IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2012-441-316
[2015] NZHC 1856

UNDER	The Insolvency Act 2006
IN THE MATTER OF	the bankruptcy of Michelle Jane Hodder
BETWEEN	THE OFFICIAL ASSIGNEE Applicant
AND	BERYL MARY HENSHAW Respondent

On the Papers

Counsel: G E Slevin for the Official Assignee

Judgment: 6 August 2015

JUDGMENT OF ASSOCIATE JUDGE SMITH

---

[1] Ms Hodder was adjudicated bankrupt by order made in this Court on 5 June 2014. She now resides in Australia.

[2] Ms Hodder's father died in Queensland in early 2013. She was not named as a beneficiary in his Will, but has a potential claim against her father's estate under the Succession Act 1981 (Qld). That claim is an item of property which vested in the Official Assignee (the Assignee) on Ms Hodder's bankruptcy.[1]

[3] The Assignee has recovered no assets in the bankruptcy, and has been unable to consider (and if appropriate pursue) the claim against Ms Hodder's estate under the Queensland legislation.

---

[1] Insolvency Act 2006, s 101, and *Gollan v Official Assignee* [2012] NZHC 1869, at [8]; *Creser v Creser* [2006] NZFLR 850 (HC). See also the definition of "property" in s 3 of the Insolvency Act 2006: the definition includes "…rights, interests and claims of every kind in relation to property however they arise".

[4] Through her solicitor, Ms Hodder sought the consent of the Assignee to pursue the claim herself, on the basis that she would retain the benefit of any recovery in the proposed litigation. At first, the Assignee refused. Ms Hodder then made a proposal that, on the basis that the cause of action against her father's estate would be assigned to her, she and the Assignee would share equally in any recovery, after payment of costs.

[5] The solicitor acting for Ms Hodder in Australia has advised on a preliminary basis that the proposed claim has some prospects of success. Like a claim under the Family Protection Act 1955, the prospects of success will apparently depend on a number of factors including Ms Hodder's needs and the competing needs of other possible claimants. The solicitor acting for Ms Hodder in Australia has advised that it will only be after Ms Hodder has been able to reach an agreement with the Assignee on a basis for sharing any recovery that a detailed investigation and assessment of the amount Ms Hodder might recover will be undertaken. A preliminary estimate puts the value of the deceased's estate at AUD$364,000.

[6] The debts in Ms Hodder's bankruptcy total approximately $15,000. Understandably in those circumstances, the Assignee considers that, if an arrangement can be made for the assignment of the cause of action to Ms Hodder on the basis proposed, an asset will or may be recovered for the benefit of Ms Hodder's creditors that could not otherwise have been recovered.

[7] The Assignee now applies to the Court for approval to assign Ms Hodder's claim under the Queensland legislation to her, on the basis of the 50/50 sharing of proceeds set out above.

[8] The respondent named in the proceeding is the executor of Ms Hodder's father's estate. The respondent has advised through her solicitor that she will abide by the Court's decision on this application.

The application

[9] The application is made under s 221(1) of the Insolvency Act 2006 (the Act). That section provides:

221 Assignee may assign right to sue under this Act

(1) The Assignee may, if the court has first approved it, assign any right to sue that is conferred on the Assignee by this Act.

…

[10] In submissions filed in support, Mr Slevin for the Assignee refers to the decision of this Court in *Goodwin v Copland*,[2] a case in which Gendall J held that a right to sue which has been assigned to a bankrupt by the Assignee does not automatically re-vest in the Assignee (as after-acquired property under s 102 of the Act)[3] if the assignment has been approved by the Court under s 221. However Mr Slevin properly drew to my attention an issue, not addressed in *Goodwin*, as to whether s 221 applies to an assignment of the type which is contemplated in this case.

[11] By Minute dated 15 May 2015 I sought certain further submissions from the Assignee. Those further submissions have been received and considered.

