IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-739
[2016] NZHC 703

UNDER	the Insolvency Act 2006
IN THE MATTER OF	bankruptcy proceedings
BETWEEN	BARTERCARD EXCHANGE LIMITED Judgment Creditor
AND	ANTHONY HARRY DE VRIES Judgment Debtor

Hearing: 9 December 2015

Counsel: J K Mahuta-Coyle for the Judgment Creditor
A H de Vries in person

Judgment: 15 April 2016

JUDGMENT OF ASSOCIATE JUDGE SMITH

---

[1] The judgment creditor Bartercard Exchange Ltd (Bartercard) applies for an order adjudicating Mr de Vries bankrupt.

[2] Bartercard served a bankruptcy notice on Mr de Vries on 30 September 2015. The debt claimed in the bankruptcy notice was $179,772.42, said to be the amount of a judgment Bartercard obtained against Mr de Vries in the Hutt Valley District Court on 22 September 2011.

[3] In fact, Bartercard obtained two judgments against Mr de Vries in 2011, one being the judgment just mentioned (which was obtained in proceeding CIV-2011-032-396 – I will refer to it as "the principal judgment"), and the other for the sum of $170,308.56 (in proceeding CIV-2011-032-387). As a bankruptcy notice can only be issued in respect of one judgment, Bartercard elected to issue its bankruptcy notice based on the principal judgment.

[4] Mr de Vries did not pay the amount claimed in the bankruptcy notice, and he did not secure it or enter into a new formal agreement with Bartercard, or obtain the High Court's approval of terms of payment. Nor did he file any application to set aside the bankruptcy notice.

[5] Bartercard filed its application for an adjudication order on 5 November 2015.

[6] When Bartercard's application for adjudication was called on 1 December 2015, another party claiming to be a creditor appeared to support the application. That party was Body Corporate 68792 (the Body Corporate). The Body Corporate claims that Mr de Vries owes it approximately $167,000.

[7] Mr de Vries filed a detailed and lengthy notice of opposition to the application for adjudication. He has also filed an affidavit, and a number of memoranda and other documents, most of which were concerned with various disputes he has with the Body Corporate. At this stage, I am not concerned with the claims of the Body Corporate, as it has not been substituted as creditor under s 44 of the Insolvency Act 2006 (the Act).[1]

[8] A further form of affidavit was submitted by Mr de Vries' wife Mrs Geraldine de Vries, but it was unsworn. Mr de Vries confirmed at the hearing that his wife had elected not to complete the affidavit.

The events since the District Court judgments were obtained in September 2011

[9] Bartercard applied for an order for examination of Mr de Vries as to his means. The examination was conducted before a deputy registrar in the Lower Hutt District Court on 28 May 2012. In a formal report dated 30 May 2012, the Deputy Registrar recorded that, after assessing Mr de Vries' income, expenditure, assets and liabilities, no order would be made. Mr de Vries was then said to be unemployed

---

[1] Under s 44, the Court may substitute a creditor for the creditor who has made the application for an adjudication order only if the creditor who has made the application has not proceeded with due diligence, or at the hearing offers no evidence. That is not the case here.

and living on redundancy pay, and it was considered that he would be unable to meet any order for payment of the debt by instalments as he did not then have any income.

[10] Mr de Vries asserted at the hearing in this Court that the deputy registrar also accepted that the amount of the District Court judgment entered against Mr de Vries was incorrect. However that is not accepted by Bartercard, and no record of it has been produced in this Court. There is no suggestion that Mr de Vries has ever taken any step to have the alleged error or errors in the judgment corrected.

[11] Following the examination of Mr de Vries in the District Court, Bartercard took steps to register a charging order against a property in Lower Hutt registered in the name of Mr de Vries and his wife. Bartercard attempted to enforce that charging order in proceedings filed in this Court. In an affidavit filed in this proceeding, Mr Chetty, a credit controller for Bartercard, stated that no order for sale was made, as the property was held by Mr and Mrs de Vries as the trustees of a trust, and the debt owed by Mr de Vries to Bartercard is a debt owed by him personally. Although that attempt to recover the debts was unsuccessful, Mr Chetty says that there was no issue over the validity of the District Court judgments.

[12] Mr de Vries has made a number of payments on account of the debts since 2011. In his affidavit, Mr Chetty states that a total of $18,100 had been paid by Mr de Vries, against both debts, since 2011. That figure is challenged by Mr de Vries. He says that a total of $23,127.52 was paid by Mrs de Vries in Bartercard trade dollar payments between May 2011 and 17 January 2012. In addition, Mr de Vries says that Mr Rogers, a co-guarantor liable to Bartercard on the original debts, which appear to have been owed by companies named Zoom Zoom Ltd and Zoom Zoom Properties Ltd (both now in liquidation), had paid a total of $24,000 by 31 March 2013. Mr De Vries also says that, in the period between 18 April 2013 and 15 September 2015, when Bartercard issued the bankruptcy notice, Mr de Vries himself made instalment payments totalling $6,750. It is common ground that Mr de Vries did pay the $6,750, and that he made one further payment (of $350) in October 2015.

