IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-004620
[2014] NZHC 1559

IN THE MATTER OF	Part 5, Subpart 2 of the Insolvency Act 2006
AND	
IN THE MATTER OF	an application for approval of the proposal of AJAY KUMAR BHATT of Auckland, an insolvent
BETWEEN	WESTPAC NEW ZEALAND LIMITED Judgment Creditor
AND	AJAY KUMAR BHATT Judgment Debtor

Hearing: 23 June 2014

Appearances: Q S Haines for Trustee, C S Young
J A Harrop for Westpac New Zealand Ltd, a creditor in opposition

Judgment: 4 July 2014

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
as to approval of insolvent's proposal

This judgment was delivered by me at 3.30 pm on 4 July 2014 pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] Ajay Bhatt ("Mr Bhatt") arrived in New Zealand in 2000 having previously had a career in Asia as a commodities trader and broker. From 2001 he built a number of businesses in Auckland and elsewhere both in financial advisory services and in property development. From 2008 he experienced financial difficulties which he ascribes to the Global Financial Crisis of that period.

[2] In conjunction with his secured creditor, Westpac New Zealand Ltd, ("Westpac") he sold his secured assets leaving a shortfall owing to Westpac. Westpac subsequently obtained summary judgment for $233,800.89.[1]

[3] Mr Bhatt deposes to having 20 other creditors whose debts together exceed $1,200,000.

[4] In October 2013 Mr Bhatt, having received a bankruptcy notice from Westpac, filed a proposal ("the proposal") under subpart 2 of Part 5 of the Insolvency Act 2006.

[5] Mr Bhatt proposed that a chartered accountant, Clyde Young, be his trustee ("the trustee").

[6] The key financial components of Mr Bhatt's proposal are that:

(a) Satisfaction of debts directed by the Insolvency Act 2006 be paid in priority to all other debts in the distribution of the property of the insolvent will be made as follows:

(i) Six times six monthly payments of $2,000.00 are to be paid toward the priority debts. Any money paid in excess of the amount owed will be retained by the trustee and distributed on a pro rata basis to all unsecured creditors.

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1 *Westpac New Zealand Ltd v Bhatt* DC Waitakere CIV-2011-090-311, 8 July 2013.

(b) Provision for payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal be made in the following manner:

(i) 20 per cent of the first $3,000.00 or part of it, with a minimum of $200.00;

(ii) 10 per cent of the next $7,000.00 or part of it; and

(iii) 5 per cent of any amount in excess of $10,000.00.

(c) The insolvent make six times, or earlier, six monthly payments of $8,000.00 being a total of $48,000.00 as satisfaction of all unsecured creditors' debts and obligations. All payments will be made from the insolvent to the trustee on the first business day of each six month period. The first payment will be made within six months of the approval of this proposal.

(d) The insolvent also pay 60 per cent of any income earned above $50,000 per annum gross, after all deductions for the period of the next three years from the date of the compromise towards the value of the entire debt and limited to the total amount of debt as on that date. This will be over and above the amount in clause (c).

[7] The trustee has now reported to the Court as to the proposal and the holding of a creditors' meeting. At the same time he makes application for an order approving the proposal and the holding of a creditors' meeting.

[8] The trustee reports that 18 unsecured creditors with combined proofs of claim of $1,199,792.01 voted in favour of the proposal. Three unsecured creditors (including Westpac), with proofs of claim totalling $266,194.10, voted against the proposal.

[9] Westpac alone has opposed the present application.

The issues

[10] For Westpac, Mr Harrop submitted that the Court should decline to refuse to approve the proposal for two reasons, namely:

(a) The terms of the proposal are not reasonable (s 333(3)(b) of the Act);

(b) It is not expedient that the proposal be approved (s 333(3)(c) of the Act).

[11] Westpac's grounds of opposition (and Mr Harrop's initial synopsis of submissions) included a third ground, namely that the provisions of the Act relating to proposals have not been complied with. Mr Harrop abandoned this ground when he commenced his oral submissions. I consider his concession in this regard was appropriate. I will deal with the compliance with the provisions of the Act first, as it provides background to the discussion of issues which follows.

Compliance with the Act

[12] Westpac initially suggested that certain debts had been included within the proposal incorrectly.

[13] First, it was suggested that a number of included debts did not qualify under s 325(1) of the Act because each was not within the definition of that provision:

> ... a debt that would be provable in the insolvent's bankruptcy.

Each of the attacked four debts (representing $37,076 in total) arose as a result of an oral guarantee of the debt of one of Mr Bhatt's companies. As such, the guarantees appear to be rendered unenforceable (depending on their timing) either by virtue of s 2 Contracts Enforcement Act 1956 or (from 1 January 2008) by s 27 Property Law Act 2007.

[14] Mr Haines, in supporting the decision of the trustee to allow the creditors of those debts to vote at the creditors' meeting, referred to reg 32 Insolvency (Personal Insolvency) Regulations 2007 which provides:

> **32 Admission or rejection of claims for purposes of voting**
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> (1) The provisional trustee has the power to admit or reject a claim for the purposes of voting at a creditors' meeting, but his or her decision is subject to appeal to the Court.
>
> (2) If the provisional trustee is uncertain whether a claim may be admitted or rejected, he or she must allow the creditor to vote subject to that vote being declared invalid in the event of the claim being rejected for purposes of voting.

