IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001584
[2015] NZHC 595

UNDER	Sections 3, 7, 8 and Schedule 1 Insolvency (Cross-Border) Act 2006
IN THE MATTER OF	VIC 16/59 of 2014/12 being the proposed Personal Insolvency Agreement of Peter Jesse Holland under Part X Bankruptcy Act 1966 (Commonwealth)
BETWEEN	JAMES PATRICK DOWNEY Plaintiff
AND	PETER JESSE HOLLAND Defendant

Hearing: 2 July 2014

Appearances: C Murphy for the Plaintiff
No Appearance, of or for the Defendant
N W Ingram QC for Holland Corporate Limited

Judgment: 2 July 2014

Reasons: 27 March 2015

REASONS JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 27 March 2015 at 4.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: C Murphy, Auckland
N W Ingram QC, Auckland

Solicitors: Dermot Ross and Co (D M M Ross), Auckland
Graeme Skeates Law, Auckland

[1] Holland Corporate Ltd ("HCL") is a plaintiff in a civil proceeding filed in this Court against Peter Jesse Holland ("the civil proceeding"). The substantial hearing of this proceeding was scheduled to be heard by way of formal proof on Monday, 30 June 2014.

[2] However, on that date, James Patrick Downey of Australia filed a without notice originating application for recognition of a foreign proceeding and relief ("the application"). Mr Downey had earlier been appointed as a controlling trustee of the property of Mr Holland pursuant to s 188 of the Bankruptcy Act 1966 (Cth) ("the Bankruptcy Act"). So, Mr Holland's assets became subject to Part X of the Bankruptcy Act ("the Australian proceeding"). The application sought to invoke the rules applying to cross-border insolvency proceedings as set out in Schedule 1 of the Insolvency (Cross-border) Act 2006 ("the Act") so as to have the Australian proceeding recognised in New Zealand.

[3] Once the Court was seized of Mr Downey's application, it convened a conference with counsel for HCL and counsel for Mr Downey. Counsel were agreed that the application could proceed on a Pickwick basis on 2 July 2014.

[4] The formal proof hearing of the civil proceeding against Mr Holland was adjourned until Thursday, 4 July 2014. There were four causes of action in this proceeding, one of which was a recognisable proof of debt under the Australian proceeding. Mr Downey was concerned, therefore, that the formal proof hearing of the civil proceedings against Mr Holland might result in a judgment that skewed the allocation of Mr Holland's available resources unfairly in favour of HCL. So, he brought the application with a view either to obtaining interim relief staying the civil proceeding, or for the Australian proceeding to be recognised as a foreign insolvency main proceeding, which would automatically lead to a stay of the civil proceeding under art 20 of the first schedule to the Act.

[5] HCL opposed the application and, in the alternative, it applied for an order that any stay of proceedings under art 20 not apply to the civil proceeding. It wanted to proceed with the formal proof hearing.

[6] When the application was called on 2 July 2014, counsel were agreed that the substantial application could be dealt with, though counsel for Mr Downey made submissions on interim relief, as well as on final relief.

[7] On 3 July 2014, I delivered a result judgment on the substantial application with reasons to follow.[1] I found that the Australian proceeding met the definition of an insolvency proceeding in s 4 of the Act and that it qualified for recognition under art 17 as a main foreign proceeding. This meant that under art 20(1)(a), the civil proceeding was automatically stayed.

[8] However, I also found that HCL's application under art 20(2) had merit and accordingly I allowed that application on the following conditions:

(a) HCL's claim against Mr Holland was to proceed in relation to the breach of fiduciary claims (fourth cause of action) only – which was the only cause of action that the controlling trustee could recognise as a debt in the Australian proceeding; and

(b) Any relief that HCL could recover as a result of proving its claim would not extend to an award of costs or disbursements.

[9] In this way, I sought to limit the quantum of any payment that I might find owing in the civil proceeding to those types of payments that it would be open to Mr Downey as the controlling trustee to recognise were he so persuaded.

[10] My reasons for judgment now follow.

The Bankruptcy Act Part X process

[11] Mr Downey deposed that the processes prescribed under Part X of the Bankruptcy Act have been commenced with the view to discharge Mr Holland's debts without having to resort to bankruptcy.

