IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-001605
[2019] NZHC 915

BETWEEN	ALLAN ROY McCOLLUM, NANCY MARGARET McCOLLUM and TERENCE NEIL WALKER Judgment Creditors
AND	DAVID JOHN THOMPSON Judgment Debtor

CIV-2018-404-001605

BETWEEN	ALLAN ROY McCOLLUM, NANCY MARGARET McCOLLUM and TERENCE NEIL WALKER Judgment Creditors
AND	JOSEPHINE RUTH MACBETH Judgment Debtor

Hearing: 8 March 2019

Appearances: B D Gustafson for Judgment Creditors
A Barker QC and C R T Hollings for Judgment Debtors

Judgment: 30 April 2019

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by Associate Judge Andrew
on 30 April 2019 at 3.00 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……

Introduction

[1] The judgment debtors defaulted on a substantial loan advanced by the judgment creditors (the McCollums) that was secured by general security agreement (GSA) over their dairy herd, including some 47 heifers. This resulted in a judgment debt of $105,752.76 plus interest[1] following lengthy litigation in this Court[2] and the Court of Appeal.[3]

[2] The McCollums now seek to have the judgment debtors adjudicated bankrupt for failure to comply with the bankruptcy notices based on the judgment debt.

[3] The bankruptcy notices did not refer to the existence of any security.

[4] The GSA was subject to the requirements of the Personal Properties Securities Act 1996 (the PPSA). The judgment debtors say, however, that the requirements of that legislation have not been met by the McCollums, who have failed properly to account to them for the income received from the 47 heifers (income from both milk and progeny). The judgment debtors also say that the taking and retention of the heifers by the McCollums discharged the debt in full and that there is a claim of true substance that the income from the heifers that should have been applied to the judgment debtors' credit exceeds the value of the judgment debt and interest.

[5] The critical issues I must determine are:

(a) Whether the McCollums have established an act of bankruptcy by the judgment debtors under ss 13 and/or 14 of the Insolvency Act 2006 (the 2006 Act); and

(b) Whether it is just and equitable for the Court to make an order of adjudication (s 37 of the 2006 Act).

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1 *McCollum v Thompson* [2018] NZHC 173 per Lang J (16 February 2018).
2 *McCollum v Thompson* [2016] NZHC 28.
3 *McCollum v Thompson* [2017] NZCA 269, [2017] NZAR 1106.

Relevant legal principles

[6] Under s 14 of the 2006 Act, a secured creditor can only bring an application for adjudication to the extent that the debt owed to the creditor is unsecured, and only if the amount of that unsecured debt exceeds $1,000. The onus is on the secured creditor to establish this.[4] Section 14 provides a mandatory direction.

[7] Section 14 reads:

> **Application by secured creditor**
>
> The Court must not make an order of adjudication on the application of a secured creditor unless the creditor has established that the amount of the debt exceeds the value of the charge by at least $1,000.

[8] In *Re Keiha*, *ex parte Williams & Kettle Ltd*,[5] Robertson J held that the rule in s 25 of the Insolvency Act 1967 (now s 14 of the Insolvency Act 2006) was made clear in *Re Ewing, ex parte Morgan* as follows:[6]

> It is the duty of the petitioning creditor to bring before the Court at the hearing evidence sufficient to justify the Court in finding either that the debt was unsecured or that after a valuation of the security by the creditor as provided by s.37 [of the Bankruptcy Act 1908, replaced by s 25 and now s 14 of the Insolvency Act 2006] the balance of the debt due is not less than 30 pounds [now $1,000].

[9] In *Re Keiha*, Robertson J held that the Court must be persuaded that the necessary state of affairs exists at the time of the hearing.[7]

[10] The judgment debtors contend that the McCollums have not discharged their obligations under s 14. It is submitted that the Court cannot be satisfied that there is no security for the debt (there is considerable uncertainty) and that the value of any security is less than the value of the debt. This is a matter of jurisdiction, and the McCollums have not established it.

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4 *Insolvency Law & Practice* (Thomson Reuters, online looseleaf ed) at IN14.04.
5 *Re Keiha*, *ex parte Williams & Kettle Ltd* HC Gisborne B10/88, 15 March 1989.
6 *Re Ewing, ex parte Morgan* (1905) 24 NZLR 808 at 811 as cited in *Re Keiha*, *ex parte Williams & Kettle Ltd* HC Gisborne B10/88, 15 March 1989 at 6.
7 *Re Keiha*, *ex parte Williams & Kettle Ltd* HC Gisborne B10/88, 15 March 1989 at 7.

