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

**CIV 2013-485-450**
**[2014] NZHC 345**

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| UNDER | the Declaratory Judgments Act 1908, the Insolvency Act 2006 and KiwiSaver Act 2006 |
| IN THE MATTER OF | a proposed exercise of power under Rule 10 of Schedule 1 of the KiwiSaver Act 2006 |
| BETWEEN | THE OFFICIAL ASSIGNEE<br>Plaintiff |
| AND | TRUSTEES EXECUTORS LIMITED<br>Defendant |

Hearing: 24-25 February 2014

Counsel: M Andrews, R D Garden and G E Slevin for Plaintiff
C M Stevens and N D Chapman for Defendant
J L Marshall QC as Amicus Curiae

Judgment: 21 March 2014

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**JUDGMENT OF RONALD YOUNG J**
**(Re-released pursuant to r 11.10 High Court Rules)**

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## Introduction

[1] These proceedings raise the following question: can the Official Assignee ("Assignee") use a bankrupt's KiwiSaver account to help pay the bankrupt's creditors?

[2] The Assignee seeks 11 declarations to authorise the use of a bankrupt's KiwiSaver account to help pay the bankrupt's creditors. The Assignee submits that the declarations would reflect a proper analysis of the Insolvency Act 2006 and the KiwiSaver Act 2006.

[3] Trustees Executors Limited, the trustees for the KiwiSaver accounts of the two bankrupts immediately affected by these proceedings, and the amicus on behalf of the two bankrupts, all submit that none of the declarations should be made. They submit that a proper reconciliation of the KiwiSaver Act 2006 and the Insolvency Act 2006 means the Assignee cannot access a bankrupt's KiwiSaver account for any purpose.

[4] All parties agree, however, that the answer to the question I have posed raises three questions. The answer to these questions, they say, will in turn enable me to decide which, if any, of the 11 declarations sought by the Assignee should be made.

**The issues for determination**

[5] The three questions (as framed by the Assignee) are:

(a) are the bankrupts' KiwiSaver interests "property" for the purpose of the Insolvency Act 2006? If yes;

(b) on insolvency, do the KiwiSaver interests of a bankrupt vest in the Assignee? If yes;

(c) can the Assignee access the bankrupts' KiwiSaver interests under the early withdrawal provisions of the KiwiSaver Act 2006, in particular the "significant financial hardship" provision?

**Background facts**

[6] These issues arose when the Assignee requested Trustees Executors Superannuation Limited (the defendant's predecessor) to release the funds in the KiwiSaver accounts of two bankrupts (Mr T and Mr H) to the Assignee pursuant to the hardship provisions of the KiwiSaver Act 2006.[1]

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[1] KiwiSaver Act 2006, sch 1, r 10.

[7] Trustees Executors refused to release the funds; they said that the bankrupts' KiwiSaver interests were not property. The KiwiSaver interests of a bankrupt therefore did not vest in the Assignee on bankruptcy and, in any event, the significant financial hardship provision in the KiwiSaver Rules would not permit early release of the funds.

[8] Mr T has been a member of a KiwiSaver scheme since 2007. He was adjudicated bankrupt in June 2010. His proofs of debt were received for $26,254, although there may have be other unproved debts. There were no assets in the estate to satisfy the proofs of debt. Mr T, however, has a KiwiSaver interest at the time of bankruptcy totalling $11,860.46.

[9] The second bankrupt, Mr H, has been a member of the KiwiSaver scheme since January 2008. He was adjudicated bankrupt on 4 November 2012. Although claims notified by creditors were over $32,000, proofs of debt for only $9,583 were actually received. Mr H has no assets other than his KiwiSaver account and a small tax refund. His KiwiSaver interest totals $10,805.98, more than the proofs of debt filed in his bankruptcy.

**Jurisdiction**

[10] There seems to be no dispute that the High Court has jurisdiction to make a declaration or declarations in this case. Although an existing dispute is not essential to orders under the Declaratory Judgments Act 1908, there is such a dispute here.[2] Apart from the two bankrupts identified in this case there are many others in a similar situation.

[11] As of May 2013, now 11 months ago, there were 1,971 bankrupt persons with KiwiSaver accounts cumulatively valued at $7,613,943. There were a further 705 bankrupt persons with KiwiSaver accounts where the value of their accounts was unknown. This figure is only likely to increase.

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2 *Mandic v Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194.

[12] While the dispute between the parties could be brought before the Court by bringing proceedings in each individual case, the fundamental question raised in these declaratory judgment proceedings will potentially affect a large number of people. It is therefore more conveniently answered by way of the declaratory judgment procedure.

**The two relevant statutes**

[13] The KiwiSaver Act and the Insolvency Act were both passed in 2006. The KiwiSaver Act received assent on 6 September 2006; the Insolvency Act on 7 November 2006. The KiwiSaver Act 2006 has a defined purpose, whereas the Insolvency Act 2006 has no stated purpose.

[14] Section 3 of the KiwiSaver Act 2006 identifies the purpose of the Act is:

> … to encourage a long-term savings habit and asset accumulation by individuals who are not in a position to enjoy standards of living in retirement similar to those in pre-retirement. The Act aims to increase individuals' wellbeing and financial independence, particularly in retirement, and to provide retirement benefits.

[15] Members are automatically enrolled in the scheme at the beginning of new employment. They may opt into or out of the scheme at any time. If a KiwiSaver account is opened, contributions are made from a member's wage or salary and from their employer. There is also an initial contribution by the Crown of $1,000 and annual tax credits.