[13] The payment figure of $18,100 mentioned by Mr Chetty in his affidavit was also shown in a schedule sent by Bartercard to Mr de Vries on 29 October 2015. In the schedule, payments totalling $11,000 are shown as having been applied to one of the judgments, and payments of $7,100 to the other.

[14] Although payments on account have been made by Mr de Vries on a fairly regular monthly basis since the judgments were entered in 2011, Mr de Vries has not contended in this Court that there was an agreement under which Bartercard agreed to accept payments by instalments. That may be because he does not appear to have been prepared to commit to a specific monthly amount, or to a particular period by which the debts would be cleared.[2]

Mr de Vries' grounds of opposition

[15] Mr de Vries raises a number of grounds of opposition. Many of them appear to amount to challenges to the principal judgment. For example, he complains that Bartercard wrongly cancelled his account, making it impossible for him to offer products or services, within the Bartercard system, to discharge the debt. He refers in particular to Bartercard refusing to allow him to sell machines (which he says would have equated to the value of the debt at the time) using the Bartercard system. He says that one such machine was valued at over $300,000.

[16] Mr de Vries also says that Bartercard required him to trade 100 per cent in Bartercard trade dollars, and that he was wrongly prevented from trading using a combination of trade dollars and cash. He contends that he was seriously disadvantaged in that respect when compared with other traders who were participating in the Bartercard exchange system.

[17] Mr de Vries does not say when these things happened, but it seems more likely than not that they go back to a period before Bartercard obtained the two judgments against Mr de Vries in 2011. Mr de Vries did not defend either of the

---

[2] For example, in an email sent to Bartercard on 1 October 2015, Mr de Vries said "unfortunately as much as we would like to clear our debt we are not in a position to do so, as stated to Bartercard when this began. We couldn't make any firm commitment but we would endeavour to pay as much off each week as we could…". The email went on to "request" that Bartercard allow Mr de Vries to "continue with the status-quo". Bartercard declined to do so.

District Court proceedings. He says that he was under severe stress at the time dealing with a number of unrelated problems, and that he did not realise at the time that Bartercard would claim the full amount for which it obtained judgment. He also says that he did not fully understand afterwards that Bartercard had obtained two judgments against him.

[18] Mr de Vries contends that Bartercard has failed to keep proper records of payments he or his wife have made, and that Bartercard has not been transparent in its dealings with him. One of the respects in which Mr de Vries says Bartercard has failed to demonstrate transparency, is in its refusal to provide him with a copy of an agreement Mr de Vries says Bartercard made with his co-guarantor Mr Rogers. Mr de Vries alleges that Mr Rogers was also liable to Bartercard for the debts, but Bartercard entered into an agreement with Mr Rogers under which he is obliged to pay only 50 per cent of the debt. Mr de Vries says that both Bartercard and Mr Rogers have refused to provide him with a copy of that agreement.

[19] Mr de Vries says that he could not commit to making any further payments at this point, and would not do so until Bartercard properly addressed all the points he has raised in his documents filed in this proceeding.

[20] A repeated theme in Mr de Vries' documents is that he feels that an injustice has been done to him, in that he has not been permitted to use Bartercard trade dollars to repay or reduce the debt, while at the same time Mr Rogers has been allowed to continue using Bartercard trade dollars.

[21] Mr de Vries seeks a stay of the proceeding, and a "full hearing", with discovery and an opportunity to put in a "proper defence and a possible counterclaim".

The issues to be determined

(1) Should the District Court judgments (or at least the principal judgment, on which the bankruptcy notice was based) be set aside as Mr de Vries requests? If not, should the Court order that any

enforcement of those judgments, or at least the principal judgment, be stayed?

(2) Were there payments made by Mr de Vries and/or Mr Rogers since the principal judgment was obtained in September 2011 that had the effect that the claim in the bankruptcy notice was overstated?

(3) If there was an overstatement of the amount owing in the bankruptcy notice, can the notice now be amended to show the correct amount owing?

(4) Is there evidence of Bartercard making an agreement with Mr Rogers to accept 50 per cent of the total debt from him in full discharge of his liability as co-guarantor? If so, how did that agreement affect Mr de Vries' liability?

(5) If the bankruptcy notice was valid, and Mr de Vries committed an act of bankruptcy when he failed to comply with the notice, are there other factors which should cause the Court to exercise its discretion against the making of an order for adjudication?

Issue 1: Should the District Court judgments (or at least the principal judgment, on which the bankruptcy notice was based) be set aside as Mr de Vries requests? If not, should the Court order that any enforcement of those judgments or that judgment be stayed?

