IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-1165

IN THE MATTER OF	the Insolvency Act 2006
BETWEEN	MARIA DUNLOP Applicant
AND	THE OFFICIAL ASSIGNEE Respondent

Hearing: 15 December 2009

Appearances: N. Levy - Counsel for Applicant
Ms. Kelly - Counsel for Official Assignee

Judgment: 16 December 2009 at 12.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 16 December 2009 at 12.00 pm pursuant to r 11.5 of the High Court Rules.

Solicitors: Greig Gallagher & Co, Solicitors, PO Box 935, Wellington
N Levy, Barrister, PO Box 10-909, Wellington

Introduction

[1] Maria Dunlop ("the applicant") was adjudicated bankrupt on an application brought by Bunnings Limited trading as Benchmark Building Supplies ("Bunnings") as judgment creditor at the High Court at Wellington on 19 October 2009.

[2] The debt upon which the Bunnings application was brought amounted to $27,670.98 and was due from the applicant and her husband Nicholas Dunlop under a default judgment of the District Court at Porirua given on 4 June 2009.

[3] On 24 November 2009 the applicant filed an interlocutory application for annulment of this bankruptcy together with her affidavit in support also dated 24 November 2009.

[4] The ground identified in the application for annulment was simply that "the applicant should not have been adjudicated bankrupt". The applicant stated however that the application was made "in reliance upon s. 309 Insolvency Act 2006" ("the Act").

[5] The application is not opposed by any creditor of the applicant and from the initial Report of the Official Assignee under s. 309 of the Act dated 1 December 2009 and a Supplementary Report dated 11 December 2009 it is clear the Official Assignee does not object to the annulment sought provided certain conditions are satisfied.

[6] The present application is brought in reliance upon s. 309 of the Act. For the sake of completeness I set out s. 309 in its entirety. It reads:

> "**309 Court may annul adjudication**
> (1) The Court may, on the application of the Assignee or any person interested, annul the adjudication if—
> (a) the Court considers that the bankrupt should not have been adjudicated bankrupt; or
> (b) the Court is satisfied that the bankrupt's debts have been fully paid or satisfied and that the Assignee's fees and costs incurred in the bankruptcy have been paid; or
> (c) the Court considers that the liability of the bankrupt to pay his or her debts should be revived because there has been a substantial change in the bankrupt's financial circumstances since the date of adjudication; or
> (d) the Court has approved a composition under subpart 1 of Part 5.

(2) In the case of an application on one of the grounds specified in subsection (1)(a) to (c) to (1)(a) to (c) by an applicant who is not the Assignee,—
  (a) a copy of the application must be served on the Assignee in the manner and within the time that the Court directs; and
  (b) the Assignee may appear on the hearing of the application as if the Assignee were a party to the proceeding.

(3) The adjudication is annulled—
  (a) from the date of adjudication, in the case of an application on the ground specified in subsection (1)(a):
  (b) from the date of the Court's order of annulment, in the case of an application on one of the grounds specified in subsection (1)(b) to (d) to (1)(b) to (d).

(4) In the case of an application for annulment on the ground that the adjudication should not have been made because of a defect in form or procedure, the Court may, in addition to annulling the adjudication, exercise its powers under section 418 to correct the defect and order that the application for adjudication be reheard as if no adjudication had been made.

(5) If the Court annuls the adjudication on one of the grounds specified in subsection (1)(a) to (c) to (1)(a) to (c),—
  (a) the Court may, on the Assignee's application, fix an amount as reasonable remuneration for the Assignee's services and order that it be paid, in addition to any costs that may be awarded:
  (b) that amount must be paid into a Crown Bank Account:
  (c) the Assignee is not entitled to remuneration under section 406 for those services."

[7] At the outset of the hearing of this application, Ms. Levy counsel for the applicant made it clear that the application was brought on the principal ground that the applicant should not have been adjudicated bankrupt in terms of s. 309(1)(a) of the Act. It is only if that ground is not available here that Ms. Levy submitted that the alternative grounds under s. 309(1)(b) and (c) are to be considered.

S. 309(1)(a) Applicant Should Not Have Been Adjudicated Bankrupt

[8] On this first ground Ms. Levy contends that the applicant was not aware of the Bunning's debt upon which she was adjudicated bankrupt as she had not been served with the bankruptcy notice or these proceedings. The applicant says that if she had been made aware that the Bunnings debt was still outstanding she could have paid it through superannuation funds she could access in cases such as the present where hardship grounds applied. (She does acknowledge however that she was served with Bunnings original District Court proceedings which culminated in the default judgment against her).

[9] Because the applicant here maintains she was not served with either the bankruptcy notice or the proceeding itself, she contends it must follow that the present proceeding was flawed and she should not have been adjudicated bankrupt in terms of s. 309(1)(a).