[16] A KiwiSaver account cannot, with prescribed exceptions, be accessed until a member turns 65. Schedule 1 of the KiwiSaver Act 2006 contains rules which identify the exceptions for early withdrawal.[3] There are specific rules relating to the early release of KiwiSaver funds for first home buyers.[4]

[17] The Insolvency Act 2006 has no explicit purpose section. However, the Minister of Commerce usefully detailed her view of its purpose prior to its enactment, on the third reading of the Insolvency Bill.

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3 KiwiSaver Act 2006, sch 1, rr 7, 10, 12 and 14.
4 Rule 8.

[18] The Minister said:[5]

> These bills [including the Insolvency Bill] are designed to promote innovation, responsible risk-taking, and entrepreneurialism by not excessively penalising business failure. They are designed to distribute the proceeds to creditors in an equitable manner and in accordance with their relative pre-insolvency entitlements. They are designed to maximise returns to creditors by providing flexible and effective methods of insolvency administration and enforcement that encourage early intervention when financial distress first becomes apparent. They are designed to enable individuals in bankruptcy to participate fully again in the economic life of the community.

[19] These "purposes" can in any event be ascertained by a reading of the Insolvency Act 2006. Its focus is therefore to encourage responsible risk taking in business by providing, when individuals fail, that the resulting effect of their bankruptcy is not so crushing that innovation is substantially discouraged. This is reflected in the limited period of restrictions of bankruptcy.[6]

[20] Further, the Insolvency Act 2006 is designed to ensure that creditors are entitled to the maximum return from a bankrupt's estate, so that all assets of the bankrupt can be used to pay the highest possible percentage of their debts before discharge.

[21] The Insolvency Act 2006 requires that all of the property of the bankrupt on bankruptcy vests in the Assignee without the Assignee having to take any steps.[7] Accordingly, the bankrupt's authority relating to any property is also vested in the Assignee, and all property acquired during bankruptcy by the bankrupt also vests in the Assignee.[8]

[22] "Property" itself is given a wide definition as follows:[9]

> [P]roperty means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal and includes rights, interests and claims of every kind in relation to property however they arise.

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5 (26 October 2006) 634 NZPD 6172.
6 Insolvency Act 2006, s 290.
7 Section 101.
8 Section 102.
9 Section 3, definition of "property".

**Issue one – are the bankrupts' KiwiSaver interests "property" for Insolvency Act 2006 purposes?**

[23] The Assignee's case is that the bankrupts' KiwiSaver interests are choses in action and therefore within the definition of "property" under the Insolvency Act 2006. The Assignee submits that case law and statute law treat a right to receive something in the future as a chose in action. As long as the circumstances under which the right to claim the property are enforceable and will eventuate, then it is property. The Assignee accepts that mere expectancies are not sufficient to constitute a chose in action or property.

[24] The defendant's submission is that a KiwiSaver interest is essentially an expectancy and not a contingent interest, and that it is therefore not "property" as defined by the Insolvency Act 2006.

[25] The defendant's case is based on the following propositions. First, the authorities relied upon by the Assignee to establish that an interest in a superannuation scheme is a chose in action relate to the Insolvency Act 1967. The definition of "property" in that Act was wider than that in the Insolvency Act 2006. The authorities based on the 1967 legislation therefore have no application to the definition of "property" in the 2006 legislation.

[26] Second, the defendant relies upon *Re Coram; Ex Parte Official Trustee in Bankruptcy v Inglis*.[10] That case involved consideration of a private superannuation scheme linked to a bankrupt's employment. The Australian Federal Court concluded that with regard to such a superannuation scheme:[11]

> … the present right of a member of a superannuation fund is no more than an expectancy. His entitlements are all in the future and are all [dependent] upon the happening of a prescribed event, of which the most common was the attainment of an agreed retirement age.

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10 *Re Coram; Ex Parte Official Trustee in Bankruptcy v Inglis* (1992) 36 FCR 250, (1992) 109 ALR 353.

11 At [16].

[27] And further the Judge said:[12]

> Conceptually however, the employee was only intended to benefit upon retirement; thus he would not necessarily receive any part of the amount allocated to the credit of his account if there was an early resignation or a dismissal. The emphasis on the benefit maturing upon retirement also emphasised that until retirement the member's rights to or interests in any benefit were inchoate and would not crystallise until retirement (or earlier death). Even though the benefits afforded through superannuation funds have improved materially over the years... the inchoate nature of the member's rights or interests have remained unaltered. Until the happening of a prescribed event that will crystallise his right into an actual entitlement, a member of a superannuation fund is neither the legal nor the beneficial owner of the amount that stands to the credit of his account from time to time.

[28] As to the New Zealand authorities, the defendant says that observations by Blanchard J in *Official Assignee v NZI Life Superannuation Nominees Ltd* (NZI Life), relating to the nature of a superannuation interest, were obiter and were made on the basis of the wider definition of property in the 1967 legislation.[13]

[29] Blanchard J noted in that case:[14]

> I have no doubt that the interest of a member in a superannuation fund is a "valuable thing" though it may be difficult to quantify the value at any given time. In respect of the member's rights there is, at the very least, a contingent interest arising out of that valuable thing. Therefore ... in New Zealand an Official Assignee becomes vested ... with the bankrupt's rights, whatever they may be, in relation to a superannuation scheme: they are "property … belonging to", if not "vested in", the bankrupt.