[22] It is not possible for this Court, sitting in its bankruptcy jurisdiction, to set aside the judgments made in the District Court. If Mr de Vries was unhappy with those judgments, he could have filed an appeal or appeals, or applied to the District Court to have the judgments set aside if he considered that the circumstances justified such an application. He has had over four years to take one of those steps, and has not done so. In those circumstances there is no basis for the orders which Mr de Vries seeks under the High Court Rules, setting aside the District Court judgments.

[23] Nor am I prepared to make orders under r 17.29 or r 17.30 of the High Court Rules, staying enforcement of the District Court judgments, or staying any enforcement process. First, an "enforcement process" is defined in the High Court Rules[3] as including various orders. An application for an adjudication order does not come within the definition.

[24] In any event, it would not be appropriate for this Court to make any order staying enforcement of the District Court judgments. While this Court has jurisdiction to stay, or "halt", a bankruptcy adjudication proceeding in an appropriate case,[4] any application to stay the District Court judgments should have been made to the District Court.

[25] Even if r 17.29 did permit this Court to direct a stay by enforcement of a judgment of the District Court, the rule requires the judgment debtor to show that a "substantial miscarriage of justice" would be likely to result if the judgment were enforced. In this case Mr de Vries has had over four years to appeal the District Court judgments, or attempt to have them set aside. He has not taken any such steps, and he has not offered any credible explanation for his failure to do so. On the contrary, he has made a number of instalment payments to Bartercard, presumably on the basis that there *are* valid debts owing.

[26] The combination of (i) over four years' delay since the judgments were entered and (ii) the making of payments on account, persuades me that there is no basis for the Court to halt or adjourn this proceeding to permit Mr de Vries to challenge the merits of the District Court judgments. The result is that Mr de Vries' arguments based on matters in dispute between himself and Bartercard prior to the District Court judgments cannot now be entertained in this proceeding.

[27] I conclude that there is no basis for the setting aside or stay orders which Mr de Vries seeks. Those applications are dismissed.

---

3 High Court Rules, rr 17.1 and 17.3.
4 Insolvency Act 2006, s 38.

Issue 2: Were there payments made by Mr de Vries and/or Mr Rogers since the principal judgment was obtained in September 2011 that had the effect that the claim in the bankruptcy notice was overstated?

[28] Under s 13 of the Act, a creditor may apply for an order adjudicating a debtor bankrupt if the debtor owes the creditor a certain sum of at least $1,000 which is immediately payable, and the debtor has committed an act of bankruptcy within the period of three months before the filing of the adjudication application.

[29] Under s 17 of the Act, there will be an act of bankruptcy if the creditor has obtained a final judgment against the debtor on which execution has not been stayed, and the debtor has failed to comply with a bankruptcy notice served on him or her within the period prescribed by s 17 (in this case, a period of 10 working days).

[30] The act of bankruptcy relied upon by Bartercard in this case is Mr de Vries' failure to comply with the bankruptcy notice served on him on 30 September 2015.

[31] The bankruptcy notice served on Mr de Vries included the following:

> 1. Within 10 working days after you are served with this Notice (excluding the day of service):
>
> 1.1 You must pay to … **[BARTERCARD]**…the sum of **ONE HUNDRED AND SEVENTY NINE THOUSAND, SEVEN HUNDRED AND SEVENTY SEVEN DOLLARS AND FORTY TWO CENTS** ($179,777.42)…This amount is the amount [Bartercard] claims is due (or remains unpaid) on a final judgment, on which execution has not been stayed, that [Bartercard] obtained against you in the Hutt Valley District Court on 22 September 2011;
>
> **OR**
>
> (b) You must secure or enter into a new formal agreement with [Bartercard] or, alternatively, obtain the High Court's approval of terms of payment;
>
> **OR**
>
> (c) You must satisfy the High Court that you have a counterclaim, set-off, or cross-demand against [Bartercard]:
>
> i) That equals or exceeds the amount claimed by [Bartercard]; and

ii) That you could not put forward in the action or proceeding in which the judgment or order was obtained.

[32] On the face of it, the amount stated in the bankruptcy notice *was* overstated: Bartercard acknowledges that Mr de Vries had paid $17,750 towards the two judgment debts by the time it issued the bankruptcy notice, and that part of that sum was applied in reduction of the principal judgment. Mr de Vries contends that he and his wife had paid a total of $29,877.52 of the debt by the time the bankruptcy notice was issued, and that, as at 1 April 2013, Mr Rogers had paid cash payments of $6,000 and Bartercard payments equivalent to $18,000.

[33] In answer to the apparent overstatement problem, Bartercard refers to its entitlement to statutory interest on the two judgment sums at the rate of 5 per cent per annum running from the dates of the judgments.[5] It contends that the total owing for interest far exceeds the total paid by Mr de Vries, and on that basis, there was no overstatement of the debt in the bankruptcy notice.

[34] Section 30 of the Act provides:

30 Effect of overstatement of amount owing

(1) Overstatement in a bankruptcy notice of the amount owing by the debtor does not invalidate the notice, unless—

(a) the debtor notifies the creditor that the debtor disputes the validity of the notice because it overstates the amount owing; and

(b) the debtor makes that notification within the time specified in the notice for the debtor to comply with the notice.

