

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

**I TE KŌTI MATUA O AOTEAROA
KIRIKIROA ROHE**

**CIV-2020-419-29
[2020] NZHC 1060**

UNDER the Insolvency (Cross-border) Act 2006

AND UNDER the High Court Rules

IN THE MATTER of an application pursuant to Schedule 1,
Chapter III, Article 15, and rules 24.56,
24.57 and 18.7 of the Rules

BETWEEN THE OFFICIAL TRUSTEE IN
BANKRUPTCY as Trustee of the Bankrupt
Estate of DUNCAN FREDERICK SADLER
Applicant

AND DUNCAN FREDERICK SADLER
Respondent

Hearing: On the papers

Appearances: PV Cornegé for the Applicant

Judgment: 20 May 2020

JUDGMENT OF ASSOCIATE JUDGE SMITH

*This judgment was delivered by me on 21 May 2020 at 11am
pursuant to r 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Solicitors:
Tompkins Wake, Hamilton

[1] The respondent, Mr Sadler, lives in Raleigh, New South Wales, Australia.

[2] On 9 December 2016, Mr Sadler became bankrupt on his own bankruptcy petition. He filed the required statement of affairs with his bankruptcy petition. The Official Trustee was appointed trustee of his bankrupt estate under the Bankruptcy Act 1966 (Commonwealth of Australia).

[3] The case manager for Mr Sadler's Australian bankruptcy is Ms Katrina Howard, who is employed with the Insolvency and Trustee Services section of the Australian Financial Security Authority (the AFSA). Ms Howard has had the care, conduct and supervision of Mr Sadler's bankrupt estate on behalf of the Official Trustee.

[4] In or about February 2019, Ms Howard became aware that Mr Sadler may have an asset in New Zealand. Briefly, Mr Sadler was named as a beneficiary in the will of his late mother, who died on 6 June 2017. Ms Howard's enquiries have elicited the information that approximately \$140,000 was left to Mr Sadler by his mother, and that that money has either been retained by Mr Sadler's sister, who is the administrator of the estate, or has been paid to Mr Sadler's son. It appears that Mr Sadler obtained legal advice to the effect that, because he was bankrupt, he could not take any share in the estate.

[5] The Official Trustee now wishes to investigate whether Mr Sadler was in fact entitled to a share in the estate, and if so, to ascertain what has happened to the funds. Action might then be necessary for the recovery of the funds. To do those things the Official Trustee wishes to have a local agent appointed in New Zealand to carry out the investigation and any appropriate recovery steps.

Application to have Mr Sadler's Australian bankruptcy recognised as "foreign main proceeding" under the Insolvency (Cross-border) Act 2006

[6] Under the Insolvency (Cross-border) Act 2006 (the Act) the Official Trustee applies for the following orders:

- (1) That Mr Sadler’s Australian bankruptcy be recognised as a “foreign main proceeding” under the Act;
- (2) Entrusting the administration or realisation of all of Mr Sadler’s assets located in New Zealand to Russell David Fildes, Official Assignee, New Zealand; and
- (3) Granting leave to serve any order made by the Court outside of New Zealand.

[7] The application was listed for first call in this Court on 2 June 2020, but following service of the papers on him, Mr Sadler signed a consent memorandum, under which he consented to the application and advised that he did not intend to take any further steps with regard to it. The consent memorandum recorded that Mr Sadler had been told that, if the application was granted, it would result in an order recognising his Australian bankruptcy in New Zealand, and appointing the New Zealand Official Assignee as the Official Trustee’s agent in New Zealand, and that, if that occurred, it was considered very likely that the Official Assignee would take steps to deal with Mr Sadler’s property in New Zealand for the benefit of his Australian creditors. The memorandum further recorded Mr Sadler’s understanding that he was entitled to take independent legal advice.

Relevant legal principles

[8] The Act provides a statutory framework for facilitating insolvency proceedings when a person is subject to insolvency administration in one country, but has assets or debts in another country,¹ or where more than one insolvency administration has commenced in more than one country in relation to a person.² In this case, we are concerned with the first of those situations: Mr Sadler is subject to insolvency administration in Australia, but is said to have assets in New Zealand.

[9] The relevant rules relating to the recognition of a foreign bankruptcy proceeding are contained in Chapter III of Schedule 1 of the Act.