[11] In *Baker v Westpac Banking Corp*, Richardson J held:[8]

> The principles governing the exercise of the discretion under s 26 to grant or refuse an order of adjudication in bankruptcy are well settled and have been discussed by this court in recent years in *Ellis v NZI Finance Limited* (CA253/89 judgment 24 July 1989) and *McEddy v Wilkins & Davies Marinas Limited (in receivership)* (CA54/93 judgment 7 April 1993). It is proper for the court to consider not only the interests of those directly concerned – the petitioner, other creditors, the debtor – but also the wider public interest. A creditor who establishes the jurisdictional facts set out in s 23 is not automatically entitled to an order. On the other hand, it is for an opposing debtor to show why an order should not be made. The court will give proper weight to the commercial judgment of the petitioner but the oppressive use of the bankruptcy process may be a ground for refusing an order. Another ground may be the undoubted absence of assets but that will not necessarily preclude an order given the range of interests involved including the public interest in the continuing oversight of a bankrupt's affairs and the disqualifications that go with bankruptcy. In the end the court must balance the various considerations relevant to the case and determine whether the debtor has succeeded in showing that an order ought not to be made. On appeal the court is necessarily in a different position from the Master or Judge in the High Court. An appeal against the exercise of a statutory discretion cannot succeed unless it is established that the court from which the appeal was brought erred in principle or took into account irrelevant considerations or disregarded relevant considerations or, more generally, that its ultimate decision was plainly wrong.

[12] As Heath J noted in *Bridgecorp (in rec and in liq) v Nielsen*, the 2006 Act is designed to deal only with insolvent debtors.[9] A person who is able to pay a debt, but is unwilling to do so, would not ordinarily be subjected to the bankruptcy regime. For that reason, s 37(b) permits the Court to refuse an order of adjudication if the debtor is able to pay his or her debts.

[13] If the jurisdictional facts in ss 13 or 14 are established, then the petitioning creditor is prima facie entitled to an adjudication order. Doogue AJ, in *Coromandel Independent Living Trust v Hamon*,[10] adopted the observations of Bell AJ in *Darby v Official Assignee*:[11]

> … one of the objectives of bankruptcy is to make the debtor accountable for his or her debts. I understand this to mean that it is not in the public interest that a debtor should be able to default on her debts and for there to be no apparent consequence. Such an approach would subvert the expectation that

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8 *Baker v Westpac Banking Corp* CA212/92, 13 July 1993 at 4.
9 *Bridgecorp (in rec and in liq) v Nielsen* [2010] 1 NZLR 820 (HC) at [20].
10 *Coromandel Independent Living Trust v Hamon* [2016] NZHC 392 at [13].
11 *Darby v Official Assignee* [2013] NZHC 22 at [14] as cited in *Coromandel Independent Living Trust v Hamon* [2016] NZHC 392 at [13] (footnotes omitted).

> individuals will repay their debts. Accountability also means that there is a process that acknowledges the harm that is done to those who suffer loss at the hands of defaulting debtors.

Factual background

[14] Much of the relevant factual background is set out in the Court of Appeal's judgment of 28 June 2017.[12] For the purposes of this decision, I summarise them as follows.

[15] The judgment debtors are dairy farmers in the Waikato. At the relevant time, their dairy herd largely consisted of pedigree jersey cows.

[16] The loan of $260,000 was due for repayment on 8 July 2012. It was not repaid and there was interest owing. On 13 February 2013, the judgment creditors appointed receivers. The receivers then uplifted from the judgment debtors 201 cows and 47 two-year old heifers from the judgment debtors' Onion Road property (on 13 February 2013).

[17] For the purposes of this proceeding, the stock that was seized can be divided into three groups:

(a) The Onion Road stock: These were 201 cows that were specifically listed in the GSA. They were seized in February 2013.

(b) The 47 heifers: These were the progeny of cows listed in the GSA. They were also seized in February 2013.

(c) The Otanga Valley Road stock: These were a further 47 cows that were not subject to the GSA. They were seized in September and October 2013.

[18] The Court of Appeal held that the 47 heifers were seized unlawfully on 13 February 2013 but became additional security on 11 April 2013. The heifers were thus held by the receivers unlawfully for only a two-month period.

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12 *McCollum v Thompson* [2017] NZCA 269, [2017] NZAR 1106.

[19] The receivers sold the Onion Road stock to the judgment creditors in April 2013. They retained the 47 heifers which then passed to the McCollums after the receivership ended in 2015.

[20] The judgment creditors commenced proceedings to recover the shortfall owed under the GSA in August 2014. The judgment debtors counterclaimed for sale of the Onion Road stock at an undervalue and for conversion of the 47 heifers.

[21] 40 of the 47 heifers were pregnant at the time that they were taken. In his High Court judgment of 28 January 2016, Lang J found that at the time they were taken in February 2013 the heifers were worth $50,200.

[22] The judgment debtors say that it was accepted by both parties in the Court of Appeal that in the milking seasons of 2013 – 2015, the heifers would have generated milking income of $47,731.20.

