

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

**CIV 2008-404-004263**

IN THE MATTER OF     the Insolvency Act 2006

AND

IN THE MATTER OF     the bankruptcy of KJ Child

BETWEEN               KENNETH JOHN CHILD  
                                  A Debtor

AND                       DINERS CLUB (NZ) LIMITED  
                                  A Creditor

Hearing:           10 December 2009

Counsel:           PC Ganda for creditor  
                          NS Gedye for Black Mantis Limited, a creditor

Appearance:   KJ Child, debtor in person

Judgment:       10 December 2009 at 12 noon

Reasons:         11 December 2009

---

**REASONS FOR JUDGMENT OF ASSOCIATE JUDGE FAIRE  
[on application]**

---

Solicitors:       Ganda and Associates, PO Box 27 227, Auckland for creditor

And To:           KJ Child, 183 Old Railway Road, Kumeu

[1] At 12 noon on 10 December 2009 I made an order adjudicating Kenneth John Child a bankrupt. I ordered that his estate pay costs based on Category 2 Band B for the judgment creditor applicant and for the supporting creditor, Black Mantis Limited, together with disbursements as fixed by the Registrar. I announced that my written reasons for the orders made would be released through the Registry. These reasons for judgment are issued accordingly.

[2] The judgment creditor applied for an order adjudicating Kenneth John Child a bankrupt.

[3] This proceeding has a considerable history to it.

[4] The creditor's application for an adjudication order was first called on 11 December 2008. It was adjourned at that time for settlement to 10 am on 29 January 2009. The debtor appeared for himself at that first hearing of the application for an adjudication order.

[5] On 29 January 2009 the debtor was represented by counsel, Mr GW Halse. At that time the application was further adjourned to 10 am on 19 February 2009 subject to compliance with the following conditions:

- a) That the Child Family Trust in respect of which counsel and Mr Child are trustees shall issue proceedings to recover a debt owed to it by Black Mantis Limited and Eurosafe Technologies NZ Limited by 5 February 2009. Proceedings must include an application for summary judgment in each case; and
- b) Mr Child shall serve a copy of the above proceedings and an application and supporting affidavits seeking orders halting this application by 12 February 2009. The application must contain the trustees' confirmation that if successful in its proceedings the proceeds will be advanced to Mr Child to satisfy the debt in this proceeding.

[6] On 19 February 2009 I made an order on the judgment debtor's application seeking an order halting the creditor's application for an adjudication order.

[7] By memorandum dated 20 November 2009 the judgment creditor's solicitor sought an order that the creditor's application be listed before the Court for the purpose of determining whether the application to halt the creditor's application for adjudication should continue.

[8] I issued a minute of 20 November 2009 as follows:

1. Counsel for the creditor has filed a memorandum indicating that the reasons for the order made on 19 February 2009 halting the adjudication application has now changed.
2. This proceeding shall be listed in the miscellaneous bankruptcy list at 11:45 am on 10 December 2009. Its purpose shall be to determine whether the order made on 19 February 2009 should continue or whether some other appropriate direction should be made in relation to the matter.
3. A copy of this minute must be sent to counsel for the creditor and counsel for the debtor.

[9] Counsel and Mr Child confirmed to me that the proceedings contemplated in the minute of 19 February 2009 have, in fact, been concluded. The specific reasons advanced for halting the adjudication proceeding had therefore passed and certainly provide no continuing basis for a continuation of the order halting this proceeding.

[10] Mr Child advised me that he was in the course of preparing yet further proceedings. There is no sworn evidence about this. When I questioned him he advised that the actual benefactor was likely to be a company in respect of which he holds no shares, although he does hold office as a director. He advised me that he had no financial ability to employ counsel to assist him with such proceedings.

[11] The judgment creditor seeks to proceed. The judgment creditor is not directly involved in the formal proceedings which Mr Child advanced as the basis for the order halting the proceedings. Nor is it involved in the proceeding which Mr Child is currently contemplating. Mr Child, however, nevertheless sought to persuade the judgment creditor that it might be in its interest to delay proceeding

against him in the hope that his estate might be improved by the successful conclusion to the proceeding he was contemplating.

