IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2005-404-002693

IN THE MATTER OF	the Insolvency Act 1967
BETWEEN	ANDREW NICHOLAS HOLDGATE Applicant
AND	BLOCASSA LIMITED First Respondent
AND	THE OFFICIAL ASSIGNEE Second Respondent

Hearing: 13 November 2009

Counsel: P L Rice for applicant
G S Caro for second respondent

Judgment: 8 December 2009 at 4:00pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 8 December 2009 at 4:00pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Hornabrook MacDonald Lawyers, PO Box 91845, Auckland 1142 for applicant
Office Solicitor, Ministry of Economic Development, Private Bag 92061Auckland 1142 for Official Assignee

Introduction

[1] Mr Andrew Holdgate has applied for annulment of an order adjudicating him bankrupt. The grounds for his application are that his debts have been fully paid. Although Mr Holdgate has been discharged from bankruptcy since the application was filed, the application still has significance for him in two respects. The first is that there is still an issue over entitlement to a surplus in the bankrupt estate, which depends on whether his unsecured creditors are entitled to be paid interest on their debts since the date of adjudication. Secondly, the Official Assignee decided not to pursue a cause of action against a third party but did not abandon or release that claim and it will revest automatically in Mr Holdgate upon annulment.

[2] The Official Assignee confirms that all proved debts have been paid but opposes the application on the grounds that the Court ought not to exercise its discretion to grant annulment unless creditors are first paid interest on proved debts. Mr Holdgate contends that it would be unjust, and therefore an inappropriate exercise of the Court's discretion, to require payment of interest as a condition of annulment in the circumstances of the case.

[3] This is the second time that the application has been before the Court. It was first heard in December 2007, but could not be determined at that time because there was an unresolved issue in respect of the debts of four creditors. As a consequence it could not be said at that time whether or not Mr Holdgates's debts had been paid or satisfied. In an interim judgment given on 13 February 2008 I found that the post adjudication interest did not, as a matter of law, form part of the debts which had to be paid or satisfied before an order for annulment could be made (the threshold requirements for an order) and then adjourned the application to allow the issue over the status of the debts to be determined. That has now occurred.

[4] The application was initially opposed also by the first respondent (the creditor on whose application Mr Holdgate was adjudicated bankrupt) and four creditors whose proofs of debt were being challenged by Mr Holdgate. These

creditors, who have been paid their proved debts, now abide by the decision of the Court.

[5] The issue before the Court is whether or not to exercise its discretion under s 119(1)(b) of the Insolvency Act 1967 (the Act). Before considering the various factors bearing upon that discretion, it is necessary to set out the history of this matter.

Relevant history

[6] Mr Holdgate was adjudicated bankrupt on 7 December 2005. The application for adjudication was based on his failure to comply with a bankruptcy notice requiring payment of a judgment entered in this Court on 13 April 2005.

[7] It was the third time that Mr Holdgate had been adjudicated bankrupt. He obtained an annulment of the first bankruptcy (in 1991). He was adjudicated for the second time in June 1997 and not discharged until June 2004.

[8] On 20 December 2005 Mr Holdgate applied for an order under s 119(1)(a) of the Act for an order annulling the adjudication on the grounds that the order ought not to have been made. That application was heard on 25 May 2006. At the hearing Mr Holdgate advanced his application on the sole ground that he was solvent. Associate Judge Doogue declined the application, finding that Mr Holdgate had failed to prove that he was solvent. He also said that he would not have been prepared to exercise his discretion to make an order of annulment on the facts before him.

[9] Mr Holdgate appealed the dismissal of his application. The appeal was heard by the Court of Appeal on 7 February 2007, and dismissed in a reserved judgment delivered on 17 April 2007.

[10] Subsequent to the Court of Appeal's decision, the Official Assignee advised Mr Holdgate (on 15 May 2007 and 1 June 2007) of the proofs of debt that had been admitted in the bankrupt estate. On 13 June 2007 Mr Holdgate filed an appeal in this

Court against the Official Assignee's decision in respect of the acceptance of proofs of four creditors.

