

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKAURAU ROHE**

**CIV-2017-404-2004  
[2018] NZHC 2382**

UNDER the Insolvency Act 2006 and  
the High Court Rules 2016

BETWEEN MARTIN RUSSELL HONEY,  
STEPHANIE HONEY and  
HEMI TAKA  
Judgment creditors

AND DERMOT GREGORY NOTTINGHAM  
Judgment debtor

**CIV-2018-404-1224**

UNDER the Insolvency Act 2006

IN THE MATTER of an application to prove a proposal under  
pt 5(2) of the Insolvency Act 2006

BY DERMOTT GREGORY NOTTINGHAM  
Applicant

Hearing: 6 September 2018

Appearances: Mr D Grove for Martin Honey, Stephanie Honey and Hemi Taka,  
and H T & E Ltd, in CIV-2017-404-2004 and CIV-2018-404-1224  
Ms N Tabb for Kelvin Prentice in CIV-2018-404-1224  
Mr W Wright for Allied Press Ltd (by memorandum only) in  
CIV-2018-404-1224  
Mr P D George (by memorandum only) in CIV-2018-404-1224

Judgment: 11 September 2018

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**JUDGMENT OF ASSOCIATE JUDGE JOHNSTON**

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*This judgment was delivered by me on  
11 September 2018 at 3.30 pm, pursuant to  
Rule 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*

## **Introduction**

[1] Two proceedings which incorporate two applications and one appeal are before the Court for determination:

- (a) in 2017-404-2004, an application by the judgment creditors, Mr Martin Honey, Mrs Stephanie Honey and Mr Hemi Taka, for an order pursuant to pt 2(2) of the Insolvency Act 2006 that the judgment debtor, Mr Dermot Nottingham, be adjudicated bankrupt;
- (b) in 2018-404-1224:
  - (i) an application by Mr Nottingham for approval of a proposal pursuant to pt 5(2) of the Insolvency Act; and
  - (ii) an appeal by Mr and Mrs Honey and Mr Taka pursuant to r 32(1) of the Insolvency (Personal Insolvency) Regulations 2007 against the decision of the proposed trustee under the pt 5(2) proposal to recognise a number of claimants as creditors of Mr Nottingham and allow them vote on his proposal.

[2] Logically, it appears to me that the two applications and the appeal are best addressed in this order:

- (a) Mr and Mrs Honey and Mr Taka's appeal against the decision of the proposed trustee;
- (b) Mr Nottingham's application for approval of his proposal; and

- (c) Mr and Mrs Honey and Mr Taka's application for an order that Mr Nottingham be adjudicated bankrupt.

**A preliminary issue concerning standing**

[3] Administratively, the two proceedings have been travelling together. On 9 July 2018 Associate Judge Bell set both down for hearing. In his minute of that date his Honour issued comprehensive pre-trial directions.

[4] One of those directions was that Mr Nottingham or any other party wishing to oppose the appeal against the proposed trustee's decision or support Mr Nottingham's application for approval of his proposal should file and serve notification of their intention and any affidavit evidence by 6 August 2018.

[5] Neither Mr Nottingham nor any other party did so.

[6] Counsel for Mr & Mrs Honey and Mr Taka, Mr Grove, drew the Court's attention to this in a memorandum dated 27 August 2018 and sought a telephone conference. Laing J declined to convene a telephone conference. His Honour issued a minute dated 28 August 2018. He recorded that neither Mr Nottingham nor any other party had filed and served notice or affidavit evidence pursuant to Associate Judge Bell's pre-trial directions. He said that it would be for the presiding judge on the day to determine whether to hear from Mr Nottingham or any other party in opposition to the appeal or in support of the proposal. Laing J's minute was distributed to all concerned.

[7] In the end, neither Mr Nottingham or any other party opposing the appeal or supporting the proposal has filed or served anything.

[8] Notwithstanding his failure to comply with the Court's directions, Mr Nottingham sought to be heard in relation to both the appeal and the proposal. I would have been inclined to decline his request. But neither Mr Grove for Mr and Mrs Honey and Mr Taka, and HT & E, nor Ms Tabb for Mr Prentice, opposed Mr Nottingham being permitted to make submissions. In those circumstances, I

permitted Mr Nottingham to make submissions in relation to both the appeal and the proposal.

### **The Honey appeal**

[9] On 26 June 2018 Mr Nottingham initiated a proposal pursuant to pt 5(2) of the Insolvency Act.

[10] Part 5(2) contemplates an individual who is insolvent putting a proposal to his or her creditors as an alternative to bankruptcy.