[23] Following the Court of Appeal judgment in June 2017, the judgment creditors say that they sold part of the judgment debtors' herd for $37,031.17. A further 120 cows were sold in May 2018. However, the judgment debtors say there is considerable uncertainty as to the fate of the 47 heifers (and their progeny) after the McCollums became in possession of the conclusion of the receivership.

[24] Following the remittance of the proceedings back to the High Court from the Court of Appeal, Lang J, in his supplementary judgment of 16 February 2018, held as follows:

(a) There was no loss of profits arising out of the conversion of the 47 heifers in the period 13 February 2013 to 11 April 2013.[13]

(b) That interest runs on the outstanding judgment sum of $105,752.76 at the rate of $43.46 per day.[14] The judgment creditors were therefore awarded interest as sought.

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13 *McCollum v Thompson* [2018] NZHC 173 at [3].
14 At [4].

[25] Lang J also recorded that counsel for the judgment debtors (the defendants) had received no further instructions from the defendants in relation to the three outstanding issues.

[26] The judgment creditors issued bankruptcy notices dated 27 July 2018. They were served on the judgment debtors on 4 August 2018.

[27] On 17 August 2018, the judgment debtors applied to set aside the bankruptcy notice. However, because they failed to serve the applications within the statutory 10-day time period, Bell AJ determined, in a minute of 4 October 2018, that the applications must fail. They have not been pursued.

[28] On 16 October 2018, the judgment creditors made application for adjudication orders based on the judgment debt of $105,752.76 plus interest of $6,866.68 (total final judgment figure of $112,619.44). Both applications stated expressly that the creditors have no security for the debts.

[29] On 15 February 2019, the judgment debtors made an application to recall the supplementary judgment of Lang J of 16 February 2018. The judgment debtors contend that the supplementary judgment erroneously dealt with only one substantive issue that was remitted back to the High Court and failed to deal with an important second issue, namely the quantum of loss arising from the taking of what is known as the Otonga Valley Road livestock. That application has not yet been determined.

The competing position of the parties

[30] The judgment debtors contend that the application should be dismissed for the following reasons:

(a) The McCollums have failed to establish that they do not have security for the debt under s 14 of the 2006 Act;

(b) The bankruptcy notice is defective because it did not refer to the existence of any security;

(c) The actions of the McCollums in dealing with the 47 heifers have breached their obligations under the PPSA and the judgment debtors have a claim against them for more than the value of the debt; and

(d) There is an unresolved issue in respect of the judgment of Lang J (the Otonga Valley Road stock) that is the basis for the bankruptcy notice.

[31] The McCollums respond as follows:

(a) The bankruptcy notice does not overstate the amount owed by the judgment debtors to the McCollums; the judgment of Lang J of 18 February 2018 recorded that the judgment debtors owed $182,903 comprising the $105,752.76 judgment sum plus interest of $77,150.55 (with interest accruing at the rate of $43.46 per day);

(b) The bankruptcy notice demanded payment of $105,752.76 being the judgment sum, plus interest of only $6,866.68; and

(c) The bankruptcy notice did not claim more than the judgment debtors owe the McCollums, instead it claims considerably less, even after ascribing a very generous value to the 47 heifers.

[32] The McCollums further say that it cannot be seriously contended that the bankruptcy notice is flawed because it does not value the security the creditors hold over the debtors' assets. In any event the affidavit evidence makes it clear that the 47 heifers:

(a) were either killed because they were empty;

(b) were killed because they had a fatal and contagious disease (Johnes' disease); and

(c) were sold at auction by another partnership; however, due to an unrelated dispute within that partnership the creditors have not yet received the sale proceeds.

[33] In the alternative, if required, the McCollums seek an order pursuant to s 418(2) of the 2006 Act that the judgment sum be amended to be $84,000 to take account of any recovery ultimately made by the McCollums from the realisation of the 47 heifers.

Analysis and decision

Jurisdictional issue – is there a security for the debt?

[34] A secured creditor is defined in s 3 of the 2006 Act as follows:

> **secured creditor** means a person entitled to a charge on or over property owned by a debtor.

[35] The receivers took possession of the 47 heifers in February 2013 and those animals have not been in the possession of the judgment debtors since that time. Following the termination of the receivership in 2015, the heifers were in the possession of the McCollums. For understandable reasons, namely that the entitlement to possession was in dispute, the McCollums took no steps to sell the heifers until after the determination of the Court of Appeal judgment in June 2017.

[36] While there is some uncertainty as to the fate of the heifers, I am satisfied on the evidence that they have all now either been sold or are deceased. This includes any progeny. In the circumstances, I conclude that at the time the application for adjudication was made in October 2018, the security over the heifers was spent and was no longer in existence. The judgment creditors were not secured creditors under s 3 as at 16 October 2018 because, at that stage, they were no longer entitled to a charge (it no longer existed). In any event, at that time, the debtors had no ownership or property in the heifers. They were last in possession of the heifers in February 2013 and it cannot, in my view, credibly be claimed that in 2018 they still owned them.

