IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2015-404-003086
[2016] NZHC 1742

	BETWEEN	ALLAN KENITH WILKINS Applicant
	AND	OFFICIAL ASSIGNEE Respondent

Hearing: 25 July 2016

Appearances: Mr Wilkins the Applicant in person
G Caro for the Official Assignee
N H Malarao/K Muirhead for Housing New Zealand Corporation

Judgment: 29 July 2016

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
29.07.16 at 3:00pm, pursuant to
Rule 11.5 of the High court Rules.

Registrar/Deputy Registrar
Date……

Background

[1] Mr Wilkins applies under s 226(1) and (2)(a) of the Insolvency Act 2006 (the Act) to appeal the decision of the Official Assignee (the Assignee).

[2] Mr Wilkins was adjudicated bankrupt on 11 December 2014.

[3] On 18 April 2016 the Assignee accepted a claim of Housing New Zealand Corporation (HNZC) in Mr Wilkins bankruptcy. The claim was for $151,129.97 and was admitted in full.

[4] The claim of HNZC relies on the judgment of Judge Sinclair in the District court delivered on 19 December 2012. The Assignee considers the issue of admissibility of the claim primarily derives from that judgment.

[5] Mr Wilkins s 226 application is about his challenge of the Assignee's decision accepting the claim of HNZC. Section 238 of the Act enables the court to make an order cancelling an admitted creditor's claim or reducing the amount claimed if it considers that the claim is improperly admitted.

[6] Mr Caro's submissions on behalf of the Assignee focus on situations as appear in this case, when hearing a s 238 application, the court is asked to look behind a judgment against the bankrupt. His submissions identify case authority that has reviewed the ability of the bankruptcy court to look behind the judgment relied on by a creditor.

[7] HNZC appears to respond to claims that there is sufficient in the issues raised by Mr Wilkins' application to warrant the cancellation of its bankruptcy creditor claim.

[8] Mr Wilkins case has a long history. A chronology is required.

[9] This judgment will then address issues affecting a court's ability to "look behind" a court judgment.

[10] Finally this Court will address the claims raised by Mr Wilkins upon his application.

Chronology

[11] Between March 2004 and 11 March 2005 Mr Wilkins applied to become a tenant of HNZC by completing needs assessment interviews (NAI) with HNZC interviewers who completed NAI forms based on the information provided, which Mr Wilkins signed. At time of the NAI interview Mr Wilkins did not disclose he was the sole shareholder and director of Make It Limited, a company which had purchased two Auckland properties in the previous four months or, of any income from that company.

[12] In the period 21 March 2005 to 7 March 2008 Mr Wilkins completed income-related rent subsidy forms (IRR). Those were required to calculate the amount of rent to be charged with reference to a person's household income or benefit level. In that he failed to disclose all relevant information about his interest in Make It Limited and/or Thought Box Consultancy Limited a company incorporated in November 2005 of which he was also the sole director and shareholder.

[13] On 21 April 2009 Mr Wilkins made a first appearance in the District court after HNZC laid an Information alleging he used documents for pecuniary advantage. His lawyer at that time sought further disclosure.

[14] When Mr Wilkins appeared he was on 5 May 2009 he was represented by Dr Coughlan and entered a plea of not guilty.

[15] On 30 June 2009 Mr Wilkins pleaded guilty to one representative charge of using a document to defraud between 30 March 2004 and 8 February 2007 under s 228 of the Crimes Act 1961 at a status hearing. Mr Wilkins was represented by Dr Coughlan.

[16] On 7 October 2009 Judge McNaughton permitted Mr Wilkins to vacate his earlier guilty plea. The Judge then ordered a new Information to be laid as those earlier laid had been previously withdrawn when a representative charge was laid.

[17] On 14 October 2009 Mr Wilkins confirmed his guilty plea to the one representative charge and Judge Kiernan directed that new Informations did not need to be filed.

[18] On 22 December 2009 Judge Wilson QC convicted and sentenced Mr Wilkins to five months home detention and 100 hours community work. Dr Coughlan appeared for Mr Wilkins at the sentencing.

[19] In August 2010 HNZC sought an asset preservation order from the District court which on 21 September 2010 was granted by Judge Harvey.

[20] On 10 October 2012 HNZC sought a freezing order naming additional entities associated with Mr Wilkins after HNZC became aware that he had breached the 21 September 2010 order by transferring shares in a company named in that order to another entity. That freezing order was granted by Judge Sinclair the following day.

