IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-001605
CIV-2018-404-001606
[2020] NZHC 542

UNDER		the Insolvency Act 2006
BETWEEN		ALLAN ROY McCOLLUM, NANCY MARGARET McCOLLUM and TERENCE NEIL WALKER Judgment Creditors
AND		DAVID JOHN THOMPSON and JOSEPHINE RUTH MACBETH Judgment Debtors

Hearing: 17 February 2020

Appearances: B D Gustafson for Judgment Creditors
C J C McLean for Judgment Debtors

Judgment: 18 March 2020

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by Associate Judge Andrew
on 18 March 2020 at 2.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date…….

Introduction

[1] The judgment creditors (the McCollums) seek to have the judgment debtors (Thompson and MacBeth) adjudicated bankrupt following a failure to pay a High Court judgment debt in the sum of $105,752.76 plus interest and costs.

[2] Thompson and Macbeth are dairy farmers who defaulted on a term loan to the McCollums. That loan was secured by a general security agreement (GSA) over Thompson and MacBeth's livestock. Receivers were appointed under the GSA in 2013 and lengthy litigation followed. That litigation included an appeal to the Court of Appeal in 2017.[1]

[3] In an earlier judgment dated 30 April 2019, I granted an order halting the bankruptcy proceedings for a three-month review period. The purpose of the halt was to enable Thompson and MacBeth to pursue genuinely triable cross-claims against the McCollums that might have impeached the judgment debt.

[4] In December 2019, Thompson and MacBeth filed proceedings against the McCollums in the District Court, contending that the McCollums:

(a) failed to account to them for the proceeds (milk income and progeny) from their livestock, the subject of the GSA; and

(b) pursuant to the provisions of the Personal Property and Securities Act 1999 (the PPSA), irrevocably elected to take the livestock in full satisfaction of the debt.

[5] The critical issue I must now determine is whether a further order halting the proceedings should be granted pending determination of the claim in the District Court, or whether Thompson and MacBeth should be adjudicated bankrupt. That issue depends on whether Thompson and MacBeth could have brought their PPSA claims in the High Court proceedings which gave rise to the judgment debt, as well as the prospects of the claims succeeding in the District Court.

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1 *McCollum v Thompson* [2017] NZCA 269.

Factual background

[6] The factual background is set out at [14] – [29] of my earlier judgment of 30 April 2019.[2]

[7] Sufficiently for present purposes, a brief factual summary follows:

(a) The McCollums commenced proceedings to recover the shortfall owed under the GSA in August 2014. Thompson and MacBeth counterclaimed for the sale of stock at an undervalue and for the conversion of 47 heifers;

(b) The 47 heifers were the progeny of cows listed in the GSA and were part of what has become known as the Onion Road stock;[3]

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

(d) At issue in the current District Court proceedings is the retention and sale by the McCollums of the 47 heifers originally owned by Thompson and MacBeth, which the Court of Appeal held were converted by the McCollums' receivers for a brief period from February 2013 until April 2013.[4] Those heifers have been out of the McCollums' possession since February 2013, since first being seized by the receivers;

(e) Thompson and MacBeth say that both parties accepted in the Court of Appeal that in the milking seasons of 2013-2015, the heifers would have generated milking income of $47,731.20;

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2 *McCollum v Thompson* [2019] NZHC 915. See also the recent recall judgment of Lang J in *McCollum v Thompson* [2019] NZHC 3090 at [3]-[7].

3 See *McCollum v Thompson* [2019] NZHC 915 at [17](b). Note that the Otanga Valley Road stock, the subject of the recall judgment of Lang J in *McCollum v Thompson* [2019] NZHC 3090, gives rise to separate and distinct issues and is not relevant to these proceedings.

4 See *McCollum v Thompson*, above n 1, at [34].

(f) Following the Court of Appeal judgment of June 2017, the McCollums say that they sold part of Thompson and MacBeth's herd for $37,031.17. A further 120 cows were sold in May 2018.