[15] The trustee in this case is an accountant and not a lawyer. It is unsurprising that he would be uncertain as to how to deal with an oral guarantee. Regulation 32(2) makes it mandatory ("he must") that he allow the vote if he is uncertain as to its admission or rejection. The scheme of the Regulations is that the vote can then subsequently be declared invalid.

[16] On the evidence at present before the Court it would appear that four oral guarantees in question do not qualify as "debts" within the definition. But that does not make the trustee's provisional acceptance of voting on those debts invalid. Furthermore, those four debts account for only 3 per cent of the total value of creditors' debt in favour of the proposal.

[17] Secondly, Westpac had initially contended that four of the creditors' claims did not constitute "insolvent's debts" in terms of s 326(1) of the Act because the debts in question are owed by companies of which the insolvent was a director rather than debts owed personally by the insolvent.

[18] The four debts in question were much more significant in value than those identified under Westpac's previous argument. They account for $965,944.40 of the total creditors' claims.

[19] Westpac's initial argument was understandably derived from the fact that the documents relied upon by the four creditors in question were acknowledgements of debt expressly executed by Mr Bhatt "as director" on behalf of his relevant company. Although each deed contained a provision indicating that Mr Bhatt had agreed to give a guarantee of the debt, there was no provision for him to sign the document in his personal capacity nor did he expressly do so. The creditor's argument in each

case is that the document correctly construed was signed by Mr Bhatt in both capacities. While Mr Harrop had initially referred to some case law for the proposition that the deeds did not constitute enforceable guarantees on the part of Mr Bhatt, Mr Haines referred to both English and New Zealand authority which might well be applied so as to hold Mr Bhatt liable as a guarantor in his personal capacity.[2]

[20] In any event, Regulation 32(2) again made appropriate the trustee's allowing each creditor to vote.

[21] In the circumstances, Mr Harrop appropriately abandoned the argument that Mr Bhatt and the trustee had not complied with the provisions of the Act.

Financial make-up of Mr Bhatt's indebtedness

[22] Schedule 1 to this judgment represents my table of details concerning Mr Bhatt's indebtedness.

[23] The 21 unsecured creditors are listed by number only, as their names are irrelevant.

[24] The second column indicates the level of claim accepted by the trustee for voting purposes. Creditors 1–18, who voted for the proposal, represented $1,199,792.01 of Mr Bhatt's debt. The creditors 19–21 who voted against the proposal represented $266,194.10 of Mr Bhatt's debt. Mr Bhatt's total debt therefore amounted to $1,465,986.11.

[25] The "overstatement" column, containing one item in relation to creditor 2 for $41,251.81, represents an overstatement apparent on the face of that creditor's proof of claim. The creditor, after including debt for which Mr Bhatt had provided a personal guarantee went on to include other subsequent debt which was not covered by the guarantee.

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2 *Young v Schuler* (1883) 11 QBD 651; *Doughty-Pratt Group Ltd v Perry Castle* [1995] 2 NZLR 398.

[26] The four items under "company debts" (for creditors 1, 3, 4 and 7), totalling $37,076.00 represent debts of Mr Bhatt's companies for which no evidence of a personal guarantee has been provided. I have not included creditor 17 in this table of "company debts" although there is a possibility that that debt may be purely a company debt – creditor 17 is a landlord of premises occupied by Mr Bhatt's companies. The proof of claim does not attach a copy of the relevant contract or invoices. The basis of Mr Bhatt's liability to this creditor is simply unclear.

[27] These columns of "overstatement" and "company debts" must be taken into account in order to arrive at the number and value of creditors correctly voting for the proposal. I summarise the impact of that adjustment in Schedule 2.

[28] The third adjustment column of Schedule 1 relates to "relatives", being six creditors (6, 11, 12, 13, 14 and 15) who are members of Mr Bhatt's family. The debt to them totals $124,000.

[29] Subject to later verification of their debts, these relatives are to be treated as creditors of Mr Bhatt in the normal way, entitled to repayment as any other creditor. However, for reasons I develop below,[3] the Court is entitled to take into account the close relationship and the degree of control Mr Bhatt may exercise in considering the expediency of the proposal.

[30] The proportion and impact of the debt of the relatives is identified in Schedule 2.

[31] The final column in Schedule 1 contains reference to the debts claimed by four creditors (creditors 2, 5, 8 and 18).

[32] The debts in each instance were incurred by companies of Mr Bhatt. A deed was subsequently prepared in which the relevant company acknowledged the debt and its amount and agreed that interest at 15 per cent, compounded annually, would apply. Each deed contains as clause 1 the following:

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3 At [89]–[91].

> In consideration of delay in payment by [company name], its sole director hereby agrees that he will guarantee this loan and accrued interest personally.

[33] None of the deeds had a separate signature space for Mr Bhatt. Rather he placed his signature on the document only once alongside a signature clause which reads:

> **Signed** by [company name] by its director in the presence of:

[34] I have referred to authority[4] which Mr Haines relies upon as supporting the conclusion that Mr Bhatt's signature on these deeds was in a dual capacity and he has thereby personally guaranteed the debts.

