

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-001042
[2019] NZHC 2422**

UNDER Part 12 of the High Court Rules 2016
IN THE MATTER of an application for summary judgment
BETWEEN YINGQIU ZHANG
Applicant
AND WESTPAC NEW ZEALAND LIMITED
Respondent

CIV-2018-404-002589

IN THE MATTER of the Insolvency Act 2006
AND
IN THE MATTER of the bankruptcy of YINGQIU ZHANG
BETWEEN WESTPAC NEW ZEALAND LIMITED
Judgment Creditor
AND YINGQIU ZHANG
Judgment Debtor

Hearing: 13 September 2019

Appearances: J S Learner and L B Harrison for Respondent/Judgment Creditor
Applicant/Judgment Debtor in person
A R Govind for Auckland Council
Yangbing Li (Interpreter for Applicant/Judgment Debtor)

Judgment: 25 September 2019

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me at 12 noon on 25 September 2019
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

.....

Introduction

[1] Westpac New Zealand Limited (Westpac) provided loans to Yingqiu Zhang on the security of registered mortgages over properties at 436 Paremoremo Road, Paremoremo (“the Paremoremo property”) and 159 Hillcrest Road, Orewa (“the Hillcrest property”). Ms Zhang defaulted under the mortgages and Westpac sold the properties as mortgagee. There was a shortfall after sale. Westpac obtained summary judgment against Ms Zhang for the shortfall and issued bankruptcy proceedings against her. Ms Zhang has responded by applying to set aside the summary judgment and opposing the bankruptcy proceedings. She has also applied for discovery against Westpac and non-parties.

[2] There are before the Court the following matters:

- (a) Ms Zhang’s application to set aside Westpac’s bankruptcy notice;
- (b) Ms Zhang’s application to set aside Westpac’s summary judgment;
- (c) Ms Zhang’s application for discovery against Westpac and non-parties;
and
- (d) Westpac’s creditor’s application to adjudicate Ms Zhang bankrupt.¹

Background

[3] On 30 May 2018, Westpac filed its claim against Ms Zhang. It filed an amended statement of claim in June 2018. Westpac was unable to personally serve Ms Zhang. She was served by substituted service on 21 July 2018. After service, she corresponded by email with Westpac’s lawyers. On 25 August 2018, Ms Zhang advised Westpac’s lawyers that she would not be attending the hearing of the summary judgment application.

¹ When these matters came before the Court on 13 September 2019, an application by Ms Zhang for an adjournment was refused. Since that hearing, Ms Zhang has filed a memorandum dated 16 September 2019 which asks that the Court “stand down this matter” until her application for discovery is determined. The application for discovery is determined in this ruling.

[4] On 28 August 2018, Woolford J granted Westpac summary judgment against Ms Zhang in the sum of \$431,422.27 plus costs and disbursements.

[5] On 22 November 2018, a bankruptcy notice was issued against Ms Zhang in respect of Westpac's summary judgment. The bankruptcy notice was served by substituted service on 15 March 2019. On 23 March 2019, Ms Zhang emailed Westpac's solicitors requesting an extension of time to comply with the bankruptcy notice. The request was declined. The bankruptcy notice expired on 29 March 2019.

[6] On 23 April 2019, Westpac made a creditor's application for Ms Zhang to be adjudicated bankrupt. This was served on 13 May 2019; again, by substituted service. The hearing of the creditor's application was scheduled for 13 June 2019.

[7] On 15 May 2019, Ms Zhang requested a delay in the hearing of the creditor's application. Westpac declined the request. On 10 June 2019, Ms Zhang filed a memorandum with the Court seeking an adjournment of Westpac's creditor's application. She appeared in person at the hearing on 13 June 2019 and was granted an adjournment to 4 July 2019 to put forward a payment proposal to Westpac.

[8] On 3 July 2019, Ms Zhang filed her application to set aside Westpac's bankruptcy notice with affidavits in support. Ms Zhang alleged that she has a counterclaim against Westpac which exceeds the amount owed to Westpac.

[9] When Westpac's creditor's application came before Associate Judge Andrew on 4 July 2019, he granted a further adjournment to allow Ms Zhang to obtain legal representation. He also made timetable orders. These included that Westpac's creditor's application would be heard on 10 September 2019.