[10] On this aspect, Bunnings in their initial bankruptcy proceeding have filed the following:

(a) An affidavit of service of the Bankruptcy Notice dated 7 August 2009 from Dion Graham Neill a Wellington Process Server, and

(b) An affidavit of service of these proceedings dated 3 September 2009 from Brett Gordon a Wellington Process Server.

[11] In the case of Mr. Neill's affidavit, he deposes that:

> "(1) I effected service of the Bankruptcy Notice on the judgment debtor at 32 Ngatitoa Street, Elsdon, Porirua in New Zealand, by delivering to and leaving with the said debtor."
>
> (2) I believe it was the judgment debtor that I served because:
>
> (a) the judgment debtor acknowledged that she is the judgment debtor."

[12] And, in the affidavit of Mr. Gordon relating to service of the proceeding itself, he deposes:

> "2. I served the documents on the judgment debtor at 32 Ngatitoa Street, Elsdon, Porirua in New Zealand, by delivering them personally to the judgment debtor.
>
> 3. I believe it was the judgment debtor that I served because:
>
> (a) the judgment debtor acknowledged that she is the judgment debtor."

[13] Notwithstanding what appear to be unequivocal statements from these process servers that they served the applicant personally with documents required for the bankruptcy application and that she acknowledged to each of them that she was the judgment debtor, the applicant insists in her affidavit that these documents were <u>not</u> personally served on her. She states that she was unaware that a creditor's application to have her adjudicated bankrupt had been filed and purportedly served. In this regard the applicant deposes at para. 4 of her affidavit:

> "I am aware that the Court file contains affidavits from process servers indicating personal service on me on 29 June 2009 and 26 August 2009 at my home address. I do not know who accepted these documents saying that they were me, but I repeat that I had no knowledge of the bankruptcy proceedings until advised by my husband on 28 October 2009."

[14] Despite these contentions from the applicant, there does not appear to be any other evidence before the Court on her behalf to substantiate the claim first that it was not she who was served with the Bankruptcy Notice or bankruptcy application and secondly that she had no knowledge of the bankruptcy proceedings until after the adjudication order was made.

[15] Attached to Bunnings' original application for costs on the adjudication are two tax invoices from Neill Group for service of the Bankruptcy Notice and proceedings by Mr. Neill and Mr. Gordon. The first tax invoice relating to service of the Bankruptcy Notice states that it was served on 29 June 2009 at 19:43 hours. The second tax invoice for service of the bankruptcy application states that it was served on 26 August 2009 at 17:10 hours. During the hearing of the present application, I drew these tax invoices to the notice of Ms. Levy for the applicant. I then adjourned the hearing for a short time to enable Ms. Levy to obtain instructions from the applicant who was present in Court as to whether she was able to provide any further evidence on this service aspect. In particular some evidence for example that the applicant may not have been present at her home at 32 Ngatitoa Street at the time each respective service took place or that independent evidence was available that some other person received the documents, would obviously assist the Court.

[16] After that adjournment Ms. Levy indicated to the Court however that the applicant was unable to assist other than to state that on 29 June 2009 which was a Monday at 7.43 pm she was likely to be at her home with her family and others then as she worked only during the day. So far as the second service on 26 August 2009 is concerned, Ms. Levy indicated that the applicant said that as this was a Wednesday and she worked then as well, the service time of 5.10 pm was rather close to the time she would have finished work. The applicant did go on to state, however, that her work conditions allowed her on occasions to work remotely from home so she was quite unable to advise the Court as to whether she would have been at her home at 5.10 pm on 26 August 2009.

[17] This leaves the Court in somewhat of a dilemma. Although the applicant is adamant in her affidavit that she was not personally served with the Bankruptcy Petition and Bankruptcy Application, she has not been able to provide any evidence to the Court other than her affidavit statement to this effect to counter the clear evidence of service on her provided by the process servers.

[18] In considering all of this in the light of s. 309(1)(a) of the Act, it is useful to note the comments in Brookers Insolvency Law and Practice on this provision at para. IN 309.05(1) which state in part:

> "**Where adjudication should not have been made**
>
> Despite the discretion it gives to the Court, sub-section (1)(a) should be interpreted narrowly. Generally, it will not provide grounds for interfering with a discretion exercised on a properly brought adjudication petition unless there was some defect in procedure, abuse of process, or where some material fact was not brought before the Court making the adjudication order: *Re Hunter Ex Parte CIR* [2000] 19NZTC 15,722."

[19] In the present case it is difficult to escape the conclusion that the evidence before the Court here is insufficient to establish that the applicant was not properly served with the Bankruptcy Notice and the Bankruptcy Application and did not have knowledge that the proceedings were to take place. Indeed initially Bunnings' application was called before this Court on 21 September 2009 and its counsel indicated then that the parties were negotiating to enter into some settlement arrangement. Accordingly the matter was adjourned then to a call on 19 October 2009. On that second call on 19 October 2009 counsel for Bunnings confirmed that no settlement had been reached and the adjudication order was made.