(2) A debtor complies with a notice that overstates the amount owing by—

(a) taking steps that would have been compliance with the notice had it stated the correct amount owing (for example, by paying the creditor the correct amount owing plus costs); and

(b) taking those steps within the time specified in the notice for the debtor to comply.

---

5 District Courts Act 1947, s 65A and the District Courts (Prescribed Rate of Interest) Order 2011, applicable to judgments entered after 1 July 2011.

[35] I am satisfied that Mr de Vries notified Bartercard within the period prescribed by s 30(1) that he considered that the amount in the bankruptcy notice was overstated. What is not so clear is whether Mr de Vries also notified Bartercard within that period that, because of the overstatement, he disputed the validity of the notice.

[36] In the emails he produced from the relevant period (30 September to 14 October 2015), Mr de Vries does not appear to have expressly stated that he disputed the validity of the bankruptcy notice on account of the overstatement of the amount owing. However he did say, in an email of 9 October 2015, "[n]ot only is the debt in dispute, I am not liable for [Mr] Rogers' debt". In the same email, he stated that "any further attempt to continue with a bankruptcy application will be met with opposition and a counterclaim for damages as Bartercard deliberately are avoiding the serious issues we are raising that will need to be addressed". He asserted that Bartercard had an "obligation" to address his legitimate requests, and that he was looking forward to receiving the information he had requested (apparently a reference to his earlier request for a full breakdown of his accounts with Bartercard, including details of all payments made to date). Near the end of his email of 9 October 2015, Mr de Vries purported to "reserve the right to suspend any further payments".

[37] In the context of the email, I think Mr de Vries' assertion of a "right" to suspend further payments was a sufficient challenge to the validity of the notice itself – he had made it clear that he did not intend to apply under s 17 of the Act to set aside the bankruptcy notice, and in those circumstances the only possible basis for the claimed "right" would be that the notice was itself invalid. I therefore conclude that Mr de Vries did provide a sufficient notice under s 30(1)(a), within the time specified in s 30(1)(b).

[38] The next question is whether there was in fact an overstatement of the amount owing by Mr de Vries in the bankruptcy notice.

[39] It is common ground that Mr de Vries had made payments totalling $6,750 in reduction of the principal judgment between the date of the principal judgment and

the date the bankruptcy notice was issued. It is also common ground that those repayments were not provided for in the calculation of the amount claimed in the bankruptcy notice (which was simply the amount of the principal judgment, plus some further District Court costs). The bankruptcy notice did not include any claim for interest under s 65A of the District Courts Act 1947.

[40] At the hearing, Mr Mahuta-Coyle advised from the bar that whatever sums Mr de Vries says have been paid were applied to the other judgment (i.e. not to the principal judgment). However, he conceded that there is nothing in the evidence supporting that submission, and he was unable to explain why funds received by or on behalf of Mr de Vries would have been applied in reduction of one judgment and not the other. Furthermore, Mr Chetty's schedule sent to Mr de Vries on 29 October 2015 shows that payments made by Mr de Vries were applied by Bartercard towards both accounts ($6,750 in reduction of the principal judgment and $11,000 in reduction of the other judgment). In those circumstances I am unable to take any account of Mr Mahuta-Coyle's advice from the bar.

[41] It is a matter for the judgment creditor to elect whether or not to include in a bankruptcy notice interest payable on a debt.[6] If the judgment creditor does elect to include a claim for interest, the notice must accurately set out the interest claim, so that the debtor will be properly informed of the amount required to settle.[7] In *Bird*, Master Kennedy-Grant considered that, if the creditor does elect to include interest in its notice, the amount of interest, or the manner of calculating the interest payable, should be stated sufficiently clearly to enable the debtor to determine the precise amount that is required to be paid to comply with the notice.[8]

[42] In this case, Bartercard elected not to claim interest in its bankruptcy notice. Having made that election, I do not think it is now open to Bartercard to seek to add the statutory interest in order to answer the overstatement issue which arose when it

---

6 *Re Chapman ex parte Commissioner of Inland Revenue* HC Palmerston North CIV-2007-453-113, 17 July 2007, citing *Re Manning v Commercial Alliances Nominees Ltd* HC Auckland B381/82, 11 November 1982 and *Bird v South Pacific Timber (1990) Ltd* HC Auckland, B709-im00, 20 December 2000.

7 *Re Manning v Commercial Alliances Nominees Ltd*, above n 6, *Re The Bankruptcy Act 1996, Ex parte Commercial Banking Co of Sydney Ltd* (1979) 23 ALR 522 (FC) and *Re Chapman ex parte Commissioner of Inland Revenue*, above n 6, at [17], [18] and [22].

8 *Bird v South Pacific Timber (1990) Ltd,* above n 6, at [11].

apparently overlooked Mr de Vries' payments made since the principal judgment was entered.