[35] The trustee was accordingly correct to admit the claims for the purposes of voting under Regulation 32 but a degree of uncertainty which attaches to these claims by way of personal guarantee is a matter which the Court can appropriately take into account, similar to the treatment given to the debts owed to relations, when considering the expediency of the proposal.

[36] The debts claimed by the four creditors with alleged guarantees amount to $965,944.40.

Priority Creditor

[37] Mr Bhatt has one unsecured creditor entitled to priority, namely the Commissioner of Inland Revenue, whose debt is approximately $6,000.

[38] Mr Bhatt's proposal covers the position of the priority debt by committing Mr Bhatt to paying six instalments of $2,000 (at six month intervals) for settlement of the priority debt, with any surplus to be retained by the trustee and distributed pro-rata to other unsecured creditors.

[39] In relation to priority debts, the proposal accordingly meets the requirements of s 333(4)(a) of the Act by providing discretely for payment of the priority debt.

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4 Above at [19].

General compliance with the proposal regime

[40] After Mr Bhatt lodged his proposal through the trustee he followed the procedure for putting that proposal by notice to all his creditors, together with all the information required under the Insolvency Act. The meeting of creditors was convened on 19 November 2013 when the required majorities of creditors (a majority in number and a three-quarters majority in value) accepted the proposal. As Schedule 1 indicates, the majorities in favour on the day of the creditors' meeting were 85.71 per cent (18 out of 21) by number and 81.84 per cent by value. If those figures are then adjusted for overstatements and for company debts, there remain 82.35 per cent (14 out of 17) by number in favour and 81.05 per cent by value in favour.

The proposal itself

[41] Mr Bhatt proposed to pay $48,000 to the trustee for his unsecured creditors (other than the Commissioner as a preferential creditor). The payments are to be made by six equal payments of $8,000 at six monthly intervals commencing within six months after the proposal is approved. Mr Haines informs me that Mr Bhatt has already paid $11,000 to the trustee.

[42] In addition Mr Bhatt proposes to:

> ... pay 60% of any income earned above $50,000 per annum gross, after all deductions for the period of next (sic) 3 years from the date of the compromise towards the value of the entire debt and limited to the total amount of debt as on date.

[43] Mr Bhatt proposes to derive income by working as either an independent contractor or an employee in a number of consultancy positions. Three organisations have offered him work with largely commission-based remuneration. Mr Bhatt has produced letters from the relevant employers or prospective employers. The letters appear to indicate the possibility of an overall income stream of more than $10,000 per month but that flow appears unlikely to be achieved if Mr Bhatt spreads his efforts between three organisations. On Mr Haines' instructions an income stream of approximately $8,000 per month is realistic. This would suggest a net sum available to Mr Bhatt of $5,500 per month or $66,000 per annum.

[44] I infer from the creditors' vote that the substantial majority view annual payments of $20,000 (as Mr Bhatt proposes) as realistic and reasonable, and bolstered by Mr Bhatt's additional proposal, set out at [42] above, to pay an additional sum (calculated as 60 per cent of income over $50,000 gross) from any "super-earnings" Mr Bhatt receives.

My approach to the approval of the proposal

[45] Section 327 of the Insolvency Act requires a proposal to satisfy an insolvent's debts to be in the prescribed form and to be accompanied by a statement of affairs in the prescribed form. That was done. Under s 330 the person appointed provisional trustee had to call the meeting of creditors as I have referred to and I am satisfied that the provisions of both s 330 and 331 were met. These are:

> **330 Provisional trustee must call meeting of creditors**
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> (1) The provisional trustee must, as soon as practicable after the proposal is filed, call a meeting of creditors by posting to every known creditor at the creditor's last known address—
>
> (a) a notice of the date, time, and place of the meeting:
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> (b) a summary of the insolvent's assets and liabilities:
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> (c) a copy of the proposal and particulars of any charge or guarantee:
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> (d) a creditor's claim form:
>
> (e) a postal vote in the prescribed form.
>
> (2) A creditor who has proved a claim in the prescribed manner may vote on the proposal by sending a postal vote that reaches the provisional trustee before or at the meeting.
>
> (3) If the provisional trustee receives a postal vote before or at the meeting, the postal vote has effect as if the creditor had been present and voted at the meeting.
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> **331 Procedure at meeting of creditors**
>
> (1) The provisional trustee is the chairperson of the meeting of creditors, unless the creditors elect their own chairperson.
>
> (2) The creditors may—
>
> (a) examine the insolvent:

(b) accept the proposal with or without amendments or modification, by passing a resolution that sets out the proposal in its final form:

(c) confirm the provisional trustee as trustee, or appoint another person who is willing to act as trustee, in which case that person becomes the trustee.

(3) The resolution accepting the proposal must be decided by a majority in number and three-quarters in value of the creditors who—

(a) vote; and

(b) are personally present or are represented at the meeting by a person specified in section 332 or have voted by postal vote.

(4) If the insolvent consents, the creditors may include in the proposal terms for the supervision of the insolvent's affairs.

[46] Following the acceptance of the proposal it was then the obligation of the trustee to apply to the Court, as he has now done, for approval.