[10] On 11 July 2019, Ms Zhang attempted to file a counterclaim against Westpac, but it was rejected by the Registrar.²

² On the ground that judgment had already been entered against Ms Zhang.

[11] On 16 August 2019, Ms Zhang filed her application to set aside Westpac's summary judgment. She did not file an affidavit in support of the application at that stage. Westpac filed its opposition to the application on 28 August 2019.

[12] On 4 September 2019, noting that the issues were relatively discrete and of limited scope, Lang J directed that Westpac's creditor's application and Ms Zhang's application to set aside Westpac's summary judgment would be heard together on 10 September 2019. He drew Ms Zhang's attention to the need to file an affidavit setting out her grounds for wishing to have the summary judgment set aside. Ms Zhang filed her affidavit on 5 September 2019 and Westpac filed an affidavit in reply on 6 September 2019.

[13] When all matters came before me on 10 September 2019, I adjourned them until 13 September 2019. All matters were then heard on 13 September 2019. Ms Zhang has a limited command of English. During the hearing, Ms Zhang was assisted by an interpreter, appointed for her by the Court, and by her partner. At the beginning of the hearing, Ms Zhang applied for an adjournment which I refused for reasons that are set out in a ruling of 16 September 2019.

Application to set aside bankruptcy notice

[14] As noted above, Westpac's bankruptcy notice was served on 15 March 2019. Ms Zhang applied to set it aside on 3 July 2019. The grounds upon which she sought to set aside the bankruptcy notice are:

- (a) she has a counterclaim against Westpac for a greater amount than its judgment; and
- (b) she has a claim against Mr Chenjiang Wu for a greater amount than Westpac's judgment.

[15] Under s 17(1)(d) of the Insolvency Act 2006, a debtor commits an act of bankruptcy where they fail to comply with the requirements of a bankruptcy notice served on them within 10 working days after the date of service of that notice. The 10

working day time limit cannot be extended.³ Ms Zhang's application is out of time and the Court cannot set aside the bankruptcy notice. Ms Zhang's application is accordingly dismissed.

[16] I note, however, that the matters Ms Zhang raises are relevant to whether the Court should exercise its discretion to refuse to adjudicate her bankrupt on Westpac's application.⁴ I shall deal with them in that context.

Application to set aside Westpac's judgment

[17] The Court may set aside a summary judgment where a defendant does not appear at the hearing under r 12.14 High Court Rules. That rule provides:

12.14 Setting aside judgment

A judgment given against a party who does not appear at the hearing of an application for judgment under rule 12.2 or 12.3 may be set aside or varied by the court on any terms it thinks just if it appears to the court that there has been or may have been a miscarriage of justice.

[18] The Court's discretion to set aside a summary judgment is unfettered but must be exercised on a principled basis. Typically, three considerations are regarded as being of dominant importance, namely:⁵

- (a) whether the judgment debtor has an arguable ground of defence;
- (b) whether the judgment debtor's delay in defending the claim in which judgment was obtained is reasonably explained; and
- (c) whether the plaintiff will suffer irreparable injury if the judgment is set aside.

³ Except under r 24.10 High Court Rules 2016 which does not apply here. See *Prescott v Auckland Council* [2017] NZHC 2698; *ANZ Bank New Zealand Ltd v Edwards* [2013] NZHC 2756; and Jason Bull (ed) *McGechan on Procedure*, (online loose leafed, Thomson Reuters) at [HR24.10.01].

⁴ Insolvency Act 2006, ss 36 and 37.

⁵ *Russell v Cox* [1983] NZLR 654 (CA) at 659; and *Equitycorp Finance Group Limited v Cheah* [1989] 3 NZLR 1 (PC) at 8.

[19] Ms Zhang asserts that she has an arguable defence and counterclaim against Westpac.⁶ Although she presented it somewhat differently in her affidavit, at the hearing she agreed that her case can be reduced to the following propositions:

- (a) The sales of the Paremoremo and Hillcrest properties may not have been arms-length transactions.
- (b) Westpac failed to take reasonable steps to obtain the best possible price for the properties with the result that the sales were at a substantial undervalue.
- (c) Had Westpac not undersold the properties there would have been no shortfall.