[21] Between 15 and 19 October 2010 a five day civil trial was heard before Judge Sinclair. Fifteen witnesses including Mr Wilkins, Dr Coughlan and solicitors employed by Meredith Connell gave evidence. As well, HNZC made available all current staff that Mr Wilkins wanted to call evidence from to be available so that he could cross examine them rather than lead their evidence in the usual way.

[22] The proceeding was brought under s 60 of the Housing Restructuring and Tenancy Matters Act 1982. The claim was to recover a Crown debt arising from the income-related rent that Mr Wilkins had paid while renting an HNZC property. The issue is about the information HNZC had when assessing Mr Wilkins' income-related rent, and information it subsequently obtained. HNZC's position was that if the subsequently obtained information was correct then Mr Wilkins was liable for the difference between what was paid and what should have been paid.

[23] On 19 December 2012 Judge Sinclair delivered her reserved decision and found HNZC was entitled to $68,410 (plus interest). Her Honour also awarded $48,778.24 costs and disbursements to HNZC.

[24] On 20 March 2013 HNZC served a letter of demand and on 17 June 2013 a bankruptcy notice was served on Mr Wilkins.

[25] When the matter was called in the bankruptcy list on 25 September 2013 Faire AJ adjourned the proceeding to enable Mr Wilkins to obtain legal advice about challenging the District court's decision.

[26] On 15 November 2013 Mr Wilkins filed an application for judicial review challenging (inter alia) the validity of the alleged plea bargain with HNZC and HNZC's subsequent decision to prosecute and to recover the Crown debt from him through civil proceedings.

[27] On 20 November 2013 Mr Wilkins filed an application under s 38 of the Act to halt adjudication because he had brought a judicial review application. The following day Faire AJ adjourned the bankruptcy proceeding until the judicial review hearing had taken place.

[28] On 5 March 2014 Mr Wilkins applied to the State Housing Appeals Authority (SHAA) seeking an extension of time for lodging an appeal against HNZC's determination of his IRR in 2009.

[29] On 19 March 2014 Andrews J granted HNZC's application to strike out Mr Wilkins statement of claim commencing judicial review proceedings. Subsequently Her Honour awarded costs of $11,653 to HNZC.

[30] On 10 April 2014 SHAA declined the extension of time sought by Mr Wilkins and struck out his appeal.

[31] On 7 May 2014 Mr Wilkins filed a notice of appeal against his conviction in the District court on 22 December 2009.

[32] On 18 June 2014 Sargisson AJ heard HNZC's application to adjudicate Mr Wilkins as bankrupt which application he opposed because he had filed an appeal against his conviction. The Learned Judge reserved her decision.

[33] On 1 September 2014 Courtney J dismissed Mr Wilkins application for leave to appeal out of time his conviction on 22 December 2009.

[34] On 1 December 2014 Sargisson AJ issued an interim judgment adjourning the bankruptcy proceeding to a bankruptcy list on 11 December 2014. On 11 December 2014 Mr Wilkins was adjudicated bankrupt.

[35] On 22 December 2014 Mr Wilkins served on HNZC's solicitors an interlocutory application seeking leave for a rehearing of the proceeding heard by Judge Sinclair. In response on 11 March 2015 Judge Sinclair issued a minute striking out the rehearing application on the basis that his right to take legal action was then vested in the Official Assignee.

[36] On 20 November 2015 Mr Wilkins filed a s 226 of the Insolvency Act application in the High court Auckland.

[37] In response to the Assignee's request on 12 February 2016, HNZC's solicitors on 17 February 2016 provided their summary of information relevant to the judgment debt and the litigation between Mr Wilkins and HNZC.

[38] On 24 March 2016 the Assignee's office invited HNZC to comment upon Mr Wilkins application under s 226 before the Assignee made a decision whether to admit or reject HNZC's claim. HNZC's solicitors responded on 12 April 2016.

[39] On 18 April 2016 the Assignee decided to admit HNZC's claim for $151,129.97 in full.

[40] On 12 April 2015 Mr Wilkins filed an amended s 226 application appealing the Assignee's decision to admit HNZC's claim.

Mr Wilkins's application

[41] By his application Mr Wilkins raises essentially two issues which he says required the Assignee to look behind Judge Sinclair's judgment and to reject HNZC's claim. Those concerned the focal point of evidential interest in both of his prior criminal and civil trials. They relate to claims that he did not provide full disclosure of his financial circumstances when applying to become a tenant of HNZC. He says he only pleaded guilty in the criminal proceeding because it was agreed he would not have to pay any reparation. Regarding and notwithstanding evidence to the contrary accepted by Judge Sinclair, Mr Wilkins asserts there is new evidence obtained in affidavits he has since filed that proves that when applying to be a tenant, he was not asked for that information it is said he did not provide with his tenancy application.

