

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

CIV-2011-404-1461

IN THE MATTER OF the Insolvency Act 2006
AND IN THE MATTER OF the bankruptcy of T CARY

BETWEEN TRUSTEES EXECUTORS LIMITED
Judgment Creditor

AND TRENT CARY
Judgment Debtor

Hearing: 29 September 2011

Counsel: M J Matthew and TJP Bowler for Judgment Creditor
S A Barker and J M Phillips for Judgment Debtor

Judgment: 11 October 2011

**RESERVED JUDGMENT OF ELLIS J
[on Stay application]**

This judgment was delivered by me on 11 October 2011
at 5.00 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Buddle Findlay, PO Box 2694, Wellington 6140
Grove Darlow & Partners, PO Box 2882, Auckland

[1] Mr Cary wishes to appeal my decision dated 12 September 2011 declining to adjourn Trustees Executors Limited's (TEL's) adjudication application and (accordingly) adjudicating him bankrupt. He seeks a stay of execution pending the resolution of that appeal and a restraint on advertising. The applications are opposed by (TEL) (the judgment creditor) and by South Canterbury Finance.

[2] I note at the outset that Mr Cary has not yet filed a notice of appeal against my decision. As well as casting doubt on his willingness to pursue the matter expeditiously it also means that there was a lack of clarity about which aspect of my judgment he wishes to appeal. While the application for stay itself appears to relate to my decision as a whole (i.e. both the adjournment and the adjudication) Ms Matthew advised that her instructions were that only my refusal to grant an adjournment of the adjudication application would be the subject of Mr Cary's appeal. It is difficult to see however, how it is logically possible to separate the two particularly given Mr Cary's "synchronicity of focus" noted in my earlier judgment. I therefore proceed on the basis that any appeal would encompass both aspects of my decision.

[3] I also record at the outset that further affidavits have been filed in relation to the application for stay. Some of them concern matters referred to in affidavits which I previously declined to read for the reasons set out in my judgment of 12 September 2011. I accept, however, that I am able to read them in the context of the present application.

[4] The principal ground advanced in support of the application is that Mr Cary's appeal rights would be rendered nugatory if a stay is not granted.

[5] Essentially for the reasons advanced by Mr Barker, I do not accept that Mr Cary's appeal rights would be rendered nugatory in the absence of a stay. As Mr Barker said, there are three reasons for this:

- (a) section 414(2) of the Insolvency Act 2006 (the Act) expressly provides that a bankrupt may appeal to the Court of Appeal from a decision of the Court under the Act;

- (b) a judgment debtor may also apply for an order suspending the adjudication until any appeal is decided under s 416 of the Act; and
- (c) in terms of any ongoing desire by Mr Cary to put a proposal to creditors under Part 5, he will be able to enter into a composition with creditors under subpart (1) of Part 5 of the Act. Such a composition operates within the bankruptcy, rather than as an alternative to it. And if accepted by creditors and approved by the Court a composition would result in annulment of the bankruptcy: s 317(2).

[6] As to the merits of the proposed appeal, I record that Mr Cary has identified a great many errors in my decision. Whether or not those allegations of error will ultimately be reflected in a formal notice of appeal is yet to be seen. I note, however, that a considerable number of the proposed grounds relate to Mr Cary's contention that I placed "insufficient weight" on certain matters. That seems potentially problematic in terms of what is an appeal from the exercise of discretion. A number of the grounds also rely on his contention that the evidence before me was incomplete or wrong.

[7] On one level that contention merely serves to emphasise the points made in my 12 September judgment about Mr Cary's somewhat cavalier approach to disclosure and about the logistical difficulties presented to the court by the lateness of the adjournment application. The reality is that the Court was able only to determine the applications on the basis of the evidence that was before it. Moreover, I note in passing that some of the facts now put forward by Mr Cary appear somewhat dubious. For example, his contention that it was his wife (rather than Mr Cary himself) who "asserted" the existence of residential tenancy in relation to the Benson Road property does not appear consistent with the position taken by him in relation to TEL's summary judgment application. In his decision on that application dated 18 February 2011 Associate Judge Faire stated at [9]:

The first and second defendants have sworn affidavits. It is alleged by them that a tenancy agreement was entered into by the second defendant with the first defendant in his capacity as trustee in respect of 52 Benson Road, Remuera, Auckland and in favour of the second defendant as tenant. Although initially the agreement was not produced a copy has now been

made available to the court. The agreement provides no fixed term. It provides for the payment of a weekly rental of \$1,200 to be paid “as and when required by the trust”.

[8] Thus it seems that both Mr Cary and his wife “asserted” the existence of the residential tenancy agreement. While it may be that the tenant under that alleged agreement was Mr Cary’s wife it seems plain enough that he was a party to it (as trustee). For that reason I view with some scepticism Mr Cary’s contention that it was his wife alone who made decisions about the carriage (and abandonment) of the residential tenancy proceedings.

[9] Other matters raised by Mr Barker that militate against the present application for stay can also be recorded in passing.

[10] First, it remains unclear whether that Mr Cary does in fact have the numbers required for his proposal to be put before the Court.

[11] Secondly, the interests of the general public do not favour a (potentially lengthy) stay. In that respect Mr Barker referred in particular to the statement by Master Kennedy-Grant in *Bruns, ex parte Trust Bank Central Limited*:¹

... the provision of section 42(4)(a) of the [Insolvency Act 1967] that the bankruptcy relates back to and commences at the time of the act of bankruptcy on which the order is made adjudicating the debtor bankrupt. In this case, i.e. 21 January 1992, already something over 7 months. If Mr Bruns is adjudicated bankrupt now his property vests in the Official Assignee with effect from 21 January 1992. Persons who have dealt with him in the interim may find their transactions are invalid. The longer this goes on the more people are placed at risk. This cannot be in the interests of the general public: *Re Nesbitt* (supra). A stay would, if it were subsequently dissolved and an order of adjudication made, have the effect of prolonging the period of potential invalidity of transactions even further. It has been long enough already.

[12] Under the Insolvency Act 2006 a bankruptcy commences on the date and time of adjudication (s 55) rather than at the time the relevant act of bankruptcy is committed. Nonetheless I accept that the effect of granting a stay would necessarily be to create undesirable uncertainty for all those with whom Mr Cary transacted during the period of his adjudication and any lifting of the stay.

¹ *Re Bruns, Ex parte Trust Bank Central Ltd* HC Auckland B2436/91, 4 September 1992.

[13] And thirdly, the further evidence filed in opposition to the stay reveals that on 30 August 2011 (the day before the adjudication/adjournment hearing before me) Mr Cary transferred his shareholding in York Trustees Limited to his father-in-law. Mr Cary has also admitted transferring his shareholding in No Leak Limited to his father-in-law on the same day. No evidence has been given of the consideration received for that transfer and I accept Mr Barker's submission that there may well be value in the shares transferred.

[14] This last point again serves to underscore my concerns about the adequacy of his disclosure in circumstances where he is seeking an indulgence from the Court. In my view Mr Cary's disclosure has been (at best) casual and disingenuous throughout. There may well be a real benefit in involving the Official Assignee.

[15] Lastly, I record that there was a further issue about whether the application for a stay involved breach of an undertaking given by Mr Cary's former counsel in the context of the adjournment application. Because of the view I have already formed, however, it is unnecessary for me to consider that further. Were I to do so, however, there is no possibility that it would assist Mr Cary's position.

[16] For all the reasons I have given Mr Cary's application for stay is declined.

Rebecca Ellis J