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1 *Downey v Holland* [2014] NZHC 1546.

[12] Part X provides a voluntary procedure.[2] Under s 188 of the Bankruptcy Act, a debtor may authorise the appointment of a controlling trustee. Once the controlling trustee's appointment is effective, he or she takes control of the debtor's property and affairs.[3] This restraint on the debtor's property and affairs is immediate. Once the process in s 188 is set in motion, it must run its course.[4] The s 188 authority is irrevocable.[5]

[13] Under s 188(2E) of the Bankruptcy Act, a proposal for dealing with the debtor's affairs under Part X must include a draft personal insolvency agreement. The controlling trustee calls a meeting of the debtor's creditors to consider the proposed personal insolvency agreement.[6] Any creditors' petition proceeding in Australia against the debtor is automatically stayed[7] until the personal insolvency agreement is considered at the creditors' meeting. If the proposed personal insolvency agreement is not accepted by creditors, they may resolve that the debtor file his own petition in bankruptcy.

[14] Under Part X, while control of a debtor's property is under a controlling trustee, there is no automatic stay of proceedings of legal action[8] being taken against a debtor, though a controlling trustee can apply for a stay and the Court has the power to order a stay.[9]

The Insolvency (Cross-borders) Act regime

[15] The Act enacts in domestic New Zealand law the UN Model Law on Cross-border Insolvency.[10] This Model Law is designed to create a uniform approach to

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2 See Bankruptcy Act, ss 188-232.
3 Sections 189(1) and 190(2).
4 Section 189(1A) sets out the six events that will bring the control given to a controlling trustee under s 188 to an end.
5 See s 188(3)
6 See s 190.
7 See s 189AAA.
8 This is legal action other than a creditors' petition proceeding.
9 See s 189AA(1)(b).
10 Insolvency (Cross-border) Act, 3 3(a); the rules applying to cross-border insolvency proceedings are contained in Schedule 1 of the Act; those rules correspond for the most part to the provisions of the UN Model Law on Cross-border Insolvency.

cross-border insolvency that allows insolvency proceedings to be conducted in a unified way and to ensure fair outcomes across multiple countries.[11]

[16] The Act provides a framework for facilitating insolvency proceedings when a person is subject to insolvency administration (whether personal or corporate) in one country, but has assets or debts in another country.[12] In particular, when a foreign proceeding is recognised as a foreign main proceeding, this triggers an automatic stay on proceedings in order to allow the foreign main proceeding to control the affairs of the debtor.[13] However, a court may on application by a creditor or interested person make an order that the stay or suspension does not apply in respect of any particular proceeding.[14]

Recognition of foreign proceedings

[17] Subject to a public policy exception in Schedule 1, art 6, a foreign proceeding shall be recognised if the requirements in art 17(1) are met. These are:

(a) The foreign proceeding is a proceeding within the meaning of art (2)(a);[15]

(b) The foreign representative applying for recognition is a person or body within the meaning of art 2(d);[16]

(c) The application meets the requirements of art 15(2); [17] and

(d) The application has been submitted to the High Court.[18]

Was the Australian proceeding a "foreign proceeding"?

[18] A "foreign proceeding", for the purpose of the Act, is defined in, art 2(a) as:

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11 See preamble in Schedule 1 of the Act.
12 See 3(b)(i).
13 See art 20.
14 See art 20(2).
15 Art 17(1)(a).
16 Art 17(1)(b).
17 Art 17(1)(c).
18 Art 17(1)(d).

> **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. (emphasis added)

[19] The Australian proceeding was taking place in a foreign state. It was "collective" in nature because Part X of the Bankruptcy Act is designed to involve all of the debtor's known creditors. In this regard, the definition section at art 2(i), which defines a New Zealand insolvency proceeding, is helpful in understanding the meaning of "collective":

> New Zealand insolvency proceeding means a collective judicial or administrative proceeding pursuant to the law in New Zealand relating to the bankruptcy, liquidation, receivership, judicial management, statutory management, or voluntary administration of a debtor, or the reorganisation of the debtor's affairs, under which the assets and affairs of the debtor are administered, or the assets of the debtor are or will be realised, for the benefit of secured or unsecured creditors.