Issues for determination

[12] The issues for determination are:

(a) Does the Court have jurisdiction to approve the proposed assignment under s 221 of the Act?

---

2 *Goodwin v Copland* [2015] NZHC 213.

3 Section 102 of the Act provides:

102 Status of property acquired during bankruptcy

(1) Between the commencement of bankruptcy and discharge of the bankrupt,

(a) all property (whether in or outside New Zealand) that the bankrupt acquires or that passes to the bankrupt vests in the Assignee without the Assignee having to intervene or take any other step in relation to the property, and any rights of the bankrupt in the property are extinguished; and

(b) the powers that the bankrupt could have exercised in, over, or in respect of that property for the bankrupt's own benefit vest in the Assignee.

(2) This section is subject to section 104 and section 123.

(3) This section does not apply to property that is vested in the bankrupt under an order made under section 119(3).

(b) If so, should the Court approve the proposed assignment under s 221?

(c) If the Court does not have jurisdiction under s 221, is there inherent jurisdiction to approve the assignment, and if so, should the Court exercise that jurisdiction in favour of approval?

[13] I will consider each issue in turn.

Issue (1) - Does the Court have jurisdiction to approve the proposed assignment under s 221 of the Act?

[14] *Goodwin v Copland* was a case where the Assignee sought a direction from the Court on the question of whether, in the light of s 102, a claim that had vested in the Assignee pursuant to s 101 of the Act could effectively be assigned to the bankrupt during his term of bankruptcy. Mr Goodwin's claim clearly existed at the date of his adjudication, hence the reference to the claim having vested in the Assignee under s 101 of the Act. Gendall J concluded that an assignment of a right to sue to the bankrupt would be effective if an appropriate application on notice for Court approval were first made by the Assignee or the bankrupt, and that application succeeded under s 221 of the Act. As an alternative, his Honour considered that the Assignee could disclaim the action and then the bankrupt could apply to the Court to have the disclaimed action vested in the bankrupt.

[15] Gendall J referred to an Australia case, *Meriton Apartments Pty Ltd v Industrial Court of New South Wales*, where Greenwood J highlighted two of the purposes of removing litigation rights from a bankrupt, in the following terms:[4]

> The prohibition upon the bankrupt serves two immediate statutory purposes. First, to ensure that estate property is not deployed in the conduct of proceedings by the bankrupt and potentially dissipated and secondly, defendant/respondents should not be put at further or new risk of action and irrecoverable cost. The vesting of existing actions in the trustee…seeks to prevent the dilution of property divisible amongst the creditors by subjecting an existing action to the professional judgment of the trustee…

---

4 *Meriton Apartments Pty Ltd v Industrial Court of New South Wales* [2008] FCAFC 172 at [143].

[16] Greenwood J, in accordance with the majority, considered the assignment in that case to be invalid. However Branson J took the view that the issues identified by Greenwood J could be avoided if the bankrupt obtained litigation funding.[5]

[17] As Gendall J noted in *Goodwin*, the same policy issues arise in New Zealand, although the legislative framework is different. For example, the exemption which permits the Court to allow a bankrupt to acquire property which the Assignee has disclaimed,[6] does not exist in the Australian legislation.

[18] The issue raised in this case, which was apparently not drawn to the attention of Gendall J in *Goodwin*, is whether the words "conferred on the Assignee by this Act" in s 221 exclude from the ambit of the section the assignment of a right to sue which was already owned by the bankrupt at the date of his or her adjudication, and thus formed part of the bankrupt's property which vested in the Assignee under s 101.

[19] Counsel for the Assignee accepts that the Assignee's general power to begin legal proceedings (conferred by s 217(2) and para (b) of Schedule 1 to the Act) does not assist. The powers in Schedule 1 to the Act enable the Assignee to exercise rights the bankrupt could have exercised over the property but for the bankruptcy. They are not new rights: if the bankrupt did not have them, nor will the Assignee.