[30] The definition of property in the 1967 legislation included any "valuable thing".[15] The definition of property in the 2006 legislation does not include "valuable thing". Blanchard J used this phrase as the basis for concluding that the interest of a member in a superannuation scheme was "property". The defendant argues that the 2006 definition of "property" is narrower than that of the 1967 legislation and does not include any valuable thing, such that Blanchard J's reasoning in *NZI Life* is of no value here given we are concerned with the 2006 definition of "property".

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12 At [13].
13 *Official Assignee v NZI Life Superannuation Nominees Ltd* [1995] 1 NZLR 684 (HC).
14 At 697.
15 Section 2, definition of "property".

[31] Third, the defendant adopts the reasoning in an article entitled "Superannuation Schemes in Insolvency" by Paul Heath and Julie Kaye Maxted.[16] The authors noted that in their view, "inchoate rights in a superannuation scheme which have not crystallised at the time of bankruptcy or before discharge should not pass to the Official Assignee" as property.[17]

[32] I am satisfied that a bankrupt's interest in KiwiSaver is property for the purposes of the Insolvency Act 2006. I agree with the reasoning of Blanchard J in *NZI Life* and I consider this reasoning applicable to the 2006 definition of property. I consider that the Australian decision of *Re Coram* and other similar decisions can be distinguished from the facts of this case and the KiwiSaver scheme. I am satisfied that a KiwiSaver interest is not a mere expectancy.

[33] I do not consider that *NZI Life* can be distinguished on the basis of a different definition of "property" in the Insolvency Act 1967 compared with the Insolvency Act 2006.

[34] The definitions of "property" in the two enactments do use different words but both define "property" in the broadest possible way. The 1967 definition provides as follows:[18]

> **Property** means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property:

[35] And the 2006 definition:[19]

> **[p]roperty** means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise

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16 Paul Heath and Julie Kaye Maxted "Superannuation Schemes in Insolvency" (1997) 3(1) NZBLQ 43.
17 At 66.
18 Section 2.
19 Section 3.

[36] Whatever the meaning of the term "valuable thing", the definition of "property" in the 2006 legislation does, in my view, inevitably encompass such a concept. Describing property as being of every kind and including rights, interests and claims of every kind illustrates the point. Such "property" will inevitably include "every valuable thing".

[37] The different definitions primarily illustrate differences in drafting styles between 1967 and 2006. The 1967 definition relied partly on an attempt to specify what constituted "property", for example land, money, goods and things in action.

[38] The 2006 definition relies upon the phrase that "property" means "property of every kind". The rest of the 2006 definition retains that broad flavour. In contrast with the 1967 definition, the 2006 definition does not specifically mention "things in action" as property. Yet there can be no doubt that "things in action" come within the 2006 definition of "property of every kind". Finally, as the Assignee pointed out in its submissions, if Parliament had intended to significantly change the definition of property (a matter of considerable importance in the Insolvency Act 2006) then some comment in the Parliamentary debate would be expected. There was no such comment noted in the debates.

[39] I am satisfied that Blanchard J's observations in *NZI Life* relating to the definition of property cannot be distinguished as the defendant claimed.

[40] I accept that Blanchard J's comments about property and superannuation interests on bankruptcy were, in the circumstances, obiter, but I find his analysis compelling. This analysis is supported by the position in England.[20]

[41] *Krasner v Dennison* involved two appeals. The appellants had been declared bankrupt. They both had personal pension schemes, and the trustee in bankruptcy obtained a declaration that the bankrupts' rights under the pension schemes vested in the trustee. The bankrupts unsuccessfully challenged the declaration on appeal. The pension schemes were personal pension schemes rather than occupational schemes.

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[20] *Krasner v Dennison* [2000] 3 All ER 234 (CA); *In Re Landau (A Bankrupt)* (1998) Ch 223 (Ch).

Personal pension schemes, being defined contribution schemes rather than occupation-based defined benefit schemes have many similar features to KiwiSaver. The schemes are typically provided by financial institutions (rather than employers), they are not dependent on the contributor being employed by a particular employer (or indeed employed at all), the size of the pension fund is determined by the contributions made by the employee and employer, and the quality of the investment of those funds determines the pension amount rather than a members salary at retirement.

[42] Typically, such personal pension schemes prohibit assignment. As the Court of Appeal noted in *Krasner v Dennison*, restrictions on alienation in such schemes will not generally be enforceable against creditors in bankruptcy.[21] The Court considered that in the absence of specific statutory direction the benefits under such policies should vest in the trustee in bankruptcy as the bankrupt's property.[22]

[43] The KiwiSaver scheme is a personal pension scheme. It can be distinguished from the employment-based schemes and therefore from the facts in *Re Coram*. Essentially it is a contract, the details of which are specified by statute. Once an individual is enrolled, the member must contribute a share of his or her income, the employer (should there be one) must make a contribution, and the Government must provide an initial incentive and tax credits. It requires the trustee to hold these contributions, invest them, and then return them as the statute specifies (typically at retirement). The savings are generally "locked-in".[23] But they are not tied to any employment or other hooks. They are intended to improve the general public's retirement savings and thereby their standard of living on retirement. The return date is intended to be retirement. The retirement date is set to match the National Superannuation eligibility age of 65. This reflects the purpose of KiwiSaver.