I interpret this definition as saying that a collective scheme is one where the assets and affairs of the debtor are administered for the benefit of secured or unsecured creditors. This is also the purpose of the processes in Part X of the Bankruptcy Act.

[20] The Australian proceeding is pursuant to the law relating to personal insolvency. An authority under s 188 of the Bankruptcy Act cannot be revoked by a debtor. Once a controlling trustee has been appointed, his or her control over the debtor's property can only come to an end in certain circumstances.[19] The aim of a controlling trustee in the general course of administering a debtor's assets is to collect in and maintain the assets. Further, the processes under Part X of the Bankruptcy Act are subject to the control and supervision of a court having jurisdiction in bankruptcy.[20] Such a court has a number of powers relating to the assets and affairs of the debtor, including powers:

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19 See s 189(1A) of the Bankruptcy Act.

20 See s 5 of the Bankruptcy Act for the definition of "the Court".

(a) To order a stay of a civil or criminal proceeding begun at any time against the person or property of the debtor for the debtor's failure to pay a debt;[21]

(b) To order a release of a debtor's property from a controlling trustee, if satisfied that there were special circumstances that justify it.;[22]

(c) To set aside a personal insolvency agreement,[23] or to terminate a personal insolvency agreement;[24]

(d) To determine an application for directions relating to a proposed realisation of the debtor's property;[25]

(e) To make a sequestration order against the estate of the debtor.[26]

[21] Further, such a court may, on the application of certain specified persons, inquire into the conduct of a controlling trustee and if satisfied order the removal of a controlling trustee.[27]

[22] Thus, I was satisfied that under the Part X process, Mr Holland's assets and affairs were under "control or supervision" by a foreign court in terms of art 2(a).

[23] Lastly, the Part X process is for the purpose of reorganisation, as the aim is to distribute the debtor's available assets to creditors. Thus, it qualified as a "reorganisation" of Mr Holland's assets and affairs in terms of art 2(a).

[24] It followed that the Australian proceeding qualified as a foreign proceeding.

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21 Section 189AA.
22 Section 208.
23 Section 222.
24 Section s 222C.
25 Section 190(4A) and s 190(4B).
26 Section 221(1))
27 Sections 179-210.

Was the controlling trustee a foreign representative in terms of art 2(d)?

[25] Mr Holland appointed Mr Downey as a controlling trustee under Part X of the Bankruptcy Act. Part X allows the controlling trustee to call a meeting of the debtor's creditors and to take control of the debtor's property. This appointment was certified by the Australian Securities and Financial Authority.

[26] The finding that the definition of "foreign proceeding" is met, is applicable here.

[27] "Foreign representative" is defined to mean:[28]

> 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

[28] Mr Downey submitted that as his appointment as controlling trustee was certified by the Australian Securities and Financial Authority to administer the reorganisation of the debtor's assets or affairs, he qualified as a "foreign representative". I would agree that he satisfied this requirement.

Did the application meet the requirements of art 15(2)?

[29] The application for recognition was accompanied by the certificate issued by the Australian Financial Security Authority appointing the applicant as controlling trustee. I believed this satisfied the requirements of art 15(2) and so the application satisfied art 17(1)(c).

Had the application been submitted to the High Court?

[30] As the application was filed in this Court and was before me, the requirements of art 17(1)(d) were satisfied.

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[28] Art 2(d).

Was the Australian proceeding a "foreign main proceeding"?

[31] The next question was whether the Australian proceeding qualified as a "foreign main proceeding".

[32] Article 2(b) provides that a foreign main proceeding means:

> **foreign main proceeding** means a foreign proceeding taking place in the State where the debtor has the centre of its main interests.

[33] Article 17 provides, where relevant:

> (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.

[34] Article 2(f) defines "establishment" as:

> (f) **establishment** means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.

[35] Heath J in *Williams v Simpson (No 5)* said:[29]

> [26] This is not a discretionary regime. The Act requires that a "foreign proceeding" be recognised either as a "main" or "non-main" proceeding. If the "foreign proceeding" does not fall within the definitions of those terms, there is no jurisdiction to grant recognition under Art 17.

