IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2016-425-000117
[2017] NZHC 367

IN THE MATTER	the Insolvency Act 2006
AND	
IN THE MATTER	of the bankruptcy of ABRAHAM NICOLAAS VAN DER WALT
BETWEEN	OFFICIAL ASSIGNEE Applicant
AND	PENNY LOUISE CARRIM Respondent

Hearing: 1 March 2017

Appearances: G E Slevin for Applicant
R T Chapman for Respondent

Judgment: 8 March 2017

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[on irregular transactions]

Introduction

[1] Abraham Van der Walt (the bankrupt) was adjudicated bankrupt on 19 November 2015.

[2] This application is brought by the Official Assignee in the bankruptcy of the bankrupt.

[3] The respondent ("Ms Carrim") is the bankrupt's partner.

[4] In the two-year period before the bankruptcy, the bankrupt and Ms Carrim settled a family trust upon themselves and then funded it to complete a purchase of

an Invercargill property as their home (the property). To avoid confusion, where in this judgment the couple are involved in their capacity as trustees, I refer to them as "the trustees".

[5] The total purchase price including associated costs was $283,243.66.

[6] The Assignee asserts that part of the funds received by the trustees represented a gift made by the bankrupt and that another aspect of payment represented a gift made to Ms Carrim personally.

[7] As a result, the Assignee regarded the gift elements as "insolvent gifts" under s 204 Insolvency Act 2006 (the Act) and took steps to cancel the irregular transactions under s 206(2) of the Act.

[8] The procedure adopted by the Assignee is not in issue. Nor is there an issue that a gift effected by the bankrupt by deed is properly characterised as a "gift" under the Act. There is an issue as to whether one other transaction involved a gift.

The general nature of the issues

[9] The Court is required to determine first what sums the bankrupt gifted to the trustees and, secondly, what sum (if any) Ms Carrim should appropriately be ordered to pay to the Assignee under s 207 of the Act.

The statutory framework

[10] The Act deals with the concept of insolvent gifts in ss 204 – 205:

> **204 Insolvent gift within 2 years may be cancelled**
>
> A gift by a bankrupt to another person may be cancelled on the Assignee's initiative if the bankrupt made the gift within 2 years immediately before adjudication.
>
> **205 Insolvent gift within 2 to 5 years may be cancelled if bankrupt unable to pay debts**
>
> (1) A gift by a bankrupt to another person may be cancelled on the Assignee's initiative if—

(a) the bankrupt made the gift within the period beginning 2 years immediately before adjudication and ending 5 years immediately before adjudication; and

(b) the bankrupt was unable to pay his or her debts.

(2) A bankrupt is presumed to have been unable to pay his or her debts for the purpose of subsection (1)(b) unless the party claiming under the gift proves that the bankrupt was immediately after the making of the gift, or at any time after that up to his or her adjudication, able to pay his or her debts without the aid of the property that the gift is composed of.

[11] The Act then sets out a procedure for cancelling irregular transactions in ss 206 – 210. Section 206 relevantly provides:

206 Procedure for cancelling irregular transactions

(1) The procedure set out in this section applies to the following irregular transactions:

(a) an insolvent transaction:

(b) an insolvent charge:

(c) an insolvent gift:

(d) a disposition of property to which subpart 6 of Part 6 (setting aside of dispositions that prejudice creditors) of the Property Law Act 2007 applies.

(2) The Assignee who wishes to cancel an irregular transaction to which this section applies must—

(a) file a notice with the court that meets the requirements set out in subsection (3); and

(b) serve the notice on—

(i) the other party to the transaction; and

(ii) any other party from whom the Assignee intends to recover.

…

(4) The irregular transaction is automatically cancelled as against the person on whom the Assignee has served the Assignee's notice, if that person has not objected by sending to the Assignee a written notice of objection that is received by the Assignee at his or her postal, email, or street address within 20 working days after the Assignee's notice has been served on that person.

…

[12] The orders which the Court may make in relation to a cancelled irregular transaction are set out in s 207 of the Act:

> **207 Court may order retransfer of property or payment of value**
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> (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—
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> (a) the retransfer to the Assignee of the property or interest in the property; or
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> (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.
>
> (2) The court may make any other order for the purpose of giving effect to an order under subsection (1).
>
> (3) An order under subsection (1) is in addition to any other rights and remedies available to the Assignee, and this section does not restrict those rights.