[11] On 13 September 2007 Mr Holdgate filed the application for annulment that is now before the Court, this time under s 119(1)(b) of the Act (on the ground that his debts were fully paid or satisfied). He contended that the debts would be fully paid upon resolution of his appeals against the Official Assignee's decisions on the four creditors, either entirely from funds collected in the bankrupt estate or with the use of funds to be lodged with the Official Assignee by a third party to cover any shortfall in the bankrupt estate.

[12] The Official Assignee, the petitioning creditor and the four creditors whose proofs of debt were under appeal, all opposed the application for annulment. They said that it should not be determined ahead of the appeals (which would determine whether or not all debts had been fully paid or satisfied), and also contended that the Court should not exercise its discretion to annul in the circumstances of the case.

[13] The application was heard on 3 December 2007. I issued my interim judgment on 13 February 2008, adjourning the application (in respect of the exercise of discretion) until the appeals had been determined.

[14] Mr Holdgate's appeal in this Court against the Official Assignee's acceptance of the disputed proofs of debt was heard on 5 May 2008. The appeal in respect of one of the creditors was abandoned just before the hearing. In a reserved decision delivered on 4 July 2008, Courtney J found that the debt claimed by one of the remaining three creditors (SB Properties Limited) should not have been admitted, but that the debts of the other two creditors were properly admitted. SB Properties Limited appealed that decision to the Court of Appeal.

[15] The costs of Mr Holdgate's appeal against the Official Assignee's decisions were determined in a reserved decision delivered on 19 December 2008. On 5 February 2009 the Official Assignee made an interim distribution to creditors (excluding SB Properties Limited) of 70 cents in the dollar.

[16] The Court of Appeal dismissed SB Properties Limited's appeal on 24 July 2009. Consequent upon that decision, the Official Assignee formally rejected SB Properties Limited's proof of debt (both the initial proof of debt and a subsequent one lodged in April 2008) on 28 July 2009. On 11 August 2009 the Official Assignee made a further distribution to all creditors (now excluding SB Properties Limited) to bring the total distribution up to 100 cents in the dollar.

[17] As a consequence of Courtney J's decision (and the size of the disallowed claim by SP Properties Limited) it became apparent that there was a significant surplus ($121,613.43) in the bankrupt's estate. The Official Assignee took the position that as there were sufficient funds in the estate, post adjudication interest totalling $95,646.83 should be paid pursuant to s 104(1)(h) of the Act. As Mr Holdgate contested the matter, the Official Assignee sought a resumption of the hearing of his application for annulment to address the point.

The central issue

[18] The application is brought under s 119(1)(b) of the Insolvency Act 1967 (the Act). Although that Act has been repealed generally by the Insolvency Act 2006, it continues to apply to this application under the transitional provisions of s 444 of the Insolvency Act 2006.

[19] The issue at the heart of this application is whether the Court can direct payment of post adjudication interest as part of the exercise of its discretion to annul an order for adjudication in a solvent estate. Although the application is to be determined under s 119(1)(b) of the Act the issue is of wider relevance, notwithstanding the repeal of the Act and s 119, as s 309 of the Insolvency Act 2006 is essentially in the same terms.

[20] Section 119(1)(b) reads:

> **119 When Court may annul adjudication**
>
> (1) In any of the following cases the Court may by order, on the application of the Assignee or any person interested, annul the adjudication—

...

(b) Where the Court is satisfied that the debts of the bankrupt have been fully paid or satisfied ....

[21] Counsel were agreed that the section involves a two stage process. First, the Court has to be satisfied that the bankrupt's debts have been "fully paid or satisfied" (being a threshold requirement). Secondly, the Court has to decide whether it is appropriate to exercise its discretion to make the order, in the circumstances of the case.

[22] It was common ground that Mr Holdgate has satisfied the threshold requirement by paying the debts accepted by the Official Assignee as due as at the date of adjudication. It is also common ground that there is sufficient money left in the bankrupt estate to pay interest in accordance with s 104(1)(h) and (i) (although the latter is not relevant in this case) ahead of any payment to Mr Holdgate under s 104(1)(j) of the Act. Mr Holdgate and the Official Assignee part company, however, on whether it is open to the Court to require payment of post adjudication interest as a condition of exercise of its discretion, and whether it is appropriate to do so in this case.

