

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

**CIV-2011-442-000461
[2012] NZHC 34**

UNDER the Insolvency Act 2006

IN THE MATTER OF the Bankruptcy of BRYAN DAVID
MAYERS

BETWEEN THE OFFICIAL ASSIGNEE IN THE
BANKRUPTCY OF BRYAN DAVID
MAYERS
Applicant

AND BRYAN DAVID MAYERS, VIVIENNE
NANCY MAYERS AND CHARMAINE
ANNE FIELD, AS TRUSTEES OF THE
BRIAN AND VIVIENNE MAYERS
FAMILY TRUST
Respondents

Hearing: 8 December 2011

Counsel: D J C Russ for Applicant
M J Logan for V N Mayers and C A Field
B D Mayers in person

Judgment: 27 January 2012

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

[1] The applicant is the Assignee in bankruptcy of the first-named respondent (Mr Mayers). The respondents are trustees of a family trust. In 2007 Mr Mayers advanced to the trustees the sum of \$310,000, and he, and the other trustees, executed a deed of acknowledgement of debt acknowledging indebtedness to Mr Mayers in this sum, and an obligation to repay the debt on demand.

[2] On each of 30th March 2007, 18th May 2008 and 18th May 2009, Mr Mayers partially released and forgave the trustees the sum of \$27,000, a total of \$81,000.

[3] Mr Mayers was adjudicated bankrupt on 11th November 2009. In July and August 2011 each of the three trustees was served with a notice to cancel irregular transactions issued by the applicant under ss 204 and 205 of the Insolvency Act 2006, in relation to the three releases of debt.

[4] The applicant has brought this proceeding under s 207 of the Insolvency Act 2006 seeking an order that the respondents pay him the sum of \$81,000.00.

[5] By separate notices of opposition, the second and third-named respondent trustees, by their solicitor, and Mr Mayers personally, plead that the forgiveness of the debt was not a transfer of property to them, and accordingly the Court does not have jurisdiction to make an order under s 207 of the Insolvency Act 2006. Further, they plead that if the Court does have jurisdiction it should exercise its discretion not to order payment, as the trustees' liability under the deed is limited to the assets of the Trust and the value of trust funds in their hands has not yet been ascertained.

[6] The issue in this case is whether a release of debt is a transfer of property in terms of s 207.

[7] Section 204 of the Insolvency Act 2006 provides that a gift by a bankrupt may be cancelled on the Assignee's initiative if made within two years before adjudication. Section 205 provides that a gift beyond two years but prior to five years before adjudication may also be cancelled on the Assignee's initiative if the bankrupt was unable to pay his or her debts at the time of the gift. A bankrupt is presumed to have been unable to pay his or her debts for this purpose unless the party claiming under the gift proves that the bankrupt was, immediately after the making of the gift, or at any time thereafter and up to the adjudication, able to pay his or her debts without the aid of the property comprised in the gift.

[8] Section 206 sets out the procedure to be followed. The Assignee must file a notice with the Court and serve it on certain parties. Section 206(4) provides that the

transaction in question is automatically cancelled unless a written notice of objection is received by the Assignee within 20 working days of service.

[9] Counsel for Ms V N Mayers and Ms C A Field accepted that the respondents had not given written notice of objection to the Assignee within 20 working days of service of the Assignee's notice setting aside the gifts, and that accordingly all three of the gifts were automatically cancelled under s 206(4). I did not understand Mr B D Mayers to argue otherwise. He did raise an issue about whether the Official Assignee had advised him incorrectly in relation to the effect of the notices, but there is no evidence before me to support this contention. I therefore find that the notices were validly cancelled under s 206(4).

[10] Section 207(1) provides:

207 Court may order retransfer of property or payment of value

- (1) On the cancellation of an irregular transaction under which property of the bankrupt, or an interest in property of the bankrupt, was transferred the Court may make an order for –
 - (a) the retransfer to the Assignee of the property or interest in the property; or
 - (b) payment to the Assignee of a sum of money that the Court thinks appropriate, but the sum must not be greater than the value of the property or interest in the property when the transaction was cancelled.

[11] The argument put forward by Mr Logan turned on the wording of s 207: were the gifts “irregular transaction(s) under which property of the bankrupt, or an interest in property of the bankrupt, was transferred ...”. Only if that test is satisfied may the Court make an order for the retransfer to the Assignee of the property or interest in the property, or order payment to the Assignee of a sum of money that the Court thinks appropriate. Mr Logan argued that a forgiveness of debt is not a transfer of property or an interest in property. He appeared to accept that the three gifts were irregular transactions in terms of s 207(1).

[12] There is no definition of the word “gift” in the Insolvency Act 2006. The learned authors of *Heath & Whale on Insolvency* para 24.92 discuss this omission and proffer the view that if the effect of the transaction is to bring about a diminution in value of the assets of the donor or to otherwise reduce the value of the assets

which would be available to the Assignee in the bankruptcy of the donor, then it is a transaction which may be cancelled on the initiative of the Assignee.

[13] I accept that to be the position, and counsel did not argue otherwise. However, the classification of each of the three acts of forgiveness of debt as gifts, and thus as irregular transactions in terms of s 206, does not determine whether by its very nature a forgiveness of debt is a transaction which transfers property, thus giving the foundation for an order under s 207.

[14] A debt is a legal chose in action.¹

[15] A chose in action is a personal right of property which can only be claimed or enforced by action, as distinct from a chose in possession which is a thing of which a person may have physical possession. The creditor is the owner of the chose in action, or right to enforce payment of the debt, against the debtor.

[16] A forgiveness of debt is an enforceable promise not to exercise the right to claim repayment of, or enforce, the debt. It may only be effected at law by deed.² By means of a deed the creditor forgoes the personal right of property previously held; the chose in action is thus abrogated.

[17] This relinquishment of the right, or chose in action, is not a transfer of the right to the debtor. A creditor cannot transfer to a debtor its right to take action against that debtor, because a debtor cannot sue himself.³ If it were made, such a transfer would operate wholly or partially as a release of the debt,⁴ but as such a transfer cannot be effected, a release of a debt by deed is not a transfer of the creditor's chose in action to the debtor.

[18] It follows, therefore, that the partial releases of debt in issue in this case were not transfers from the creditor to the debtor of any property right. Accordingly, there

¹ *Brice v Bannister* (1878) 3 QBD 569 at 573; *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] QB 759.

² *CIR v Morris* [1958] NZLR 1126 (CA).

³ *Goss v Suckling and others* (1910) 13 GLR 64; *In Re Charge Card Services Ltd* [1987] Ch 150 at 176E.

⁴ *Ibid* 175C.

has not been, in any of the transactions which have been set aside, a transfer in terms of s 207(1) of the Insolvency Act 2006 and, accordingly, the Court cannot make an order for a retransfer to the Official Assignee under s 207(1)(a). Nor can it make an order for payment of a sum of money under s 207(1)(b).

[19] The application is dismissed. Ms Mayers and Ms Field will have costs on a 2B basis with disbursements fixed by the Registrar. There is no order for costs in favour of Mr Mayers, as he represented himself on this application.

J G Matthews
Associate Judge

Solicitors:

Anthony Harper (C R Vinnell), PO Box 2646, Christchurch
Pitt & Moore, PO Box 42, Nelson
Mr B D Mayers, 191 Pretty Bridge Valley, RD 1, Wakefield.