[43] The answer to the question posed by issue (2) is that the claim in the bankruptcy notice *was* overstated.

[44] Before leaving issue (2), and in case the matter should go further, I mention three other matters. First, Mr de Vries contends that Bartercard failed to take into account a sum of $9,200 which was allegedly paid to it from the voluntary liquidation of Zoom Zoom Ltd or Zoom Zoom Properties Ltd. I can do very little with this. Mr de Vries has provided no evidence of when this sum is said to have been received by Bartercard. From his affidavit, it appears that the relevant Zoom Zoom company had been put into liquidation before the principal judgment was entered, and if that is right any dividend Bartercard received in the liquidation may well have been allowed for in the claim made against Mr de Vries in the District Court. Further, in his 29 October 2015 email to Mr de Vries, Mr Chetty invited Mr de Vries to check his own history of payments made by him, to confirm that the parties' records matched. Mr de Vries did send a reply on 9 November 2015, but he did not point to any specific errors in the Bartercard schedule, and did not mention the $9,200 allegedly received from the liquidation.

[45] Secondly, I record that Mr de Vries did not mount any argument that Bartercard was not entitled to apply payments made by him to whichever of the judgments it saw fit. (I note in that regard that although Bartercard had provided Mr de Vries with a copy of his guarantee by 27 October 2015, neither party elected to produce a copy of the document in evidence.)

[46] The final matter I mention on this issue is that Mr de Vries questions the fact that the certificate of the principal judgment which was filed with Bartercard's request for the issue of a bankruptcy notice contained certain figures which had been crossed out and substituted with new figures. The changes were initialled by the Deputy Registrar of the District Court who provided the certificate. Mr de Vries refers to three different figures appearing in the certificate.

[47] There is nothing in this. The certificate clearly shows that Bartercard was awarded judgment for $176,859.77 plus costs of $2,770.95, being a total $179,630.72. Subsequent costs and the costs of the certificate itself (totalling $146.70) brought the total amount to $179,777.42, the amount claimed in the bankruptcy notice.

[48] Mr de Vries might perhaps have had some argument that the subsequent costs of $96.50 and the costs of the certificate ($50) were incurred some time after 22 September 2011, when the principal judgment was entered. But the amounts are relatively insignificant, and the addition of the costs orders made in the same District Court proceeding would not have been sufficient to invalidate the notice on the basis that it is based on more than one judgment.[9]

Issue 3: If there was an overstatement of the amount owing in the bankruptcy notice, can the notice now be amended to show the correct amount owing?

[49] It might be thought that the effect of s 30(1) is that a notice which is caught by the section is invalid and cannot form the basis for a later adjudication application. The use of the word "unless" immediately before subs (a) and (b) of s 30(1) might be thought to support that view.

[50] But there is at least one authority in which the Court has held that it retains a discretion under s 418 of the Act to correct the notice, on such terms as the Court sees fit.

[51] Section 418 of the Act provides:

> **418 Defects in proceedings**
>
> (1) A proceeding under this Act must not be invalidated or set aside for a defect (which includes misdescription, misnomer, or omission) in a step that must be taken as part of, or in connection with, the proceeding, unless a person is prejudiced by the defect.
>
> (2) The court may order the defect to be corrected, and may order the proceeding to continue, on the conditions that the court thinks appropriate in the interests of everyone who has an interest in the proceeding.

---

9 *Re Ebbett ex parte Fletcher Merchants Ltd* HC Tauranga B109/92, 9 October 1992, at [2].

[52] The authority referred to in para [50] is *Re Nigro, ex parte Clayton*,[10] a case in which Williamson J was presented with a situation where the debtor had given notice disputing the validity of the relevant bankruptcy notice on the ground that the amount owing was overstated. In those circumstances the creditor was unable to rely on s 20(b) of the Insolvency Act 1967 (a provision materially the same as s 30(1) of the Act) in support of a contention that the overstatement did not invalidate the bankruptcy notice. His Honour nevertheless considered that the notice could be amended under s 11 of the 1967 Act (a provision materially the same as the Act).

[53] His Honour refered to the Court of Appeal decision in *Best v Watson*,[11] noting that:[12]

> it will always be a question of degree whether or not it can be said that, notwithstanding failure to comply with an apparently material requirement of [the 1967 Act] or the [rules applicable under the 1967 Act], there is before the Court what could fairly by described as proceedings under [the 1967 Act].

[54] Although the overstatement in the notice in *Nigro* produced a figure which was 40 per cent higher than the real debt, the Judge concluded on the facts of the case that the notice was not a nullity and that there was a proceeding before the Court which was capable of being corrected under the 1967 Act equivalent of s 418 of the Act (s 11).