[20] In effect, Ms Zhang is arguing that Westpac breached s 176(1) of the Property Law Act 2007, which provides that a mortgagee who exercises the power to sell mortgaged property has a duty of reasonable care to persons, including the current mortgagor, “to obtain the best price reasonably obtainable as at the time of sale.”

[21] For present purposes a useful summary of the principles to be applied in determining whether a mortgagee has fulfilled its duty under s 176 are to be found in *Westpac NZ Ltd v Lamb* where Wylie J approved and added to principles set out by Asher J in *Public Trust v Ottow*.⁷ Wylie J said as follows:⁸

I hesitate to supplement this careful analysis, but would suggest as follows:

- (a) The statutory obligation is not to obtain the best price reasonably obtainable, but to take reasonable care to obtain the best price reasonably obtainable;
- (b) A property is only worth what somebody is prepared to pay for it at the time of sale;
- (c) Valuations lose much of their significance if reasonable care is taken, there has been a properly advertised and conducted auction, and the property has been sold at auction or by negotiation after the auction;

⁶ The defence and counterclaim are based on the same facts and for present purposes the distinction is immaterial.

⁷ *Westpac New Zealand Limited v Lamb* [2012] NZHC 319, and *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC) at [17].

⁸ *Westpac New Zealand Ltd v Lamb*, above n 7, at [34], (footnotes omitted).

- (d) If reasonable care is taken, it does not necessarily follow that the best price reasonably obtainable will, in fact, be achieved;
- (e) What constitutes reasonable care will always turn on the facts of the case. The steps taken by the mortgagee in fulfilling the statutory duty have to be looked at in the round.
- (f) In considering the reasonableness of the care taken, the courts should be slow to second-guess the actions of a mortgagee acting on apparently sound professional advice.

[22] In *Lamb*, Wylie J noted the guidance provided by Asher J in *Ottow* as to the factors that are likely to indicate whether a mortgagee has taken reasonable care to obtain the best reasonably obtainable price, which were as follows:⁹

- (a) The appointment of a reputable real estate agent to market the property.
- (b) Obtaining a valuation report from an experienced valuer as a guide to what could reasonably be expected for the property.
- (c) Marketing over a reasonably long period of time.
- (d) An extensive advertising and promotional campaign.
- (e) A properly conducted auction.¹⁰
- (f) A sale price that, given all the circumstances, can be reconciled with expert opinion as to value.

Arms-length sales?

[23] Ms Zhang argues that the sales of the Paremoro and Hillcrest properties may not have been arms-length sales for two reasons:

- (a) The Paremoro property was sold to a client of Westpac and this was not disclosed to her.

⁹ *Ottow*, above n 7, at [31].

¹⁰ Other methods of sale, such as by competitive tender, may also be appropriate

- (b) Her research on the internet revealed an instance where the ANZ Bank sold a house to the wife of one of its executives at an undervalue and, another case where a real estate firm sold a property without disclosing its relationship with the buyer that gave rise to a conflict of interest.

[24] As to the first matter, Ms Zhang relies upon a title search of the Paremoremo property. The title search records that two months following the registration of the purchasers as the proprietors of the property a mortgage to Westpac was registered. It does not establish that the purchasers were Westpac customers at the time they acquired the property.

[25] In any event, there is no blanket rule that a bank, acting as mortgagee, must not sell to its customer. In a small economy one would expect this to be a regular occurrence. Without more, the existence of a banker-customer relationship, which is primarily contractual, would not give rise to any conflict of interest or duty on the part of the bank.¹¹ Any such rule would, in many cases, prejudice the bank, the mortgagor and other parties bound to perform obligations secured by the mortgage. In addition, the circumstances of the sale might be such that the bank does not know that a purchaser, or a person on whose behalf a purchase is made, is its customer.

[26] There is no evidence that Westpac has any association with the purchasers of the Paremoremo property giving rise to a conflict of interest and duty.

[27] As to the second matter, the cases Ms Zhang relies upon did not involve mortgagee sales or Westpac and are irrelevant.

