

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

CIV 2009-404-003694

IN THE MATTER OF the Insolvency Act 2006

BETWEEN MARK RONALD BRYERS
 Judgment Debtor

AND COOK NEILSON STREET LEASEHOLD
 LIMITED (IN LIQUIDATION)
 Judgment Creditor

Hearing: 1 October 2009

Appearances: A Nicolls for the Judgment Debtor
 D Grove for the Judgment Creditor
 D Grove for AD102 Limited in support
 L Gellert for Westpac New Zealand
 W Moffat for Bridgecorp and Consolidated Technologies Limited
 B Atkins for GE Finance
 E Grove for 188 Nominees Limited and Lucy Rose Herron

Judgment: 1 October 2009

**ORAL JUDGMENT OF
ASSOCIATE JUDGE ROBINSON**

Solicitors/Counsel:

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[1] The judgment creditor applies for an order adjudicating the judgment debtor bankrupt claiming that the judgment debtor owes the judgment creditor \$1,935,000.00 plus interest being the amount claimed on a bankruptcy notice which was served on the judgment debtor on 29 July 2009. The judgment creditor's application is now supported by the following creditors:

• Cook Nelson St Leasehold	\$1,935,000.00
• AD102 Limited	\$4,298,822.77
• GE Finance	\$444,045.56
• Bridgecorp	\$47,532,545.20
• Westpac	\$11,192,708.49
• 188 Nominees Limited	\$172,323.33
• Lucy Rose Herron	\$2,157,631.04
• Consolidated Technologies Limited	\$18,000,000.00

[2] The total value of creditors who support this application is approximately \$85,000,000.00.

[3] The judgment debtor who resides in Australia has not until this morning taken any steps to oppose the application. He has now instructed counsel who seeks leave to file an opposition to these proceedings. In the notice of opposition the judgment debtor advises of an intention to make a proposal under part 5 subpart 2 of the Insolvency Act 2006 and claims that it is therefore not just and equitable for him to be adjudicated bankrupt.

[4] The judgment debtor has sworn an affidavit giving details of the proposal. He claims to have been working with Peri Finnigan Chartered Accountant of McDonald Vague with the intention of preparing the proposal. He has submitted with his defence a statement of his assets and liabilities. According to that statement

he has no assets at all other than \$300.00 in a bank account. His debts and liabilities are acknowledged as follows:

- Unsecured creditors \$9,225,500.00
- Shortfall to further unsecured creditors with security granted by other entities \$60,432,600.00
- Contingent/Other creditors \$104,168,700.00

[5] His total debts he acknowledges as being \$173,826,300.00.

[6] He says he rents the property he resides in. He has no life insurance policies or any other investments. He drives a leased vehicle. He acknowledges having an interest as discretionary beneficiary in a trust.

[7] Under his proposal he will arrange for Balboa PM Services Pty Limited to pay the proposed trustee funds of NZ\$1,200,000.00 over a three year period which will be distributed amongst his creditors.

[8] He says the funds will be paid quarterly in 12 instalments. The first instalment to be made no later than 30 days after the order approving the proposal.

[9] His counsel advises that one of the creditors who supports the proposal Northern Crest Investments Limited will agree to defer receiving any money from the proposal and in this way the amount available to the other creditors will be increased. Northern Crest Investments Limited are creditors with debt of \$72,000,000.00.

[10] When the matter was called this morning I stood the matter down to give creditors appearing in support of the applicant for the debtor's adjudication an opportunity to consider the debtor's proposal.

[11] In terms of the Insolvency Act, if the majority of creditors with debts to the value of three quarters of the total indebtedness support a proposal then the Court can approve the proposal in which event the adjudication would not proceed.

[12] Had there been an indication that the creditors to the value of three quarters of the debts outstanding wanted to consider the proposal then I probably would have granted the request by the debtor for an adjournment. However all creditors appearing this afternoon have decided to reject the proposal.

[13] On that basis I am faced with a situation where creditors to a value of just under 50 percent of the outstanding indebtedness have made it clear that they are not going to agree to the proposal.

[14] The creditors include creditors with financial experience, if I can use that word. They include banks and finance companies. They are entitled to make a decision on whether they are going to accept the proposal, whether they want further time to consider whether they are going to accept the proposal or whether it is going to be a waste of their time and money in considering the proposal because it is simply not acceptable.

[15] This Court is not in a position to advise creditors on whether a proposal should or should not be accepted. The Insolvency Act makes it clear that the decision is really for the creditors. Consequently in circumstances where creditors to the value of 49 percent have made it clear that they are not going to accept the proposal, there can be little point in further adjourning these proceedings for that purpose. All that will happen is that the adjudication will be delayed and other creditors may be put to more expense in considering a proposal that simply cannot get off the ground because of the value of creditors who are now opposing.

[16] I have considered the authorities that have been sighted in support of the application. In *St Laurence Lending Limited v Olliver*, 13/5/09 Faire AJ, High Court Auckland, CIV 2008 404-001417 the adjournment reflected in a proposal which was approved because the debtor could persuade creditors to the required value to agree to the proposal. That I am satisfied will not happen in this case.

[17] Consequently, I conclude that the debtor has no defence. There is certainly nothing in the evidence advanced today that would justify the Court in exercising any residual discretion in refusing to grant the application for the debtor's

adjudication and there are good reasons why the application should be granted having regard to the substantial indebtedness in this case. One of the consequences of adjudication is to prevent the debtor from accumulating debts in the future that can amount to anything like the amount he owes today. I certainly do not need to go into the reasons why those amounts have accrued. It may very well be that a significant amount has accrued because of personal guarantees.

[18] For the reasons I have given therefore, the application for an adjournment will be declined. The evidence establishes that the amount owing to this creditor has not been paid and indeed the debtor's affidavit confirms the amount owing to this creditor.

[19] Consequently I am prepared to grant the order sought. The creditor as are the supporting creditors are entitled to costs on a 2B basis with disbursements as fixed by the Registrar.

[20] I am unable to locate the affidavit of service of the bankruptcy notice. Counsel for the creditor assures me that the bankruptcy notice was served and an affidavit of service can be produced. The order adjudicating the debtor bankrupt will accordingly lie in Court pending production of the affidavit of service of the bankruptcy notice.

[21] I note the order is made at 3:30pm.

Associate Judge Robinson