Opposing arguments

[23] Counsel for Mr Holdgate submitted that:

a) it is wrong in principle to require payment of interest given that the Act does not require it as a pre-condition and the threshold requirement (the debts being fully paid) had been met;

b) English authorities relied on by the Official Assignee can be distinguished and should not be followed;

c) the priorities for distribution established under s 104(1) of the Act should be limited to insolvent estates by analogy to the reasoning in a company liquidation (*Re Stewart Timber & Hardware (Whangarei) Limited (in liquidation)* (1991) 5 NZCLC 67,137);

d) even if the Court has a discretion to direct payment of statutory interest, it would be unjust to require payment in this case as the creditors had been kept out of their money by matters that were outside of Mr Holdgate's control (primarily a wrong decision by the Official Assignee in accepting SB Properties Limited's proof of debt and the ensuing appeal by SB Properties Limited); and

e) it has not been the Official Assignee's practice to seek post adjudication interest and the Official Assignee was not acting even-handily in pursuing a claim in this case (he had changed his position since the earlier hearing).

[24] Counsel for the Official Assignee submitted that:

a) the Court has an unfettered discretion whether or not to grant an annulment;

b) it would be consistent with the statutory purpose and the scheme of distribution under s 104(1) to exercise the discretion to require statutory interest to be paid to creditors in a solvent estate before the surplus was released to the bankrupt (relying on recent English authority under the comparable provisions of the Insolvency Act 1986 (UK) as the point does not appear to have been considered previously in New Zealand);

c) statutory interest would be payable if the estate was distributed in the ordinary course (without the application for annulment);

d) it was Parliament's intention (expressed in the priorities for distribution of the estate in s 104(1) of the Act) that statutory interest should be paid to creditors in a solvent estate;

e) if interest is not ordered these priorities would be circumvented, in practice, by an application for annulment based on payment of the proved debts only;

f) justice required that creditors receive statutory interest on annulment of a solvent estate (they have been prevented from enforcing their claims since date of adjudication); and

g) there is no reason to deny creditors their interest in the circumstances of this case.

The extent of the Court's discretion

[25] On its face the Court's discretion under s 119(1)(b) of the Act appears to be unfettered (although it must of course be exercised consistently with the purposes of the Act). It is to be exercised in all the circumstances of the case. This is the approach taken in the English authorities under the comparable section s 282(1)(b) of the Insolvency Act 1986 (UK) to which counsel referred: *Harper v Buchler* [2004] BPIR 724; *Harper v Buchler (No 2)* [2005] BPIR 577, *Wilcock v Duckworth* [2005] BPIR 682; and *Halabi v London Borough of Camden* [2008] BPIR 370.

[26] Counsel for Mr Holdgate submitted, however, that it was inappropriate to exercise the discretion to require payment of interest where there was otherwise no legal entitlement. He submitted that where debts have been fully paid the discretion should be limited, and annulment should be refused only in the rare cases where some good reason makes annulment inappropriate. He submitted that Parliament could have, but had not, expressly required payment of interest as a condition of annulment. He also relied on commentary to *Brookers Insolvency Law* at para IA104.06(7) where the authors expressed the view that s 104(1)(h) did not confer a right to interest on a creditor not otherwise entitled (citing *Re Stewart Timber & Hardware (Whangarei) Limited (in liquidation)*).

[27] This application arose at a time when the estate appeared to be insolvent, and the balance of creditors' debts was to be paid from third party funds. The rejection

of the SB Properties Limited's claim resulted in the estate being solvent. If the application is not granted, the estate will be distributed in accordance with s 104 of the Act. Parliament's intention, as expressed in that section, is clearly that creditors have priority over the bankrupt both in respect of the proved debt in respect of interest on the debt, post adjudication.