[37] I thus conclude that s 14 of the 2006 Act has no application to this case. The McCollums are no longer secured creditors. The matter of jurisdiction falls to be determined under s 13 rather than s 14. The steps taken with respect to realising security and the uncertainty surrounding it (at the time it existed) are nevertheless relevant to the exercise of my discretion, as I discuss below.

[38] Having concluded that this case falls to be determined under s 13 (not s 14), it is not necessary for me to address the issue of whether the notice was defective and incapable of amendment. In any event, I incline to the view that an amendment would be possible and would be appropriate under s 418 of the 2006 Act; the notice was thus not a nullity incapable of being remedied.[15]

[39] I now turn to address the issue of whether pursuant to s 37 of the 2006 Act the Court should exercise its discretion to refuse adjudication.

[40] Section 37 reads:

> **Court may refuse adjudication**
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> The court may, at its discretion, refuse to adjudicate the debtor bankrupt if—
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> (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.

Jurisdiction under s 13 of the 2006 Act

[41] As noted above, the starting point is that the judgment creditor is prima facie entitled to an adjudication order if the jurisdictional facts in s 13 are established.[16]

[42] In analysing this issue, it is important to recall, as Mr Gustafson submitted, that the judgment creditors have obtained a judgment of this Court in the sum of $105,752.76 plus interest, that the execution of such judgment has not been stayed and that the judgment debtors have failed to comply with the requirements of the bankruptcy notices served on them. On the other hand, however, despite lengthy litigation between the parties, there has not to date been any judgment or determination of the concerns that the judgment debtor now raises about the failure of the McCollums to account to them for the sale or disposal of the security, namely the 47 heifers, in

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15 *Bridgecorp (in rec and in liq) v Nielsen* [2010] 1 NZLR 820 (HC) at [33]–[43].

16 See [11] above; and *Baker v Westpac Banking Corp* CA212/92, 13 July 1993 at [4].

accordance with the requirements of the PPSA. That issue falls to be determined on the just and equitable ground in s 37(b) that I address below.

[43] The jurisdictional threshold in s 13 is, as Mr Gustafson submitted, relatively low. What needs to be established is that the debtor owes the creditor $1,000 or more. I also accept the submission of Mr Gustafson that the effect of s 30(1) of the 2006 Act is that the bankruptcy notices here are not invalid for the reason that the amount in the notices might exceed the amount actually due. The judgment debtors have not disputed the amount due within the time prescribed in the notices.

[44] In his affidavit of 24 January 2019, Mr McCollum has provided some detail of the judgment debtors' herd that was sold, including some of the heifers. Mr McCollum said that some of the heifers were euthanised, but he acknowledges that they did not keep records of the 40 heifers that needed to be euthanised. In an attempt responsibly to give the judgment debtors some credit for this, Mr McCollum has allowed a total deduction from sales of $21,540 against a judgment sum of $105,752.76 to leave what is said to be an outstanding amount still owed by the judgment debtors of a sum of at least $84,212.76. To state the obvious, that figure is obviously well in excess of the $1,000 threshold.

[45] In their submissions, the judgment debtors contend that at the date the Onion Road stock was taken (including the 47 heifers) the value of the debt including receivers' costs was $285,056. While strictly speaking that might be correct, I accept the submission of Mr Gustafson that there is no proper basis for disputing the calculations recorded at [87] and [88] of the Court of Appeal decision of 28 June 2017 where the total amount of the claim which includes agreed costs (new) of $106,596.76 totalled $391,652.76. That was the total amount from which the judgment debt of $105,752.76 plus interest was calculated. As recorded at [13] of the Court of Appeal judgment, the judgment debtors conceded at the opening of the appeal hearing that there were two further amounts that should have been included in calculating the secured debt as at 7 June 2013, but which were not included by the trial Judge. These were receivers' costs of $92,562.22 and default interest costs of $14,034.54 (a total of $106,596.76).

[46] In the present circumstances, I conclude that the judgment creditors have established the jurisdictional threshold under s 13(a) of the 2006 Act; the judgment debtors owe the McCollums $1,000 or more and have committed an act of bankruptcy. I now turn to address the other factors in s 37.

[47] The factual circumstances of this case are far from clear and regrettably, there is an unsatisfactory level of uncertainty (and accountability) about just what has happened to the heifers. The frustrations and difficulties of the McCollums, including the impact of the ongoing litigation on their ability to complete steps to recover their losses, are understandable. However, on the evidence available to me, the McCollums appear to have failed in material ways to have complied with their obligations under the PPSA. These omissions cannot be dismissed as technical or trifling; they are, in my view, an important factor in the exercise of my discretion under s 37.