[47] Sections 333 (1)–(3) provide:

333 Court must approve proposal

(1) After the proposal has been accepted by the creditors, the trustee must, as soon as practicable,—

(a) apply to the court for approval of the proposal; and

(b) send notice of the hearing of the application in the prescribed form to the insolvent and to each known creditor.

(2) The court must, before approving a proposal, hear any objection that is made by or on behalf of a creditor.

(3) The court may refuse to approve the proposal if it considers that—

(a) the provisions of this subpart have not been complied with; or

(b) the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors; or

(c) for any reason it is not expedient that the proposal be approved.

[48] The process is therefore in three stages. The first stage was achieved through the filing of the proposal and the meeting of creditors; the second stage was achieved through the acceptance of the required majorities had to be secured; and the third is

the stage which has now reached me. I have to consider the reasonableness of the proposal, and I have to consider the expediency of the proposal.

[49] It is well settled law that while I have a discretion to refuse an approval only if one or more of the trigger paragraphs in s 333(3) apply. The approach normally taken to proposals is that set out by Hardie Boys J in *Re Bennetts Proposal*:[5]

> Rather than it being for the proponents of a scheme to show that it ought to be approved (see *Re Rogers* (1884) 13 QBD 438), I think the Court should accept the view of the creditors, or the majority of them, and grant approval unless it is apparent that one of the grounds for refusing approval exists. The Court is clearly required to exercise its independent judgment, for considerations of wider public interest are relevant, and therefore even unanimity amongst the creditors will not be predeterminative of approval. But unless it is clear that the creditors generally would fare better under a bankruptcy, approval ought normally to be given unless other special circumstances militate against it. Whilst a proposal ought not to be imposed upon dissentient creditors if that would be disadvantageous to them as members of the general body of creditors their dissent should not be upheld if to do so could be prejudicial to the general body of creditors.

[50] I note also, as has been pointed out by this Court previously, that the very heading to s 333 is that the "Court must approve proposal", which emphasises the limited nature of the discretion.

Reasonableness – s 333(3)(b) of the Act

The statutory provision

[51] The Court may refuse to approve a proposal if it considers that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors.[6]

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5 *Re Bennetts Proposal* HC Christchurch B138/81 and M306/81, 1 February 1982 (alternative citation: *Re Duncan Holdings Limited (in liquidation)*) at 9; quoted with approval in *Farmer v Rowley* [1992] 2 NZLR 195 (CA) at 196; approved by the Court of Appeal in *Magsons Hardware Limited t/a Mitre 10 Mega v Bogiatto* [2011] NZCA 378 at [23] and *Herbert v New Zealand Guardian Trust Co Ltd* [2012] NZCA 442 at [27].

6 Insolvency Act 2006, s 333(3)(b).

Unreasonableness

[52] The Court of Appeal has in *Magsons Hardware Limited t/a Mitre 10 Mega v Bogiatto*[7] explained the role of the Court in considering reasonableness under s 333(3)(b) in this way:[8]

> When exercising its independent judgment to determine whether a proposal is reasonable, the Court:
>
> > ... must be influenced by the commercial judgment of creditors who in approving the proposal have demonstrated their willingness and wish to receive a partial payment without recourse to bankruptcy. It is important to emphasise, too, that it is the creditors who stand to lose the benefit if a proposal is rejected and bankruptcy ensues. Unless there are special public interests or other commercial considerations present the assessment of the substantial body of the creditors ought to be accepted. [*Farmer v Rowley* [1992] 2 NZLR 195 (CA)]
>
> We endorse Asher J's observation in *Kelly v Structured Finance*[9] that reasonableness under s 333(3)(b) is best assessed objectively from the perspective of the "commercially experienced prudent creditor" rather than the public, whose interests are protected under s 333(3)(c). Additionally, while the reasonableness element imports into the Court's independent judgment the views of the creditors, the alternative touchstone of benefit to the general body of creditors under s 333(3)(b) raises the fairness of the proposal between classes of creditors, requiring a comparative analysis of the creditors' relative positions under the proposal or bankruptcy respectively.

In *Magsons Hardware* the Court of Appeal endorsed observations of Asher J in *Kelly v Structured Finance,* including his Honour's emphasis on the Court's independent judgment under s 333(3)(b) of the Act. In so emphasising the Court's independent judgment, Asher J rejected a number of decisions which suggest that there is an onus on creditors who oppose a proposal to show that approval should be refused.[10]

[53] When the Court exercises its independent judgment, it does so from the perspective of the commercially experienced prudent creditor.[11]

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7 *Magsons Hardware Limited t/a Mitre 10 Mega v Bogiatto* above n 5.
8 At [28]–[29].
9 *Kelly v Structured Finance Ltd* [2009] 2 NZLR 785 (HC) at [45].
10 *Kelly v Structured Finance Ltd* at [17] – Asher J not following *Re Trott* [2009] 2 NZLR 800n; or *Re Hart* [1991] 2 NZLR 219 at 225.
11 *Kelly v Structured Finance Ltd* per Asher J at [45]; endorsed by the Court of Appeal in *Magsons Hardware* at [29].

Discussion

[54] In considering whether the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, I must first recognise and have due respect for the commercial judgment of the creditors who voted in favour of the proposal. When the overstatements and company debts to which I have referred are excluded, the creditors in support by number were 82.35 per cent and by value were 81.05 per cent.