[8] Thompson and MacBeth say that the heifers were, at the time they were taken, pedigree stock. The essence of their complaint, now at issue in the District Court proceedings, is that the McCollums have at no time properly accounted to them for milk income, progeny or their ultimate sale price. They contend that the McCollums have committed multiple breaches of their obligations under the PPSA.

[9] In the District Court proceedings, Thompson and MacBeth (the plaintiffs) claim the 47 heifers retained by the McCollums would have had progeny in their first year and every year thereafter.[5] They say the McCollums have not credited to them the value of any of the 47 heifers the McCollums sold or accounted for any income earned from the heifers in accordance with the requirements of ss 137, 147 and 152 of the Property Law Act 2007 (PLA 2007). In their first cause of action Thompson and MacBeth contend that under s 176 of the PPSA they are entitled to damages from the McCollums. By way of remedy they seek an accounting of any income earned that ought to have been earned from the heifers and the progeny of those heifers, as well as any further offspring.

[10] As a second alternative cause of action, Thompson and MacBeth say that in accordance with s 120 of the PPSA the McCollums retained the 47 heifers in discharge of the debt. As a consequence of s 123 of the PPSA, they allege that the McCollums have irrevocably elected to take the 47 heifers in satisfaction of the debt. By way of relief, Thompson and MacBeth seek a declaration that the debt has been discharged in full.

Relevant legal principles

[11] Section 43 of the Insolvency Act 2006 reads:

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5 DC Manukau, CIV-2019-092-4484.

Court may halt application while underlying debt determined

(1) This section applies if the debtor appears in opposition to a creditor's application and the debtor says either –

(a) that he or she does not owe a debt to the creditor; or

(b) that he or she does owe a debt to the creditor, but the debt is less than $1,000.

(2) The Court may, instead of refusing the application, halt the application so that the question of whether the debt is owed, or how much of the debt is owed, can be resolved at a trial.

(3) As a condition of halting the application, the Court may require the debtor to give security to the creditor for any debt that may be established as owing by the debtor to the creditor, and for the costs of establishing the debt.

[12] In *Clark v UDC Finance Ltd*, the Court of Appeal held that where the legitimacy of the underlying judgment debt claimed in the bankruptcy notice is challenged in new proceedings, those proceedings must establish a genuinely triable claim, but also the debtor must establish that the claim in the new proceedings could not have been brought in the original proceedings that gave rise to the judgment debt.[6]

[13] In *Clark*, the judgment debtor sought to set aside the bankruptcy notice under s 19 of the Insolvency Act 1967 (now s 17 of the 2006 Act). However, in my view, the principles of that case still apply to the question of granting a halt pursuant to the wide discretion conferred by s 43 of the 2006 Act.

Analysis and decision

[14] I address in turn each of the two critical issues that arise in determining how to exercise the discretion conferred by s 43 of the 2006 Act. The focus is, of course, on the District Court proceedings which challenge the underlying debt. The particular causes of action for those proceedings had not been formulated at the time I gave my earlier judgment of 30 April 2019.

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6 *Clark v UDC Finance Ltd* [1985] 2 NZLR 636 at 639-640.

Issue (a): Could the District Court claims have been brought in this Court in the original proceedings before Lang J in 2015?

[15] It is apparent that the proceedings which gave rise to the judgment debt were long and complex. The heifers were first seized in February 2013 and have not been in the possession of Thompson and MacBeth since that time. The trial before Lang J took place in September and November 2015 and his finding that the McCollums had converted the heifers was overturned (in the main) by the Court of Appeal in its judgment of 28 June 2017.[7]

[16] In the proceedings before Lang J, Thompson and MacBeth had claimed consequential losses for the alleged conversion, including claims for milk solids.[8]

[17] The issue of recovery of consequential losses (of both milk solids and progeny) is complicated by the recent findings by Lang J in his recall judgment of 26 November 2019:[9]

> More importantly, I find as a fact for the reasons given earlier that by the time the plaintiffs [McCollums] converted the Otanga Valley Road stock the defendants [Thompson and MacBeth] had to all intents and purposes ceased to trade. Furthermore, there is no evidence that they had any viable means of deriving the income they would have earned had they retained possession of the animals after September and October 2013. They would therefore have been left with no realistic alternative other than to sell them. This means that the true measure of the defendants' loss is a capital value of the livestock, credit for which has already been given.