Just and equitable

[48] The judgment debtors submit that it would be a miscarriage of justice if they were to be bankrupted on a judgment debt for which security was held when no accounting has been made by the McCollums of the value that they realised from the security.

[49] In support of their contention that it would not be just and equitable to make an order for adjudication, the judgment debtors submit as follows:

(a) The basis for their cross claims is clear. The value is uncertain. The reason it is uncertain is that the McCollums have not provided the evidence necessary to establish the extent of their liability. The evidence that is before the Court suggest that the value of the cross claims will easily exceed the value of the debt.

(b) These potential cross claims would have been cross claims for the purposes of s 17 of the 2006 Act in particular:

(i) the debtor need only show it has a "genuine triable claim"[17] and that is "a claim of true substance that he genuinely proposes to pursue";[18]

(ii) it seems likely that the value of that claim will exceed the value of the debt; and

(iii) the claim is not one that could be advanced earlier.

[50] The essence of these submissions is that the judgment debtors do not know what has happened to the 47 heifers and that judgment creditors have failed adequately and lawfully to account for the action they took in realising the security. It is further contended that the further affidavit filed by Mr Allan McCollum (dated 22 March 2019) does little to clarify the issues; there is no information about progeny and no evidence which explains what income was earned or derived from the 47 heifers. No proper records have been kept and none provided to the judgment debtors.

[51] The judgment debtors accept that it is now too late to invoke their cross claims under s 17 of the 2006 Act (that is, as a basis for setting aside the bankruptcy notices). However, I accept their submission that the issue of whether there is a genuinely triable claim (that is, a failure to account for value realised from the security) can be a relevant factor in the Court's determination of whether it is just and equitable to make an adjudication order.

[52] I turn now to consider the merits of the judgment debtors' cross claims which they contend are genuinely "triable claims" or "claims of true substance" they genuinely propose to pursue.[19] This involves a consideration of the provisions of the PPSA.

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17 *Jacomb v Wikeley* [2013] NZHC 3034 at [26] and [34].
18 *Sharma v ANZ Banking Group (New Zealand) Ltd* (1992) 6 PRNZ 386 (CA) at 389.
19 See *Sharma v ANZ Banking Group (New Zealand) Ltd* (1992) 6 PRNZ 386 (CA) at 389.

[53] The 47 heifers were held by the receivers from February 2013 to April 2015. After that, they were retained by the judgment creditors. Mr McCollum says that the judgment debtors' herd (which included the heifers) was then sold in two tranches, namely in June 2017 and in May 2018.

[54] During the time the heifers were retained by the McCollums, the judgment debtors say there is likely to have been significant income earned from them. They would have earned, it is contended, at least $47,540 from the milking of the 47 heifers from 2013 to 2015.[20] At the time the 47 heifers were taken, they were, in accordance with the findings of the trial Judge, worth $50,200.[21] There would also have been income in future years. There would also have been progeny, and those progeny would themselves have produced further progeny over the following years. It was found at trial that 40 of the 47 heifers were themselves in calf.[22] The judgment debtors submit that there would accordingly have been 40 progeny in the 2013 year. If one assumes roughly 50 per cent would have been females, there would have been a further potential breeding and milking cows born that year.

[55] It is necessary to analyse the legal consequences of the judgment creditors' claim that they have sold the heifers and they have applied the proceeds in reduction of the debt.

[56] If the McCollums have sold the 47 heifers, then the PPSR imposed a number of obligations on them as secured creditor as to how that process was to occur. In particular:

(a) Section 109 of the PPSA gave the McCollums, as security holder, the power to take possession of and sell the collateral after a default by the judgment debtors;

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20 In the Court of Appeal, both parties accepted that the milking season in 2013 to 2015 would have generated milking income of $47,731.20: *McCollum v Thompson* [2017] NZCA 269, [2017] NZAR 1106 at [41].

21 *McCollum v Thompson* [2016] NZHC 28 at [108].

22 At [107].

(b) In that sales process, the McCollums owed a duty to the judgment debtors to obtain the best price reasonably obtainable at the time of sale (s 110);

(c) No later than 10 working days before any sale, the McCollums were required to give notice of the sale to the judgment debtors and other interested parties under s 114;

(d) After receiving such notice, the judgment debtors had a right to redeem the collateral (s 132);

(e) Within 15 working days after the sale, the McCollums were required to give a statement of account to the judgment debtors and other interested persons (s 116);

(f) The statement of account was required to include gross proceeds from sale, costs and expenses incidental to sell and a balance owing by or to the judgment debtors; and

(g) Any surplus was to be distributed in accordance with the rules set out in the PPSA (s 117).