Chronology

[13] The relevant events are:

14 July 2014	bankrupt and Ms Carrim contract to purchase the property; Ms Carrim pays deposit of $10,000; Ms Carrim effects deposits of $10,350 and $16,650 into bankrupt's savings account;
4 August 2014	Australian judgment for AUD$221,185 entered against bankrupt;
18 August 2014	bankrupt and Ms Carrim settle family trust;
18 August 2014	bankrupt and Ms Carrim each gift to trustees by deed $141,621.84;
21 August 2014	bankrupt and Ms Carrim draw down joint loan of $224,000 from SBS Bank (SBS);

21 August 2014	Ms Carrim effects deposit of $10,000 and transfer of $27,037.51 into bankrupt's current account;
21 August 2014	Ms Carrim effects transfer of $49,219.98 from bankrupt's bank account to solicitor's trust account;
21 August 2014	trustees' solicitors effect settlement of the property purchase;
10 June 2015	Australian judgment registered in New Zealand;
16 July 2015	trustees resolve to distribute trust property to Ms Carrim;
21 July 2015	Ms Carrim pays SBS balance of loan ($208,877.11);
21 July 2015	the property is transferred to Ms Carrim;
8 October 2015	bankrupt served with creditor's application for adjudication order;
19 November 2015	bankrupt adjudicated bankrupt;
18 March 2016	Assignee issues notice to cancel irregular transactions;
20 April 2016	respondent objects to cancellation;
19 September 2016	Assignee issues amended notice to cancel irregular transactions;
17 October 2016	respondent objects to cancellation;
31 October 2016	Assignee applies for orders cancelling the transactions.

The main transaction

The facts

[14] On 18 August 2014, the bankrupt executed a deed (which the trustees also executed as donees) by which he gifted $141,621.84 to the trustees. Ms Carrim executed a like deed. The two gifts represented the funds needed to cover the property purchase and costs.

[15] The evidence identifies three components of the total ($283,243.68) which the bankrupt and Ms Carrim gifted:

(a) A deposit of $10,000 (paid by Ms Carrim);

(b) The loan monies ($224,000.00) sourced from SBS;

(c) The couples' funds of $49,219.98.

The $141,621.84 gift as an "insolvent gift"

[16] For Ms Carrim, Mr Chapman accepted that the sum gifted by deed was an insolvent gift liable to be cancelled under s 204 of the Act. Mr Chapman further accepted that the Court may make an order of cancellation under s 206(6). His submission was that, when the Court then undertakes the assessment required under s 207 of the Act, it will justly conclude that it should not order a payment by Ms Carrim to the Assignee.

[17] Both Mr Chapman and Mr Slevin recognised that it would be unjust if, in ordering a payment, the Court were to ignore the value of Ms Carrim's subsequent settlement of the SBS debt.

Binding proof as to gift

[18] As Mr Slevin submitted, estoppel by deed applies to this situation. As recorded in the *Laws of New Zealand*:[1]

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[1] Colin Fraser, *Laws of New Zealand – Estoppel* (online looseleaf ed, LexisNexis) at [63].

> At common law, estoppel by deed is a rule of evidence founded on the principle that a solemn and unambiguous statement or engagement in the deed must be taken as being binding between parties and privies and therefore is not admitting any contrary proof.[2]

[19] Ms Carrim, having executed deeds which recognised that each donor was gifting to the trustees $141,621.84, is precluded from now asserting that the bankrupt's contribution (by gift) was less.

The repayment of the SBS loan

(i) The amount of the debt

[20] Mr Chapman submits that, because the SBS loan has been repaid, the Court should in its s 207 consideration take account of (by deducting) the full value of the original loan ($220,000). Mr Chapman submitted that (notwithstanding that Ms Carrim had to pay SBS the reduced sum of $208,877.11) there should be a full recognition of the original $224,000 because Ms Carrim's payment excused the bankrupt from his joint and several liability.

[21] The argument is unpersuasive. The Court is concerned with the real value received by the recipients. If the bankrupt had not been released from his joint and several liability, SBS would simply have become a creditor in his bankrupt estate. There is no sound reason to bring into account in the s 207 consideration the bankrupt's release from the SBS liability.

(ii) An accounting for household costs?

[22] Secondly, Mr Chapman referred to Ms Carrim's oral evidence (she was called for cross-examination in relation to an affidavit filed late for the hearing). She said that she had used her own money to meet usual household costs and deposed that she is now "responsible solely for the mortgage" and has been since July 2015 when she took over ownership of the property.