[28] I do not accept the argument of counsel for Mr Holdgate that the fact that Parliament did not expressly provide for payment of interest as a pre-condition to an order for annulment should be taken to be an implied limitation on the Court's otherwise unfettered discretion. There may be circumstances where the Court would consider it unjust to require interest to be paid (the English decision of *Wilcock v Duckworth* would fall into that category). The only limitation on the discretion is that it must be exercised in accordance with the principles underlying the Act. That is an aspect of the exercise of the discretion rather than a pre-requisite to the exercise of the discretion.

[29] Although the English authorities to which I was referred are fact specific, they all proceeded on the basis that the Court could take into account whether interest had been paid when exercising its discretion in a solvent estate. A brief review of those case offers assistance to the approach which this Court will take.

[30] *Harper v Buchler* was a decision of a Registrar of the Chancery Division of the High Court (sitting in its bankruptcy jurisdiction). Mr Harper (a bankrupt) intended to apply for annulment after paying off his debts by use of third party funds. His estate was solvent but illiquid. He applied for directions as to whether he had to show payment of statutory interest as well as discharge of the debts as at date of adjudication. The Registrar found (as have I in my interim judgement) that statutory interest was not part of the bankruptcy debt for the purpose of an application for annulment. He stated some general principles to be applied in determining the application (which had still to be made). In summary they were:

a) The Court has a completely unfettered discretion in deciding whether or not to grant an application for annulment;

b) The Court may have regard to all the circumstances of the matter in the exercise of its discretion, and is not limited to analysis of the applicant's conduct;

c) The Court could take into account the time between the bankruptcy order and the application for annulment (the Court may well disregard the statutory interest if an application was made promptly, but would likely have regard to it if the application was made "some years later");

d) The source of funds being used to discharge the debts would be considered, as would the sufficiency of the estate to discharge the bankruptcy debts and the statutory interest that would ordinarily accrue in the bankruptcy.

[31] In *Harper v Buchler (No 2)* a different Registrar considered Mr Harper's application. The Registrar adopted the general principles ennunicated in the earlier decision. The Registrar declined the application as the third party funding was going to be insufficient to repay the bankruptcy debts, let alone any statutory interest. He took into account that there were sufficient funds within the estate to pay both (as a consequence of substantial increases in property values over a 10 year period). Factors relevant to the decision were the time the creditors had had to wait to receive payment; the prospect that Mr Harper would benefit from the significant increase in the value of the (unrealised) estate; Mr Harper's conduct (he had failed to cooperate and failed to complete tax returns); and that there was no need to introduce third party funds because the assets, if realised, would be sufficient to pay the bankruptcy debts, costs and statutory interest.

[32] In *Wilcock v Duckworth*, the bankrupt (Mr Wilcock) also proposed paying his debts with use of third party funds. A major asset in the bankrupt's estate (his house) had not been realised at the start of the bankruptcy (there was no equity in it at that point). Over a 10 year period (through most of which no steps had been taken by the trustee in bankruptcy) the house had increased sufficiently in value to pay the bankruptcy debts and costs. The issue before the Court was whether statutory

interest should be paid, and if so, for what period. The Registrar took the view that statutory interest should be paid but only for the period of active administration (there had been a substantial period when the estate was merely "parked" with a statutory agency separate to the trustee in bankruptcy, the Protracted Realisations Unit of the Insolvency Service). The Registrar stated (at para [8]):

> ... the Bankruptcy Court will normally require statutory interest to be paid by a debtor where he or she seeks an annulment in circumstances where there are sufficient assets in the bankruptcy estate to pay all liabilities, costs, fees and expenses.

The Registrar also stated at para [15] that debtors, (referring to bankrupts) should only be required to pay interest for the period of active administration, but emphasised that this was a principle to be applied only where the Protracted Realisations Unit was involved. The Registrar recognised that in other cases it was relevant to take into account the length of time that the bankruptcy creditors had been kept out of their money. Mr Wilcock's application was adjourned to allow him to arrange payment of statutory interest for the period of the act of administration.