Sales at an undervalue

[28] Ms Zhang contends that the Paremoremo and Hillcrest properties were undersold. She says:

¹¹ In *Public Trust v Kumar* HC Auckland CIV 2009-404-4886, 13 October 2010 the Court rejected an argument that a mortgagee breached its duty of care by providing vendor finance to a buyer when the evidence lent no support for the possibility that a conflict of interest was at play.

- (a) Valuations prepared for Westpac by Hollis & Scholefield Ltd (H & S) were out of date and contained inaccurate information because they did not take account of new capital valuations of November 2017.
- (b) The sales agents and “perhaps” prospective purchasers may have been misled as to the true value of the properties by the H & S valuations.
- (c) Valuations prepared by Bayleys in February 2016 (in respect of the Paremoremo property) and April 2016 (in respect of the Hillcrest property) and the capital valuations of November 2017, assessed the value of the properties to be much higher than the prices obtained by Westpac for them.

[29] Before marketing the properties, Westpac engaged H & S, a firm of Registered Valuers and Property Consultants, to assess their market and forced sale values.

[30] In a report of 19 October 2017, H & S assessed the market value of the Hillcrest property to be \$1,400,000 (incl GST if any) and its forced sale value at \$1,000,000-\$1,200,000 (incl GST if any). The property sold on 21 February 2018 for \$1,622,880.

[31] In a report of 30 October 2017, H & S assessed the market value of the Paremoremo property to be \$800,000 (incl GST if any) and its forced sale value at \$650,000-\$700,000 (incl GST if any). The property sold on 21 February 2018 for \$840,000.

[32] The H & S valuations were not out of date nor did they contain inaccurate information. There was a period of around four months from when the valuations were prepared until the properties were sold. In between times, Westpac called for marketing proposals and instructed real estate agents. Marketing of the properties began immediately following the 2017/2018 Christmas holidays. Marketing was undertaken for periods of four and five weeks before the properties were sold on 21 and 28 February 2018. It is hard to see how Westpac could have been more diligent consistent with its obligation to adequately market the properties.

[33] Whilst the H & S valuations did refer to capital values as at July 2014, they were the latest figures then available. Westpac was not required to seek updated valuations in November 2017 (when new capital valuations became available) because the H & S valuations were based on up-to-date comparable sales evidence and were only a guide as to what could be expected for the properties.

[34] The H & S valuations would not have misled the agents and purchasers. There is nothing to suggest that they were shown to either. The agents' marketing proposals contain their own assessments of the value of the properties based on recent comparable sales.

Disparity in valuations and sale price

[35] In support of her contention that the properties were undersold Ms Zhang relies upon two Bayleys valuations and the 2017 capital valuations.

[36] A Meijuan Chen instructed Bayleys to value the Paremoro property in February 2016. Bayleys valuation was addressed to Westpac. Bayleys assessed the current market value of the property as at 19 February 2016 to be \$1,725,000.

[37] The 2017 capital valuation of the Paremoro property was \$1,275,000.

[38] Ms Zhang instructed Bayleys to value the Hillcrest property in April 2016. Bayleys valuation was again addressed to Westpac. Bayleys assessed the current market value of the property as at 19 April 2016 to be \$3,350,000.

[39] Ms Zhang says in her affidavit that the 2017 capital valuation of the Hillcrest property was \$2,400,000.¹²

[40] The sale prices of both properties were below the values assessed in the Bayleys valuations and the 2017 capital valuations, although higher than the market values assessed by H & S.

¹² She apparently obtained this figure by phoning the Council.

[41] Ms Zhang argues that the 2017 capital valuations were the latest and the most appropriate “valuations to be used.” She says that averaging the three valuations available produces values close to the 2017 capital valuations.¹³

[42] Capital valuations are not an accurate guide to market value as they are generally mass appraisals, normally without any form of inspection.¹⁴ I do not accept, either, that the properties’ market values can be assessed by averaging the three valuations. Such an exercise assumes that all valuations are prepared on the same basis and represent reasonable assessments of value, which they do not.

[43] My consideration of the Bayleys valuations satisfies me that they contain errors of approach, particularly in their comparable sales analysis and the assessment of the development potential of the Hillcrest property. However, that aside, the apparent discrepancy between the properties’ assessed values and the sale prices obtained can be readily explained by the following factors.