[44] There are exceptions to that general rule of payment to the member on retirement. If the member dies, payment can be made to his or her estate.[24] This illustrates the member's entitlement to his or her savings. If there is a serious

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21 *Krasner v Dennison*, above n20, at [46].
22 At [52].
23 KiwiSaver Act 2006, sch 1, r 4.
24 Rule 9.

financial emergency, early payment can be made to the member. The key point of the scheme is the fundamental entitlement by the member to the account balance on retirement. These propositions all support the Assignee's claim that a KiwiSaver interest is a chose in action rather than a mere expectancy.

[45] Section 101G(2) of the KiwiSaver Act 2006 confirms this approach relating to the employer contribution. It provides that such a contribution vests in the member immediately on receipt by the provider, despite any provision to the contrary. This illustrates the intention behind the KiwiSaver scheme. Once a contribution is credited to a member's account, whether it was made by the member or the employer, it belongs to the member. As the Assignee noted in its submissions, the member's payment does not need to vest because the member has and will always own that contribution.

[46] The defendant also relied on comments by the Court of Appeal in *Terranova Homes and Care Ltd v Faitala (Terranova)* which suggested that a KiwiSaver member may not be entitled to his or her KiwiSaver funds and that members only had an expectancy.[25] The issue on appeal (as explained in the hand note) was:

> ... where parties were in an employment relationship and an employee was paid at the statutory minimum wage rate, the employer was entitled to deduct from that wage its compulsory employer contributions payable for that employee under the KiwiSaver scheme. At issue in the principle appeal was the relationship between two significant statutory provisions: s 6 of the Minimum Wage Act 1983 (the MWA) and s 101B of the KiwiSaver Act 2006 the (KSA).

[47] In what was essentially an aside, not apparently essential to the ultimate decision, the Court said:

> [21] Moreover, as Mr Cranney submitted, the money paid to a KiwiSaver scheme does not belong to the employee but to the scheme. The employee's rights will ultimately depend upon the terms and conditions of the governing instrument. But it cannot be said that an employee who contributes to a KiwiSaver scheme is necessarily entitled to receive the money at a future date.

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[25] *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, (2013) 10 NZELR 849 (CA).

[48] The defendant submits that the Court's observations support the position that there is no entitlement to the KiwiSaver funds, and that a KiwiSaver member has no more than an expectancy.

[49] I accept that such an inference can be taken from the Court's remarks in *Terranova*. I am satisfied, however, that their observations were obiter. The proposition stated in [21] of the judgment did not seem to be the subject of argument before the Court, nor was there a detailed analysis of the conclusion. I am satisfied that, with limited exceptions, a member is entitled to their KiwiSaver account on retirement.

[50] The KiwiSaver scheme provides that a member will be entitled to his or her KiwiSaver account at the age of 65. There are few circumstances provided for in the KiwiSaver Act 2006 which limit that right. If an enactment or a court judgment requires it, then it must be done.[26] Some restrictions are typically found in KiwiSaver trust deeds, but all such provisions are subject to the provisions of the KiwiSaver Act 2006.

[51] This fundamental entitlement to receive a KiwiSaver interest, with minimal exceptions, supports the submission that the KiwiSaver scheme is more than an expectancy. Save parliamentary or court direction, a living member is entitled to the balance of their account at 65 years of age. Thus, the member has a property interest in the scheme.

[52] In summary, a member is entitled to his or her account upon retirement. The exceptions relate to court orders or statutory directions. A member's interest is more than a mere expectancy. The KiwiSaver scheme is not attached to employment interests which define when and whether superannuation is payable. Authorities based on employment schemes can be distinguished from the KiwiSaver scheme. This is a personal pension scheme with an entitlement to payment.

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[26] KiwiSaver Act 2006, s 196 and sch 1, r 7.

[53] I am satisfied a member's interest in his or her KiwiSaver account is property pursuant to the Insolvency Act 2006. I propose to make a declaration accordingly, the terms of which I will identify at the end of this judgment.

**Is a KiwiSaver interest accumulated during bankruptcy "property"?**

[54] Mr Marshall QC as amicus submits that the KiwiSaver interest of a member accumulated during bankruptcy is not "property" based on the different wording between ss 101 and 102 of the Insolvency Act 2006. It is common ground that as a general proposition property earned or received by a bankrupt during bankruptcy passes to the Assignee and is therefore available for distribution to creditors.

[55] Mr Marshall submits, however, that with respect to KiwiSaver accounts the difference in wording between ss 101 and 102 means money that accumulates in a KiwiSaver account during bankruptcy is not property and therefore cannot be available to distribute to creditors. Section 101 provides that on bankruptcy all property belonging to the bankrupt vests in the Assignee. In contrast, s 102 is concerned with property *acquired by or passing to* the bankrupt during bankruptcy. It is only this property that vests in the Assignee. Mr Marshall's submission is that s 102 is concerned with property which comes into the physical possession of the bankrupt during bankruptcy and not otherwise. This is the meaning of the word "acquired" in s 102. "Acquired" is not used in s 101. Mr Marshall submits that the KiwiSaver interest accumulated during bankruptcy does not come into the bankrupt's physical possession at that time (unless the bankrupt turns 65 during bankruptcy and triggers the KiwiSaver payment), but when the member retires. Thus, the KiwiSaver property accumulated during bankruptcy (in terms of s 102) is not "acquired" by the bankrupt and is therefore not property which vests in the Assignee.