[55] The creditors come from a wide range of commercial backgrounds and dealings with Mr Bhatt. They include people whose relationship with him was as clients for advice, investors, lenders, landlord and lawyers. They are people with the commercial experience to be able to exercise sound judgement in relation to a financial proposal.

[56] Some of Mr Bhatt's supporting creditors have provided affidavit evidence. The trustee has provided written testimonials from others. There is a consistent theme amongst the supporting creditors that Mr Bhatt has been known to them as an honest and reliable man of good character. He is said to have consistently met his financial obligations before the Global Financial Crisis and thereafter to have been open with his creditors as to his financial difficulties. It is Mr Bhatt's uncontradicted evidence that, when he experienced his financial difficulties, he worked closely with Westpac as his secured creditor to achieve an orderly sale of assets.

[57] One of Mr Bhatt's creditors summarises matters this way:

> I am confident that once he is allowed to trade out of a situation, he has a strong capacity to bounce back; I believe he has the moral fortitude to then pay the shortfall to his creditors…

[58] The supporting creditors have clearly considered the impact upon them should the proposal be rejected and the creditors left simply with their rights to any distribution from a bankrupt estate. One of Mr Bhatt's largest creditors puts it this

way:

> I support the proposal put forward. I am one of the main creditors involved this matter and any outcome will have a direct influence and a major, detrimental effect upon me if it is rejected.

[59] This is not a case where the creditors have shown their support for a proposal simply by voting in its favour. I find the views of the supporting creditors in this case particularly deserving of respect by reason of the range and depth of consideration which has self-evidentially gone into the testimonials and affidavits which have been filed. People who knew Mr Bhatt well and have been financially hurt by his financial failure have the confidence that he will be able to adhere to a staged payment regime which will deliver them better outcomes than the alternative (of Mr Bhatt's bankruptcy).

[60] Westpac is the single creditor which has opposed the approval of the proposal. It gave evidence of its concerns through Lynette Tomkins, a senior manager of its Credit Restructuring Division. Westpac had obtained summary judgment against Mr Bhatt in July 2013. Ms Tomkins deposes as to difficulties which Westpac thereafter experienced in serving a bankruptcy notice upon Mr Bhatt. Ms Tomkins considers, with some support from email correspondence, that Mr Bhatt did not cooperate in that process as fully as he might have.

[61] Ms Tomkins also expresses Westpac's concern and doubt as to the veracity of the claims of Mr Bhatt's relatives, most of which are expressed to be "family loans".

[62] Ms Tomkins refers also to the substantial debt claimed by one of the creditors (creditor no. 2 in Schedule 1 hereto – claiming $239,413.05) who claims as a creditor while having been engaged in Mr Bhatt's companies, including as a director.

[63] Because Mr Bhatt's proposal is based upon a commitment to generate income and thereby payments to his creditors over a three-year period, I accept that Mr Bhatt's commercial and general reliability are a significant consideration when weighing the reasonableness of the proposal. Significantly, Westpac's evidence does not contain a rejection of Mr Bhatt's evidence as to his response to his problems

immediately after the Global Financial Crisis, including his cooperation in the realisation of his assets. Those were the significant commercial dealings which affected his creditors in that period. There has been no opportunity for the Court to make any trial-type assessment of the debts which are questioned by Westpac. Questions over such debts can and will be taken into my consideration of the expediency of the proposal. But in the present consideration of reasonableness, the questions as to some debts cannot obscure the fact that many, experienced, commercial creditors, whose debts are unquestioned, support this proposal. Westpac did not call Mr Bhatt for cross-examination. I am not prepared to infer (if Westpac was effectively inviting me to do that) that the filing of any questionable claims was orchestrated by Mr Bhatt in a way which reflects on his reliability and the reliability of his proposal generally.

[64] I also do not find that any difficulties which Westpac had in serving Mr Bhatt with a bankruptcy notice reflect on the reasonableness of his proposal. At most, any obstructive behaviour might be relevant to expediency under s 333(3)(c) of the Act. I will deal with it in that context.

[65] Mr Harrop submitted further that the course which would be reasonable and calculated to benefit the general body of creditors is to not approve the proposal and to have Mr Bhatt adjudicated bankrupt so that his estate could be properly examined by the Official Assignee. The Official Assignee would properly examine claims, would have the power to summons Mr Bhatt and others in order to obtain relevant information, would assess Mr Bhatt's ability to contribute to his estate and would thereafter monitor Mr Bhatt's payment performance.

[66] The creditors who voted on the proposal undoubtedly took the option of bankruptcy into account. As with the majority of them, I am not satisfied that adjudicating Mr Bhatt would be the more reasonable course on the basis of Mr Harrop's analysis, for the following reasons.

[67] First, the trustee, Mr Young, is a chartered accountant with experience and the support of the substantial Australasian practice to which he belongs. Mr Young has acted responsibly in dealing with creditors' claims for the purposes of voting

(adopting the pragmatic approach mandated by Regulation 33). He can be relied upon, with the voting process completed, to now undertake the fuller assessment of claims required if they are to be properly verified so that all creditors can be assured that only those with valid claims are receiving distributions. Although Mr Harrop referred to the coercive powers of the Official Assignee in acquiring information, I do not view those powers as of particular significance in this case – if the trustee calls for adequate verification of debts and is not provided with it, the almost inevitable consequence is that those debts will not be recognised for the purpose of distributions. The proposal includes the required provision for the payment of the trustee's fees and expenses and the sum provided for is a realistic one given that the trustee will have to carefully scrutinise a number of the claims.

