya Nandan Pillay a bankrupt.

I advised counsel and the parties that the reasons for both orders would be released shortly. Those reasons are now set out in this judgment.

[2] The judgment debtor applies for an order halting the judgment creditor's application for an adjudication order.

[3] The judgment creditor's application for an adjudication order was filed on 2 September 2009. The application was given, as its date of hearing, 15 October 2009. On that day the application was adjourned to 28 October 2009 to allow the debtor to make the application to halt the adjudication application.

[4] On 28 October 2009 I made orders relating to the filing of additional affidavits, a notice of opposition, affidavits in opposition and reply affidavits in relation to the judgment debtor's application. I gave directions for the filing of submissions and other documents relating to the hearing on a defended basis of the judgment debtor's application. I adjourned the application for a special fixture to 2 December 2009.

[5] The judgment debtor's application is made in reliance on s 42 of the Insolvency Act 2006. Section 42 provides:

> **42 Halt or refusal of application when judgment under appeal**
>
> (1) This section applies if the creditor's application for adjudication relies on 1 of the following acts of bankruptcy:
>
> (a) the debtor failed to comply with a bankruptcy notice (*see* section 17):
>
> (b) a judgment against the debtor for non-payment of trust money is not satisfied within 5 working days after the date of the judgment (*see* section 28).

> (2) If the debtor has appealed against the judgment or order underlying the bankruptcy notice or the judgment for nonpayment of trust money, as the case may be, and the appeal is still to be decided, then the Court may—
>
> (a) halt the creditor's application for adjudication; or
>
> (b) refuse the application.

[6] The grounds set out in support of the judgment creditor's application for an order of adjudication and pleaded contain the following:

i) The judgment creditor obtained a final judgment against the judgment debtor on 1 July 2009;

ii) Execution of the judgment has not been stayed;

iii) The judgment debtor was served with a bankruptcy notice in this matter on 4 August 2009;

iv) The judgment debtor has not complied with the requirements of the bankruptcy notice by 18 August 2009 as required; and

v) The judgment debtor has committed an available act of bankruptcy.

[7] The judgment which underlies the bankruptcy notice pleaded in the judgment creditor's application is a judgment of Associate Judge Christiansen given in this Court on 1 July 2009. In that judgment the judgment creditor's application for summary judgment was granted and the judgment debtor's counterclaim was struck out. The amount of the judgment debt is $1,335,147.32. Interest accrues at the rate of $302.27 per day in respect of that judgment.

[8] The documents disclose that a notice of appeal was filed with the Court of Appeal on 27 July 2009. On that day a notice was dispatched to the counsel then acting for the judgment debtor from the Court Registry Officer in the Court of Appeal, which explained the steps that were required to be taken. Because serious delay in the prosecution of this appeal is a factor that has to be taken into account I

set out the notice issued by the Court of Appeal Court Registry Officer on 27 July 2009.

> CA442/2009 Sataya Nandan Pillay v ANZ National Bank Limited
>
> I acknowledge receipt of your Notice of Appeal filed on the 27th of July 2009.
>
> The above number has been allocated to this appeal. It must be used in all communications with the Court relating to this appeal. Attention is drawn to the requirements set out in the Court of Appeal (Civil) Rules 2005. The Court will insist upon these requirements, with special attention drawn to the following Rules:
>
> Rule 38
>
> A party may, at any time, apply to the Registrar for the allocation of a hearing date. Attention is drawn to the requirements for such an application contained in Rule 38, Rule 39 and Rule 40. Please note that Rule 38 is subject to Rule 43, and must also be read in conjunction with Rule 37(2) in regards to the payment of security for costs.
>
> The $2,200.00 setting down fee must accompany any application for allocation of a hearing date (if a waiver of the setting down fee is to be applied for, this must accompany your application).
>
> Rule 41 and Rule 42
>
> Deadlines and specifications for submissions by Appellant and Respondent must be strictly observed.
>
> Rule 43(1)
>
> Under Rule 43 of the Court of Appeal (Civil) Rules 2005 the allocation for a hearing date must be applied for and the Case Officer on Appeal filed within six months from the date of filing the notice of motion. If this deadline is not observed the appeal will be deemed abandoned.
>
> Please note that if a fixture is applied for and made before the Case on Appeal is filed Rule 43 has not been complied with and will still operate.
>
> Rule 35
>
> Please also pay attention to Rule 35 of the Court of Appeal (Civil) Rules 2005. Security for costs must be given in the Court of Appeal within 20 working days of the filing of the notice of appeal. Please also note that the appellant may not apply for the allocation of a hearing date if security is not given in accordance with Rule 35.
>
> Security in regards to this appeal has been fixed by the Registrar at $4,740. Please note that under Rule 35(7), any application for an order in regards to security (Rule 35(6)) must be made within 20 working days of the filing of the notice of appeal.