[12] The creditor's application is based upon a judgment obtained in the District Court at Waitakere on 9 June 2008. It further relies on the non-compliance with a bankruptcy notice which was served on Mr Child on 10 September 2008. The creditor remains unpaid.

[13] 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.

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

[15] 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.

[16] In *Eide v Colonial Mutual Life Assurance Society* [1998] 3 NZLR 632 at 635 I summarised the general principles involved in the exercise of the discretion under s 26 of the Insolvency Act 1967 (which is now s 37 of the Insolvency Act 2006) and noted that the important matters were the following:

- 1) “A creditor who establishes the jurisdictional facts set out in s 23 is not automatically entitled to an order. On the other hand, it is for an opposing debtor to show why an order should not be made.” *McHardy v Wilkins & Davies Marinas Ltd* (Court of Appeal, Wellington, CA 54/93, 7 April 1993) at p 3.
- 2) “. . . in the exercise of the discretion under s 26 it is proper for the Court to consider not only the interests of those directly concerned – the petitioner, other creditors, the debtor – but also the wider public interest.” *McHardy v Wilkins & Davies Marinas Ltd* (supra) at p 3.
- 3) In determining whether an order should be made, the wider public interest must be taken into account to determine whether adjudication is “conducive or detrimental to commercial morality and the interests of the general public.” *Re Nisbett, ex parte Vala* [1934] GLR 553 at p 556.
- 4) “. . . on a bankruptcy petition the Court must have regard to public interest in a way which transcends the interest of the immediate parties to the proceeding. . . . The public interest in exposing and controlling an insolvent debtor is one which exists quite independently of the separate question of debt collection by his immediate creditors.” *Re Fidow* [1989] 2 NZLR 431 at p 444.
- 5) Absence of assets is a factor but:
  - “. . . even the undoubted absence of assets will not necessarily preclude an order, for the circumstances may be such that the debtor ought in the public interest to be visited with the disqualifications that go with bankruptcy.” *McHardy v Wilkins & Davies Marinas Ltd* (supra) at p 3.
- 6) Another matter:
  - “. . . is the potential for further investigation. A bankruptcy makes available to creditors an array of procedures for investigating the financial circumstances of the debtor.

Those procedures are likely to prove more effective than an investigation conducted by other means.” *Re Fidow* (supra) at p 444.

7) There is a need:

“. . . for the Court to balance the various considerations relevant to the case, and to determine whether in the end the debtor has succeeded in showing that an order ought not to be made”. *McHardy v Wilkins & Davies Marinas Ltd* (supra) at p 4.

[17] I am not satisfied that there is any justification to refuse an adjudication in this case. When I consider the matters which were reviewed in *Eide v Colonial Mutual Life Assurance Society* I find none that justify the exercise of the discretion against adjudication in this case. More particularly, if no order is made it is likely that the judgment debtor’s assets will be dissipated as he embarks on yet further litigation. If the contemplated litigation does have a sound basis, then it is more appropriate for the litigation to be advanced under the control of the Official Assignee which, of course, may happen if an order of adjudication is made. These matters led me to the conclusion that it would be wrong to refuse adjudication in this case having regard to what I was advised by Mr Child.

[18] Accordingly, these are my reasons for the order which I pronounced at 12 noon on 10 December 2009 and which are recorded in [1] of this judgment.

[19] The order for costs that I have made in this case is the standard order that is made in relation to an application filed and which leads to an order of adjudication by a judgment creditor. There are no unusual or disqualifying factors which call for any departure from that position. So far as the supporting creditor is concerned, Mr Child indicates that he does wish to be involved in litigation against that entity. Be that as it may, its position via the appearance of counsel in support of the application for an adjudication order is entirely proper and, indeed, was necessary. It is, of course, only prudent that a creditor, whether the creditor be contingent or otherwise, enter an appearance where bankruptcy proceedings are filed against a debtor so that the creditor, if necessary, can seek orders for substitution. Accordingly, I conclude that the supporting creditor is also entitled to the normal

costs which are awarded to a supporting creditor when an adjudication order is made.

---

JA Faire  
Associate Judge