

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

CIV-2008-454-658

IN THE MATTER OF the Insolvency Act 2006

AND IN THE MATTER OF the bankruptcy of GRANT GRAHAM
FERRIER

BETWEEN DEMA INTERNATIONAL
INCORPORATED
Judgment Creditor

AND GRANT GRAHAM FERRIER
Judgment Debtor

Hearing: 26 November 2009

Appearances: Mr. G.G. Ferrier - Applicant
Mr. Mcaughan - Counsel for Official Assignee
Mr. G.A. Paine - Counsel for Dema International Inc.

Judgment: 26 November 2009 at 4.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

*This judgment was delivered by Associate Judge Gendall on 26 November 2009 at
4.00 pm pursuant to r 11.5 of the High Court Rules.*

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Official Assignee, Private Bag 6001, Napier

[1] Grant Graham Ferrier (“the applicant”) was adjudicated bankrupt on an application brought by Dema International Incorporated (“Dema”) as judgment creditor at the High Court at Palmerston North on 1 October 2009.

[2] On 9 October 2009 the applicant filed an interlocutory application for an annulment of this adjudication.

[3] The sole ground identified in the application for annulment was:

“That the order of adjudication should never have been made”.

Notwithstanding this the application stated that it was:

“... made in reliance on s. 309(1)(a)-(d) Insolvency Act 2006 and r 24.5 of the High Court Rules.”

[4] On 2 November 2009 Dema, the judgment creditor, filed a Notice of Opposition to the application together with a supporting affidavit.

[5] A report of the Official Assignee under s. 309 Insolvency Act 2006 dated 2 November 2009 was filed on 4 November 2009 and a supplementary report dated 24 November 2009 was filed on 26 November 2009.

[6] For the sake of completeness I set out s. 309 Insolvency Act 2006 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) 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 it is clear that neither the provisions of s. 309(1)(c) or (d) apply in this case. The Court has not approved a composition nor has there been a substantial change in the bankrupt's financial circumstances since adjudication that justifies the revival of his debts.

[8] So far as the other grounds in s. 309(1) are concerned, it is clear from the two reports of the Official Assignee filed pursuant to s. 309 Insolvency Act 2006 that the total known liabilities of the applicant exceed \$111,000.00. This includes the Dema debt stated at a figure of \$13,682.37.

[9] As to the applicant's asset position, before me today Mr. Ferrier confirmed that he did not have any assets, although there may possibly be some equity in a motor vehicle he owns of about \$4,500.00.

[10] That said, there cannot be any question here that the bankrupt's debts have been fully paid or satisfied and the Official Assignee's fees and costs cleared in terms of s.309(1)(b) to justify an annulment on that ground.

[11] That leaves the only possible ground for an annulment order here as s. 309(1)(a). This is to the effect that the Court considers the bankrupt should not have been adjudicated bankrupt at the time when this occurred on 1 October 2009. In this

respect the applicant, Mr. Ferrier contends that there was an accounting or systems error by Dema at the time the bankruptcy order was made in this proceeding in that the amount then outstanding by him to this judgment creditor was AUD\$6,786.00 and not the AUD\$10,910.71 specified at the time.

[12] Dema, as I understand it, now acknowledges that the correct amount owing by the applicant as at the time of bankruptcy was in fact the AUD\$6,786.00. Notwithstanding this, however, it is clear that as at 1 October 2009 the applicant was unable to pay his debts as they fell due. These debts totalling something in excess of \$100,000.00 and he had, in any event, committed an available act of bankruptcy. It is clear too that he had little by way of assets disclosed to the Court at that time and, on this basis the order for adjudication was properly made on 1 October 2009.

[13] Under all these circumstances, it is clear here that the applicant has been unable to satisfy the Court that he should not have been adjudicated bankrupt in terms of s. 309(1)(a) Insolvency Act 2006.

[14] One final matter needs to be mentioned. This is the fact that, in his 18 November 2009 affidavit filed in support of the present application the applicant attaches what he describes as a “forecast of sales for the next 12 months” and a Proposed Plan by him for a repayment of his debts. As I understand the position this repayment proposal is advanced on the basis that he has a business partner who would run the present pump business under his separate company, paying the applicant a wage as an employee. Monthly projected profits for the business would then be paid out to all the applicant’s creditors on a progressive basis. The applicant contends it would then take some two or three years to settle all the outstanding debts.

[15] It is commendable that the applicant has taken time to investigate and assemble this broad proposal. It could proceed in any event with the consent of the Official Assignee whilst the applicant is an undischarged bankrupt, provided that it did not in any way infringe the provisions of the Insolvency Act 2006. The proposal, however, which essentially is for a forecasted time payment arrangement for existing

creditors, does not provide grounds for an annulment of the applicant's adjudication pursuant to s. 309 Insolvency Act 2006 upon which he relies.

[16] For all these reasons the present application for an annulment of the adjudication order is dismissed.

[17] If costs are in issue here, they are reserved.

'Associate Judge D.I. Gendall'