[36] Heath J went on to say at [41] that the inquiry into the "centre of main interests" is fact-specific and it is necessary to begin by reference to the presumption in art 16(3).

[37] Mr Downey relied on art 16(3), which provided that the court is entitled to presume (in the absence of proof to the contrary) that the debtor's habitual residence is presumed to be the centre of the debtor's main interests.

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[29] *Williams v Simpson (No 5)* [2011] 2 NZLR 380 (HC).

[38] Heath J at [42] quoted from *Basingstoke v Groot*[30] and stated that the inquiry into "habitual residence" is:

> a broad factual one, taking into account such factors as settled purpose, the actual and intended length of stay in a State, the purpose of the stay, the strength of ties to the State and to any other State (both in the past and currently), the degree of assimilation into the State (including living and schooling arrangements), and cultural, social and economic integration.

[39] In *Williams v Simpson (No 5)*, Heath J held that the debtor's centre of main interests was in New Zealand and not in England. Although the debtor spent part of his time in England and part in New Zealand, the debtor regarded New Zealand as his home and had a school-aged daughter in New Zealand.[31]

[40] I was not told how long Mr Holland had lived in New Zealand. There was evidence that the company HCL was incorporated in New Zealand to provide business advisory services in New Zealand *and* Australia. Prior to this, Mr Holland held a senior role with the ANZ Bank in Australia for eight years. The website of HCL provided Mr Holland's contact details both in New Zealand and in Australia. In the civil proceeding, HCL claimed that Mr Holland had wrongfully provided services to a competitor, Providence Growth Solutions Pty Ltd. A companies search showed that this company was registered in Australia. Regarding HCL's other claims against Mr Holland for breach of fiduciary duties that he owed to the company, those were based upon his dealings while in Australia with mostly Australian registered companies. The available evidence pointed to Mr Holland's habitual residence being in Australia, and not in New Zealand. Thus, there was nothing to displace the presumption in art 16(3). I was satisfied, therefore, that the Australian proceedings qualified as a foreign main proceeding.

Relief upon recognition

[41] Once a proceeding is recognised as a foreign main proceeding, relief is available under art 20(1). This includes the automatic staying of any proceeding brought against Mr Holland in New Zealand:[32]

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30 *Basingstoke v Groot* [2007] NZFLR 363 (CA).
31 *Williams v Simpson (No 5)* at [49].
32 See art 20(1)(a).

> (1) Upon recognition by the High Court of a foreign proceeding that is a foreign main proceeding,
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> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities is stayed;
>
> (b) execution against the debtor's assets is stayed; and
>
> (c) the right to transfer, encumber, or otherwise dispose of any assets of the debtor is suspended.

[42] Accordingly, Mr Downey argued that HCL's formal proof claim against Mr Holland in this Court was stayed by operation of art 20(1)(a). In the result judgment I acknowledged this was so.

[43] However, the Court has discretion under art 20(2) to order that subject to conditions as the Court thinks fit, the stay does not apply in respect of any particular action or proceeding:

> (2) Paragraph (1) of this article does not prevent the Court, on the application of any creditor or interested person, from making an order, subject to such conditions as the Court thinks fit, that the stay or suspension does not apply in respect of any particular action or proceeding, execution, or disposal of assets.

[44] I considered that it was appropriate in the circumstances that were before me to exercise the power available to me under art 20(2). I did so for the following reasons.

[45] The Australian proceeding and Mr Downey's role as controlling trustee were drawn from the Bankruptcy Act. This Act does not impose an automatic stay on civil proceedings that are being brought against a debtor who appoints a controlling trustee under s 188. Instead, it is for the controlling trustee, once appointed, to apply to the court for a stay of the civil proceeding.[33]

[46] Thus, had HCL's proceeding against Mr Holland been brought in Australia, the appointment of Mr Downey under s 188 of the Bankruptcy Act would not have

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[33] See s 189AA, Bankruptcy Act; and see the *Laws of Australia Bankruptcy* [3.16.740] "there is no automatic stay of execution in respect of legal action taken by creditors against a debtor for recovery of debts … However, a court does have power to order a stay of legal action under s 189AA(1)(b) of the Bankruptcy Act.

automatically stayed HCL's proceeding. Mr Downey would have had to apply to a court in Australia for a stay of proceeding. Under s 189AA(1)(b), an Australian court has a discretion as to whether it will stay a proceeding in these circumstances. Thus, the intent of the Australian legislation is to leave the question of a stay to the discretion of the court.