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[2] The New Zealand authorities cited are *Smith v Green* (1903) 22 NZLR 976 and *Re Carr* (1913) 16 GLR 197.

[23] Mr Chapman submitted that the Court should allow Ms Carrim an offset against the bankrupt's gift to the trustees by reason of "shared household costs to which Ms Carrim has contributed".

[24] This argument is similarly unpersuasive. It misses the fundamental point that the gifts were made to the trustees, not to the parties themselves in their personal capacities. Secondly, Ms Carrim chose to provide only the most generalised evidence as to contribution. She did not refer to specific sums or comparative contributions. The bankrupt is a psychiatrist. Ms Carrim is an occupational therapist. On the basis of the little documentary evidence provided, it appears that in 2014 the bankrupt was receiving into his bank account a fortnightly net salary payment of $7,298.36. Nothing in Ms Carrim's evidence suggests that she was receiving an income approaching that. Furthermore, the bankrupt's current account, which was the account used for household expenses and primarily operated by Ms Carrim, appears on the limited documentation exhibited to have been funded from the bankrupt's income and not by Ms Carrim's.

[25] The request for recognition of an offset must be rejected both by reason of the lack of an evidential foundation and a lack of substantial merit.

The appropriate calculations

[26] Of the property transferred to the trustees, the balance of the SBS debt (as repaid by Ms Carrim) falls to be excluded from the consideration of value transferred.

[27] The remaining components of the two gifts were therefore:

(a)	Equity (through SBS loan repayment)	$15,122.89
(b)	Deposit	$10,000.00
(c)	Couple's cash contribution;	$49,219.98
	Total:	$74,342.87

[28] As each party contributed 50 per cent of the total gift, the bankrupt's transfer of value was $37,170.53.

Conclusion

[29] On my assessment it is appropriate in terms of s 207(1)(b) that Ms Carrim pay to the Assignee the sum of $37,170.53.

A second gift?

The Assignee's analysis

[30] This discussion focuses on the $49,219.98 provided by the couple to the solicitor's trust account for settlement of the property purchase. The Assignee's initial analysis was that, in order to place Ms Carrim in a position to gift her 50 per cent of $49,219.98, there first needed to have been a transfer of that 50 per cent ($24,649.99)[3] from the bankrupt to Ms Carrim.

[31] Upon the Deputy Assignee's analysis of the documents initially available, he concluded that the entire $49,219.98 had been sourced from the bankrupt (it having been paid from his current account to the solicitors). The (amended) notice of cancellation consequently identified $24,649.59 as being a gift made by the bankrupt to Ms Carrim. The Assignee notified her wish to recover that sum. Ms Carrim gave notice of objection.

[32] In her (first) affidavit, Ms Carrim identified the two deposits which had been made into the bankrupt's current account on 21 August 2014, being $27,037.51 and $10,000. She deposed that those payments had been made by her in cash (as a contribution to the property purchase).

[33] The Assignee has since accepted that of those two payments the $10,000 was Ms Carrim's money.

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[3] The reference to $24,649.99 involves correction of a typographical error in the figures used by the parties.

[34] In relation to the $27,037.51 deposit, however, the Assignee obtained and exhibited further bank records. The additional records indicate that a total sum of $27,000 was paid into a savings account of the bankrupt on 14 July 2014 in two tranches, the first of $10,350 and the second of $16,650. It is clear from the records that it was that total of $27,000 (with interest of $37.51) which was then credited into the bankrupt's current account on 21 August 2014.

[35] The particulars included in the bank records indicate that for all the relevant transactions Ms Carrim was the customer involved, using a card which permitted her to operate the bankrupt's accounts.

The Assignee's amended position

[36] For the hearing, Mr Slevin recognised that, of the $49,219.98 paid to the solicitor's trust account, Ms Carrim had contributed $10,000.

[37] Therefore, the Assignee, instead of seeking from Ms Carrim a payment of $24,609.99, seeks a now reduced sum of $14,609.99 (being $24,609.99 less $10,000). In Mr Slevin's submission, the $14,609.99 represents a gift from the bankrupt to Ms Carrim. The purpose of the gift was to enable Ms Carrim to equally contribute the gift to the $49,219.98 portion of the total sum which the parties were gifting to the trustees that day.