[18] Although the recall judgment relates specifically to the Otanga Valley Road stock, the findings would have had equal application to the 47 heifers and the Onion Road stock.

[19] It is clear from this factual background that by the time the proceedings went to trial before Lang J in September 2015, the heifers had been in the possession of the

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7 The Court of Appeal held that the McCollums had converted the heifers for a brief period from February 2013 until April 2013, see above n 1.

8 See *McCollum v Thompson*, above n 1, at [39]–[42].

9 *McCollum v Thompson* [2019] NZHC 3090 at [30]. There is also merit in Mr Gustafson's submission that the finding of Lang J in his original judgment that the McCollums had no security interest in the 47 heifers would have meant (until such time the judgment was overturned) that the McCollums kept the stock pending the appeal not as secured creditors but as involuntary bailees, and the debtors attempted to uplift them. That is understandable since Lang J realised and found that Thompson and MacBeth post-October 2013 had nowhere to put the heifers.

McCollums for at least two-and-a-half years and the issues of milk solids and progeny were engaged.[10]

[20] I take the view that Thompson and MacBeth did have the opportunity in 2015 to formulate a cause of action alternative to conversion, namely that if the 47 heifers were part of the security, any net revenue for milk solids and/or progeny should have been deducted from the principal sum. That was not done when it clearly could have been.

[21] I also find that it was open to Thompson and MacBeth in 2015 to elect an account of profits for the McCollums' use of the converted animals as an alternative remedy.[11] Lang J acknowledged as such at [14]–[16] of his recall judgment.[12] In light of the finding by Lang J that Thompson and MacBeth had ceased to trade, that might have been (with the benefit of hindsight), the more sensible election.

[22] I accept that the full extent of the profit said to be unaccounted for would not in 2015 have crystallised or been apparent (the heifers were sold quite some time later), and that some of the alleged breaches of the PPSA (now at issue in the District Court proceedings) had not by that time occurred. However, the opportunity was available to Thompson and MacBeth in 2015 to seek the remedy they do so now and on such terms that would have protected their position in relation to ongoing profit for which the McCollums needed to account. However, Thompson and MacBeth did not do so.

[23] Equally, in this Court before Lang J, Thompson and MacBeth elected only to pursue a claim in conversion and not an alternative claim that the 47 heifers' value be deducted from the secured debt (as they now seek to do in the District Court proceedings).

[24] I also accept Mr Gustafson's submission that Thompson and MacBeth's first cause of action in the District Court is flawed to the extent that it is premised on the contention that the McCollums were obliged to maintain the heifers as pedigree stock

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10 At [16].

11 See generally the approach in *Beale v Lucky Fishing Ltd* HC Tauranga CIV-2011-470-3, 28 June 2011.

12 *McCollum v Thompson*, above n 9, at [14]–[16].

(i.e. stock of premier quality, reflecting in sale price of not only the heifers but their progeny). The principles applicable to a mortgagee's duty when exercising a power of sale under s 176 of the PLA 2007 are analogous to the duty owed under s 110 of the PPSA.[13] In accordance with those principles, a mortgagee is under no obligation to improve the property or increase its value and a mortgagee does not have any general duty to maintain properties prior to sale. The mortgagee's duty of care is to take reasonable care to obtain the best price reasonably attainable at the time of sale. Furthermore, a mortgagee sale for a price less than the current market value assessed by valuers does not, of itself, establish a breach of duty, although a large discrepancy may indicate a failure to take reasonable care.

[25] I accept that applying these principles would not render Thompson and MacBeth's claims for an account of profits untenable. However, they might well have a substantial impact on the extent of any account of profits remedy and/or result as to whether there was a breach of s 110 of the PPSA.