¹ Insolvency (Cross-border) Act 2006, s 3(b)(i).

² Insolvency (Cross-border) Act 2006, s 3(b)(ii).

[10] Article 15 of Schedule 1 provides:

(1) A foreign representative may apply to the High Court for recognition of the foreign proceeding in which the foreign representative has been appointed.

(2) An application for recognition shall be accompanied by:

(a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or

(b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or

(c) in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.

(3) An application for recognition shall also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(4) The Court may require a translation of documents supplied in support of the application for recognition into an official language of New Zealand.

[11] The terms “foreign proceeding”, and “foreign representative”, are defined in Article 2 of Schedule 1 as follows:

For the purposes of this Schedule:

(a) **foreign proceeding** means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;

(b) **foreign main proceeding** means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

...

(d) **foreign representative** means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.

...

[12] In this case, there was no Australian court proceeding which resulted in Mr Sadler’s bankruptcy – his bankruptcy arose from his own petition. In those circumstances the Official Trustee cannot rely on Article 15(2)(a) or (b): there has been no relevant “decision”, and no foreign court has been involved. The Official Trustee therefore relies on Article 15(2)(c) – “other evidence acceptable to the court”.³

³ Insolvency (Cross-border) Act 2006 Schedule 1, Article 15(2)(c).

[13] Article 17 sets out the criteria for determining when a foreign proceeding should be recognised. Article 17 provides:

- (1) Subject to article 6, a foreign proceeding shall be recognised if:
 - (a) the foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
 - (b) the foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
 - (c) the application meets the requirements of paragraph (2) of article 15; and
 - (d) the application has been submitted to the High Court.
- (2) The foreign proceeding shall be recognised:
 - (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
 - (b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
- (3) An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
- (4) As soon as practicable, after the Court recognises the foreign proceeding under paragraph (1) of this article, the foreign representative shall notify the debtor, in the prescribed form, that the application has been recognised.
- (5) The provisions of articles 15, 16, 17, and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

[14] Applications for the recognition of foreign proceedings under the Act are dealt with in this Court under r 24.56 of the High Court Rules 2016. That rule provides:

24.56 Applications for recognition of foreign proceedings

- (1) An application by a foreign representative under article 15(1) must be made by originating application under Part 19.
- (2) In addition to complying with the requirements of article 15, the application must—
 - (a) be supported by an affidavit verifying the statement referred to in article 15(3) (identifying all foreign proceedings in respect of the debtor that are known to the foreign representative) or by other sworn evidence acceptable to the court;
 - (b) be served, in accordance with Part 6 of these rules, on the debtor or a New Zealand agent or representative of the debtor unless a Judge directs that the application may in all the circumstances proceed without that service.
- (3) A foreign representative who has filed an application under subclause (1) may apply without notice for relief of a provisional nature under article 19(1).

Evidence supporting the application

[15] Ms Howard provided an affidavit in support, generally confirming the matters relating to Mr Sadler's estate, and the Official Trustee's wish to investigate the possibility of a further asset in New Zealand, as set out above.

[16] The second affidavit was that of Mr Matthew Osborne. Mr Osborne is a principal legal officer with the AFSA, and he provided expert evidence on relevant Australian law and the application of the relevant provisions of the Act. Mr Osborne deposed that the administration of Mr Sadler's bankruptcy is a "collective administrative proceeding" in relation to his debtor's petition, involving ongoing oversight by the Official Assignee for the period from the date of the bankruptcy to the date of the discharge. The administrative proceeding is "collective" in nature, in that it is for the benefit of the bankrupt's creditors entitled to prove their debts in the bankruptcy. Under the relevant provisions of the Bankruptcy Act 1966, debts proved rank equally except as otherwise provided, and creditors are to be paid proportionately, subject to statutory priorities. And the bankruptcy proceeding arose out of an Australian law relating to insolvency (the Bankruptcy Act 1966), in which the bankrupt's assets and affairs are subject to control or supervision by a "foreign court", (either the Federal Circuit Court of Australia, or the Federal Court of Australia), for the purposes of reorganisation or liquidation.⁴ The control or supervision is effected by an authority competent to control or supervise foreign proceedings, namely the Official Trustee.⁵

[17] Mr Osborne said that the Official Trustee is authorised to administer the reorganisation or the liquidation of the bankrupt's assets or affairs, and to act as a representative of the foreign proceeding.⁶

[18] The third affidavit was that of Mr Russell Fildes, who is an Official Assignee employed by the Insolvency and Trustee Service of the Ministry of Business Innovation and Employment in New Zealand. Mr Fildes formally consented to being

⁴ Bankruptcy Act 1966 (Cth), s 30.