[57] As an alternative to a sale under s 109, a secured party may take and retain the collateral in satisfaction of the obligation secured by the security agreement. This is provided for in s 120 which reads as follows:

> **120 Proposal of secured party to retain collateral**
>
> (1) A secured party with priority over all other secured parties may, after default under the security agreement concerned, propose to take the collateral in satisfaction of the obligation secured by it.
>
> (2) The secured party must give notice of the proposal to the persons listed in section 114(1).

[58] Section 123 of the PPSA reads:

> **Position where persons entitled to notice do not object to retention of collateral by secured party**

> (1) If no notice of objection is given, the secured party is, at the expiration of the 10-day period referred to in section 121, deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interests of the debtor and of any person entitled to receive notice under section 114(1).
>
> (2) If subsection (1) applies, all security interests in the collateral that are subordinate to the security interest of the secured party referred to in subsection (1) are extinguished.

[59] The legal implications of s 120 are uncertain; that is, whether the retention of the collateral is satisfaction that all of the debts (so that there is nothing outstanding) or whether the debt is only satisfied to the extent of the value of the collateral. There is conflicting academic commentary on this point.

[60] Linda Widdup, in her text *Personal Property Securities Act: Concepts in Practice*,[23] suggests that the collateral is taken in full discharge of the debt. Other authors note that the issue is uncertain.[24] It appears that there was a statutory amendment to address the issue, but no such amendment has been enacted.[25]

[61] It is clearly arguable in this case that the McCollums are in breach of their obligations under the PPSA. No notice of sale was ever given, no statement of account provided, and no notice given under s 120(2). If it were concluded that the McCollums exercised the powers of sale under s 109 then the judgment debtors may well have a claim to damages for breach by the McCollums of their obligations under the legislation. That is provided for in s 176 of the PPSA which is entitled "Entitlement to damages for breach of obligations".

[62] Mr Barker QC, on behalf of the judgment debtors submitted as follows. The actions of the McCollums have not been those of a party that holds a security interest. They have instead been the actions of a person who believes that they own the 47 heifers (for example, they gave them to a sharemilker in a partnership they were involved in). The issue is how have they come to own the 47 heifers. If it was not a

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23 Linda Widdup *Personal Property Securities Act: Concepts in Practice* (4th ed, LexisNexis NZ Ltd, Wellington, 2016) at [31.22].

24 Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis NZ Ltd, Wellington, 2010) at [21.17]; and Michael Gedye, Ronald CC Cumming and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers Ltd, Wellington, 2002) at [123.4].

25 Michael Gedye, Ronald CC Cumming and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers Ltd, Wellington, 2002) at [123.4].

sale to them – there is no evidence that this was done – then the only legal route would be by s 123. If that is the case, then the acceptance of the collateral appears to have been done in discharge of the debt.

[63] In my view, there is considerable force in that submission. Section 109 is about possession, not ownership (as opposed to s 120, read in light of s 123, which states that the creditor is entitled to hold or dispose of the collateral free from all rights and interests of the debtor or any other entitled person). As I understand it, the judgment debtors' s 120 argument is not primarily grounded on the fact that the McCollums failed to meet their notification requirements in relation to s 109 (they failed equally to meet them with respect to s 120). Rather, their claim is based on the McCollums treating the collateral as if they were the owners rather than having only a possessory interest. In essence, what is contended is that the 47 heifers were retained under s 120 and subsequently disposed of pursuant to s 123.

[64] I acknowledge that a potential problem with the conclusion that the heifers were retained under s 120 is that s 123 does not apply until proper notice of a s 120 proposal is given and no objection is made within the 10 working days of that notice. However, I do not need to resolve that particular issue or the issue of whether the taking of the collateral under ss 120 and 123 was a taking in full discharge of the debt or otherwise. All I need to determine is whether there is a genuinely triable claim that might extinguish or exceed the judgment debt. In any event, it would be wrong, when the facts are unclear and have not been tested by evidence at trial, to reach a concluded view on an important matter of statutory interpretation.

[65] In the circumstances here, where the McCollums arguably took and retained the heifers under s 120, I conclude that there is a triable claim that the taking and retention of the herd constituted a full discharge of the debt. In reaching that conclusion I refer to the following passage from Linda Widdup:[26]

> Given that these provisions [ss 120 and 123] relate to foreclosure as an alternative to applying or selling collateral pursuant to the other enforcement provisions, the reference to 'in satisfaction of the obligations secured' likely refers to the entire obligation owing from the debtor to the secured party, rather

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[26] Linda Widdup *Personal Property Securities Act: Concepts in Practice* (4th ed, LexisNexis NZ Ltd, Wellington, 2016) at [31.22].

> than the portion of the obligation representing the value of the collateral being sold, although the likelihood is not definitive. If that is correct, then a secured party can either take the collateral in satisfaction of the entire debt, or go through the enforcement process outlined in ss 108–119 and, subject to any other law that may restrict actions for deficiency, sue for any deficiency that remains after the sale of the collateral.