[42] It is this affidavit evidence Mr Wilkins says provides reason for challenging the conclusions reached by Judge Sinclair regarding the evidence Her Honour heard.

[43] Another aspect of Mr Wilkins appeal challenges claims of a debt at all being due. In this regard Mr Wilkins relies on the affidavit of Ms Brock a chartered accountant.

[44] By her affidavit Ms Brock deposes having prepared the IRR calculations using the HNZC's IRR formula provided to Mr Wilkins who provided the same to her. She deposes:

(a) IRR rent calculations are all referenced to the source documents.

(b) Her calculations were submitted in the supplementary submissions of Mr Wilkins in support of his application for adjudication.

(c) She used the HNZC IRR formula for the purpose of calculating the correct IRR owed by Mr Wilkins to HNZC.

(d) All income sources required to be considered using the HNZC IRR formula were taken into account and in the a result Mr Wilkins owed HNZC the sum of $9,061 (only).

[45] Mr Jenkins did not appeal the order for his adjudication. That however does not preclude consideration of an order cancelling an admitted creditor's claim or reducing that amount claimed.

Looking behind a considered judgment following a contested hearing

[46] In *Corney v Brien*[1] Fullagar J of the Australian High court noted at 356 – 357:

> No precise rule exists as to what circumstances call for an exercise of the power, but certain things are, I think, clear enough. If the judgment in question followed a full investigation at a trial in which both parties appeared, the court will not reopen the matter unless a prima face case of fraud or collusion or miscarriage of justice is made out…

[47] And at 358:

> The question whether the judgment is to be reopened or "gone behind" at all will, of course, often involve some preliminary investigation of the merits of the attack on the judgment. But, when once the court decides that it will "go behind" the judgment, the cases which I have cited show, in my opinion, that the whole matter is open. When once it is considered proper to "reopen", the only question would be whether there was, in fact and in law, a debt which could legally found the judgment…".

[48] Later in *Wren v Mahoney*[2] Barwick CJ said at 224:

> The judgment is never conclusive in bankruptcy… But the Bankruptcy court may accept the judgment as satisfactory proof of the petitioning creditor's debt. In that sense that court has a discretion. It may or may not so accept the judgment. But it has been made quite clear by the decisions of the past that where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in Truth and Reality a debt due to the petitioning creditor, the court of Bankruptcy can no longer accept the judgment as satisfactory proof. It must then exercise its power, or if you will, its discretion to look at what is behind the judgment: to what is its consideration… The court's discretion in my opinion is discretion to accept the judgment as satisfactory proof of that debt. That discretion is not well exercised where substantial reasons are given for questioning whether

[1] (1951) 54 CLR 343.
[2] (1972) 126 CLR 212.

> behind that judgment there was in Truth and Reality a debt due to the petitioner".

[49] As Mr Caro to this court submits Barwich CJ was saying that when the court was asked to look behind the judgment it had a duty to do so to see if there was in truth and reality a debt due in fact and law.

[50] Both *Corney* and *Wren* involved default judgments. The Australian case of *Ramsey Healthcare Australia Pty Limited v Compton*[3] did not involve a default judgment but concerned a judgment given on a bankruptcy petition following a contested three day hearing.

[51] In that case the High court concluded it should not go behind the judgment of the Supreme court for two reasons:

(a) The circumstances in which the discretion should be exercised have not been enlivened; and/or

(b) As a matter of discretion the court ought not to do so.

[52] Those judgments concerned appeals of orders adjudicating a debtor bankrupt. They were not about decisions of the Assignee admitting or rejecting a creditor's claim.

[53] Mr Wilkins case primarily concerns issues of liability but as well by the affidavit of Ms Brock issues of quantum are raised. It follows it is not appropriate for the court simply to say that because there has been a considered judgment on liability that no argument on liability will be considered. What an assignee needs do is adopt a process which is fair to both sides.

[54] The responsibility for Mr Wilkins in the present case is to demonstrate there is proper evidential reason to go behind the judgment of Judge Sinclair. Likely an Assignee will accept a judgment debt as sufficient proof following a fully heard contest. That should not preclude looking behind in cases where it was proper to do

[3] [2015] FCA 1207.

so. The Assignee/Bankruptcy court needs to make a separate assessment about whether it is proper to do so.