[11] The proposal must nominate a trustee who will have overall responsibility for its administration and set out the details of the proposal which will generally involve the insolvent discharging his or her obligations to creditors on a discounted basis. A copy of the proposal must be lodged with this Court although at this stage in the process the Court plays no active role. Copies must also be served on the insolvent's creditors. A meeting of creditors is then convened. The proposed trustee is responsible for determining whether claimants are to be recognised as creditors and therefore entitled to vote. Those who are recognised have the opportunity to vote, most importantly on whether or not the proposal should be accepted or rejected. If a simple majority in number and a three quarters majority in value vote in favour of the proposal, the insolvent may apply to the Court for approval. If the proposal is approved by the Court, all creditors are bound.

[12] In this case, Mr Nottingham's proposal nominated Mr Kevin Whitley, an Auckland accountant, as the trustee. He and Mr Whitley arranged a meeting of creditors in Auckland on 4 July 2018. At that meeting Mr Whitley as the proposed trustee accepted all claims and the meeting proceeded on the basis that all claimants were permitted to vote.

[13] As I understand it, insofar as the critical question of whether to accept or reject the proposal is concerned, Mr Nottingham's judgment creditors, Mr and Mrs Honey and Mr Taka, HT & E, Mr Prentice, Allied Press and Mr George, voted against the proposal and all other creditors voted for it. The number and value of the votes in

favour of the proposal dwarfed those of the judgment creditors. Accordingly, a resolution to accept the proposal was passed.

[14] On that basis, on 5 July 2018, Mr Nottingham commenced the proceeding seeking the Court's approval to the proposal which is before me for determination.

[15] Mr and Mrs Honey and Mr Taka, HT & E, Mr Prentice, Allied Press and Mr George continue to oppose the application, and Mr and Mrs Honey and Mr Taka appeal pursuant to r 32(1) of the Regulations against Mr Whitley's decision to recognise the creditors who voted for the proposal.

[16] It is common ground that if that appeal is successful Mr Nottingham's application for the Court's approval of the proposal must fail because the outcome would be that 100 per cent of his creditors in both number and value voted against it.

[17] The basis upon which Mr and Mrs Honey and Mr Taka appeal against Mr Whitley's decision to accept certain creditors' claims and allow the creditors to vote on the proposal is straightforward.

[18] The conduct of creditors' meetings for proposals under pt 5(2) of the Insolvency Act is governed by the provisions of pt 5(2) itself and the Insolvency (Personal Insolvency) Regulations. Regulation 12 says:

- (1) A creditor's claim form under section 233 or 247 must—
  - (a) be signed by the person completing the form; and
  - (b) be dated; and
  - (c) have attached to it evidence of the debt and any other evidence supporting the claim.
- (2) A creditor's claim form under section 233 or 247 must contain the following information:
  - (a) the creditor's full name;
  - (b) the creditor's current address, telephone number, and any other contact detail (such as a mobile telephone number or an email address);

- (c) the creditor's goods and services tax registration number (GST number), if any;
- (d) if the form is completed on behalf of the creditor, the full name of the person completing the form;
- (e) the full name of the bankrupt or debtor;
- (f) the amount of the debt claimed;
- (g) a description of how and when the debt was incurred;
- (h) whether the debt is secured;
- (i) if the debt is secured, a description of the security and the estimated value of the security.

[19] The evidence before the Court includes copies of the alleged creditors' claims.

[20] Mr Grove took me through all of the claims which are the subject of appeal. No useful purpose would be served by going through them all in this judgment. Three typical examples will suffice:

- (a) Mr Marc Spring's claim dated 2 July 2018 describes his claim for \$28,756 as follows:

Cash advances — multiple Motor Vehicle expenses. Breiting mens (sic) watch.

- (b) Mr Boris Jamieson's claim dated 4 July 2018 describes his claim for \$76,758 as follows:

"Loan guarantee".

- (c) Mr Matthew Crann's claim dated 28 June 2018 describes his claim for \$35,700 as follows:

Commercial building maintenance civil earthworks. Digger hire. Cash advances.

[21] None of the other alleged creditors whose claims are the subject of this appeal provided more by way of elucidation.

[22] As Associate Judge Osborne said in *Re Kenneth Wikeley*:<sup>1</sup>

If the Claimant does not comply with Reg 12 requirements, the claim must be rejected with the consequence that the creditor is ineligible to vote.

[23] On the evidence I am satisfied that none of the creditors whose claims are the subject of this appeal lodged claims with Mr Whitley which came remotely close to complying with Regulation 12.