The concept of "gift" in the Insolvency Act

[38] The Act does not contain a definition of "gift" as used in ss 204 – 206. The term had been defined in s 54(6) Insolvency Act 1967 as "any disposition made otherwise than in good faith and for valuable consideration". The authors of *Heath & Whale on Insolvency* note the omission of a definition in the current Act.[4] They suggest that all the current Act requires is that a transaction, to be a gift, must have the effect of bringing about the diminution in the value of the donor's assets or otherwise reducing the value of the assets which would have been available to the

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[4] Paul Heath and Michael Whale *Heath & Whale on Insolvency* (online looseleaf ed, LexisNexis) at [24.92].

Assignee. It would then become for the donee to raise any available defence under s 208 of the Act.

[39] That commentary has been accepted in this Court.[5] I also adopt it as the correct approach.

[40] Accordingly, if it is established as a probability that more than 50 per cent of the $49,219.98 paid by the couple to the solicitors' trust account was that of the bankrupt, the effect has been to diminish the value of his assets. To the extent Ms Carrim purported to gift to the trustees a sum equal to that of the bankrupt's gift, she was in fact using the bankrupt's money.

[41] It is therefore necessary to determine the ownership of the total sum of $27,000 at the point the two deposits were made into the bankrupt's savings account on 14 July 2014.

Ms Carrim's affidavit evidence and cross-examination

[42] Ms Carrim, as I have recorded, filed a second affidavit late before the hearing. The evident purpose of the affidavit was to clear up what Ms Carrim described as the Assignee's misunderstanding of her earlier evidence.

[43] The following is the sequence of evidence.

[44] The Assignee, in her notices of cancellation, had characterised the $24,609.59 (half of $49,219.98) as a gift by the bankrupt to Ms Carrim. Russell Fildes, the Official Assignee, Southern Region (who provided the Assignee's initial affidavit) exhibited the banking record identifying the 21 August 2014 transfer of $49,219.98 from the bankrupt's current account to the solicitors's trust account.

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5 *Official Assignee v Mayers* [2012] NZHC 34 at [12] – [13]; *Official Assignee v Russell Bay Lodge Ltd* [2013] NZHC 1940 at [33]; *Official Assignee v Scott* [2013] NZHC 2904 at [60] – [61].

[45] Ms Carrim in her initial affidavit responded directly to that evidence, deposing:

> On 21 [August][6] there are two deposits recorded into that bank account of $27,037.61[7] and $10,000 respectively. Those payments were made by me in cash into Abe's BNZ bank account at the Invercargill branch. I am a signatory to that account and have my own card. The two deposits are recoded as branch transactions. These two cash payments were made by me as a contribution to the house purchase and a part of the $49,219.98 that was transferred to Preston Russell for these purposes.

[46] The Assignee now accepts, as I have noted, that the $10,000 payment referred to by Ms Carrim came from her. But Ms Carrim's evidence caused a Deputy Assignee to make further enquiries of the bank records. It emerged that the $27,037.51 paid into the bankrupt's current account represented a transfer from the bankrupt's savings account. The Deputy Assignee (Robert McDonald) filed a reply affidavit in that regard in January 2017 in accordance with the Court's timetable directions.

[47] On 24 February 2017, Ms Carrim completed her second affidavit, in which she referred to the Assignee's misunderstanding of her evidence regarding the $27,037.51 deposit. In this affidavit she drew attention to the two deposits ($10,350 and $16,650) paid into the bankrupt's savings account some five weeks earlier (on 14 July 2017), as recorded in the bank statement. She accepts in her second affidavit that the earlier affidavit had not pointed out that the $27,000 was initially deposited into the savings account before being transferred (along with accrued interest) to the bankrupt's current account.

[48] Ms Carrim's affidavit then continues:

> I am aware that my Counsel had pointed this out to the applicant's counsel, but the applicant appears to be denying that the $27,000 came from me but was only a transfer from another account. I confirm that the $27,000 deposited on 14 July was from my own funds.

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6 Ms Carrim's affidavit by mistake recorded "21 October".

7 $27,037.61 involves a typographical error – the correct figure is $27,037.51.

[49] From the bar, Mr Chapman advised the Court that the two payments made by Ms Carrim into the savings account on 14 July 2014 were each of cash (tranches of $10,350 and $16,650 respectively).

[50] At that point, Ms Carrim was made available for cross-examination. Mr Chapman first had her add to her affidavit evidence.