[44] First, the Bayleys valuations were prepared in February 2016 and April 2016, around two years before the sales. The valuations were well out of date by the time the properties were sold.

[45] Second, the Paremoremo property had been developed by the conversion of existing buildings into multiple dwellings, the relocation onto the site of a dwelling that had been converted into multiple dwellings and the installation of a sub-standard waste-water system. Bayleys emphasised the improvements as part of its overall assessment of value. This development work was unlawful and subject to an Enforcement Order of the Environment Court of 27 September 2017. The Environment Court ordered the removal of unconsented dwellings and the decommissioning of the non-complaint water-waste system.

[46] The H & S valuation noted that the presence of the Enforcement Order was a significant factor affecting value because the purchaser would bear the cost of the work “at considerable expense” for which “a significant discount needs to be applied.”

¹³ That is the Bayleys valuation, the 2017 capital valuations and the H & S valuations.

¹⁴ This is stated in both Bayleys valuations.

[47] The agent's marketing reports confirm this turned out to be the case. The week 4 marketing report noted that:¹⁵

The principle areas of concern for a number of prospective purchasers are...being close to the prison and the cost of remediating the property according to the council requirements.

Another concern is the difficulty raising finance on a lifestyle block property subject to an Environment Court Order.

...

[48] Third, the Bayleys valuations were not prepared on a forced sale basis. A property sold at mortgagee sale is likely to sell at a discount. The H & S valuations state that most mortgagee sales indicate price reductions of between 15 – 25 per cent but because the market was not as buoyant as it had been twelve months previously it was possible that the properties would be more heavily discounted.

[49] In *Mitchell v Trustees Executors Ltd*, the Court of Appeal observed that a discrepancy between a sale price and a valuer's opinion may, "not must", establish a breach of duty has occurred.¹⁶ The Court noted that if the mechanism adopted for the mortgagee sale properly tested the market, then the results demonstrated at auction, rather than the opinion of the valuer, must be taken as demonstrating what the market value of the property was.

[50] In *Westpac v Lamb*, Wylie J held that valuations lose much of their significance if reasonable care is taken and there is a properly advertised sale process.¹⁷ This is because ultimately a property is worth only what someone will pay for it.

[51] Having regard to the factors identified in *Ottow* I now consider the steps taken by Westpac to sell the properties and note the following:

- (a) Westpac appointed reputable real estate agents (Barfoot and Thompson and Bayleys) to market the properties. Both are established real estate

¹⁵ Exhibit B of the affidavit of Angelene Rona Smylie dated 6 September 2019 at [3].

¹⁶ *Mitchell v Trustees Executors Limited* [2011] NZCA 519, (2011) 12 NZCPR 659 at [68].

¹⁷ *Westpac v Lamb*, above n 7, at [34] and [61].

agencies. Both provided marketing proposals for each of the properties. Consideration was given to sale by auction and by tender.

- (b) Westpac obtained valuation reports from an experienced valuer and there is nothing to suggest that the H & S valuations were not completed competently in accordance with relevant standards.
- (c) The Paremoremo property was marketed over a five-week period. The Hillcrest property was marketed over a four-week period. This was consistent with marketing campaigns conducted in similar cases.¹⁸ There is no suggestion that there was anything exceptional about the properties themselves which required longer marketing campaigns.
- (d) The properties were extensively marketed by way of on-site signage, agents on-site, and advertisements in property publications, newspapers and on the internet. The properties were advertised to the Chinese community and the agents followed up leads in their own databases.
- (e) The properties were sold by way of well-conducted tender processes which resulted in competitive tenders for both properties. In both cases the highest offers were accepted.
- (f) The sale prices can be reconciled with (and in fact were better than) the expert opinion of H & S.

[52] For the reasons given, I am satisfied that Westpac took all reasonable steps to obtain the best possible price reasonably obtainable at the time of sale and that Ms Zhang has no arguable defence to its claim.

Is Ms Zhang's delay in opposing Westpac's claim reasonably explained?

