

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

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

**CIV-2019-404-001559  
[2020] NZHC 783**

UNDER the Insolvency Act 2006  
BETWEEN WEST COAST HOLDINGS LIMITED  
Plaintiff  
AND TREVOR JAMES MURRAY  
Defendant

Hearing: 19 March 2020  
Appearances: S A McKenna for Judgment Creditor  
Judgment Debtor in Person  
Judgment: 22 April 2020

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**JUDGMENT OF ASSOCIATE JUDGE SARGISSON**

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This judgment was delivered by me on 22 April 2020 at 3.00 p.m.  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar  
Date.....

Solicitors:

Grantham Law, Hamilton

## **Introduction**

[1] West Coast Holdings Ltd seeks an order of adjudication against the judgment debtor, Trevor Murray. The application for adjudication is made in reliance on an act of bankruptcy triggered by Mr Murray's failure to comply with a bankruptcy notice issued on 2 August 2019. The bankruptcy notice is founded upon a long-outstanding judgment debt of \$257,785.25 entered against Mr Murray in this Court on 14 February 2017.

[2] Mr Murray opposes the application. He says it would be unjust to adjudicate him bankrupt.

[3] I am satisfied that the jurisdictional grounds for the order sought have been made out and that Mr Murray has failed to show grounds to warrant the Court exercising its discretion to refuse the order. The reasons for this are explained in this judgment.

## **Background**

[4] The application to adjudicate Mr Murray has been before the Court on several occasions. It is unnecessary to refer to each of them, but it is useful to set out what I recorded in the minute I issued in relation to the list hearing on 5 March 2020:

[2] The judgment debtor, Mr Murray ... has filed a notice of opposition and supporting affidavit. He says it would be unjust to adjudicate him and wishes to have the opportunity to be heard at a defended fixture. He says he was told time would be allocated, and that today's hearing would be simply a directions hearing.

[3] Mr Murray acknowledges that he is unable to pay the long-outstanding judgment debt. He also accepts the following:

- (a) This proceeding is based on the bankruptcy notice that was issued on 2 August 2019, and that he was served with that notice on 30 August 2019; and
- (b) On 7 November 2019 Associate Judge Smith dismissed his application to set aside the bankruptcy notice. He declined to set aside the bankruptcy notice accordingly.
- (c) No steps were taken to comply with the bankruptcy notice before His Honour's determination.

[4] Following His Honour's ruling, the judgment creditor proceeded with its application for adjudication. The application was filed on 13 December 2019. It is the judgment creditor's case that the debtor has committed an act of bankruptcy within the period of 3 months before the filing of the application.

[5] Mr Murray argues that he has not committed an act of bankruptcy. This appears to be on the basis that the judgment creditor did not respond to his proposals in relation to an earlier bankruptcy notice. He also says there are other matters that point to an abuse of process on the part of the creditor that would make it unjust to make an order.

[6] Counsel for the judgment creditor submits that Mr Murray's contentions are devoid of merit and that the Court may now, at its discretion, adjudicate the debtor bankrupt pursuant to s 36 of the Insolvency Act 2006. But she appears to accept, in the circumstances, that there should be an opportunity for a defended hearing.

[7] I adjourn the matter for a 1 hour defended hearing on **19 March 2020 at midday**.

[8] I note that the judgment creditor advises that it served the application for adjudication by email which Mr Murray acknowledges. Nonetheless, an affidavit confirming such service should be filed. I direct accordingly.

[9] I further direct:

- (a) Any affidavit the judgment creditor wishes to rely upon in reply to Mr Murray's affidavit evidence is to be filed and served by **12 March 2020**.
- (b) The judgment creditor is to file and serve **brief** written submissions in support of its application by **12 March 2020**. The submissions should set out for the Court and the judgment debtor:
  - (i) why the judgment creditor says the jurisdictional basis for an order of adjudication is made out under s 13;
  - (ii) any relevant discretionary matters under s 36.
- (c) The judgment debtor is to file and serve **brief** written submissions in response by **17 March 2020**. The submissions should set out for the Court and the judgment creditor:
  - (i) why the judgment debtor says the creditor has not established the jurisdictional requirements for an order of adjudication.
  - (ii) any relevant discretionary matters under s 37(c) or (d).
- (d) The parties' submissions are to be brief and should not exceed 3 pages.