[56] This distinction is based on the proposition that "acquire" as used in s 102 means to come into physical possession. I reject this argument. First, I consider that in the context in which "acquired" is used, a bankrupt does "acquire" a KiwiSaver interest during his bankruptcy. Section 102 is concerned with either property acquired or property passing to the bankrupt during bankruptcy. The KiwiSaver

account during bankruptcy will be made up of a member's contributions, employer contributions, as well as some tax credits. During bankruptcy the member continues to contribute (assuming the member is employed), as will the member's employer.

[57] A member's KiwiSaver contribution, therefore, is property acquired from employment. The fact that a member may not be entitled to that property until, for example, retirement, does not mean that the property is not acquired at the time payments are made into a KiwiSaver account. The fact that the money is being controlled and invested by another does not affect a member's acquisition of the money during bankruptcy.

[58] As to the employer's contribution, s 101G(2) of the KiwiSaver Act 2006 provides that employer contributions to a KiwiSaver account immediately vest in the employee upon payment to a provider. The employee therefore acquires the employer contribution immediately. The fact that the KiwiSaver member cannot access this money at the time (other than through the aforementioned exceptions to the scheme) does not affect the fact of its acquisition.

[59] I therefore reject Mr Marshall's submissions. I am satisfied that the bankrupt does acquire his or her interest in the contributions made to the KiwiSaver account as they are made. Therefore, any KiwiSaver interest acquired during bankruptcy is "property" for the purpose of s 102 of the Insolvency Act 2006.

**Issue two – Does the KiwiSaver "property" vest in the Assignee?**

[60] The Assignee's case is that once the KiwiSaver member's account comes within the definition of "property", then pursuant to s 101 of the Insolvency Act 2006, the member's interest vests in the Assignee on bankruptcy and, pursuant to s 102, an interest accumulated during bankruptcy also vests in the Assignee.

[61] The defendant and the bankrupts' position is that a close analysis of ss 101, 102 and 105 of the Insolvency Act 2006 and s 196 of the KiwiSaver Act 2006 establish that a bankrupt's KiwiSaver account does not vest in the Assignee. They submit that these provisions effectively prohibit any such vesting.

[62] I have concluded that a KiwiSaver member's interest is property for the purpose of the Insolvency Act 2006. Sections 101 and 102 provide that "property" of the bankrupt and "property" obtained during bankruptcy vests in the Assignee on bankruptcy. The Assignee does not need to act. The property vests by law.

[63] Sections 101 and 102 (amongst others) are governed in part by the provisions of s 105 of the Insolvency Act 2006.

[64] Section 105 provides as follows:

> **105 Effect of other laws**
>
> (1) Nothing in the Land Transfer Act 1952 restricts the operation of sections 101 to 104.
>
> (2) Sections 101 to 104 do not affect the operation of any other law that prevents any property from vesting in the Assignee.

[65] If there is "any other law" which prevents any property vesting in the Assignee, then the vesting provisions in ss 101 and 102 will not affect such a law. Sections 101 and 102 will therefore be subject to "any other law" which prevents vesting. The defendant submits that s 196 of the KiwiSaver Act 2006 is such a law. It prevents KiwiSaver interests from vesting in the Assignee, such that sections 101 and 102 do not apply to KiwiSaver interests. Their direction that property vests in the Assignee on bankruptcy is excluded by the combination of s 105 of the Insolvency Act 2006 and s 196 of the KiwiSaver Act 2006.

[66] Section 196(1) provides as follows:

> **196 Member's interest in KiwiSaver scheme not assignable**
>
> (1) Except as expressly provided in this Act, a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme must not be assigned or charged or passed to any other person whether by way of security, operation of law, or any other means.

[67] By itself, s 196(1) prohibits the assignment or passing of any KiwiSaver interest to another. Given that s 105(2) of the Insolvency Act 2006 provides that the vesting provisions in ss 101 and 102 are subject to any other statutory provision, the

defendants argue that s 196(1) applies (as another statutory provision) and that the KiwiSaver interest does not vest in the Assignee.

[68] The question, therefore, is whether there is "any other law" in the KiwiSaver Act 2006 which prevents property vesting in the Assignee?

[69] Section 196(2) provides:

> (2) However, nothing in subsection (1) prevents a member's interest or any future benefits that will or may become payable to a member under the KiwiSaver scheme from being released, assigned, or charged, or from passing to any other person if it is required by the provisions of any enactment, including a requirement by order of the Court under any enactment (including an order made under section 31 of the Property (Relationships) Act 1976).

[70] Subsection (2) authorises a member's KiwiSaver interest or future benefits under the scheme to be paid to another if it is required by any other enactment. Thus, when considered as a whole, s 196 of the KiwiSaver Act 2006 does not prevent property vesting in the Assignee. It limits the circumstances under which this can happen. If a statute or a court order requires a member's KiwiSaver interests to vest in another, then that will be done. Section 196 is not therefore another law which prevents property from vesting in the Assignee. On the contrary, subs (2) permits vesting if required by law.

[71] The bankrupts argued that the words in subs (2) "if it is required by the provisions of any enactment" should be read as requiring specific authority in a statute before a KiwiSaver interest can vest in another. They submit that the Insolvency Act 2006 would have to specifically say that the KiwiSaver interest on bankruptcy vests in the Assignee before s 196(2) could apply.