[33] In *Halabi v London Borough of Camden* Ms Halabi brought an application to annul her bankruptcy order within approximately 6 months of her adjudication. Her bankrupt estate was solvent but illiquid. She had not appreciated before she was made bankrupt that she had sufficient equity in her property to borrow sufficient to discharge her debt. The Judge made an order for annulment on the basis that it was not to take effect until the Official Receiver notified the Court that the bankruptcy debt, (and statutory interest on it) was paid. The following passages from the judgment are relevant to the present application:

> 21 In this case I consider this is a proper case in which to exercise the discretion to annul the bankruptcy. Of course, annulment is not a matter of right for a bankrupt and it is a matter of discretion. Some of the Registrars have described it as a privilege. That probably is not the best language to use. It is perhaps best described as an indulgence which the court grants to a bankrupt in these circumstances. The factors that the court will take into account in exercising its discretion must embrace whether there is a public interest in allowing annulment. The mere fact that the creditors are content that annulment should take place is never in itself sufficient. If there are cases where there has been gross mismanagement or misconduct, it may be an inappropriate case to grant annulment. The reason for this is that the message which is sent out by the court in annulling a bankruptcy is that there

> is nothing wrong in the bankrupt's conduct. The court must always be mindful of that.
>
> ....
>
> 23 One issue which arose in argument was whether statutory interest should be included in the debt which was to be paid. The amount of statutory interest in this case is some £831.06.
>
> 24 The view which I take in relation to statutory interest (and which is the normal practice of the bankruptcy court) is that it should be paid by a debtor seeking annulment where there are sufficient assets in the bankruptcy estate to pay all liabilities, costs, fees and expenses. In this case there are more than adequate funds, since the equity in the property amount to some £70,000 and it is therefore right in principle that statutory interest should be paid.

[34] Counsel for Mr Holdgate argued that these English authorities could be distinguished and should not be followed in this case. He said that the language of the statutes differed and the UK's statutory regime included an entity that was not present in the New Zealand statute (the Protracted Realisations Unit). I do not consider that they should be distinguished. There is no relevant difference in the comparable section dealing with annulment (s 282(1)(b) of the UK Act is couched in comparable terms to s 119(1)(b) with regards to discretion). I do not regard the creation of the Protracted Realisations Unit as a reason to take a different approach on the scope of discretion.

[35] Counsel also said that the factual circumstances were quite different. He pointed out that in the *Harper* cases the Court accepted that interest could be disregarded if the application was made very promptly, and had regard to the fact that the passage of time had led to substantial increases in property values (in other words, there was an 'external' windfall factor that is not present in this case). He noted that in *Wilcoc*k interest was disallowed for the period when the property had "been parked" with the Protracted Realisations Unit. As to *Halabi*, he noted that although the Court had directed that interest should be paid, there had been only a very brief period of administration and a comparatively small amount of interest. These are all matters going to the exercise of a discretion in the particular case. They are not limitations on the discretion.

[36] Similarly, I do not accept counsel's arguments that it would be wrong in principle to link payment of interest to the exercise of discretion where there is no contractual entitlement to interest or judgment directing payment of interest. This point is answered by Parliament's intention, as expressed in s 104 of the Act, that where an estate contains sufficient funds interest is to be paid at the statutory rate.

[37] Counsel sought to persuade me that the section 104 priorities should apply only to an insolvent estate, by analogy to *Re Stewart*. In that case the Court had to consider whether creditors had a right to interest where companies had become solvent in the course of liquidation. The Court found that there was no automatic right to interest in the absence of agreement or judgment, and that it did not have a discretion to make an order in favour of the creditors. However, that latter finding was on the basis that the statutory entitlement to interest in a liquidation arose out of the incorporation of s 104 of the Insolvency Act 1967, and the relevant section of the Companies Act incorporated s 104 only "in the winding up of an insolvent company". The Court regarded this as an anomaly but one that was for the legislature rather than for the Court to address. In other words, the case can be distinguished as arising out of the particular language of the Companies Act. It is not a basis for restricting the discretion in the annulment of a bankruptcy.

[38] In summary, I do not accept that the Court's discretion should be limited in the manner suggested for Mr Holdgate. It is to be exercised having regard to all the circumstances of the case, including the public interest, (under which matters of conduct can be taken into account) and the nature and sufficiency of the estate (including what creditors might expect to receive out of the estate were it not for the application for annulment).