A copy of this letter is enclosed for forwarding to the respondent.

Hayley McConnell
Court Registry Officer

[9] It is apparent from the short summary that I have set out that the jurisdictional requirements for the making of an order under s 42 of the Insolvency Act 2006 are met in this case because:

a) The judgment debtor has failed to comply with a bankruptcy notice;

b) The judgment debtor has appealed against the judgment which underlies the bankruptcy notice; and

c) The appeal is still to be decided by the Court of Appeal.

[10] The Court's discretion under s 42 is an unfettered discretion. A number of factors, however, have often assumed importance in determining whether, in a particular case, the Court should exercise its discretion and grant an order halting the adjudication application. Those matters were summarised in the judgment of Associate Judge Doogue HC AK CIV 2006-404-1164 Yeoh & Anor v Al Saffaf 21 June 2006 as:

a) The bona fides of the judgment debtor in prosecuting the pending appeal;

b) What stage the appeal has reached and whether there has been delay in prosecuting the appeal;

c) Whether an order halting the application for an adjudication order would unduly prejudice the judgment creditor; and

d) Whether the bankruptcy proceeding might render the appeal nugatory as the judgment creditor would be unable to prosecute the appeal.

[11] The above matters, of course, are the matters that are usually taken into account with possibly the following additional matters:

a) The effect on third parties;

b) The novelty and importance of the question involved in the appeal;

c) The public interest in the proceeding which is under appeal; and

d) The overall balance of convenience.

Those matters were part of the summary of traditional matters taken into account and which were referred to by Hammond J in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* 13 PRNZ 48 at 50 when considering applications for stay generally where an appeal is pending.

[12] The effect on third parties, the novelty and importance of the question involved, and the public interest in the proceeding were not matters advanced as justifying the stay and therefore require no particular analysis.

[13] A short background summary is contained in the judgment of Associate Judge Christiansen, which I now set out so that this matter is put into perspective. That summary is as follows:

> [1] The plaintiff (ANZ) seeks summary judgment upon its claim against Mr Pillay pursuant to his guarantee of loan facilities provided to Cohesive Integration (NZ) Limited (Cohesive Integration).
>
> [2] Mr Pillay completed a deed of guarantee on 27 October 2006. As at 4 November 2008 Cohesive Integration was indebted to ANZ in the sum of $1,162,932.86 upon its loan and in the sum of $63,838.96 upon its overdraft. It claims judgment in those sums together with interest and costs. By his defence Mr Pillay claims that at the time of advancing the loan to Cohesive Integration on 27 October 2006 ANZ assumed "fiduciary duties" to him personally to and did advise on the overall merits of the agreement for sale and purchase entered into by Cohesive Integration at that time. The business purchase having failed Mr Pillay claims that ANZ is now liable to pay him personally some $2,200,000 being losses alleged to have resulted from the business failure.

> [3] Mr Pillay's counter claim for alleged "breach of fiduciary duty" is advanced under four separate headings – Fair Trading Act; breach of trust and fiduciary duty; knowing assistance; and deceit.
>
> [4] In essence Mr Pillay claims that the bank's obligations arise not from just loaning money to Cohesive Integration but rather by assuming much larger fiduciary obligations. Mr Pillay claims that the bank assumed duties to him personally, not to the company nor even to its shareholder, Albert Street Investment NZ Limited (ASIL) a company of which Mr Pillay is a director and shareholder.

[14] I consider specifically the bona fides of the judgment debtor in prosecuting the appeal.

[15] A number of matters require comment in this respect.

a) Security for costs in the sum of $4,740 as fixed by the Court was not paid promptly. It was a matter of comment at the calls of the application for an adjudication order. The application to halt the adjudication application refers to the fact that counsel acting for the judgment creditor, Mr Kashyap, has advanced the sum of $4,740 to the Court of Appeal, being the sum that was due for security for costs;

b) No steps have been taken to prepare a case on appeal or to seek a fixture despite the fact that it was known by the judgment debtor that an application for an adjudication order was outstanding; and

c) No counsel has been instructed on the appeal.