[26] I turn now to address the second cause of action in the District Court proceedings and whether that could have been brought on an earlier occasion.

[27] Although not apparent from the District Court statement of claim, it is clear that Thompson and MacBeth rely upon a letter of 11 April 2013 as constituting notice under s 120(2) of the PPSA for taking the collateral in satisfaction of the obligation secured by it. That s 120(2) cause of action (taking collateral in satisfaction of all of the debt) was available to Thompson and MacBeth at the time of the High Court proceedings, but no such claim was made, until very recently.

[28] I thus conclude that both causes of action in the District Court proceedings could have been brought in this Court before Lang J, notwithstanding the fact the full extent of the claims now made (including some particular breaches of the PPSA in relation to the sales of stock finally achieved in 2018) had not by that stage occurred.

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13 *Murray v UDC Finance Ltd* [2018] NZHC 3386 at [36].

Issue (b): Prospects of success

[29] I now address the second critical issue, namely the prospects of success for Thompson and MacBeth's District Court proceedings.

[30] I accept that Thompson and MacBeth have a reasonable prospect of establishing that the McCollums acted in breach of various obligations under the PPSA including ss 114 and 116. Breaches of those sections and s 176, which entitles them to damages for breach of obligations under the PPSA, form part of the first cause of action. It appears that no notice of sale of the collateral was ever issued, nor was any statement of account provided to Thompson and MacBeth, which the legislation requires.[14] Mr Gustafson, without conceding that the McCollums had breached any obligations, accepted that what had happened over the course of many years, was not perfect.

[31] However, the critical question is not whether Thompson and MacBeth can establish breaches of the PPSA, but whether there is a reasonable prospect that any quantum of damages they might obtain would meet or exceed the judgment debt, the subject of the adjudication proceedings.

[32] On that crucial issue, I find that the prospects of Thompson and MacBeth obtaining a quantum of damages of that level are remote. The evidence of Mr McCollum (which is so far unchallenged) is that of the 47 heifers, seven were empty and sent to the works, while 30 were euthanised. That left approximately 10 heifers, so even if there was some calculation based on that of milk solids and/or progeny, it is highly unlikely to exceed or extinguish the outstanding judgment debt of over $105,000.

[33] I acknowledge that Thompson and MacBeth may wish to challenge Mr McCollum's evidence. However, the reality is that they have no first-hand knowledge of what has happened to the heifers and it seems clear that they have now all been sold and that, realistically, they were not as valuable as Thompson and MacBeth now contend. I also accept that the McCollums have responsibly attempted

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[14] Personal Properties Security Act 1999, ss 114 and 116.

to fix a value, namely $21,540, of what the 47 heifers as security actually realised. Mr McCollum's evidence also states that the entire herd (i.e. not just the 47 heifers) was sold for $58,556.91.

[34] Thompson and MacBeth place some reliance on the October 2019 affidavit of Mr Thompson. However, as Mr Gustafson submitted, Lang J in the recent recall judgment dismissed much of what Mr Thompson said.

[35] As to the prospects of success for the second cause of action, I find again that the claim has significant flaws and weaknesses which the claimants are unlikely to overcome. It is difficult to see how the letter of April 2013 can be properly construed as a notice under s 120(2) of the PPSA. That letter did not expressly state that the judgment creditors were exercising their right to take the animals in lieu of the debt. In fact, it said there were not enough animals to meet the debt and that more were required. Furthermore, what the legislation seems to contemplate is that notice under s 120, construed in light of the consequences provision in s 123, requires clear and unequivocal advice to the debtors (and other parties listed in s 114) that states the secured party proposes to take the collateral in satisfaction of the obligation secured by it. The letter of April 2013 falls well short of that standard.

[36] Furthermore, in my earlier judgment of 30 April 2019, I noted the legal uncertainty in relation to s 120 of the PPSA and whether the retention of the collateral would be satisfaction of all of the debts (so that there is nothing outstanding), or whether the debt is only satisfied to the extent of the collateral value.