[24] In relation to Mr and Mrs Honey and Mr Taka's appeal, Mr Nottingham made three submissions.

[25] First, he said that it was not open to a party who did not object to a claimant being accepted as a creditor and permitted to vote at the meeting to object at a later stage to that creditor's status. Plainly it is. That is what r 32(1) of the Regulations provides.

[26] Second, Mr Nottingham asserted that his judgment creditors who voted against the proposal lodged claims which were similar in nature to those which are the subject of appeal. The evidence before the Court indicates otherwise. It indicates that the judgment creditors attached copies of the judgments on which they relied to their claims thus providing the information required by Regulation 12. But, even if the judgment creditors had not filed compliant claims, there is no challenge to their claims before the Court.

[27] Third, Mr Nottingham emphasised that the application by Mr and Mrs Honey and Mr Taka for an order adjudicating him bankrupt is based on a judgment debt for \$15,000. That submission overlooks the fact that there is an amended application before the Court alleging another act of bankruptcy on Mr Nottingham's part. In any event, it is not a relevant consideration in relation to the appeal (though it may be a relevant consideration in the application for adjudication).

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<sup>1</sup> *Re Kenneth Wikeley* [2014] NZHC 2677.

[28] In my judgment, Mr and Mrs Honey and Mr Taka have established that Mr Whitley was wrong to have accepted the claims of the general creditors and allowed them to vote. I propose to allow the appeal and overturn his decision.

### **Mr Nottingham's application for approval of his proposal**

[29] The effect of overturning Mr Whitley's decision to accept the claims of all creditors who voted in favour of the proposal entirely undermines the vote in favour of the proposal at the meeting. It means that 100 per cent of those creditors eligible to vote voted against the proposal. In those circumstances, there is no question of approving the proposal.

[30] I propose to decline Mr Nottingham's application.

### **The Honey application for an order for adjudication in bankruptcy**

[31] In the course of his submissions in support of the application by Mr and Mrs Honey and Mr Taka for an order adjudicating Mr Nottingham bankrupt, Mr Grove took me through the background to the proceeding demonstrating that all necessary material was before the Court.

[32] Mr Nottingham did not contend otherwise.

[33] In opposing this application Mr Nottingham advanced two submissions.

[34] First, he submitted that the judgment debt in favour of Mr and Mrs Honey and Mr Taka against him for \$15,000, and every other judgment debt against him (and there are a number), are all the subject of appeals.

[35] I do not think that is correct.

[36] Mr and Mrs Honey and Mr Taka secured their judgment debt following a private prosecution bought by Mr Nottingham against them. That involved a three week hearing before Judge Paul in the District Court in Auckland. Judge Paul concluded that there was no case to answer. Mr and Mrs Honey and Mr Taka were acquitted. Judge Paul awarded Mr and Mrs Honey and Mr Taka costs of \$15,000.

[37] Mr Nottingham sought leave to appeal against Judge Paul's judgment pursuant to s 296 of the Criminal Procedure Act 2011. In a judgment dated 24 July 2017 Davison J declined Mr Nottingham's application concluding that he had not raised any legitimate question of law which could be the subject of an appeal. He did not appeal against the costs award within time so applied for an order enlarging the time within which to do so. That application was refused by Downs J in a judgment dated 28 November 2017. Downs J described the appeal as an abuse of process. Mr Nottingham appealed to the Court of Appeal against both judgments. In a judgment delivered on 4 September 2018 — two days prior to the hearing before me — the Court of Appeal dismissed his appeals. I am told by Mr Nottingham that he has now filed an application for leave to appeal to the Supreme Court against the Court of Appeal's judgment. So in short, the position is that Judge Paul's judgments remain extant and enforceable, and have done since day one. Mr Nottingham's applications for leave to appeal have been dismissed in this Court and the Court of Appeal. What he has done is sought leave to appeal to the Supreme Court. That does not mean that Judge Paul's judgments are the subject of appeal. Far from it. Two senior courts have thus far refused to allow Mr Nottingham to appeal. Granted, there is a sense in which Mr Nottingham is entitled to say that he has a residual challenge. He quite rightly warned me against reaching any view as to the likely outcome of his application for leave to the appeal to the Supreme Court. However, I am certainly not prepared to dismiss Mr and Mrs Honey and Mr Taka's application, as Mr Nottingham invited me to do, on the basis that it is conceivable that he will ultimately obtain leave to appeal against Judge Paul's judgments and then succeed in overturning them.