[20] Such powers may be contrasted with new rights to sue created by the Act, which arise only after adjudication. As Mr Slevin puts it, these rights allow the Assignee to do things the bankrupt could not, for example to recover a discrepancy in value between property disposed of and any consideration given for it, or property that has been gifted absolutely. Such rights *can* be said to be "conferred on the Assignee by the Act". By contrast, any right to sue that requires the exercise of the powers in para (b) of Schedule 1 is one that is incidental to the ownership of the property.

---

5 At [15].

6 See s 119(2) and (3) of the Insolvency Act 2006, referred to at [29] of this judgment.

[21] Mr Slevin notes that rights of action that are vested in the Assignee under s 101 or s 102 of the Act have always been assignable for consideration without the leave of the Court, whereas the statutorily conferred rights of action were not.

[22] I accept those submissions as an accurate reflection of the meaning and intention of the Act.

[23] In my view, the requirement for approval under s 221 applies only to assignments of rights that are *created by the Act for the Assignee*, such as the ability to apply to set aside certain transactions. Those are rights that never inhered in the bankrupt prior to adjudication and could not have vested in the Assignee under ss 101 or 102. Instead they are "conferred". Parliament has required the Court's approval if rights to sue of that kind are to be assigned to any third party.

[24] I conclude, therefore, that s 221 does not provide authority for the Court to approve the proposed assignment.

[25] That view of the section is consistent with the clause by clause analysis of the Insolvency Bill 2006, which said of cl 219 (now s 221) that it:

> allows the Assignee to assign a right to sue "conferred by this Act". This is distinct from the Assignee's right to sue as an incident of the bankrupt's property vested in the Assignee – that has always been assignable and [this provision] is not intended to regulate assignment by the Assignee in those cases.

[26] It is also consistent with the view expressed by the authors of Brookers' *Companies and Securities Law* on the materially identical s 260A of the Companies Act 1993, that the purpose of the provision is to allow the assignment of any right of suit expressly conferred on the liquidator by the Act. The learned authors say:[7]

> Section 260A distinguishes rights of suit granted by the Companies Act 1993 from rights of action exercisable by the liquidator that are an incident of the property of the company. Rights of action that are an incident of the property of the company have always been assignable.
>
> Section 260A now provides authority to the liquidator to assign causes of action conferred by the Act (such as claims against directors for reckless trading or applications to set aside voidable transactions) that previously

---

7 *Companies and Securities Law*, (looselead ed, Brookers) at [CA260A.01].

> could have only been pursued by the liquidator. However in many cases liquidators do not have the funds to pursue these kinds of cases. The intent of the new section is to facilitate the introduction of third party finance for insolvency litigation, subject to the safeguard of prior Court approval of the assignment.

[27] Quite apart from the meaning of the words "conferred on the Assignee by this Act" in s 221, I think the absence of any specific exception to the automatic vesting rule set out in s 102(1) tells against s 221 creating jurisdiction for the proposed assignment. There is only one situation where property acquired by a bankrupt after adjudication is *not* to vest in the Assignee automatically under s 102, and that is the situation where the property is onerous, and has been disclaimed by the Assignee under s 117 of the Act.

[28] Section 117 materially provides:

> **117 Assignee may disclaim onerous property**
>
> (1) Subject to section 120, the Assignee may disclaim onerous property.
>
> …
>
> (3) The Assignee must, within 10 working days after the disclaimer, send a written notice of the disclaimer to every person whose rights are, to the Assignee's knowledge, affected by it.
>
> (4) For the purposes of this section and section 120, *onerous property*—
>
> (a) means—
>
> …
>
> (ii) property of the bankrupt that is unsaleable, or not readily saleable, or that may give rise to a liability to pay money or perform an onerous act; or
>
> (iii) a litigation right that, in the opinion of the Assignee, has no reasonable prospect of success or cannot reasonably be funded from the assets of the bankrupt's estate; but
>
> …

[29] The bankrupt may apply for an order that property disclaimed under s 117 be delivered to, or vested in, the bankrupt.[8] On such an application, the Court may make the order sought if it satisfied that it is fair that the property should be

---

[8] Insolvency Act 2006, s 119(2).

delivered to, or vested in, the bankrupt.[9] In such case, s 102(3) provides that the disclaimed property is *not* to be treated as after-acquired property that is immediately re-vested in the Assignee.