[53] Ms Zhang advances several reasons why she did not respond to Westpac's summary judgment application, including a need to care for her son, that her husband

¹⁸ *Westpac v Lamb* above n 7, at [47].

was in prison, her lack of familiarity with the English language and health difficulties experienced by members of her family in China. Whilst one can have some sympathy for Ms Zhang's personal circumstances, there is no doubt that she received Westpac's summary judgment application, she corresponded with Westpac's solicitors after service of the proceeding, she understood the nature of the proceeding and was told to get legal advice.

[54] Ms Zhang chose not to defend Westpac's claim and absented herself from the hearing in full knowledge of the date on which it was to be held. Such wilful absence must weigh against her ability to set aside the summary judgment. After judgment was entered she did not challenge it but tried to negotiate with Westpac. She never disputed her liability until bankruptcy proceedings were issued.

[55] I find, in these circumstances, that Ms Zhang's failure to defend Westpac's claim (and then not promptly apply to set it aside) are not reasonably explained.

Will Westpac suffer irreparable injury?

[56] The Court must consider the effects of setting aside a judgment on the opposing party. If there is to be injury to that party that will weigh against granting the application. It cannot be argued that Westpac will suffer irreparable injury if its judgment is set aside but it certainly will be prejudiced. It would have incurred significant wasted costs and will incur more costs relitigating its claim. There is nothing to suggest that there is any prospect that Ms Zhang could pay those costs, either now or as the condition of setting aside the judgment.

Balancing the considerations

[57] Ms Zhang has no arguable defence to Westpac's claim, her failure to defend the claim is not reasonably explained and Westpac will suffer injury if the judgment is set aside.

[58] Ms Zhang has not satisfied me that there has or may have been a miscarriage of justice by the entering of summary judgment against her. The application to set aside the judgment is dismissed.

The application for discovery

[59] Ms Zhang seeks discovery from Westpac and the selling agents of a range of documents on the basis that the documents “may tend to advance the Applicant’s case.” I have held that Ms Zhang does not have an arguable defence or counterclaim against Westpac. The making of a discovery order would serve no purpose. The application is dismissed.

Westpac’s application for adjudication

[60] Under s 36 Insolvency Act 2006, the Court has a discretion to adjudicate a debtor bankrupt if the creditor has established the requirements set out in s 13 of the Act. Those requirements are established in this case.

[61] The starting point is that the creditor is prima facie entitled to an adjudication order if the jurisdictional facts in s 13 are established. However, under s 37, the Court may in its discretion refuse to adjudicate a debtor bankrupt if it is just and equitable not to make an order or there is any other sufficient reason not to make an order. The debtor has the onus of satisfying the Court that either it is just and equitable or that some other sufficient reason exists for the Court not to make an order of adjudication and the Court is not to refuse an order of adjudication on the grounds of expediency or convenience.¹⁹

[62] A factor that Ms Zhang has advanced relevant to whether the Court should exercise its discretion in her favour is that she has a counterclaim against Westpac and a claim against a Mr Wu and that both claims exceed the amount of Westpac’s judgment.

¹⁹ *Re Tootell, ex parte Rabobank Australia Ltd* [2013] NZHC 2975.

[63] Her proposed counterclaim against Westpac is based on the same matters I have considered above. It is not arguable for the reasons given.

[64] Ms Zhang has annexed her statement of claim against Mr Wu to her affidavit of 3 July 2019. The kernel of her claim is that from February 2015 she leased the Paremoremo and Hillcrest properties to Mr Wu for five years in return for which he was to manage the properties, collect rents and pay Westpac. It is alleged that since April 2017 Mr Wu is in breach of the agreement and has failed to pay Westpac.

[65] *Ellis v NZI Finance Ltd* is authority that the existence of a claim, particularly where there was no realistic prospect of it being heard for a long time, is not a good ground for depriving a creditor of its normal rights.²⁰

[66] In *Re Kroon, ex parte Westpac Banking Corporation* Associate Judge Doogue held that the existence of a debtor's claim against a third party was not a ground to stay or dismiss an application for adjudication.²¹ He noted that there were very substantial sums owing by the debtor and it could be a long time until the claim was heard. Associate Judge Doogue noted also that it was in the public interest that institutions which rely upon personal guarantees should be able to promptly enforce them. This last point can be made even more strongly in the case of principal debtors, such as Ms Zhang.