[37] Overall, I conclude Thompson and MacBeth's claims in the District Court are unlikely to succeed.

How should the Court exercise its discretion under s 43 of the Insolvency Act?

[38] Having reached those conclusions, I now turn to address the exercise of my discretion under s 43.

[39] It is likely, as Mr Gustafson submitted, that the failure of Thompson and MacBeth to advance the claims they now make in the District Court proceedings in

the earlier proceedings in this Court, constitutes an abuse of process. In accordance with *Henderson v Henderson*, the law recognises that the bringing of a claim or the raising of a defence in later proceedings may, without more, amount to an abuse of process if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.[15]

[40] In *Beattie v Premier Events Group Ltd*, Cooper J held to similar effect that it is an abuse of process to commence a proceeding, although not estopped by the principles of either cause of action estoppel or issue estoppel, where the plaintiff wishes to rely on issues of fact which could and ought to have been raised in a previous proceeding.[16]

[41] In all the circumstances, and particularly given my finding that the District Court proceedings do not have a reasonable prospect of success, I find that there are very good reasons for now declining to grant any further stay of proceedings.

[42] In my view, it is now time these proceedings be brought to a conclusion. As Casey J held in *New Zealand Social Credit Political League Inc v O'Brien*, where there have been successive actions about the same subject-matter spread over many years, imposing a significant burden on the other party, the Court may need to step in (as a matter of obligation) and say "enough". [17]

[43] I find that this is one of those cases. It is no longer appropriate to maintain the indulgence I granted Thompson and MacBeth in my earlier judgment of 30 April 2019.

[44] I accept that perhaps some (a small number) of the particular claims made in the District Court might survive an abuse of process challenge (I reach no firm conclusion on that point). However, that is of little moment given my finding that there are no reasonable prospects of the District Court proceedings succeeding to the

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15 *Henderson v Henderson* (1843) 3 Hare 100 at 115 per Wigram VC; see also *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at [60].

16 *Beattie v Premier Events Group Ltd* [2014] NZCA 184 at [45].

17 *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 at 100.

extent Thompson and MacBeth would obtain relief equal to or in excess of the bankruptcy judgment debt from this Court.

[45] I also acknowledge that there may be some tension between the findings I made in my earlier judgment of 30 April 2019 and the conclusions I now reach. However, I am considering afresh the exercise of my discretion (i.e. whether a further stay should be granted) against the backdrop of fresh documentation, including the District Court pleadings and the recall judgment of Lang J. My earlier judgment of 30 April 2019 expressly contemplated a further review of the circumstances and further argument on the question of stay.[18]

[46] I thus accept the submission of Mr Gustafson that Thompson and MacBeth, as the judgment debtors, should now either pay the amount owed to the creditors or be bankrupted. Section 43(3) of the Insolvency Act 2006 provides that the Court may require the debtor to give security as a condition of halting an application.

[47] I will give Thompson and MacBeth one final but limited opportunity to pay the outstanding amount before any orders adjudicating them bankrupt take effect.

[48] I make the following orders:

(a) Unless the judgment debtors, Mr Thompson and Ms MacBeth, pay the sum of $105,752.76 into the trust account of the judgment creditors' solicitors by **12 noon, 31 March 2020** then both judgment debtors will be adjudicated bankrupt. If the funds are paid, the adjudication proceedings will be halted under s 43(3) of the Insolvency Act 2006 pending determination of the proceedings in the District Court. As a further condition of the halt, the judgment debtors are to prosecute the District Court proceedings promptly and expeditiously;

(b) Upon the expiry of the deadline for the paying of the security of $105,752.76, counsel for the judgment creditors is to file a

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[18] *McCollum v Thompson* [2019] NZHC 915 at [90](a).

memorandum with the Court confirming the position one way or the other;

(c) In the event that the security is not paid, the proceedings will be called in the Bankruptcy List on **2 April 2020 at 11.45 am** for orders for adjudication and costs to be made in open court.

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Associate Judge P J Andrew