

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

CIV-2008-488-000053

BETWEEN IGOR ALEXANDROVICH MIKITASOV
Plaintiff

AND BERNARD JOHN COLLINS
Defendant

CIV-2008-027-000210

AND BETWEEN IGOR ALEXANDROVICH MIKITASOV
Plaintiff

AND BERNARD JOHN COLLINS
First Defendant

AND PACIFIC VIEW PROPERTIES LIMITED
Second Defendant

Appearances: S D Henderson and J Browne for Plaintiff
No appearance for First Defendant
R O Parmenter for Non-parties

Judgment: 26 November 2009 at 4:05 pm

RESERVED JUDGMENT (2) OF COURTNEY J

This judgment was delivered by Justice Courtney
on 26 November 2009 at 4:05 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date.....

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Introduction

[1] Following the formal proof hearing of this matter last week the plaintiff's solicitors have obtained further information regarding Mr Collins' bankruptcy and also the sale of the Aotea Street property. On 25 November 2009 I held a telephone conference to deal with these matters. There was no appearance for Mr Collins. Mr Parmenter, however, appeared for Ms Flego and Mr Collins junior, though he had only been instructed recently and was not in a position to deal with any of the substantive matters.

Application under s 76 Insolvency Act 2006

[2] The plaintiff has now obtained confirmation that Mr Collins was adjudicated bankrupt on 11 November 2009. This was the same day that I declined Mr Collins' application for adjournment of the fixture. Under s 76 Insolvency Act 2006 the proceedings against Mr Collins are halted as a result of his bankruptcy. However, the plaintiff applies under s 76(2) for an order allowing the proceedings to continue. The principles applicable to such an application are conveniently summarised by Paterson J in *Saimai v McKay & Ors*.¹ Of relevance in the present case are the fact that the Court has a discretion to do what is right and fair according to the circumstances of the case and when a person is adjudicated bankrupt his assets are to be administered in an orderly fashion for the benefit of all his creditors and a particular creditor should not be able to obtain an advantage by bringing proceedings against him. There should thus be no prejudice to other creditors or to the ordinary administration of the bankruptcy if the action were to proceed.

[3] The Official Assignee was advised of Mr Mkitasov's application under s 76(2) and of the telephone conference but elected not to appear. Mr Browne conveyed to me the Official Assignee's indication that she did not object to such an order being made.

¹ (1998) 6 NZBLC 102,611 Paterson J (decided under the predecessor s 76)

[4] The claims against Mr Collins are for alleged breaches of contract, misrepresentation and trespass. These are allegations more suitably determined by action rather than the lodging of a proof of debt in Mr Collins' bankruptcy. Further, the proceeding has now been heard and judgments on both proceedings are imminent. Although there is no information before me as to the extent of other creditors (other than the knowledge that Mr Collins' various properties are heavily mortgaged), the lack of any objection from the Official Assignee indicates that allowing this proceeding to continue in order for me to deliver a judgment is unlikely to prejudice any other creditors. For these reasons I consider that I should exercise my discretion in favour of the plaintiff. There will, therefore, be an order under s 76(2) that both proceedings be allowed to continue.

Change of name

[5] In the CIV-2008-027-000210 proceedings Mr Collins' company, Pacific View Properties Limited, is named as the first defendant. Since the hearing before me the plaintiff has found that this company changed its name in October 2009 to Immigration Partners Limited. He seeks an order under R 1.9 High Court Rules amending the name of the company in this proceeding. Under R 1.9 the Court may before, at or after the trial of any proceeding, amend any defect or error in the pleadings. In this case it is clear that the name of Pacific View Properties Limited as it appears in the pleadings ought to be changed to reflect its present name and I accordingly make such an order.

Sale of Aotea Street property

[6] At the telephone conference of this matter on 5 November 2009 Mr Mark (then acting for Mr Collins) advised that he had spoken to Mr Collins junior and Ms Flego and that the Orakei property was not for sale. However, the following day on 6 November 2009 a transfer of the property was registered.

[7] In accordance with my order requiring an explanation from Mr Collins junior as to the acquisition of the Aotea Street property Mr Collins junior and Ms Flego

have each sworn an affidavit. The Aotea Street property was purchased by Mr Collins junior and Ms Flego in July 2008 for \$820,000 using a loan of \$600,000 from Westpac. The balance was contributed equally by Mr Collins junior and Ms Flego. Mr Collins junior explains that Mr Collins supplied his cash contribution and that it represented commission owed to him by of Bay of Islands Immigration Limited (a company owned by Mr Collins and in which Mr Collins junior was employed). Ms Flego deposes that she obtained her cash contribution from Mr Collins in return for giving up any claim to an interest in their previous residence at Binnie Street, Paihia. Mr Collins junior and Ms Flego each received approximately \$129,000 after loan repayments and expenses.

[8] Mr Browne is concerned that on this evidence Mr Collins arguably did have an interest in the Aotea Street property and has an interest in the proceeds of it. Neither Mr Collins junior nor Ms Flego have provided any documentary evidence to support their respective explanations for Mr Collins providing the cash contribution for the purchase of Aotea Street. Without anything more than their bare assertions as to the circumstances in which the cash contribution was provided by Mr Collins I conclude that there is a real possibility that the proceeds are, in fact, the property of Mr Collins senior.

[9] It appears from Mr Parmenter's understanding of the situation that the proceeds have already been distributed by the solicitors acting for Mr Collins junior and Ms Flego. I accept that steps should be taken to ensure that the money is not dissipated while investigations continue.

[10] I therefore made the orders that:

- a) Angelina Flego and Sean Collins are restrained from disposing of or dissipating any proceeds they hold or control from the sale of the Aotea Street property;
- b) Angelina Flego and Sean Collins are each to file an affidavit within 48 hours detailing where the money is presently held;

- c) Carson Fox are to provide a copy of the conveyancing file relating to Aotea Street, excluding any privileged material, to Henderson Reeves Connell Rishworth within 48 hours;
- d) Mr Mark is to provide an affidavit within 48 hours as to the advice he received from Angelina Flego and/or Sean Collins regarding the sale of Aotea Street up to and including 5 November 2009;
- e) Leave is reserved to Ms Flego and Mr Sean Collins to apply on 24 hours notice to vary or discharge the orders.

[11] Orders (a), (b), (c) and (d) were made at about 5 pm 25 November 2009 and time runs from then.

P Courtney J