[51] Ms Carrim stated that the two deposits ($10,350 and $16,650) paid into the bankrupt's savings account on 14 July 2014 were made by her as cash transactions. She stated that the funds were her own money, she having had that amount of money at home in cash. She said that she took the money to the bank in two separate amounts because she did not want to carry the total amount of cash at one time.

[52] In answer to Mr Slevin, Ms Carrim confirmed that the $10,000 which she paid as the deposit on the same day (in addition to the $27,000 deposited to the bankrupt's savings account) was also paid from her cash.

[53] Ms Carrim stated that her own bank account records would show little by way of credit. Although her income from the hospital is paid into her savings account, she prefers to keep her cash not in a bank but at home (in a safe).

[54] Ms Carrim indicated that she had been building up her cash for some twelve years. In answer to a question from Mr Slevin, she stated that she had moved (with the bankrupt) from Australia some three and a half years ago.

Ms Carrim's evidence – assessment

[55] It is for the Assignee, as applicant, to satisfy the Court on the balance of probabilities that a particular transaction involved a gift. In this case, the Assignee would satisfy the onus if the Court finds (as a probability) that the monies paid by Ms Carrim into the bankrupt's account on 14 July 2014 were in fact the bankrupt's.

[56] There are aspects of Ms Carrim's evidence as to her ownership of the deposited funds which do not lend themselves to ready acceptance. The stock-piling of at least $37,000 in cash in a residence is an unusual event in itself. For most

people, some issues as to security would arise. For a lot of people, the lack of return on the fund would be of concern, particularly if such a fund was gradually building up over a 12-year period. The period of accumulation provides a further complexity to Ms Carrim's evidence given that she transferred between jurisdictions (Australia to New Zealand) towards the end of that 12-year period. Finally, while the aspects of security are of a slightly different nature, there is something of a tension between Ms Carrim's apparent comfort with holding a large sum of cash at home while deciding, for stated reasons of security, to divide the $27,000 cash into two (odd) sums to take it to the bank in two trips.

[57] Alongside Ms Carrim's financial situation in mid-2014 stood the bankrupt's position. His income was significant. Furthermore, the Australian judgment (subsequently registered in New Zealand in June 2015) was obtained on 4 August 2014. Of the AUD$221,185 adjudged to be owing, the judgment records that $100,000 had been withdrawn by the bankrupt from the joint home loan account and that a further $110,050 represented the bankrupt's spouse's share of the matrimonial asset pool (which asset pool the bankrupt had, by inference, earlier received). There is no evidence before this Court as to what became of the bankrupt's assets and money so received. The Court does not know whether the bankrupt himself held at particular times any significant cash or moved cash about. Given the assets in relation to which he was ordered to pay AUD$221,185 to his spouse, it seems likely that the bankrupt would have had funds available to him.

[58] These matters taken together leave the Court in doubt as to Ms Carrim's evidence of the source of the $27,000. It appears to the Court a possibility on the evidence that the bankrupt either contributed on the day (14 July 2014) to the funds deposited by Ms Carrim or that he had contributed his own money at an earlier point to the fund which Ms Carrim says she was building up at home. But these are, in evidential terms, matters of possibility. I cannot be satisfied that it is probable that all or any part of the funds paid into the bankrupt's savings account on 14 July 2014 represented the bankrupt's own money.

Conclusion

[59] The Assignee has not established that there was any element of gift (as between the bankrupt and Ms Carrim) in relation to the $49,219.98 component of the gift made to the trustees.

Costs

[60] Costs would normally follow the event in favour of the Assignee. She has succeeded in relation to what I have identified as the "main transaction". In relation to the alleged gift which has not been proved, Ms Carrim's opposition has succeeded through evidence which was filed late and reasonably required to be tested at the hearing.

[61] Counsel indicated that it was appropriate that costs nevertheless be reserved.

[62] Failing prompt agreement between the parties as to costs and disbursements, the issue will be resolved on the papers on the basis of memoranda filed (counsel for the applicant to file first and counsel for the respondent to file within five working days thereafter (memorandum each limited to four pages)).

Orders

[63] I order:

(a) The respondent, Penny Louise Carrim, shall pay to the Official Assignee in bankruptcy of the property of Abraham Nicolaas Van der Walt, $37,170.53;

(b) The costs and disbursements of the application are reserved.

Associate Judge Osborne

Solicitors:
The Insolvency and Trustee Service, Christchurch
Cruickshank Pryde, Invercargill