[72] I reject this argument. There is, in my view, nothing in s 196(2) that requires specific reference to the provisions of the KiwiSaver Act 2006 before a KiwiSaver interest can vest in another. The Insolvency Act 2006 requires all property to vest in the Assignee on bankruptcy. There is no reason for this purpose to be read as excluding KiwiSaver interests, simply because they are not specifically mentioned in the Insolvency Act 2006.

[73] The defendant said that there was a circularity in the statutory provisions. Thus, the best interpretation of these provisions was that s 196 was an absolute prohibition for the purpose of s 105, and it followed that the vesting orders authorised under ss 101 and 102 were excluded. I reject that approach. When read as a whole, s 196 does not in my view entail an absolute prohibition against vesting of a member's KiwiSaver interest. It permits members' interests or future benefits in another to be passed to another person if so required by law. Sections 101 and 102 require such a passing. Section 105(2) applies only to the operation of a law that prevents property from vesting in the Assignee. Section 196 considered as a whole does not do that. It prevents vesting with exceptions where required by law, and ss 101 and 102 entail such a requirement. I am therefore satisfied that ss 101 and 102 of the Insolvency Act 2006 apply to a bankrupt's KiwiSaver account.

*Other reasons why the defendant says the property does not vest*

[74] The defendant submits that a bankrupt's KiwiSaver account cannot vest in the Assignee because a KiwiSaver account can only be held by a natural person. The Assignee is essentially an office rather than an individual.

[75] Section 6 of the KiwiSaver Act 2006 confirms that the Act applies only to "an employee or other natural person". Further, s 4 defines a "member" in the KiwiSaver scheme as "a natural person".

[76] I do not consider the provisions of ss 4 and 6, and the fact that the KiwiSaver Act 2006 requires a member of the scheme to be a natural person sufficient to prevent the Assignee from accessing the bankrupt's KiwiSaver account on bankruptcy.

[77] The Assignee's interest is in the money in the KiwiSaver account. The KiwiSaver account will remain in the bankrupt's name after bankruptcy, and indeed until its expiry. The bankrupt will remain a member of the scheme but the Assignee will exercise the member's rights under the scheme during the bankruptcy, given that the Assignee takes over the exercise of the member's powers during bankruptcy.[27]

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[27] Insolvency Act 2006, ss 101(1)(b), 102(1)(b).

[78] Further, the mandatory provisions of ss 101 and 102, which vest a bankrupt's property in the Assignee, apply at bankruptcy. The KiwiSaver Act 2006, in restricting membership to natural persons, does not by itself prevent property from vesting in the Assignee.[28] Sections 101 and 102 therefore apply to the bankrupt's KiwiSaver account irrespective of ss 4 and 6 of the KiwiSaver Act 2006 relating to the requirements of membership.

[79] The defendant also argued that the KiwiSaver Act 2006 provides that person can only be a member of one KiwiSaver scheme at a time. The defendant argued that if the Assignee was to become the Assignee of the bankrupt's KiwiSaver scheme, then that would require one scheme for the bankrupt at bankruptcy, and a second scheme for after bankruptcy.

[80] The solution to this concern is set out in s 53(3) of the KiwiSaver Act 2006. That provides as follows:

> **53 Person may be member of only 1 KiwiSaver scheme at any one time**
>
> (1) A person may be a member of only 1 KiwiSaver scheme at any one time.
>
> (2) This section does not limit subpart 3.
>
> (3) This section does not prevent people from having more than 1 account or investment product of any one KiwiSaver scheme.

[81] A KiwiSaver member can have more than one account in any one KiwiSaver scheme. The bankrupt could therefore have one account for his KiwiSaver interest which vests in the Assignee, and another account where no such request is made, providing continuity for the KiwiSaver member after bankruptcy should that be necessary. I reject this submission.

[82] The defendant further submits that the appropriate mechanism for the Assignee to access the KiwiSaver account of a bankrupt is through s 106 of the Insolvency Act 2006 rather than through the declarations sought in this case.

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[28] Section 105(2).

[83] Section 106 of the Insolvency Act 2006 provides as follows:

> **106 Court may order that money due to bankrupt is assigned to Assignee**
>
> (1) The Court may, on the application of the Assignee, order that any money due to the bankrupt, or any money to become due or payable to the bankrupt, is assigned or charged to, or in favour of, the Assignee.
>
> (2) The assignment or charge is a discharge to the person who pays the Assignee.

[84] Section 106 may be one method by which, in each individual bankruptcy, an Assignee may be able to seek an order relating to a bankrupt's KiwiSaver account. The fact that this section exists does not mean, however, that there is no other way in which KiwiSaver accounts can be accessed. The existence of s 106 is therefore, in my view, neutral in assessing whether or not a KiwiSaver member's account vests in the Assignee upon bankruptcy. I therefore reject this argument.

[85] I am satisfied ss 101 and 102 of the Insolvency Act 2006 apply to a bankrupt's KiwiSaver account. I will consider the particular declarations sought at the end of this judgment.