[66] With a view to providing further clarification as to the fate of the 47 heifers, their sale proceeds and any income the McCollums may have earned while they retained them, I granted leave to the judgment creditors to file further affidavit evidence.[27]

[67] In his affidavit of 24 January 2019, Mr McCollum says that seven of the 47 heifers were "empty" and sent to the works. He says that his "recollection" is that about 30 of the animals in the total herd of 273 cows (including the 40 heifers) were euthanised because they had Johnes' disease. He says that the majority that were killed were heifers less than two years old. However, he accepts that he cannot depose exactly how many of the heifers were euthanised because no records were kept.

[68] It is important to record that, in 2013, the High Court valued the 47 heifers at $50,200. I also note that in, an affidavit sworn 5 August 2015, Mr John Andrew Dixon, an independent expert witness and livestock consultant, deposed that at the time the judgment debtors' herd was taken in 2013 "the livestock were well looked after". He went on to note that it was a good grass growing season and "generally all livestock were in good condition". There are some considerable tensions in the evidence before me.

[69] In his further affidavit of 22 March 2019, Mr McCollum says that he is making the affidavit:

> To show that as secured creditors the plaintiffs have made a net loss from the possession of the survivors of the 47 heifers … and any progeny when it used those animals in trade with their own herd.

[70] Mr McCollum says that this is to:

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[27] Following the approach of Williamson J in *Re Nigro, ex parte Clayton* HC Auckland B353/90, 24 May 1990.

> Rebut the defendant's submission that the profits earned from milking the heifers and their progeny would repay the secured debt and so prevent the plaintiffs as secured creditors being able to bankrupt the defendants.

[71] In that affidavit, Mr McCollum provides copies of financial statements and GST returns relating to the NTA Partnership.

[72] At [10] and [11] of that affidavit, he concludes as follows:

> To summarise the position, the heifers and any progeny only ever contributed a small part of the plaintiffs' revenue from milk proceeds or sale of progeny. Overall, the plaintiffs in the four years trading its herd and the heifers and progeny made a net loss of $21,703.
>
> The Court can have confidence that the defendants owe the plaintiffs more than $1,000 (it is actually over $100,000) and should be bankrupted.

[73] I acknowledge the challenges the McCollums faced in having to deal with the herd, including the uncertainty created by the ongoing litigation. It may be that they did act reasonably in the steps they took to dispose of the heifers and in trying circumstances made reasonable attempts to try and account for any income received from the collateral. However, I find that there are too many unanswered questions and concerns that the judgment debtors have raised and, in the circumstances, they have established a genuinely triable claim (that is, one of true substance) that the McCollums have failed properly to account to them for any income that was earned from the heifers, including not just milk proceeds, but progeny.

[74] There is generally very little evidence on the question of progeny before me. There is an attempt to portray the progeny issue as insignificant but, in reality, very little detail is provided and against the backdrop of the finding of Lang J that, in 2013, 40 of the heifers were in calf. Ultimately the McCollums may be able to establish that there is no basis for concluding that the judgment debtors owe them less than $1,000 in total, and even after making very generous allowances to them. However, at this stage, it would be wrong to conclude that the judgment debtors' cross claims have no prospect of success. They may make a decisive difference; if s 120 is held to apply and the taking and retention of the heifers constituted a full discharge of the debt, it will of course have been extinguished. If, on the other hand, s 109 applies, then the issue of damages together with the need to account for progeny and milk proceeds will

need to be determined. The interest calculation may well substantially change if there were a reduction in the principal debt.

[75] I acknowledge the good faith attempt by Mr McCollum to try and provide further information in his affidavit of 22 March 2019. However, in my view, there is still considerable uncertainty, as follows:

(a) It remains unclear as to how the heifers became part of the NTA Partnership. Very little information has been provided about that partnership.

(b) The financial accounts provided in the affidavit of 22 March 2019 only extend up until 31 March 2015. That is of course before the end of the receivership. After that date, only GST returns are provided. Those returns tell us nothing about the farming operation itself. Furthermore, the GST returns end in May 2017 and do not cover the 2017/2018 milking season.

(c) There is still no information about progeny.

[76] I accept the submission of Mr Barker that the further evidence provided does not adequately explain what income was earned or derived from the 47 heifers. I also accept that there is merit to his submission that, based on a figure of $47,000 for damages for conversion in relation to the 2013/2014 and 2014/2015 milking seasons, it would be reasonable to assume that the figures would be similar for the three milking seasons that followed.

[77] Having concluded that the proposed cross claims are ones of true substance, it is necessary to address two further questions:

(a) Why, despite lengthy litigation to date, these concerns/cross claims have not to date been advanced by the judgment debtors; and

(b) How might these cross claims now be resolved?