[38] Second, Mr Nottingham repeated the submission he first made in relation to Mr and Mrs Honey and Mr Taka's appeal, that the basis for their application for an order adjudicating him bankrupt is a judgment debt of \$15,000. He dismissed this as being a paltry sum and submitted that it would be an injustice for him to be bankrupted on the basis of such a debt. I disagree. From the perspective of Mr and Mrs Honey and Mr Taka, \$15,000 is no doubt a minimal contribution to the costs they incurred in defending the criminal proceeding against them. But it is nevertheless a significant sum of money. And, in any event, as Mr Grove submitted, this is a judgment debt and Mr and Mrs Honey and Mr Taka are entitled to avail themselves of the enforcement processes which the law provides.

[39] There is a further consideration namely that Mr Nottingham has, since Mr and Mrs Honey and Mr Taka commenced their proceedings for an order that he be adjudicated bankrupt, put a proposal to his creditors in which he asserts that he has no assets and debts in the order of \$2 million. As Associate Judge Christiansen said in *Re Wesley Liddle*<sup>2</sup> the presentation of a proposal by an insolvent to his or her creditors evidencing significant indebtedness may itself be an independent act of bankruptcy in terms of s 22 of the Insolvency Act where it carries the implication that he does not intend to meet his financial obligations.

[40] Mr and Mrs Honey and Mr Taka have now filed and served an amended application dated 6 August 2018 referring to this second possible act of bankruptcy on Mr Nottingham's part.

[41] There is nothing in any of the arguments which Mr Nottingham advanced in opposition to the application of Mr and Mrs Honey and Mr Taka which persuades me that I should exercise my discretion by declining to make an order adjudicating him bankrupt.

[42] On the contrary, as Mr Grove submitted, there is, in this case, a significant public interest in making such an order.

[43] Mr Nottingham has a demonstrated history of commencing private prosecutions against individuals in which he has thus far been entirely unsuccessful.

[44] Unquestionably these apparently groundless prosecutions have wreaked havoc with the lives of those wrongly accused of criminal activity. In my view, if Mr Nottingham's bankruptcy puts an end to this practice on his part, then that is a public good.

[45] Furthermore, as Mr Grove also submits, whilst there may be some room for doubt as to whether all of those persons who claim to be creditors of Mr Nottingham and who filed the claims in the context of his proposal that I have overturned are all bone fide creditors, if they are, it would seem that Mr Nottingham's creditors have

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<sup>2</sup> *Re Wesley Liddle* (unreported), High Court, Auckland, Christiansen AJ, 19 August 2010.

paid to him something in the order of \$2 million (in cash or value) over recent years and yet he claims to be penniless. In my view, there is a public interest in Mr Nottingham being bankrupted so that the Official Assignee can investigate his affairs to establish whether all of these claims are legitimate and if so what has happened to the \$2 million which Mr Nottingham has received but claims no longer to have available to him.

[46] For those reasons, I propose to make an order adjudicating Mr Nottingham bankrupt on the application of Mr and Mrs Honey and Mr Taka.

### **A late memorandum**

[47] Following the hearing of this matter on 6 September 2018, but before this judgment was finalised, Mr Nottingham filed a document entitled “Urgent memorandum of judgment debtor clarifying nature of sale of Mr Prentices (sic) claims by judgment so that the court is not led to error”. Essentially, Mr Nottingham’s memorandum was intended to demonstrate that one of the creditors supporting Mr and Mrs Honey and Mr Taka’s bankruptcy proceeding, Mr Prentice, had assigned his debit to a third party.

[48] I do not need to address that in this judgment because it is irrelevant to the conclusions I have reached.

### **Conclusion**

[49] For those reasons I make the following orders:

- (a) The decisions of Mr Kevin Whitley in his capacity as the proposed trustee under Mr Nottingham’s proposal pursuant to pt 5(2) of the Insolvency Act 2006 to accept all those parties who voted in favour of the proposal at the meeting of creditors held in Auckland on 4 July 2018 is overturned;
- (b) Mr Nottingham’s application for the approval of his proposal pursuant to pt 5(2) of the Insolvency Act 2006 is declined;

(c) Pursuant to pt 2(2) of the Insolvency Act 2006 I make an order adjudicating Mr Dermot Gregory Nottingham of Auckland, beneficiary, bankrupt on the application of Mr Martin Honey, Mrs Stephanie Honey and Mr Hemi Taka. The Official Assignee at Auckland is appointed as the assignee of Mr Nottingham's bankrupt estate. This order is made on the date and at the time noted by the Registrar above.

Associate Judge Johnston

Solicitors:  
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