**Serious financial hardship**

[86] It is common ground that the Assignee in whom a bankrupt's KiwiSaver account vests can only act within the powers given to the member by the KiwiSaver scheme. Although I am satisfied that a member's interest is property, and that a member's interests vest in the Assignee on bankruptcy, a bankrupt and therefore the Assignee or indeed any member generally can only access a KiwiSaver account on retirement or if permitted by law.[29]

[87] There are exceptions to the retirement rule. The Assignee in this case seeks declarations that one of the exceptions, the serious financial hardship provision, invariably applies if a KiwiSaver member is bankrupt. If the declarations are made, the Assignee will be able to access a bankrupt's KiwiSaver accounts for the benefit of creditors on an invariable basis without further application being necessary. This

[29] KiwiSaver Act, sch 1, rr 4 and 7.

would ensure that a member's bankruptcy will always bring the bankrupt's circumstances within the serious financial hardship provision. This is based on the proposition that trustees may give early access to a KiwiSaver account if the KiwiSaver member suffers serious financial hardship.

[88] The process for early release of funds relating to financial hardship is set out in the KiwiSaver Rules.[30] Rule 10 provides as follows:

> **10 Withdrawal in cases of significant financial hardship**
>
> (1) If the trustees are reasonably satisfied that a member is suffering or is likely to suffer from significant financial hardship, the member may, on application to the trustees in accordance with clause 13, make a significant financial hardship withdrawal in accordance with this clause.
>
> (2) The amount of that significant financial hardship withdrawal may, subject to the trustees' approval under subclause (3), be up to the value of the member's accumulation less the amount of the Crown contribution (disregarding any positive or negative returns for the purpose of calculating the amount of the Crown contribution) on the date of withdrawal.
>
> (3) The trustees—
>
> (a) must be reasonably satisfied that reasonable alternative sources of funding have been explored and have been exhausted; and
>
> (b) may direct that the amount withdrawn be limited to a specified amount that, in the trustees' opinion, is required to alleviate the particular hardship.

[89] Examples of serious financial hardship are set out in r 11, which provides as follows:

> **11 Meaning of significant financial hardship**
>
> (1) For the purposes of these rules, **significant financial hardship** includes significant financial difficulties that arise because of—
>
> (a) a member's inability to meet minimum living expenses; or
>
> (b) a member's inability to meet mortgage repayments on his or her principal family residence resulting in the mortgagee seeking to enforce the mortgage on the residence; or

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30 Schedule 1.

(c) the cost of modifying a residence to meet special needs arising from a disability of a member or a member's dependant; or

(d) the cost of medical treatment for an illness or injury of a member or a member's dependant; or

(e) the cost of palliative care for a member or a member's dependant; or

(f) the cost of a funeral for a member's dependant; or

(g) the member suffering from a serious illness.

(2) In this section, **serious illness** has the meaning given to it by clause 12(3).

[90] The Rules are focused on the financial hardship of the KiwiSaver member. If the trustees are satisfied a member "is suffering or is likely to suffer serious financial hardship" then they may authorise a withdrawal. The withdrawal need not be all of the KiwiSaver account. The r 11 examples emphasise the criteria of significant financial hardship by describing events such as an inability to meet basic living expenses, to make mortgage payments on the family home to obtain medical care, or to pay for a funeral. These examples illustrate that serious financial hardship is focused on an inability to meet the "basics" of life including food, shelter and medical care.

[91] The Assignee's case is that bankruptcy will always constitute serious financial hardship, and that such hardship will remain until all the bankrupts' creditors are repaid.[31] A bankrupt is not discharged from her or his debts until discharged from bankruptcy.[32] They lose ownership of their assets and may lose surplus income beyond that required to meet their basic living expenses.[33] The Assignee submits that bankruptcy is inevitably the result of serious financial hardship and so will inevitably be a qualifying event for early withdrawal.

[92] When an application is made under r 10, the trustees will need to ask themselves two questions. The first is whether serious financial hardship has been established, and if not, whether it is likely to occur. They will be guided as to the

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31 Insolvency Act 2006, s 273.
32 Section 304.
33 Section 344.

meaning of serious financial hardship by the examples given in r 11. Once serious financial hardship is established, the trustees will still have a discretion as to the release of funds. Here, the second question will be relevant – will the payment alleviate, in whole or in part, the suffering experienced from serious financial hardship?

[93] I do not consider that the bankruptcy of a KiwiSaver member will always bring an individual within the circumstances in r 10 entitling early withdrawal for serious financial hardship.

[94] The situation of the two bankrupts in this case illustrates the point. One, Mr T, has proven debts exceeding his KiwiSaver balance. If the trustees paid the KiwiSaver interest to the Assignee, who in turn pays the bankrupt's creditors, in part, it seems unlikely that payment will alleviate any of Mr T's financial hardship. He would remain bankrupt and would continue to be governed by the restrictions applicable to a bankrupt.

[95] As Mr T noted in his affidavit filed in these proceedings, the alleviation of his financial hardship occurred at bankruptcy. He instantly became better off after having been declared bankrupt because he no longer had to meet his own debts. Paying KiwiSaver interest to his creditors after bankruptcy would not have any effect on his circumstances.

[96] Before bankruptcy, significant portions of his income were used to pay his debts. Now he is bankrupt he no longer needs to make these payments and his personal financial circumstances are in fact considerably improved. Mr T no longer suffers any serious financial hardship, nor is he likely to during the course of his bankruptcy. Mr T's evidence is therefore that on bankruptcy he suffered no serious financial hardship, but that even if he did, partial payment of his creditors would not have alleviated this hardship.

