

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

CIV 2009-463-306

IN THE MATTER OF the Insolvency Act 2006

BETWEEN TOMAS EARL CONDON
 Judgment Debtor

AND SOUTHLAND BUILDING SOCIETY
 Judgment Creditor

Hearing: 23 November 2009

Appearances: Mr Fitches as provisional trustee for Judgment Debtor
 Ms Wootton for Judgment Creditor

Judgment: 23 November 2009

**ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN**

Solicitors/Counsel:

Ms Wootton, Gordon Pilditch, Rotorua – Fax: 07 349 3985 – Email: sarah-louise.wootton@gordonpilditch.co.nz
J Toebes, Buddle Findlay, Wellington – Fax: 04 499 4141 – Email: justin.toebes@buddlefindlay.com

[1] The judgment creditor (SPS) petitions for the judgment debtor Mr Condon's adjudication in bankruptcy. It relies upon its judgment in the sum of \$7,714,211.95 obtained on 27 April 2009, plus accumulated interest.

[2] SPS's petition was filed on about 30 July 2009.

[3] On 7 October 2009 Mr Condon filed a creditor's proposal application. The proposal provides for an estimated maximum payment to creditors in the sum of \$0.05. Mr Fitches is assisting Mr Condon with his proposal. For Mr Condon it is submitted the value of SPS's judgment debt may be ignored even though it comprises 66 percent in value of Mr Condon's total indebtedness. For Mr Condon it is claimed the value of the SPS debt can be ignored because SPS holds security by way of mortgage for that indebtedness.

[4] I am satisfied having heard Ms Wootton for SPS that notwithstanding a creditor holds security for its debt it is nevertheless entitled to have the full amount of its debt taken into account in any vote upon a debtor's proposal. The following extracts from the decision of the Court of Appeal in *Guest v Duffy* [1991] 1 NZLR 183, makes as much clear:

“The legislation does not deal expressly with the amount of the vote of a secured creditor. For reasons which we can express quite shortly, we consider that the statutory intention is to allow creditors to vote the full value of their debts whether secured or unsecured: any allocation between a secured and an unsecured portion properly arises only after the proposal is approved and when the trustee is administering the property of the insolvent pursuant to s 144 [p 187 at line 47].

For the reasons given we consider that the provisional trustee was not entitled to exclude in a calculation of votes against the proposal his estimate of the value of the BNZ's security. It follows that the three-fourths majority was not achieved in either case [p 189 at line 29].”

[5] In the outcome Mr Condon did not obtain a sufficient majority in support his proposal and therefore the proposal must fail.

[6] For the reasons I have just expressed, it is not necessary for me to consider other aspects of submissions addressed on Mr Condon's behalf including:

- a) What restrictions there may be upon a secured creditor's vote after adjudication pursuant to s 95 of the Insolvency Act 2006;
- b) Whether, because the secured creditor has issued separate proceedings against the valuer of the property in reliance upon which funds were advanced to Mr Condon's company in consideration of the provision of Mr Condon's guarantee, even though in that outcome the extent of Mr Condon's debt may be reduced, even possibly totally repaid.

[7] In the outcome I determine SPS's petition should be granted and at 3:40pm on 23 November 2009 I made an order for Mr Condon's adjudication and directed costs be paid on a 2B basis together with disbursements as fixed by the Registrar.

Associate Judge Christiansen