[68] Secondly, the creditors are entitled to take the view that the trustee will diligently supervise Mr Bhatt's performance of his obligations under the proposal. The obligations of the trustee under s 337 of the Act are comprehensive. The statutory obligation under s 338 of the Act (in relation to six monthly summaries) will mean that all creditors have through the High Court Registry the means to regularly monitor receipts and payments.

[69] Thirdly, there is no basis in evidence for anticipating that the Official Assignee, upon Mr Bhatt's bankruptcy, would be able to produce financial arrangements which achieve greater distributions to creditors than the distributions that will come through this proposal. The proposal would see Mr Bhatt working potentially three jobs so as to avoid bankruptcy and to maintain his ability to work as an independent contractor. The creditors are entitled as a matter of commercial sense to reject any assumption that Mr Bhatt would work as hard as a bankrupt to produce a surplus for creditors (and for himself) as he would if he is saved from bankruptcy.

[70] Fourthly, Mr Bhatt's achieved payment of $11,000 to the trustee provides some measure of confidence that Mr Bhatt will fulfil his commitments under the proposal.

[71] Mr Harrop submitted that the proposal is also not reasonable or calculated to benefit the general body of creditors because Mr Bhatt may have engaged in an

insolvent transaction. Any such payment may be voidable were he to be adjudicated bankrupt. Mr Harrop referred to the testimonial from one of Mr Bhatt's major creditors in which the creditor stated:

> Amount outstanding is about $241,000. This is the residual after RJ repaid close $70,000 towards the entire debt.

That creditor filed with the proof of claim a calculation of its debt. It appears from the calculation that Mr Bhatt made no payments after February 2009. It appears that the $70,000 payment to which the creditor refers must have pre-dated February 2009. I am not prepared to draw any other inferences in the light of this documentation, particularly when Mr Bhatt was not required for cross-examination.

[72] Westpac opposed the proposal also upon the basis that the total distribution proposed to unsecured creditors, (approximately $48,000) amounts to only 0.4 cents in the dollar. In Westpac's notice of opposition the criticism of the proposal in this regard was primarily upon the basis that distribution could possibly give creditors less funds than would be available for distribution through bankruptcy (a proposition which I have already discussed).[12]

[73] Many proposals have been approved (particularly coming out of the Global Financial Crisis and earlier recessions) where the proportionate distribution has been much less than 4 per cent. Mr Harrop notes, however, that many of those cases have involved up-front payments (such as payments from family trusts or other supporters) which had nothing to do with a future income which might be generated by the bankrupt. The benefit of an early, one-off payment in such cases is obvious. This case is of a different kind. Mr Bhatt deposes to having no assets of significant value (having only a motor-vehicle of minimal value). The best hope is that he secures employment, works hard and produces returns for his creditors as he proposes. For the reasons I have discussed, it cannot be said that the proposal is not reasonable on the grounds that the Official Assignee in bankruptcy would be likely to produce a better outcome.

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12 At [69].

[74] I do not consider that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors.

Expediency

[75] The Court may, under s 333(3)(c) of the Act, refuse to approve a proposal if it considers that for any reason it is not expedient that the proposal be approved.

[76] I adopt the approach to the term "expedient" formulated by Asher J in *Kelly v Structured Finance:*[13]

> ... The word "expedient" is capable of a broad meaning. It can mean "practicable", but also has the wider meaning of "suitable" or "appropriate"... I consider that s 333(3)(c) requires an open-ended approach, and that any attempt to focus it on a specific matter would be to impose a limitation that does not arise from the words of the subsection.
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> ...
>
> ... I consider ... that a limited interpretation of the word "expedient" cannot be justified. It would seem artificial to exclude considerations of the public interest when considering expediency, given the wide meaning of the word. One of the consequences of bankruptcy is that s 149 applies to the bankrupt and restricts the bankrupt's ability to enter business. This protects members of the public who might have had dealings with the insolvent person but for the bankruptcy. This protection can be seen as one of the purposes of the insolvency legislation. It would be defeated if the public interest could not be considered in relation to approval of a proposal.

[77] In its notice of opposition, Westpac after asserting that the proposal is not expedient, explained –

> If accepted, the proposal would allow the insolvent to continue in a director's role and expose the public to further losses.

[78] There is evidence that a number of Mr Bhatt's companies had defaulted on debts and were pursued successfully by Westpac, resulting in judgment. Other companies of which Mr Bhatt has been a director have been struck off. Mr Harrop observed that little explanation has been provided for Mr Bhatt's financial failure other than the catch-all justification of the Global Financial Crisis. Mr Harrop submitted that Mr Bhatt has demonstrated financial irresponsibility which has

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[13] *Kelly v Structured Finance* above n 9, at [53] and at [59]. (These and other passages approved by the Court of Appeal in *Magsons Hardware,* above n 5.

resulted in large losses to his creditors. He submitted that public interest is not served by sending a message that the consequences of such activity can be escaped by payment of a mere 0.4 cents in the dollar. Mr Harrop urged the Court to conclude that, as in *Kelly v Structured Finance Limited,* the proposal should be declined. He emphasises the need to protect members of the public who, but for bankruptcy, might otherwise have dealings with the insolvent. Ms Tomkins, in her affidavit in opposition, very briefly raised very similar considerations in expressing Westpac's concern. She concluded that the debts of Mr Bhatt had arisen as a result of failure of companies he had run. She commented that if the proposal is approved, Mr Bhatt will be free to continue to incorporate companies and to act as a company director. She stated that that is a concern given his track record of failed companies and unpaid debts of companies he controls.