⁵ Bankruptcy Act 1966 (Cth), ss 18, 19, 58 and 134.

⁶ Bankruptcy Act 1966 (Cth), ss 18, 19, 58, 108, 109 and 134, and Cross-Border Insolvency Act 2008 (Cth), s 11.

appointed as the Official Trustee's representative entrusted with the administration or realisation of all of Mr Sadler's assets located in New Zealand, if so appointed.

Discussion and conclusions

[19] I am satisfied that the orders sought are appropriate and should be made.

[20] Ms Howard has deposed that she is authorised on behalf of the Official Trustee for the purposes of making the present application, and the Official Trustee is authorised in the relevant foreign proceeding (Mr Sadler's bankruptcy) to administer the reorganisation or the liquidation of Mr Sadler's assets or affairs. The application has accordingly been brought by a "foreign representative", as required by Article 15(1) of Schedule 1 of the Act.

[21] And I am satisfied on the evidence produced that Mr Sadler's Australian bankruptcy constitutes a "foreign main proceeding" for the purposes of the Act. It is a collective administrative proceeding in a foreign state, pursuant to the law relating to insolvency in Australia, in which the assets and affairs of Mr Sadler are subject to control or supervision by a foreign court (the Federal Circuit Court of Australia, or the Federal Court of Australia), for the purpose of reorganisation or liquidation. The administrative proceeding in Australia is collective in nature, as it is being undertaken for the benefit of all of Mr Sadler's creditors who have proved debts in his bankruptcy and who have become entitled to receive a pro rata distribution from his bankrupt estate.

[22] The question of how Article 15(2) applies when the foreign bankruptcy proceeding arises from a debtor's own bankruptcy petition, was addressed by Davison J in *The Official Trustee in Bankruptcy v Henare*,⁷ which was also a case involving an Australian bankruptcy that occurred as a result of the debtor lodging a debtor's petition. Davison J was satisfied on the affidavit evidence produced in that case that the Official Trustee's administration of the respondent's bankrupt estate in Australia was a foreign proceeding, as defined, as "the assets and affairs of the debtor are subject

⁷ *The Official Trustee in Bankruptcy v Henare* [2019] NZHC 1024.

to control or supervision by a foreign court, for the purpose of reorganisation or liquidation”.⁸

[23] The *Henare* case thus confirms that a foreign bankruptcy which commences on the filing of a debtor’s petition for bankruptcy may be a “foreign proceeding” for the purposes of Article 15 of Schedule 1 of the Act, and the evidence produced in this case is sufficient to satisfy the requirements of Article 15(2)(c).

[24] Ms Howard’s affidavit includes a statement that she is not aware of any foreign proceedings in respect of Mr Sadler, so Article 15(3) of Schedule 1 of the Act is therefore satisfied. The requirements of r 24.56 of the High Court Rules have been met.

[25] I find also that the Australian bankruptcy proceeding is a “foreign main proceeding” as defined in Article 2 of Schedule 1 of the Act,⁹ as the bankruptcy administration is taking place in Australia, where Mr Sadler has centred his interests.

[26] Mr Fildes is obviously suitably qualified, and I accept that it is appropriate to appoint him as the Official Trustee’s New Zealand agent.

Orders

[27] I make the following orders:

- (1) Mr Sadler’s Australian bankruptcy, arising out of his debtor’s petition under s 55(2) of the Bankruptcy Act 1966 (Cth), is recognised as a foreign main proceeding under the Act;
- (2) The administration or realisation of all of Mr Sadler’s assets located in New Zealand is entrusted to Russell David Fildes, Official Assignee;
and

⁸ At [24].

⁹ At [24].

(3) Leave is granted to the Official Trustee to serve these orders outside of New Zealand.

Associate Judge Smith