[39] Turning now to the exercise of my discretion, counsel for Mr Holdgate advanced several matters which he contended made it unjust to require payment of interest. In my view none of them prevails in this case, in light of the wider statutory purpose of preferring the creditor's interest to those of the bankrupt for the reasons I now give.

[40] First, the Court must keep in mind the need to act justly in relation to the creditors, who have been denied the right to take steps to recover their debts since December 2005. The statutory regime for payment of interest (s 104(h) and (i)) intended to compensate them for that, where the assets in the estate permitted. Counsel for Mr Holdgate argued that there was also a statutory purpose of closing off the estate, and getting the bankrupt "back on his feet". That is so, but it does not "trump" the objective of doing justice to creditors. The Act makes it clear that creditors take no priority to the bankrupt.

[41] I have already dealt with his submission that a requirement for interest is inappropriate where there is no contractual obligation or entitlement under a judgment: that is answered by the provision in s 104 for statutory interest.

[42] Counsel argued that the payment of debts had been delayed by factors outside Mr Holdgate's control. He submitted that the delay in payment was attributable to the wrong decision of the Official Assignee to admit SB Properties Limited's debt, and that it would be unjust to impose interest on top of very substantial costs incurred in putting that error right. I am not persuaded either that this argument is tenable in principle or that it is supported by the facts:

a) The argument assumes that Mr Holdgate has an entitlement to receive funds from the estate. He has no such entitlement until either the order for adjudication is annulled, or a surplus is established pursuant to s 104 of the Act.

b) Any delay is attributable to Mr Holdgate himself or, latterly, to SB Properties Limited. There is no reason to attribute it to the Official Assignee and thereby to creditors. For the first year and half of his bankruptcy, Mr Holdgate pursued an unsuccessful application to annul his adjudication under s 119(1)(a). Within two months of the Court of Appeal dismissing his appeal on that application, Mr Holdgate challenged the Official Assignee's admissions of proofs of debt from four creditors (not just SB Properties Limited). The size of the estate could not be determined until those appeals were

determined. Only the appeal in respect of SB Properties Limited succeeded. The Official Assignee made an interim distribution to creditors (other than SB Properties Limited) promptly after the costs of the Mr Holdgate's appeal were determined (another essential aspect of determining the estate). The final distribution was made within three weeks of the Court of Appeal dismissing SB Properties Limited's appeal.

c) Mr Holdgate has contributed to the course and costs of administration by a lack of cooperation with the Official Assignee generally. He has failed to provide a statement of affairs or a residential address, he has not responded to queries regarding proofs of debt and he caveated properties that had vested in the Official Assignee when he had no standing (as a bankrupt) to do so. I have already identified these aspects of lack of cooperation in my interim judgment. It is a pattern which goes back over previous bankruptcies.

d) Mr Holdgate himself has been responsible for a substantial part of the Official Assignee's legal costs by reason of his first, unsuccessful application for annulment (taken to the Court of Appeal), his unsuccessful application to maintain a caveat against properties in the estate, and a combination of his lack of cooperation with the Official Assignee (which is likely to have contributed to the Official Assignee's decision to accept the four disputed proofs of debt) and his decision to bring the present application prematurely. Mr Holdgate attempted to justify all of these steps on the liquidators' decision to admit the proof of debt from SB Properties Limited. Whilst I have no doubt that the disputed claim by SB Properties Limited was a trigger for most of his actions, I do not accept that this was all out of his control. He had the ability to cooperate, and full cooperation may well have avoided some of these steps and, if not, would surely have truncated them. His counsel argued that at least he should not be visited with interest after his appeals were determined (for the period that SB Properties Limited was pursuing its appeal to the Court of

Appeal). However, that is not a matter to be laid at the feet of the Official Assignee or the other creditors.

[43] Finally, I take into account that although the amount is not before the Court, interest has been earned on the proceeds of realisations of the estate. As I have already said, Mr Holdgate must take responsibility for the delay in realisation (as a consequence of his misconceived caveat application).