[79] Mr Harrop, in his oral submissions, did not address me at length on the issue of expediency.

[80] The evidence for the Court does not point to the commercial delinquency on the part of Mr Bhatt suggested by Westpac through its notice of opposition. Mr Bhatt had, until 2000, lived in Asia and had a career as a commodities trader and broker. From his arrival in New Zealand in 2001 he trained as a financial adviser and also subsequently started property development and trading. He took legal and accounting advice as to his trading activities and formed different entities for separate activities. He identifies eight separate entities. While that number is significant, it is not unusual. Mr Bhatt deposes that with the onset of the Global Financial Crisis (and trading difficulties for some of his entities) he took on a number of personal guarantees following lengthy discussions with his creditors. He deposes that from the time of the Global Financial Crisis he has not obtained any further credit. He has kept his creditors informed and has obtained the ongoing support of the majority of his creditors. He gave the uncontradicted evidence which I have referred to as to his cooperation with Westpac in its process of realising securities.

[81] He exhibits valuations as to the three properties sold by Westpac. The valuations indicate the impact which the Global Financial Crisis had in causing of reduction to the value of the properties with resulting losses on realisation.

[82] When Westpac obtained judgment and initiated bankruptcy proceedings, Mr Bhatt explored possibilities of employment or consultancy with other organisations, with the three positions to which I have referred resulting.

[83] In relation to his personal life, Mr Bhatt deposes to having always lived a frugal life.

[84] Mr Bhatt attended Court (in the company of several of his supporting creditors and the trustee) for the hearing and through Mr Haines expressed his apology to his creditors and the creditors of his various entities for the losses that they have incurred. This apology echoed a similar apology in his affidavit evidence.

[85] Ms Tomkins of Westpac had spoken of a "track record of failed companies and unpaid debts". The uncontradicted evidence points strongly to an entrepreneurial individual who in the course of almost a decade in New Zealand, built up significant assets but also carried debt which, with the arrival of the Global Financial Crisis, could not be sustained. The evidence establishes that from the time his financial difficulties arose, Mr Bhatt faced them openly, responsibly and sensibly.

[86] The problems which have confronted debtors and creditors since the Global Financial Crisis have a parallel in the events following the sharemarket crash of October 1987. It is instructive in this case to refer back to the proposals made by Messrs Trott and Joy in 1989. They had debts of $22m and $17m respectively. Mr Trott's proposal was for 0.6 cents in the dollar, Mr Joy's for 3.6 cents in the dollar.

[87] Tompkins J heard the application for approval of the Joy/Trott proposals.[14] For opponents, it was submitted that to approve the proposals would have amounted to condoning serious conduct, that being the conduct of the insolvents that led to the very large deficiencies. It was submitted also that there was a public interest in

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[14] *Re Trott* [2009] 2 NZLR 800n.

having a detailed investigation because of the extraordinary circumstances of the case. It was further submitted that if the insolvents escaped without bankruptcy, such a result might set a precedent which could influence others to take unjustifiable financial risks in the belief that even if a financial disaster followed they could escape bankruptcy.[15] Tompkins J accepted that those were considerations relevant to the exercise of the Court's discretion.[16] But his Honour identified the relevance of misconduct in the following passage which I adopt:[17]

> ... for misconduct to amount to a reason why it is not expedient that the proposal should be approved, it must be conduct so serious and irresponsible as to make it, for the reasons to which I have referred, contrary to public interest for the proposal to proceed. It would include evidence of the deliberate and wilful squandering of assets, of excessively extravagant living, or what could fairly be described as misconduct of a gross character. The latter was the description used by Vaughan Williams LJ in *Re EAB* [1902] 1 KB 457 as justifying the Court refusing its sanction to a scheme of arrangement submitted by the debt or after bankruptcy proceedings were commenced – proceedings probably more akin to a composition under s 122. As he put it at 466:
>
> > ". . . there is no rule that any misconduct will justify the Court in refusing to sanction a scheme: the misconduct must have been such as would make it against public policy to sanction the scheme; that is the misconduct must have been of a gross character."

[88] In the event, Tompkins J found that the conduct of neither Mr Trott nor Mr Joy had involved such gross misconduct as to justify the Court refusing its approval to an otherwise acceptable proposal.[18]

[89] Finally I turn to consider the impact on this proposal of the voting by associated entities or friendly creditors. In his submissions, Mr Harrop had dealt with these matters in relation to the reasonableness of the proposal. I view these matters as more appropriately dealt with, as the cases tend to have.[19] The fact that a proposal is supported by an entity closely connected with the insolvent can be taken into consideration in the Court's discretion when considering expediency.[20]

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15 At 816.
16 Ibid.
17 At 810–811.
18 At 818.
19 See the cases collected in *Brookers Insolvency Law & Practice* (looseleaf ed, Thomson Reuters) at [IN 333.06](3)(c).
20 *Kelly v Structured Finance,* above n 9, at [56].