[55] This appeal has been dealt with under s 238 of the Act. By it the court will make its own assessment of HNZC's proof of debt and will decide what weight ought to be given to the Assignee's decision to admit those proofs of debt. The Assignee's obligations are clear[4]. There must be an examination of a creditor's claim form which would show the grounds of the debt; then the claim is admitted or rejected in whole or part; and the Assignee can require further evidence be provided in support of the claim. The purpose is to determine a real debt is due. The court may look behind a judgment debt although there are no clear rules about how this should be done, but if the judgment followed a full investigation at trial where both parties appeared, and where the evidence and issues there are at least similar upon a debtors challenge of an Assignees decision, then that may have a persuasive influence upon any review of the Assignee's decision.

[56] Regarding the correct test to apply the Assignee submits adopting the *Corney* test approach and the court agrees that:

(a) The court can in general accept a judgment debt as sufficient proof especially when the judgment results from a defended hearing.

(b) The circumstances in which the court may inquire into the validity of a judgment debt are not closed: there are no inflexible rules about when the court may so inquire.

(c) Fraud, collusion, and a miscarriage of judgment are examples of the circumstances in which the court may elect to enquire into a judgment debt.

[4] S 234.

Conclusion

[57] In a five day defended hearing before Judge Sinclair Mr Wilkins was found to have failed to provide all the information necessary when applying for an HNZC house and when applying for an income-related rent subsidy. At trial HNZC had organised any of its staff that Mr Wilkins wanted to call evidence from to be available for cross examination by him. He also called his then accountant Mr Giles. In total 15 witnesses were called.

[58] By Her Honour's reserved decision Judge Sinclair found Mr Wilkins did not provide true and complete information as to his financial circumstances, and entered judgment against him in that amount Her Honour calculated was due by the evidence she considered.

[59] Regarding Mr Wilkins claims of not have provided statements of account because he had not been requested to, Judge Sinclair found HNZC's staff had done all that was required to obtain the necessary information from Mr Wilkins in order to make a proper assessment and that he had not provided true and complete information as to his financial circumstances.

[60] Mr Wilkins has subsequently and unsuccessfully attempted to relitigate those matters heard and determined by Judge Sinclair. Those attempts include a judicial review application challenging Judge Sinclair's finding that there was no "plea bargain" between Mr Wilkins and HNZC in relation to his being convicted on one account of using a document to defraud in 2009. Mr Wilkins lodged an appeal with the State Housing Appeal Authority against the decision of HNZC to establish an IRR debt, and the decision of the HNZC review office to alter the amount of that debt. Mr Wilkins filed leave to appeal out of time his conviction for use of a document some five years after entering his guilty plea. He opposed the adjudication application claiming the quantum of the underlying debt was in dispute. Within two weeks of being adjudicated bankrupt he applied for leave out of time to rehear the District court proceeding that had been presided over by Judge Sinclair.

[61] There is a degree of flexibility about those circumstances when a court and an Assignee can inquire into a judgment debt to determine whether a creditor's claim is founded on a real debt. The court accepts, as clearly did the Assignee accept that this case is not simply about accepting the decision of Judge Sinclair. The Assignee made extensive inquiries from counsel for HNZC before reaching the decision to admit the judgment debt. The Assignee did what he needed to so, namely make further inquiries.

[62] At the end of the day it is all about whether in truth or reality there is a debt. In that regard the Assignee and the court do not disagree. Regarding belated challenges to the quantum of the debt by the affidavit of Ms Brock, it is to be inferred that she has relied on information that was provided to her by Mr Wilkins.

[63] That affidavit dated 10 July 2014 had also been before the court when Mr Wilkins was adjudicated bankrupt. In that regard and by Her Honour's judgment dated 1 December 2014 Sargisson AJ said that as matters stood the contentions in Ms Brock's affidavit did not give rise to any available dispute in the context of the bankruptcy application or to assist Mr Wilkins to show just and equitable grounds for refusing adjudication.

[64] The acceptable overall inference is that having carefully considered Mr Wilkins application, the information provided by HNZC via its solicitors, and the relevant authorities, the Assignee appropriately made the decision to admit the full amount of HNZC's claim on 18 April 2016.

[65] Mr Wilkins has not and the court agrees cannot make out a prima face case of miscarriage of justice of any other circumstances that might justify the court enquiring into the judgment debts let alone prove that HNZC's claim was improperly admitted and that the decision of the Assignee to admit it ought to be cancelled or the quantum reduced.

Result

[66] Mr Wilkins' application is dismissed.

[67] Applications for costs will be considered in due course.

Associate Judge Christiansen