[78] The question of whether a cross claim is capable of being raised in relation to the proceedings giving rise to the judgment debt falls to be determined under s 17 as part of the definition of "cross claim". Although at this stage of the adjudication process, s 17 does not apply, it is still relevant, in my view, to address the same issue.

[79] On the issue of whether the cross claim could have been advanced in the litigation to date, I accept the submission of Mr Barker that the issue of what happened to the security is a separate issue and that many of the events relating to that separate issue, including the sale and disposal of the herd, took place subsequent to the date of the Court of Appeal judgment (June 2017). It is clearly arguable that the cross claims now raised could not have been advanced earlier.

[80] In respect of the issue of how these cross claims might now be resolved, there is, in my view, considerable uncertainty. While there is a live application before Lang J to recall his judgment of 16 February 2018, it is far from clear (if at all) whether the recall application will deal with the cross-claim issues. The issue of future disposal of these issues is addressed in terms of the relief granted below.

[81] I turn to address further questions relevant to the exercise of my discretion.

[82] Mr Gustafson made a forceful submission that his clients, now elderly (in their 80s) and after protracted litigation, have a substantial judgment debt that remains unpaid. They are entitled to hold the judgment debtors accountable. They are exhausted by the litigation and seek closure.

[83] I accept there is merit in that submission. It is also correct, as Mr Gustafson submitted, that the judgment debtors have provided no evidence of their ability to make payment of the outstanding debt. The judgment debtors have the onus of satisfying the Court that either it is just and equitable or that some other sufficient reason exists for the Court not making an order of adjudication.[28] However, they have provided no evidence at all on the issue of solvency and, to the extent that the evidence allows inferences to be drawn, it would appear that they are experiencing significant

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[28] *Re Rabobank Australia Ltd v Tootell* [2013] NZHC 2975 at [6].

financial difficulties. They were of course in default of their loan obligations and were legally aided for parts of the litigation.

[84] I also note, albeit not a matter of great weight, that the judgment debtor, Mrs Josephine Ruth McBeth, did apply to set aside the bankruptcy notice and was only just out of time in complying with the statutory deadlines.[29]

How should the Court exercise its discretion?

[85] In having regard to all of these circumstances, as analysed above, I find that the matters are somewhat finely balanced. There are valid arguments to be made either way. However, my conclusion that the judgment debtors have genuinely triable, and as yet undetermined, cross claims must carry significant weight.

[86] A substantial portion of the outstanding judgment debt consists of costs of the receiver. In that context, the submission of the judgment debtors that it would be a miscarriage of justice not to allow their genuinely triable claims to be tested has particular force; they are of course directed at insisting upon full legal accountability for the discharge of mandatory statutory obligations relating to the judgment debtors' property.

[87] On balance, I conclude that the appropriate course is to decline to make an order for adjudication at this stage and instead to make an order pursuant to s 38 of the 2006 Act halting the proceedings. The adjudication should be adjourned for three months for review and further argument if necessary and to allow the opportunity for the judgment debtors to explore options as to how their cross claims might be resolved.

[88] Although perhaps a secondary factor, halting the adjudication will also allow the application for recall (relating to the Otanga Valley stock) to be determined. In relation to that issue, I note the submission of Mr Barker that the value of any adjustment that might arise from the determination of the Otanga Valley stock issue, is unlikely to exceed the level of the bankruptcy notice. However, it is a relevant

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[29] See Minute of Bell AJ (dated 4 October 2018) where he noted that the date for complying with the bankruptcy notice was 17 August 2018 and that Mrs McBeth filed her application to set aside the notice in Court on that date. She did not, however, serve it on the creditors until later.

factor, albeit one of less weight, that I take into account in the exercise of my discretion.

[89] In concluding that I should grant a halt pursuant to s 38, I note that both that section and s 43 (Court may halt application while underlying debt determined) are expressed in wide and general terms. This is, as Bell AJ held in *Bank of New Zealand v Koroniadis*, to allow the Court to take into account the varying circumstances of each case.[30]

Result

[90] Pursuant to s 38 of the Insolvency Act 2006, I order that the judgment creditors' application for adjudication is halted and, on the following terms and conditions:

(a) The proceedings are adjourned until the bankruptcy list before me on **26 September 2019** at which time there will be a review of the circumstances and further argument, if relevant, as to the disposal of the proceedings.

(b) Both parties are to file and serve, by **19 September 2019**, a memorandum advising as to their position. The judgment debtors are to address the issue of how and when their cross claims, as analysed in this judgment, are to be dealt with. The question of the disposal of the recall application before Lang J might also be of relevance.

Costs

[91] Costs are reserved pending the further determination by the Court.

Associate Judge P J Andrew

[30] *Bank of New Zealand v Koroniadis* [2013] NZHC 2865.