[20] Unfortunately there is no evidence before the Court as to the party or parties with whom the suggested settlement negotiations around 21 September 2009 were taking place. In any event, however, in the face of the unequivocal evidence from the process servers as to service of the Bankruptcy Notice and proceedings on the applicant, and the absence of any definitive or independent evidence from the applicant on this service issue, I find that there are no proper grounds for an order of annulment here under s. 309(1)(a). I am satisfied that in this case there has been no defect in procedure or abuse of process nor has any material fact not been brought

before the Court such that the Court can be satisfied the applicant should not have been adjudicated bankrupt on 19 October 2009. I dismiss the present application in so far as it is based upon s. 309(1)(a) of the Act. And in any event I note in passing that, at the appropriate time, the applicant was likely to be insolvent in that the value of her debts of over $55,000.00 exceeded the value of her assets even on her own estimate in her Statement of Affairs provided to the Official Assignee (at a total of $37,500.00 being $12,500.00 equity in her car and $25,000.00 superannuation) – see *Re Hunter Ex Parte CIR*.

[21] That is not an end of the matter, however. I now turn to consider the alternative grounds advanced for the applicant under s. 309(1)(b) and (c) of the Act.

Section 309(1)(b) Applicant's Debts Have Been Fully Paid or Satisfied

[22] For s. 309(1)(b) to apply the Court must be satisfied that all the applicant's debts are fully paid up or satisfied before an annulment of the adjudication can be made under this provision – *Nisbett v Wilson & Co*, High Court, Wellington, 14 July 2008, Associate Judge Gendall, CIV-2008-485-202.

[23] In the present case, the applicant's debts at this point have not been fully paid or satisfied although, as will be seen later, funds are being arranged to clear these debts.

[24] To her considerable credit, in the nearly two months since her adjudication the applicant has taken a number of steps to make financial arrangements towards clearing all these debts, debts which she states include significant amounts incurred by her husband and some of which she was not aware.

[25] Nevertheless, it is apparent that at this point all the applicant's debts have not been fully paid up or satisfied. The net result is that the essential requirements of s. 309(1)(b) are not satisfied. I dismiss this application therefore in so far as it is based upon s. 309(1)(b) of the Act.

Section 309(1)(c) Substantial Change in the Applicant's Financial Circumstances

[26] The final matter to be considered is s. 309(1)(c) of the Act. Since adjudication, it is clear from the initial report and the supplementary report of the Official Assignee filed in this proceeding that the debts of the applicant totalling $55,040.33 are now covered by funds currently held in the Official Assignee's trust account totalling $13,061.29, the applicant's Airways Superannuation Plan funds which are available to her totalling $25,156.06 and a balance of some $16,500.00 which is available through the applicant's solicitors trust account. As I understand the position these funds include loans from the applicant's family. It has also been confirmed that additional funds are available to meet the Official Assignee's costs and disbursements in this matter which as at 11 December 2009 totalled some $4,884.30.

[27] Although I am satisfied that it cannot be said here that first, the applicant was solvent throughout and secondly that the original order of adjudication should not have been made, it is clear to me that an order for annulment is nevertheless justified in the present case under s. 309(1)(c). This conclusion is supported by the Official Assignee in his reports where he indicates no objection to an annulment being granted provided the outstanding debts and Official Assignee's costs and disbursements are paid or suitable payment arrangements agreed to.

[28] I also reach this conclusion on the basis that:

(a) Since adjudication, to her credit the applicant has taken considerable steps to arrange funds to settle all debts.

(b) Sufficient monies to pay these debts and the Official Assignee's costs and disbursements are now available.

(c) There is no objection to the annulment sought from any creditor or the Official Assignee.

(d) The facts in this case, as I see it, disclose a substantial change in the financial circumstances of the applicant since the date of her adjudication. Arrangements have now been made to clear all her debts and I am satisfied in the present circumstances that there is no reason in terms of s. 309(1)(c) why the applicant's liability to pay her debts should not be revived.

[29] That said, an order is now to be made annulling the adjudication in bankruptcy of the applicant in terms of s. 309(1)(c) of the Act. This is to be on the basis outlined in the reports of the Official Assignee that the order is not to be sealed until the Court has received confirmation that the applicant's debts and the Official Assignee's costs and disbursements have been fully paid.

Result

[30] The application for annulment before the Court succeeds under s. 309(1)(c) of the Act.

[31] An order is now made annulling the adjudication in bankruptcy of the applicant Maria Dunlop made on 19 October 2009.

[32] This order is not to be sealed until the Court has received confirmation that:

(a) All known debts of the applicant have been paid or suitable payment arrangements have been agreed to; and

(b) The Official Assignee's costs and disbursements have been fully paid.

[33] Leave is reserved for any party to return to the Court for any further directions or orders that may be required including any order confirming the timing of when this annulment order is to be effective.

‘Associate Judge D.I. Gendall’