[90] There is nothing in the evidence to suggest in this case that family members voted in the way they did other than for genuine reasons relating to recovery of some of their money. Equally, even were the entire value of the relatives' debts ($124,000) disregarded entirely, the remaining votes by value would still have been substantially over the threshold.

[91] Mr Harrop submitted that the close relationship of one particular creditor (she who had been a director on some of Mr Bhatt's companies) should carry less weight and contribute to a decision that the proposal was not expedient. There is no evidential justification in this case for discounting significantly the weight to be attached to such a vote. It is not unusual that business associates become indebted to one another in relation to their businesses. They are as equally entitled to vote on a proposal as any other creditor. There would appear to be little scope for the trustee to ultimately challenge the debt. I therefore have some regard to the closeness of the relationship of this creditor to Mr Bhatt but do not consider that this matter affects the expediency of the proposal.[21]

[92] A final category of creditors addressed by Mr Harrop was the four who claimed rights under guarantees said to be contained in deeds as discussed above[22] and detailed in the final column of Schedule 1.

[93] I have considered whether in the "expediency" context there is ground to give less weight to these four creditors than to other creditors. I conclude they should not be so distinguished. While my view of their claimed debts can in this context be only a matter of impression, the claims appear to have real substance – although Mr Bhatt did not sign twice so as to signify a signature both as for the relevant company (as director) and in his personal capacity (albeit because he was a director) he was expressly signing a document which included as its first operative clause the statement that the company's director "hereby[23] agrees that he will guarantee this

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21 In this regard, I adopt the approach of Associate Judge Christiansen in *Whimp v Official Assignee* HC Christchurch CIV-2006-409-867, 4 August 2006, in which the Court found it inappropriate to discount the vote of "friendly" voters.

22 Above at [31]–[36].

23 Emphasis added.

loan ..." There is a distinct prospect that the four proof of debts will be validly admitted.

Overall conclusion as to discretion

[94] I find in terms of s 333(3) of the Act that:

(a) The provisions of subpart 2 of Part 5 of the Act have been complied with;

(b) The terms of the proposal are reasonable and are calculated to benefit the general body of creditors;

(c) It is expedient that the proposal be approved.

[95] None of the grounds for refusal under s 333(3) is made out.

[96] I am satisfied that the proposal should be approved.

Orders

[97] I order:

(a) The proposal of Ajay Kumar Bhatt under the Insolvency Act 2006 dated 23 October 2013 is approved;

(b) There is no order as to costs.

Observation

[98] The Court extends its thanks to Mr Haines (and others associated with the preparation of Mr Bhatt's documents) for the presentation of an exemplary set of documents in relation to this proposal. The report of the trustee was simply presented, dealing with each requirement, and easy to follow. The format of submissions filed for the hearing by Mr Haines meant that the threshold requirements were comprehensively but succinctly dealt with and the issues

succinctly identified. In these regards, the presentation of the proposal differed markedly from some proposals which this Court sees. The grasp of requirements and the excellence of presentation in this case is to be commended.

[99] Nothing in these comments detracts from the presentation of Westpac's opposition which was appropriately presented and supported by equally helpful and well considered submissions of Mr Harrop.

Solicitors:
Minter Ellison Rudd Watts, Auckland
Simpson & Co, Otaki

SCHEDULE 1

	Proof Figures		Overstatement	Company Debts		Relatives	Alleged Guarantees
1	$7,440.50			$7,440.50			
2	$239,413.05		$41,251.81				$198,161.24
3	$3,628.00			$3,628.00			
4	$25,337.50			$25,337.50			
5	$511,767.46						$511,767.46
6	$2,000.00					$2,000.00	
7	$670.00			$670.00			
8	$240,995.88						$240,995.88
9	$9,374.80						
10	$10,000.00						
11	$8,000.00					$8,000.00	
12	$80,000.00					$80,000.00	
13	$4,000.00					$4,000.00	
14	$18,000.00					$18,000.00	
15	$12,000.00					$12,000.00	
16	$2,145.00						
17	$10,000.00						
18	$15,019.82						$15,019.82
SUB-TOTAL			**$41,251.81**	**$37,076.00**		**$124,000.00**	**$965,944.40**
FOR	**$1,199,792.01**	**81.84%**	**$1,158,540.20**	**$1,138,904.50**	**81.05%**		
19	$234,598.89						
20	$2,276.42						
21	$29,318.79						
AGAINST	**$266,194.10**	**18.16%**	**$266,194.10**	**$266,194.10**	**18.95%**		
TOTAL	**$1,465,986.11**		**$1,424,734.30**	**$1,405,098.60**			

SCHEDULE 2

Creditors by number:

	14 in favour	= 82.35%
	3 opposed	= 18.65%
TOTAL	**17**	

Creditors by value:

	$1,138,904.50	= 81.05%
	$ 266,194.10	= 18.95%
TOTAL	**$1,405,098.60**	