[55] In *Re Ebbett, ex parte Fletcher Merchants Ltd*,[13] Fisher J considered s 20(b) of the 1967 Act. In circumstances where the debtor could not have been prejudiced by the overstatement of the amount of the claim in the bankruptcy notice, his Honour considered that the notice should not be struck down. He directed that the notice be amended to state the lower amount which was owing when the notice was issued. I note also that in *Re Chapman ex parte Commissioner of Inland Revenue*, Associate Judge Gendall (as he then was) concluded that, had it been necessary, the equivalent of s 418 in the 1967 Act (s 11) would have provided jurisdiction to correct

---

10 *Re Nigro, ex parte Clayton*, HC Auckland B 353/90, 24 May 1990.
11 *Best v Watson* [1979] 2 NZLR 492 (CA) at 494.
12 At 4.
13 *Re Ebbett, ex parte Fletcher Merchants Ltd*, above n 9.

any defect, misnomer or inaccurate description or omission in the interest calculation which was in issue in that case (the relevant omission having no injurious effect on the debtor).[14] But in neither of those cases was it clear that s 20(b) was applicable. No notice disputing validity appears to have been given within the prescribed period in *Chapman*, or in *Ebbett*.

[56] Depending on the amount of the overstatement in a bankruptcy notice which is the subject of a valid notice by the debtor under s 30(1) of the Act, I consider that there must be jurisdiction under s 418 to correct the notice. In my view jurisdiction will exist under s 418 unless the overstatement is so egregious that the notice should fairly be regarded as nullity. I reach that view for the following reasons.

[57] First, it cannot be the case that the mere service of a notice which complies with s 30(1) is sufficient, on its own, to invalidate the bankruptcy notice. At very least, the Court must be entitled to look beyond what is said in the debtor's notice and enquire whether the amount claimed in the bankruptcy notice *was* overstated (if that were not the case, every debtor would be able to "invalidate" a perfectly accurate bankruptcy notice by simply serving a timely notice disputing the validity of the notice because of a (non-existent) overstatement of the amount owing). Accordingly, I see no reason why the Court should not also be entitled to enquire whether the overstatement has been such as to render the notice invalid. If that were not the case, an overstatement of, say, one cent would be sufficient to render the notice automatically invalid under s 30(1). I do not think that could have been Parliament's intention. A small overstatement of that sort would in my view be no more than a "defect", capable of being cured under s 418.

[58] I accordingly conclude that, depending on the amount of the overstatement, s 418 of the Act may be used to correct an overstatement in a bankruptcy notice, even where the debtor has served a timely notice under s 30(1).

[59] In coming to that view I have not overlooked the Court of Appeal's observation in *Goodwin v Copland* that s 418 cannot be called in aid to establish an

---

[14] *Re Chapman, ex parte Commissioner of Inland Revenue*, above n 6, at [21].

act of bankruptcy where none otherwise existed.[15] The Court of Appeal was there concerned with the very different situation of whether the bankruptcy notice had been properly served. If it had not, there would have been a total failure to take a required step, not merely a "defect" in the taking of a step.

[60] Applying s 418 in this case, I consider first the evidence on the extent of the overstatement in the bankruptcy notice.

[61] Of the total $29,877.50 which Mr de Vries says he and his wife have paid, two payments of $30 and $20,000 are said to have been made on 9 May 2011 and 14 September 2011, before the principal judgment was entered.[16] As I have said, it is not for this Court sitting in its bankruptcy jurisdiction to re-examine the amount of the principal judgment over four years later, in circumstances where Mr de Vries has elected not to take steps available to him to challenge the principal judgment.

[62] Even if that were not the position, what little evidence there is suggests that the payments said to have been made in May and September 2011 may have been made in reduction of the second judgment debt, and thus would not have affected Bartercard's claim on which it obtained the principal judgment.

[63] Mr de Vries' schedule of payments, which appears to have been produced after he had been served with the bankruptcy notice and was aware which of the two judgments the bankruptcy notice was based upon, shows that the instalment payments totalling $6,750 on which he relies were made in reduction of a debt owing on Bartercard's account no. 0931699, relating to Zoom Zoom Properties Ltd (in liquidation). In the absence of any evidence to the contrary, I infer that Mr de Vries' schedule was intended to list payments he says he made in reduction of the principal judgment, and that account no. 0931699 was therefore the account on which the principal judgment was obtained (and the bankruptcy notice issued).

[64] When Mr Chetty wrote to Mr de Vries on 7 October 2015, he appears to have overlooked account no. 0931699. He referred instead to account no. 09315530,

---

15 *Goodwin v Copland* [2014] NZCA 568 at [32].
16 Schedule of documents annexed to Mr de Vries' notice of opposition at 2.

which appears to have related to the separate debt on which Zoom Zoom Ltd (in liquidation) was the principal debtor. Mr Chetty stated that payments of $13,000 had been received on that account, and that there was a balance owing of $136,191.88. But in a schedule sent to Mr de Vries later in October 2015, Mr Chetty amended the payment total of $13,000 to $11,000.