- (e) The creditor must, if seeking an order, file a certificate pursuant to r 24.20 at the hearing.

[5] On 6 March 2020, I issued a further minute advising of Registry's advice that a formal fixture was not available for 19 March 2020, but that I would hear argument after list matters on that day if time was available. I also directed that the directions made on 5 March would otherwise stand.

[6] Both sides complied substantially with those directions. On 19 March 2020, they appeared and were heard in support of their written submissions. I reserved my decision.

[7] At the hearing, Mr Murray submitted that there were just and equitable grounds for refusing to adjudicate him and that this proceeding is an abuse of process. He emphasised the following:

- (a) First, he claims the parties reached a settlement agreement by which the overall debt would be reduced and he would be allowed to make payments by instalments. But, he also claims that the creditor's agreement was never conveyed to him; and he was unable to say what it had agreed to for the reduced amount or the instalments.
- (b) Secondly, he contends the bankruptcy notice supporting the application is an abuse of process. This is on the basis that there was an earlier bankruptcy notice. He argues that the fact that he was not adjudicated on that original notice — only to face the second bankruptcy notice — means that there was a deliberate plan to delay his adjudication and prolong the point in time when he would be released from bankruptcy.
- (c) Thirdly, Mr Murray questions the bona fides of counsel for West Coast Holdings Ltd, saying he believes counsel has been deliberately pursuing him to prolong his misery.
- (d) Lastly, Mr Murray says he would like time to see whether his daughter and son-in-law can come up with funds to enable a "settlement". He

explained that this was on the basis that they had earlier indicated they could possibly assist.

## **Discussion**

[8] Section 13 of the Insolvency Act 2006 sets out the jurisdictional requirements for making an application for an order for adjudication:

### **13 When creditor may apply for debtor's adjudication**

A creditor may apply for a debtor to be adjudicated bankrupt if—

- (a) the debtor owes the creditor \$1,000 or more or, if 2 or more creditors join in the application, the debtor owes a total of \$1,000 or more to those creditors between them; and
- (b) the debtor has committed an act of bankruptcy within the period of 3 months before the filing of the application; and
- (c) the debt is a certain amount; and
- (d) the debt is payable either immediately or at a date in the future that is certain.

[9] Plainly, the jurisdictional requirements for an order for adjudication are satisfied. It is not in dispute that:

- (a) Mr Murray owes West Coast Holdings Ltd a judgment debt — execution of which has not been halted by any court — and that the amount of the debt is \$1,000 or more (being, \$257,785.25); and
- (b) Mr Murray has committed an act of bankruptcy within the three months preceding the filing of the application by failing to comply with the bankruptcy notice served upon him; and
- (c) The debt is for a certain amount; and
- (d) The debt is well overdue for payment — a situation which weights strongly in favour of an order of adjudication.<sup>1</sup>

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<sup>1</sup> See also Insolvency Act 2006, s 17.

[10] Another factor weighing in favour of an order is the desirability of an investigation by the Official Assignee to determine whether there might be any meaningful recovery for creditors. Mr Murray deposes that he has no assets to speak of. However, there is little in the way of detail about his financial position — including his assets and liabilities and his sources of income — to demonstrate that an investigation by the Official Assignee would not be of any practical value.

[11] Section 37 vests a wide discretion in the Court to refuse to adjudicate the debtor bankrupt. It states:

**37 Court may refuse adjudication**

The court may, at its discretion, refuse to adjudicate the debtor bankrupt if—

- (a) the applicant creditor has not established the requirements set out in section 13; or
- (b) the debtor is able to pay his or her debts; or
- (c) it is just and equitable that the court does not make an order of adjudication; or
- (d) for any other reason an order of adjudication should not be made.