[47] It seemed to me, therefore, that if I allowed the statutory consequences in art 20(1)(a) to run their course, Mr Downey and the Australian based creditors of Mr Holland would enjoy an advantage over a creditor in this country that was not available to them under the Australian law that had led to Mr Downey being in control of Mr Holland's assets and affairs. I did not see why they should enjoy an advantage that was not available to them under the legislation that underpinned the foreign proceeding for which Mr Downey sought recognition.

[48] The discretion given to me by art 20(2), to order that the stay imposed by art 20(1)(a) not apply, seemed to me to be something that could operate as a counterpart to the discretionary power to order a stay of proceedings given to Australian Courts by s 189AA of the Bankruptcy Act.

[49] I would have thought that the question of whether to use the power in s 189AA to stay a civil proceeding or not following the appointment of a controlling trustee under s 188 is a question that would regularly give rise to disputes in Australia, and that some of those would result in judicial decisions. However, neither counsel for Mr Downey or for HCL could refer me to any such authority.

[50] In the time that was available to me, I found little Australian authority directly on point. One case I did find was *Cameron v Brookes*.[34] This was a claim by an employee against a law firm whose partners later appointed a controlling trustee under s 188. Neither the controlling trustee nor the defendants appeared to oppose the claim or to seek a stay of proceedings. Nonetheless, the Magistrate considered the effect of the defendants having appointed a controlling trustee and found:

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[34] *Cameron v Brookes* C12410454, 28 February 2013 (Victoria Magistrates' Court Industrial Division) at [4].

> I was also satisfied that whereas an authority under s 188 of the Bankruptcy Act may constitute an available act of bankruptcy, it of itself does not operate to stay a civil or criminal proceeding that has been commenced. The position is made expressly plain by s 189AA of the Bankruptcy Act, that unless otherwise ordered by the Court, such proceeding as has been commenced at any time is not stayed.

This view was consistent with my reading of s 189AA.

[51] The circumstances before me showed that Mr Holland had taken no steps for some time to defend himself against HCL's proceeding. The proceeding was ready to be heard by way of formal proof. The claims for breach of fiduciary duty that HCL made against Mr Holland were claims that the controlling trustee could recognise as a debt in the Australian proceeding. Thus, HCL could make those claims to the controlling trustee without the need for a judgment from this Court. However, I considered that a judgment from this Court on those claims might be of assistance to the controlling trustee as it would mean that an independent judicial officer had ruled on whether the claims had substance or not.

[52] HCL wanted to have the benefit of a judgment from this Court on the breach of fiduciary duty claims, and was prepared to incur the cost of a formal proof hearing.

[53] I could not see how it would disadvantage the other creditors of Mr Holland if I proceeded to determine the breach of fiduciary duty claims. If I found those claims were proved, it was likely that Mr Downey would as well. Further, I considered that as the claims were for breaches of fiduciary duties owed by Mr Holland as a director of a registered company in New Zealand, it would be helpful for Mr Downey, who was based in Australia, to have the view of this Court on a question of New Zealand law. Accordingly, I decided that in the exercise of the discretion available to me under art 20(2), I would not stay HCL's proceeding insofar as the breach of fiduciary duty claims were concerned.

[54] I also declined to award HCL costs. Mr Downey was successful in obtaining recognition of the Australian proceeding. HCL was also successful as it persuaded me to prevent the operation of the automatic stay of proceedings under art 20(1). I wanted to ensure that the practical effect of the orders I made under art 20(2) was to

limit HCL's claims against Mr Holland to those that it was open to the controlling trustee to recognise without this Court's intervention. I considered that in this way, I would ensure that HCL could make no additional claim that might prejudice other creditors.

Duffy J