[16] No criticism in respect of this matter can be directed at Mr Kashyap. He was not counsel at the summary judgment hearing. He advised me from the Bar that his brief was simply to apply for the order halting the adjudication application. He further advised me that he had informed the judgment debtor that he did not consider that it was appropriate for him to take on the task of arguing an appeal to the Court of Appeal. I say, unreservedly, that Mr Kashyap has presented the argument both fairly and properly in view of the limited brief that was given to him by the judgment debtor. However, there is no evidence to show that this judgment debtor has instructed counsel to prosecute his appeal and has taken any steps, whatever, to

prepare a case on appeal or to put his solicitors in funds to enable the setting down fee on the appeal to be paid. Indeed, Mr Kashyap told me from the Bar that the judgment debtor was currently out of the country and in Fiji. I have serious reservations as to whether this judgment debtor intends prosecuting his appeal at all.

[17] Counsel did not address me with reference to authorities on the merits of the appeal. That is understandable because the merits are not generally an appropriate matter for the Court to contemplate on an application to halt the adjudication application unless the Court considers the appeal has absolutely no prospect of success.

[18] Mr Gordon submitted that the judgment debtor's principal argument, namely that he should not have to repay the debt owed because the Bank's decision to lend the money was in some way negligent is a proposition which is contrary to established authorities on bank and client relationships. As already mentioned, the argument was not developed by either counsel.

[19] I next consider the stage the appeal has reached and whether there has been delay in prosecuting the appeal. Clearly there has been delay in prosecuting this appeal. Apart from filing the actual notice of appeal and the generous position adopted by the judgment debtor's lawyers in advancing the security for costs, no concrete steps to prosecute this appeal have been taken. It is an appeal, therefore, that one can say is very much in its infancy. It does not appear to have been the subject of careful analysis by counsel who is prepared to advance the appeal for the judgment debtor.

[20] The next question relates to potential prejudice to a judgment creditor. In this respect I note that there have been notices filed by creditors supporting the application for adjudication from the following:

> Westpac New Zealand Limited which refers to two debts; one of $139,556.67 and another of $752,765.60;

The Bank of New Zealand which claims a sum of $387,576.16 plus interest and costs;

Boston Securities (2006) Limited which claims to be owed $1,340,966.65; and

ASB Bank Limited which claims two sums $64,961.43 plus accrued interest and $115,590.77 plus accrued interest.

None of these matters are subject of judgments. The Westpac New Zealand Limited debt is the subject of a summary judgment application which has a special fixture for hearing on Friday of this week, namely 4 December 2009.

[21] When dealing with the question of prejudice any delay in the making of an order of adjudication will affect the transfer of the judgment debtor's assets by virtue of s 101 of the Insolvency Act 2006. In addition, there will also be difficulties of proof where there is a delay in determining an adjudication application, in determining the irregular transaction regime which is referred to in Part 3, Subpart 7 of the Insolvency Act 2006.

[22] The judgment debtor's disclosure of his interest in property was less than satisfactory. That matter was investigated by the judgment creditor's solicitors and is the subject of an affidavit from a legal executive employed by that firm. The searches disclose that the judgment debtor has a ½-share in a vacant section at 77-79 Chartwell Drive, Crompton Downs, Wellington. In addition, he has an interest in a townhouse at 44 Waterside Crescent, Gulf Harbour, Auckland. Although Mr Pillay has asserted his interest in the two properties has positive equity, it is clear that when I consider the searches and the evidence of charges against those properties that, that position cannot be justified. The judgment debtor's position appears, on the limited material that is available to me, to be in a negative, not a positive, equity situation. If bankruptcy is delayed he is free to incur further credit and enter into transactions with any property he owns. That can only reduce the pool of assets that may still exist and be available for creditors. This case suggests to me that delay is very likely

to be prejudicial to the applicant creditor and also other creditors of the judgment debtor.

[23] On the final matter, the question of whether an adjudication order would render the appeal nugatory, one must always appreciate that that is a likely outcome of an order of adjudication because of the fact that there may not be any incentive on the Official Assignee in Bankruptcy to prosecute the appeal. It is, however, one of the factors. When I bear in mind the substantial, yet unproven by judgment, indebtedness of this judgment debtor, I reach the view that this particular matter should not be accorded any great significance in the exercise of the discretion. It would not, when one considers the overall position of this judgment debtor, affect or lead to a position where he might remain solvent.