[97] However, the position of Mr H, the other bankrupt, may be different. His KiwiSaver account exceeded his proven debts. If his KiwiSaver funds were used to

pay his creditors then he may well be able to have his bankruptcy annulled.[34] This annulment would in turn both alleviate the immediate hardship caused by the unpaid debts, and mean that the restrictions on a bankrupt during bankruptcy would not apply to this KiwiSaver member.

[98] In such circumstances, the trustees could therefore reasonably find that release of KiwiSaver funds is likely to alleviate serious financial hardship by repaying outstanding debts and avoiding the restrictions of bankruptcy. In particular, the member would avoid the possibility of having, for example, part of his income during bankruptcy taken from him.

[99] However, there may be other impediments to a declaration by this Court that trustees should always conclude the alleviation of bankruptcy in such circumstances is the only conclusion open to them. If where a KiwiSaver fund exceeded the proved debts trustees invariably have to conclude that bankruptcy requires withdrawal of the KiwiSaver fund and payment to the Assignee for return to creditors, that may not account adequately for individual circumstances. For example, what of the situation where such a bankrupt has a serious illness in terms of r 11(1)(g) or r 12? In such a case, the trustees would need to consider which of two applications (the alleviation of financial hardship or payment to alleviate serious illness) they granted.

[100] These examples illustrate that rr 10 or 12 applications are properly decided on an individual basis rather than by general declaration. The preponderance of cases where the bankruptcy will be annulled (if KiwiSaver payments were made) is likely to be seen as alleviating the member's significant financial hardship, and therefore any such application may well be granted by the trustees.

[101] On the other hand, where there is no apparent alleviation of a member's financial suffering by a KiwiSaver payment, the Rules do not appear to authorise trustee approval of early withdrawal.

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[34] Insolvency Act 2006, s 309.

**Declarations sought**

[102] I now turn to the declarations sought by the Assignee. Given my conclusions, I make the following declarations following the statement of claim prayer for relief:

> (a) the Bankrupts' KiwiSaver Interests, including rights, interests and claims of every kind relating to the Bankrupts' KiwiSaver Interests, are property for the purposes of the Insolvency Act 2006;
>
> (b) as such, the Bankrupts' KiwiSaver Interests vest in the plaintiff on their bankruptcy under s 101 of the Insolvency Act 2006 regardless of the KiwiSaver end payment date for each Bankrupt;
>
> (c) this vesting is not prevented by any other legislative provision;
>
> (d) any increases in the value of, or additions to, the Bankrupts' KiwiSaver Interests between adjudication and discharge from bankruptcy vest in the plaintiff;
>
> (e) the Bankrupt's KiwiSaver Interests, including any that vested in the plaintiff on adjudication, and between adjudication and discharge from bankruptcy, do not revert to the Bankrupts upon discharge from bankruptcy;
>
> (f) the plaintiff can exercise any rights over property of the Bankrupts that the Bankrupts could have exercised, under s 101 of the Insolvency Act 2006.

[103] As to declaration (g), I have noted that the Assignee can apply under the early withdrawal provisions of the KiwiSaver Act to the relevant trustee by exercising the bankrupts' rights over the bankrupts' KiwiSaver interest. Given my conclusions, I cannot make a declaration that the Assignee can access the bankrupts' KiwiSaver interest. The Assignee may be able to access the KiwiSaver interest under the early withdrawal provisions if the trustee accepts the Assignee's application.

[104] Finally, I make a declaration (k) as follows:

> (k) unless and until the Bankrupts' KiwiSaver Interests vested in the plaintiff are paid out to the plaintiff, the defendant is required to ensure that those Interests are accounted for separately from KiwiSaver interests that any of the Bankrupts might accumulate following discharge from bankruptcy.

[105] I therefore refuse to make declaration (g), (h), (i) and (j), all of which relate to the significant financial hardship provisions.

[106] I accept that this result is likely to be unsatisfactory for all parties. However, it is my assessment of the current law. These declarations have the following effect on a bankrupt's KiwiSaver account.

[107] The value of a KiwiSaver account, accumulated up to and including the period of bankruptcy, vests in the Assignee. The Assignee will in each case need to apply to the trustee for early release of the KiwiSaver funds, if the Assignee considers that after bankruptcy the member's significant financial hardship will be or is likely to be alleviated by such a payment.

[108] Where the application is granted by the trustee, then the Assignee will be free to use KiwiSaver funds to pay the bankrupt's creditors. Where the application is refused the Assignee will continue to have the bankrupt's KiwiSaver account vested in it. That account will consist only of the bankrupt's KiwiSaver interest until discharge from bankruptcy.

[109] When the KiwiSaver account matures, typically at 65 years of age, the bankrupt's interest in KiwiSaver (being the separate KiwiSaver interest accumulated up to and including a discharge from bankruptcy) will be available to the bankrupt's creditors from the original bankruptcy. This will likely require two accounts for such a KiwiSaver member to be managed from discharge of bankruptcy until retirement.

[110] Should there be a surplus of KiwiSaver funds in this event, then the surplus funds will need to be dealt with in accordance with relevant legislation at the time.

[111] I accept this is an unattractive result for all concerned. Legislative reform is clearly called for.

**Costs**

[112] Counsel advised that irrespective of the outcome of these proceedings the plaintiff would meet the costs of the amicus. In the circumstances I suggest that as between the plaintiff and defendant costs lie where they fall. If, however, costs are sought then memorandum should be filed within 21 days with a further 14 days in response.

Ronald Young J

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