

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

CIV 2008-404-005306

IN THE MATTER OF the Insolvency Act 2006

BETWEEN ASL MORTGAGES LIMITED
 Judgment Creditor

AND JOHN ANDREW NIVEN
 Judgment Debtor

Counsel: K Murphy for judgment creditor
 J A Niven judgment debtor in person

Judgment: 5 March 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ABBOTT

Solicitors:
Harkness Henry & Co, Private Bag 3077, Hamilton 3240

[1] This is an application for adjudication of Mr Niven following failure to pay a claimed judgment debt arising out of a loan advance by the creditor (ASL) to Mr Niven secured against a commercial property at Motuoapa on the shores of Lake Taupo.

[2] ASL obtained a summary judgment against Mr Niven, in this Court, on 30 June 2008. The application was unopposed. It served a bankruptcy notice on Mr Niven requiring him to pay that judgment sum. Mr Niven did not respond to that notice. ASL issued its present application for an order adjudicating Mr Niven bankrupt. On being served with that application Mr Niven filed notice of intention to oppose.

[3] The application was first called before me on 4 February 2009. The essence of the opposition is that Mr Niven claims that ASL holds security (in the form of the Motuoapa property) which exceeds the amount of the judgment debt. He also raises an issue of delay in dealing with the security which he says has caused prejudice to him. As the central issue revolves around valuation of the property at relevant times, and there was an error in the affidavit filed in support of the application (the incorrect valuation was attached) ASL sought and was given leave to file a supplementary valuation evidence. Mr Niven was given opportunity to respond to it.

[4] As the matter has a limited factual background I am in a position to deal with the matter today, at the end of the ordinary list.

[5] Mr Niven has confirmed to me that his opposition to the application for adjudication centres on the extent of the security held by ASL. He is correct that if ASL holds a security that exceeds the judgment debt, that would have given him a basis for challenging the bankruptcy notice. The other issue he has raised (delay in attempting to realise the security) is inextricably linked with the overall value. Nevertheless they too must be answered.

[6] The valuation evidence before the Court ranges both in time and in the valuers' views:

- a) On 19 July 2007, a Mr Corrigan valued the property at \$1,767,000. That was clearly on the basis of it being an ongoing commercial concern at that point;
- b) On 26 February 2008, Mr Corrigan again valued the property, this time at \$2,080,000. Mr Niven acknowledges that this valuation was based on the property having been leased for a 15 year term at what appears to be a very good rental. Unfortunately, the tenant vacated the property (apparently not long after commencement of the lease). This completely undermines this valuation;
- c) On 13 May 2008, Mr C B Morison of Veitch Morison valued the property for ASL. He did so on 2 bases: as is for \$816,000, and by sale of the individual units in the property for \$1,150,000. These valuations included furnishings and chattels. This valuation was after the tenant had vacated the property; and
- d) On 23 October 2008, Veitch Morison provided a further valuation of the property of between \$700,000 and \$800,000 on a forced sale basis.

[7] It is clear from these valuations, and particularly the sequence of them, that this property has suffered badly with the economic downturn. It is equally clear that whilst the property initially provided sufficient security for ASL's debt, the current position is that it does not. In my view there is a minimum shortfall in the order of \$300,000. Mr Niven, regrettably, has been caught in a difficult position as a result of the economic downturn.

[8] I have also considered whether Mr Niven's allegations of delay in attempting to realise its security could affect the overall position. ASL has produced evidence of attempts to sell the property through a reputable mortgage broker. That evidence shows that the only offer received was one for \$500,000 (well below even the Veitch Morison assessment of value), and that there has been little interest since. Mr Niven was frank in acknowledging today that he too has been endeavouring to find a

purchaser , but without success. Again, unfortunately, that is the present commercial reality.

[9] Mr Niven has also taken issue with a period during which the property lay empty (after ASL had entered into possession). He contends that this has had a very substantial effect on the property value. It is true that for a period the property was vacant. In large part that appears to be a consequence of the intended tenant having walked off the property. Even so, there is no evidence before me as to the potential earning that might have been lost. Nevertheless it was through the winter months and I infer that any occupancy would have been low. This is supported by evidence produced by ASL as to occupancy since a manager was appointed in the latter part of last year (apparently after it became apparent that it was not going to be easy to achieve an early sale). ASL has produced evidence of low occupancy rates over the last summer, and said that this has not been enough to meet outgoings.

[10] Weighing up all of these matters I do not see that there is any prospect that earlier appointment of a manager to attempt to keep the business running would have achieved any better outcome or offer than was achieved over the last summer – and certainly not enough to reduce the amount outstanding to ALS (even if it did cover more of the outgoings).

[11] The last factor that I need to take into account is that the debt continues to accrue at over \$900 per day. I do not consider that it is in the interest of either ASL or indeed Mr Niven to have this continue.

[12] I find that there is no basis upon which Mr Niven can successfully oppose the application.

[13] Counsel for ASL has handed up a certificate that the debt of \$1,412,481.83 remains unpaid by Mr Niven as at today's date. That and the failure to respond to the bankruptcy notice (being an available act of bankruptcy) are sufficient to justify an order for adjudication.

[14] I make an order adjudicating Mr Niven bankrupt. He is also to pay costs of and incidental to this application on a 2B basis together with disbursements as fixed by the Registrar. This order is made at 11:55am today.

Associate Judge Abbott