[65] If account no. 09315530 was not the account on which the principal judgment was obtained, it was presumably the account on which Bartercard obtained the other judgment against Mr de Vries, for $170,308.56. If that is right, and Mr Chetty's balance figure of $136,191.88 for account 09315530 at 7 October 2015 was correct (or at least approximately correct), Bartercard must have received payments totalling approximately $34,000 which it applied in reduction of this judgment debt, reducing the amount owing from $170,308.56 to the figure of approximately $136,000 Mr Chetty said was owing on 7 October 2015. Allowing for $11,000 paid in instalments on this account, the difference of approximately $23,000 might be accounted for by assuming Mrs de Vries did make payments totalling approximately $23,000, which were applied to this account.

[66] Mr Chetty says in his affidavit that the full $18,100 referred to in his schedule was paid, by Mr de Vries, "against both debts", since 2011. His schedule, then, covered both judgments, but did not include any payments Mrs de Vries may have made in 2011, or any payments which Mr Rogers may have made.

[67] But Bartercard has not provided any reason for Mr Chetty reducing his figure for instalment payments on account 09315530 from $13,000 to $11,000. In addition, Mr de Vries says that the last of the payments made by Mrs de Vries (a payment of $3,072.04) was made on 17 January 2012. The best that can be said is that the payments said to have been made by Mrs de Vries in 2011 may have been allocated (assuming they were made, which is not admitted by Bartercard) to account no. 09315530. If they were, they would not have reduced the amount owing on the judgment debt.

[68] Mr de Vries produced a copy of an email from Mr Rogers dated 1 April 2013, stating that Mr Rogers had by then paid Bartercard a total of $24,000. Bartercard did

not challenge the admissibility of the email, and nor did it file any reply affidavit challenging the statements made in it. Assuming Bartercard would have treated payments received from Mr Rogers in the same way that it treated Mr de Vries' payments, namely allocating them across both debts, and that Mr Rogers made the payments referred to in his email of 1 April 2013 after the date of the principal judgment, $12,000 received from Mr Rogers would have been allocated to account no. 0931699 as at 31 March 2013, reducing the balance owing on the principal judgment by that amount. If that occurred, the amount by which the claim in the bankruptcy notice was overstated would have been $18,750 (Mr Rogers' $12,000 plus the instalments totalling $6,750 paid by Mr de Vries).

[69] But that is speculation. The overstatement may have been higher. The evidence is simply not clear enough for the court to be sure that it was not. I note, for example, that on 9 October 2015 Mr Chetty sent an email to Mr de Vries stating "I can confirm that we have been receiving monthly payments of $750 split across both accounts that had been entered with Bartercard." The schedule of payments later provided by Mr Chetty shows that all of the instalment payments allocated by Bartercard to account 09315530 (total of $11,000) up until 21 September 2015 were for the same amount, namely $250. On only two occasions did Mr de Vries make instalment payments of $500 on the other account (i.e. the account on which the principal judgment was obtained). The other 23 instalment payments made by Mr de Vries were generally for sums ranging between $200 and $300, and none of them exceeded $300.

[70] With the exception of only two months in the period since September 2011, then, the monthly amounts paid by Mr de Vries towards both accounts did not exceed $550. If Bartercard was in fact receiving $750 per month as Mr Chetty said in his 9 October 2015 email, it must have been receiving another $250 per month from someone else. The obvious candidate is Mr Rogers.

[71] That consideration, coupled with Bartercard's unexplained reduction of the payments figure on account 09315530 from $13,000 to $11,000 and its election not to address the question of what has or has not been paid by Mr Rogers, leaves the Court with no confidence that the overstatement in the bankruptcy notice of the

amount owing on the bankruptcy notice was not greater than the figure of $18,750 postulated above.

[72] Bartercard has elected not to respond to Mr de Vries' contention that it made some relevant agreement with Mr Rogers, and it has declined to provide Mr de Vries with copies of any agreements or correspondence it may have entered into with Mr Rogers. That is unsatisfactory. It is Bartercard who is asking the Court to correct the amount of the claim stated in the bankruptcy notice, and I think in those circumstances it was incumbent on Bartercard to (i) state clearly and accurately the amounts paid by Mr de Vries since the principal judgment was entered and (ii) fully address Mr de Vries' arguments based on Bartercard's alleged agreement with Mr Rogers and the payments said to have been made by Mr Rogers. Bartercard has not done that.

[73] Bartercard submits that if it had claimed interest on the principal judgment at the rate to which it is entitled, the amount claimed in the bankruptcy notice would not have been overstated. The answer to the submission is that Bartercard has failed to establish how much has been paid in reduction of the principal judgment, and when. The Court simply does not have a sufficient evidential basis to conclude that Bartercard's interest entitlement exceeded the payments made by Mr and Mrs de Vries and/or Mr Rogers, and if so by how much. There is no clear figure which could be included in a corrected bankruptcy notice.

[74] In those circumstances I do not consider I have a sufficient evidential basis to safely conclude that the overstatement in the bankruptcy notice was clearly within the boundaries of what could fairly be regarded as a "defect", so as to make available the remedial jurisdiction of s 418. I think it was for Bartercard to satisfy me on that point, by setting out clearly all payments it has received and applied in reduction of the principal judgment. I am not satisfied that it has done that.