[30] The exception in s 102(3) was enacted expressly to limit the (otherwise automatic) operation of s 102(1), and the question which arises is whether the operation of s 102 can be avoided in any case other than the re-vesting of disclaimed property in the bankrupt under s 119(3). In my view it cannot.

[31] The question was addressed by Gendall J in *Goodwin*. His Honour concluded that an assignment to a bankrupt which is approved under s 221 of the Act *does* provide another instance where the assignment will not automatically result in a re-vesting of the assigned property in the Assignee. His Honour stated:

> [26]…[Section] 221 provides a direct right, if approved by the Court, for the Assignee to assign a right to sue any person (including the bankrupt), as it is a right or property conferred or vested in the Assignee by the Act.

[32] But in my view s 221 only has limited application (to assignments of rights to sue "conferred by" the Act), and cannot apply to the proposed assignment in this case. The fact that no s 102 exemption (similar to that in s 102(3) of the Act in respect of disclaimed property) was carved out for assignments to which approval of the Court has been given under s 221 is entirely consistent with the view (to which I subscribe) that the limited kinds of rights to sue to which s 221 *does* apply were not intended to be transferred to, and exercised by, the bankrupt.

[33] For the foregoing reasons, I conclude that I do not have jurisdiction to grant consent to the assignment under s 221 of the Act, and I decline to do so.

Issue (2) – Should the Court approve the proposed assignment under s 221?

[34] In light of my answer on Issue (1), there is no need to answer this question

---

9 Section 119(3).

Issue (3) – If the Court does not have jurisdiction under s 221, is there inherent jurisdiction to approve the assignment, and if so, should the Court exercise that jurisdiction in favour of approval?

[35] I appreciate that the parties have been looking to find a practical way in which the Queensland claim can be pursued, given the lack of assets in Ms Hodder's estate. But I think it would be wrong to allow any sympathy for pragmatism of that sort to result in what I consider would be a departure from the scheme of the Act.

[36] I doubt that any inherent jurisdiction exists which would permit me to approve this compromise on a basis which would not result in the claim re-vesting in the Assignee under s 102. The assets of a bankrupt on adjudication are required by the Act to be distributed in accordance with the detailed requirements and priorities set out in s 273-280 of the Act, and it is not until all creditors' claims have been paid that any surplus is to be paid to the bankrupt under s 281. Giving half of what may be a valuable asset (the Queensland claim) to the bankrupt before any of the creditors have been paid does not sit comfortably with that distribution regime, even in circumstances where, if the claim were successful, the 50 per cent share the Assignee would recover might well be sufficient to see all of the debtors paid in full.

[37] The underlying issue here is that the property in question is onerous, in that the available assets of Ms Hodder's estate are insufficient to fund the proposed claim. In those circumstances the available options for the Assignee appear to be to disclaim under s 117, or perhaps to investigate whether third party litigation funding (whether by one or more of the creditors or by someone else) may be an option. I note that Regulation 17 of the Insolvency (Personal Insolvency) Regulations 2007 permits the Assignee to incur expense in a case where there are no available assets in a bankrupt's estate, if the Assignee has obtained a guarantee from the creditors or some of them. It is not apparent from the evidence whether the Assignee has asked the creditors to provide any such guarantee.

[38] These are matters for the parties to consider further; I make no order or direction on them. It is enough for me to answer the question, as I do, that I am not prepared to exercise any jurisdiction which might exist to approve the proposed assignment under the Court's inherent jurisdiction.

[39] The application is accordingly dismissed.

.

Associate Judge Smith