[12] As I have noted at [7] above, Mr Murray submits that it is just and equitable that the Court does not make an order of adjudication.

[13] I consider that there is insufficient substance to the matters emphasised by Mr Murray at the hearing to support the exercise of this Court's discretion under s 37(c) or (d). His arguments do not stand up to scrutiny. My reasons are as follows.

[14] First, the alleged settlement agreement allowing Mr Murray to pay a reduced amount by instalments lacks the elements of a binding settlement. There was no agreement as to the specific reduction in the overall debt or the terms relating to the instalments. Indeed, at the hearing, Mr Murray acknowledged that nothing along the lines of what might have been acceptable to the judgment creditor was ever put to him or by him. When unpacked, Mr Murray's complaint is not so much that there was a settlement but really that he was denied the judgment creditor's lawyers denied him the opportunity to negotiate a settlement and that he never got to find out what terms the judgment creditor might agree to. This seems to align with his belief that the

judgment creditor's lawyers acted in bad faith with intent to prolong his misery. However, there is no evidence of any substance to support this belief.

[15] If Mr Murray wanted to seriously explore some arrangement with the judgment creditor, there was nothing to prevent him putting forward a firm proposal for the judgment creditor to accept or reject. However, what Mr Murray points to are vague proposals to commence proceedings against a supposed debtor and to borrow from his daughter and son-in-law. Nothing came of these. It is not unjust or inequitable for the judgment creditor to decide that the better course would be to seek an order of adjudication and allow the Official Assignee to investigate.

[16] Secondly, Mr Murray's allegation that the bankruptcy notice supporting the application was an abuse of process is a groundless assertion. Counsel for the judgment creditor says, and I agree, that West Coast Holdings Ltd was merely giving Mr Murray the opportunity to take proceedings against others as a means of recovering funds to pay the judgment debt. Indeed, Mr Murray acknowledges that he asked for time to take such proceedings in hopes that he could recover funds to enable him to pay the judgment debt. He also acknowledges that nothing came of this plan and that he is in no position to pay the debt.

[17] Thirdly, there is no evidence to support Mr Murray's contention that the judgment creditor's lawyers set out with a vindictive plan to deliberately prolong the point in time when he would be released from bankruptcy. The allegation is entirely speculative. Indeed, Mr Murray himself requested that the judgment creditor give him time to pursue his own supposed debtor. Counsel for the judgment creditor says that he is simply acting on the instructions properly given to him by the judgment creditor and that Mr Murray has had ample time to indicate what he might be able to offer for settlement purposes.

[18] Lastly, I do not consider it unjust or inequitable to not give Mr Murray further time to seek his family's assistance. Mr Murray has had ample time to demonstrate that help from his daughter and son-in-law is available and what it might amount to. However, he has failed to proffer anything more than a vague proposition. The same must be said of the proceeding that Mr Murray might bring against a supposed debtor.

Regardless of whether there is a sustainable claim that ought to be pursued, Mr Murray has now had ample time to commence a proceeding. He has failed to do so. The question of whether there is a sustainable claim against the supposed debtor is now best left to the Official Assignee.

[19] Ultimately, having considered all the various factors I have referred to, I am satisfied that the public interest in bringing Mr Murray's affairs under the Official Assignee's control outweighs any private interests to the contrary. Mr Murray has failed to discharge his burden to satisfy the Court that it should refuse to adjudicate.

### **Result**

[20] I make an order adjudicating Mr Murray bankrupt. The order is timed at **2.00 pm on 22 April 2020.**

[21] As costs follow the event under the statutory costs regime, the judgment creditor is entitled to an order for costs on a 2B basis plus disbursements as fixed by the Registrar.

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Associate Judge Sargisson