[75] That conclusion is not affected by the fact that Mr de Vries may well be hopelessly insolvent (remembering that there were two judgments entered against him in 2011). Mr de Vries's status will be changed by any order for adjudication, and he is entitled to have the provisions of the Act properly applied.

[76] If (contrary to my view) the remedial jurisdiction of s 418 is available to Bartercard, I accept that it was for Mr de Vries to show that he has somehow been prejudiced by the defect in the bankruptcy notice. Arguably he has failed to do that, as (assuming the overstatement to have been within the s 418 "defect range") the evidence shows that he probably could not have satisfied the bankruptcy notice anyway. The extent of the overstatement would probably have made no difference to him.

[77] But a concern remains over Bartercard's failure to disclose its arrangement with Mr Rogers, and the extent of any payments he may have made. He appears to have made some payments, which were not allowed for in the bankruptcy notice, and depending on how much he has paid I do not think it is possible to say for sure that Mr de Vries might not have acted differently if he had had prompt and accurate disclosure from Bartercard. It is conceivable, for example, that he may have looked to his family trust for assistance, or sought to make some revised instalment payment arrangement with Bartercard.

[78] If jurisdiction does exist to correct the bankruptcy notice under s 418, I apprehend that s 418(2) confers a discretion on the Court as to whether the defect should be corrected and the proceeding be allowed to continue. In this case, I have not been provided with sufficient evidence to correct the amount stated in the bankruptcy notice, and I am unable to say whether (as and when that evidence is available) it may be appropriate to give Mr de Vries a further period to comply with the amended notice (the course adopted by Williamson J in *Nigro*). Bartercard has waited for approximately four years before it commenced its bankruptcy proceeding, and it is not clear why it elected to move against Mr de Vries when it did. Bartercard itself says that Mr de Vries has no hope of paying the two judgments and interest thereon, so some further delay will make no practical difference to it. In those circumstances, if the remedial jurisdiction of s 418 had been available, I would have exercised my discretion under s 418(2) by declining to allow the proceeding to continue. The most appropriate answer to the procedural deficiencies in the adjudication proceeding in this case would not be to adjourn the proceeding to allow Bartercard to file further evidence, but to dismiss the proceeding, without prejudice

to Bartercard's right to issue a fresh bankruptcy notice based on one of the two judgments.

[79] The answer on issue (3), then, is that the bankruptcy notice will not now be amended. It remains invalid. The result of that finding is that Bartercard has failed to prove the act of bankruptcy on which it relies, and the adjudication application must be dismissed.

Issue 4: Is there evidence of Bartercard making an agreement with Mr Rogers to accept 50 per cent of the total debt from him in full discharge of his liability as co-guarantor? If so, how did that agreement affect Mr de Vries' liability?

[80] In light of my findings on issues (2) and (3) it is not necessary to answer this question.

Issue 5: If the bankruptcy notice was valid, and Mr de Vries committed an act of bankruptcy when he failed to comply with the notice, are there other factors which should cause the Court to exercise its discretion against the making of an order for adjudication?

[81] It is not strictly necessary to answer the questions posed by this issue. But in case I am wrong in my conclusion that the act of bankruptcy relied upon has not been proved (because Bartercard has failed to produce sufficient evidence that the overstatement in the bankruptcy notice was within the s 418 "defect range", which would permit amendment by the Court), I add that I would have exercised my discretion under s 37(c) and/or (d) of the Act to decline to make an order for adjudication.

[82] Section 37 provides:

> **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.

[83] On the evidence, it appears that Mr Rogers has probably made some payments in reduction of the principal judgment, and those payments have not been disclosed to Mr de Vries. I do not think it would be fair to adjudicate him bankrupt in those circumstances, where it cannot be said safely that he might not have acted differently. There is at least the possibility of unfairness to him in not having the full picture of what has been paid and when.

Orders

[84] I make the following findings and orders:

(1) The amount stated in the bankruptcy notice served on Mr de Vries on 30 September 2015 was overstated.

(2) Bartercard's application to correct the bankruptcy notice (made orally at the hearing) is dismissed.

(3) Bartercard having failed to prove that Mr de Vries failed to comply with a valid bankruptcy notice, the act of bankruptcy relied upon by Bartercard has not been proved. Alternatively, circumstances exist which justify the Court exercising its discretion under s 37(c) and/or (d) of the Act to decline to make an order of adjudication.

(4) Bartercard's application for an adjudication order is accordingly dismissed.

(5) As Mr de Vries has been representing himself, there will be no order for costs.

[85] Finally, I record that Mr de Vries' liability under the two judgments entered against him in 2011 remains unaffected: nothing in this judgment precludes Bartercard from issuing a further bankruptcy notice against Mr de Vries based on one of those judgments if it wishes to do so.

Associate Judge Smith