[44] The third major aspect of alleged unjustness raised on Mr Holdgate's behalf was a perceived lack of even handedness in seeking interest from Mr Holdgate. Counsel contended that it had not been the Official Assignee's practice to seek payment of interest on an annulment. He relied on the fact that this was the first time the issues has been the subject of an express claim before the Court, and also on figures obtained from the Official Assignee under the Official Information Act.

[45] I find no evidence of lack of even handedness. The fact that this appears to be the first judgment expressly dealing with the point merely indicates that the matter has gone unchallenged in the past. Further, the statistics of past cases do not support the submission. The Official Assignee has only been able to obtain statistics on applications for annulment since 1 July 2001. In the period since then there have been 94 annulments under s 119(1)(b). Of those it is known that post-adjudication interest was paid in 45 cases and not in 16 cases. In the remaining 33 cases, the payments to creditors were not made through the Official Assignee's trust account and it is therefore not known whether or not post adjudication interest was paid. I accept the submission of counsel for the Official Assignee that it is a regular practice to seek payment of interest in solvent estates.

[46] This leaves three further matter to address briefly:

a) Counsel for Mr Holdgate submitted that his client's lack of cooperation should not be a significant factor, as that is a matter being dealt with by separate charges currently pending before the Court. I disagree. Not only is it part of the public interest consideration, it is

of specific relevance to the history of this bankruptcy as I have already identified.

b) The next point is that the creditors are not opposing annulment. I accept that is so, but not that it is a critical factor. I have no doubt that the creditors do not wish to incur any further costs in the matter, and for that reason are prepared to abide by the decision of the Court.

c) The last matter is that the Official Assignee is said to have changed his position since the previous hearing. I do not accept that there is anything significant in this point. The Official Assignee acknowledges that he did not advance his present argument in the hearing in December 2007. However, he was saying at that time that it was too early for the Court to exercise its discretion. As soon as Mr Holdgate's appeals were determined, and it became known that it was likely that there would be a surplus in the estate (subject to SB Properties Limited's appeal) the Official Assignee advised Mr Holdgate that he would be seeking post-adjudication interest (relying, inter alia, on the English authorities). Indeed, a similar argument could be run against Mr Holdgate in that at the previous hearing his counsel argued that the provision for interest to be paid applied only if sufficient money was realised from the bankrupt's property (paragraph [14] of my interim judgment of 13 February 2008).

[47] In conclusion, payment of post-adjudication interest is a factor to be taken into account in the exercise of the Court's discretion to annul an order for adjudication in a solvent estate. In circumstances where interest would be payable in the distribution of an estate in the ordinary course it should be for the applicant for annulment to show some compelling reason to grant an annulment without first requiring interest to be paid. In the present case Mr Holdgate seeks the order after he has been discharged but before the estate has been distributed in the ordinary course. He has not put forward any matters which persuade me to grant an order in circumstances which would cause a departure from that ordinary course. I am not prepared to exercise my discretion so as to allow a departure from that ordinary

course. However, rather than simply dismiss the application I propose adjourning the application one further time to allow Mr Holdgate the opportunity to effect that payment (either from the funds currently held by the Official Assignee and by arrangement with him, or independently).

Decision

[48] The application for annulment is adjourned to the Miscellaneous Insolvency List at 11:45am on 9 February 2010. The application will be granted that day if creditors in the bankrupt estate have been paid post-adjudication interest at the statutory rate. The application will be dismissed if that has not occurred.

[49] In my interim judgment of 13 February 2008 I reserved costs for further consideration once the outcome of Mr Holdgate's appeals were known but added that it appeared to be a case where costs should lie where they fall. Although the Official Assignee has succeed on this part of the application, there is a public interest element in the case which gives added support for costs lying where they fall overall. As I did not hear counsel on the issue of costs, however, I reserve leave for any party seeking costs to file a memorandum within 10 working days. Any memorandum in response is to be filed within a further 5 working days. I will determine costs on the basis of memoranda filed. In the event that there is no memorandum filed within 10 working days, there will be no orders as to costs.

_____

Associate Judge Abbott