[24] A further matter requires comment. The judgment debtor filed an affidavit by Mr Clayton Bray, who describes himself as a former general of ANZ Banking Group and PostBank Limited. There is a contest as to precisely which banking organisation he was formerly associated with. At the time of the swearing of his affidavit he confirmed that he was 71 years of age. Although he does not reveal it in his affidavit, it is apparent that he has a substantial business association with the judgment debtor. His affidavit is critical of the steps taken by the Bank in agreeing to lend.

[25] The position adopted by the judgment creditor in this case in relation to Mr Clayton Bray's affidavit can be summarised quite shortly. Mr Gordon submitted that the affidavit was largely argumentative and certainly, of itself, did not provide a factual foundation for a cause of action against the creditor Bank. The allegations that the deponent makes of this conduct on the Bank's behalf, or bad judgment perhaps, were matters that did concern me. The affidavit is an attempt to influence the Court on the merits of the appeal. It does not, however persuade me that this case justifies an order halting the proceeding where:

a) There has been no bona fide attempt to prosecute the appeal;

b) No security for the substantial debts outstanding of any kind is offered in the short term; and

c) There is a substantial indebtedness owed to other creditors, admittedly still to be proved by judgment.

I conclude that I am not justified in exercising the discretion to grant an order halting the proceeding.

[26] When the fixture was made for this proceeding I recorded in the minute issued to the parties that:

> The parties must be ready to argue, in the event that the application to halt is refused, the application for an adjudication order on 2 December 2009.

[27] Counsel were given the opportunity to address accordingly. Mr Gordon presented a certificate confirming non-payment of the debt.

[28] The jurisdictional requirements which must be met before an order of adjudication is made are contained in ss 13 and 36 of the Insolvency Act 2006. Section 13 provides:

> **13 When creditor may apply for debtor's adjudication**
>
> A creditor may apply for a debtor to be adjudicated bankrupt if—
>
> (a) the debtor owes the creditor $1,000 or more or, if 2 or more creditors join in the application, the debtor owes a total of $1,000 or more to those creditors between them; and
>
> (b) the debtor has committed an act of bankruptcy within the period of 3 months before the filing of the application; and
>
> (c) the debt is a certain amount; and
>
> (d) the debt is payable either immediately or at a date in the future that is certain

Section 36 provides:

> **36. Court may adjudicate debtor bankrupt**
>
> The Court may, at its discretion, adjudicate the debtor bankrupt if the creditor has established the requirements set out in section 13.

[29] The jurisdictional requirements are met in this case.

[30] I must now consider s 37 of the Insolvency Act 2006. Section 37 provides:

> **37. Court may refuse adjudication**
>
> The Court may, at its discretion, refuse to adjudicate the debtor bankrupt if—
>
> (a) the applicant creditor has not established the requirements set out in section 13; or
>
> (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.

[31] In *Eide v Colonial Mutual Life Assurance Society Limited* [1998] 3 NZLR 632 at 635, a judgment confirmed by the Court of Appeal at [1998] 3 NZLR 631, I summarised the important matters which are taken into account in the exercise of the discretion under the then s 26 of the Insolvency Act 1967, which is now s 37 of the Insolvency Act 2006. When I review those matters I can find no basis for exercising a discretion to refuse to adjudicate the judgment debtor in this case.

Orders

[32] These reasons confirm the order that I made at 11:25 am on 2 December 2009:

a) Refusing the judgment debtor's application to halt an application for an adjudication order; and

b) Adjudicating Sataya Nandan Pillay a bankrupt.

Costs

[33] Counsel were agreed that this was a Category 2 case and that Band B for the steps undertaken were appropriate. All creditors are entitled to costs based on

Category 2 Band B in respect of the documents which they have filed in respect of this proceeding. The creditors for whom Mr Gordan and Ms Blythe appeared are entitled to one allowance for appearances based on Category 2 Band B. Likewise, the creditors for whom Ms Gellert appeared are entitled to one allowance based on Category 2 Band B for the appearances. In addition, the creditors are entitled to disbursements as fixed by the Registrar.

_____

JA Faire
Associate Judge