[67] Associate Judge Doogue said:²²

...It is my opinion that the starting point should be that it will rarely be the case that the Court will be deflected from adjudicating a debtor on the basis that the debtor has a claim against a third party. Further, it will be for the debtor to show that there is some proper ground to suppose that the claim is a viable one and that the result of the litigation will not long be delayed

I accept that it is not my place to carry out a detailed critique of Mr Kroon's claim. But some regard must be had to that issue, even if only to make a judgment [sic] about whether the claim is going to be straight forward or complex, and whether it will be resolved in the near term or could take a long time to conclude. The more difficult it is for the Court to assess the prospects

²⁰ *Ellis v NZI Finance Ltd* CA 253/89, 24 July 1990. See also the commentary in Rebecca Atkins (ed) *Insolvency Law & Practice* (online loose leaf ed, Thomson Reuters) at [IN37.04(4)].

²¹ *Re Kroon, ex parte Westpac Banking Corporation*, HC Auckland CIV 2006-404-4720, 24 April 2007.

²² At [84] and [87].

of success, the more likely the Court is to decide that the potential claim is a factor that should persuade the Court to stay its hand.

It is also relevant to enquire how long it will be before the third party claim will come to a conclusion. If, for example, the matter has a hearing date and a decision is imminent, little harm can be done by the Court staying its hand to await the outcome.

Combining these two factors, the question that I pose for myself is whether the debtor's claim is one that in the near term has a reasonable chance of success. If that is so, then it is fair that the debtor should be given a chance to pursue the claim. If the Court cannot confidently place the debtor's claim in this category, then other factors which have to be placed in balance will outweigh the importance of the claim against the third party. Such other factors include the fact that in circumstances in which a debtor has committed an act of bankruptcy it is not in the public interest that there should be significant delays in the Court making orders which will bring his affairs under the control of the Official Assignee.

[68] There is no evidence that Ms Zhang's claim against Mr Wu will be heard soon or has a reasonable chance of success. There is insufficient evidence of the alleged agreement between Ms Zhang and Mr Wu to suggest that the claim is sufficiently strong to offer any real hope of payment to Westpac. There is no evidence of Ms Zhang ability to pay the costs of pursuing the claim against Mr Wu or of her entitlement to legal aid to do so. I am told by counsel that Mr Wu is understood to be in China which may well be the case when one considers that the address given for him on Ms Zhang's statement of claim is qualified by the words "last known address." This would just add to the hurdles Ms Zhang faces in taking the claim to a successful conclusion. In these circumstances, Ms Zhang's claim against Mr Wu is not a ground to refuse (or delay) Westpac's application.

[69] I have considered whether there are any other grounds upon which the Court might exercise its discretion in favour of Ms Zhang. I have been unable to find any. The amount owed to Westpac is substantial. Westpac's application is supported by another creditor, the Auckland Council, which is owed a significant sum also. Ms Zhang has not disclosed her financial circumstances (other than her inability to pay a lawyer). There is no suggestion that she can pay Westpac within a reasonable time, or at all. She acquired two substantial properties, but it is unknown what other property dealings she may have had, and her affairs should be investigated by the Official Assignee. Such enquiries could reveal that there are other assets or claims which might satisfy her creditors. There is also no suggestion that she will not upon

bankruptcy be able to support herself and she has a partner. In the circumstances Westpac is entitled to an order adjudicating Ms Zhang bankrupt.

The result

[70] Ms Zhang's application to set aside Westpac's bankruptcy notice is dismissed.

[71] Ms Zhang's application to set aside Westpac's summary judgment is dismissed.

[72] Ms Zhang's application for discovery against Westpac and non-parties is dismissed.

[73] Ms Zhang is adjudicated bankrupt on Westpac's creditor's application. The order is timed at 12 pm (noon) on 25 September 2019.

[74] Westpac is entitled to costs on all matters on a 2B basis.

[75] Auckland Council is entitled to its costs as a supporting creditor on a 2B basis.

O G Paulsen
Associate Judge

Solicitors:
Simpson Grierson, Auckland
Auckland Council – Legal Services, Auckland