

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

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

**CIV-2021-404-26  
[2022] NZHC 718**

UNDER the Insolvency Act 2006 and  
Rule 24.8 of the High Court Rules 2016

BETWEEN ZUORU JIN  
Judgment Creditor

AND MUSABAYOUFU FUATI  
Judgment Debtor

Hearing: 21 March 2022

Appearances: Daniel Zhang/Ezra Tie for the Judgment Creditor  
Paul Murray for the Judgment Debtor

Judgment: 11 April 2022

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**JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR**

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*This judgment was delivered by me on 11 April 2022 at 3:00pm  
pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

***Solicitors:***

Advent Ark Lawyers (Daniel Zhang/Ezra Tie), Auckland, for the Judgment Creditor  
Nigel L Faigan, Auckland, for the Judgment Debtor

***Counsel:***

Paul Murray, Auckland, for the Judgment Debtor

## **Introduction**

[1] Mr Zuoru Jin (**Zuoru**)<sup>1</sup> applies for Mr Musabayoufu Fuati to be adjudicated bankrupt. Zuoru says Mr Fuati has defaulted in paying a judgment debt in the sum of \$25,721.90.

[2] Mr Fuati is subject to a pending criminal proceeding in relation to alleged money laundering. The Commissioner of Police (**Commissioner**) has obtained restraining orders over his assets. Mr Fuati says that, but for those orders, he would be able to pay the amount Zuoru claims in this proceeding.

## **Background**

[3] In 2018, Mr Fuati and Mr Jun Jin (**Jun**)<sup>1</sup> brought a proceeding against Zuoru and Ms Yuchen Peng (CIV-2018-404-848). They alleged that they had advanced over CNY 4 million (or around NZD900,000) to Ms Peng as a loan for her currency exchange business. The loans were said to have been made through a series of transactions from an account held by a third party, Mr Wei Wang.

[4] Mr Fuati and Jun alleged that Ms Peng had only made a partial repayment of \$150,000, and that she had transferred large amounts of their money to Zuoru. Zuoru and Ms Peng denied the claims and defended the proceeding against them. Ms Peng's defence was that Mr Fuati and Jun were in fact part of the currency exchange business, so those transactions were not loan advances at all, but transactions in the course of operating the currency exchange business. Zuoru said he had engaged Ms Peng to provide currency exchange services, and money that he received from Ms Peng was pursuant to fulfilment of the terms of that agreement. He said he knew nothing about the business arrangements between Ms Peng and Mr Fuati/Jun.

[5] The CIV-2018-404-848 proceeding has involved multiple interlocutory applications by both parties, including, but not limited to:

- (a) Jun and Mr Fuati's successful application for, and renewal/continuation of, a freezing order against Ms Peng;

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<sup>1</sup> I will use first names to avoid confusion between the common surnames.

- (b) an application for a freezing order against Zuoru's bank accounts. Zuoru successfully opposed the continuation/renewal of the freezing orders made against him and obtained costs of \$25,721.90 against Mr Fuati and Jun. That costs order now forms the basis of the bankruptcy notice against Mr Fuati;
- (c) Ms Peng's successful application against Mr Fuati and Jun for discovery of statements of bank accounts held by them, or under their control. Walker J ordered the discovery; and
- (d) a strike-out/unless order application for Mr Fuati and Jun's failure to provide the discovery ordered by Walker J. Timetabling directions were made for the application to be heard on 17 August 2020, but it was never fully determined because on 20 July 2020 Mr Fuati and Jun sought leave to discontinue the proceeding.

[6] There were several costs orders in favour of Ms Peng and Zuoru resulting from the CIV-2018-404-848 proceeding. Relevant to this proceeding are the costs ordered by Lang J on 24 August 2020, pursuant to which Mr Fuati was ordered to pay \$25,791.90 to Zuoru.

[7] On 12 January 2021, Zuoru requested a bankruptcy notice issue for a judgment debt of \$25,721.90, being the costs awarded on his successful opposition of Mr Fuati and Jun's application for a freezing order against Zuoru's bank accounts.<sup>2</sup> The notice was issued that day. Mr Fuati did not apply to set aside the bankruptcy notice.

[8] Zuoru engaged a process server to serve the notices on Mr Fuati. The process server was not able to personally serve Mr Fuati. Substituted service was eventually effected on 28 May 2021, when Ms Peng sent Mr Fuati the bankruptcy notice and substituted service order by email and WeChat message. Mr Fuati did not respond to the bankruptcy notice that had been served on him.

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<sup>2</sup> *Fuati v Peng* [2020] NZHC 2150.

[9] As a result, on 6 September 2021 Zuoru filed an application to adjudicate Mr Fuati bankrupt. The application and its associated documents were served on Mr Fuati by way of substituted service on 12 October 2021.

[10] On 2 November 2021, counsel for Zuoru and Mr Fuati discussed possible resolution. Mr Fuati's counsel advised that he was in dialogue with the Commissioner about the release of restrained funds. Counsel for Zuoru proposed that Zuoru would agree to a two week adjournment, provided Mr Fuati:

- (a) confirmed he had sufficient money to cover the various judgment debts and the costs of the bankruptcy application; and
- (b) confirmed that he consented to pay all judgment debts out of the restrained funds.

[11] Mr Fuati did not agree with that proposal and instead filed an opposition. On 3 November 2021, Associate Judge Gardiner adjourned the proceeding for four weeks to allow Mr Fuati a chance to complete discussions with the Commissioner concerning the release of the restrained funds.

[12] On 4 December 2021, counsel for Mr Fuati advised the Judge that the Commissioner had refused Mr Fuati's request. Counsel sought a further adjournment to source funds and indicated that Mr Fuati sought an opposed hearing to be heard on whether it was just and equitable that he be adjudicated bankrupt while his assets are temporarily restrained pending a criminal proceeding. On 2 December 2021, Associate Judge Gardiner set the matter down for an opposed hearing. Her Honour directed that if Mr Fuati was to file any further evidence, he was to do so by 23 December 2021. Zuoru was to reply by 28 January 2022.

[13] Mr Fuati filed a second affidavit dated 14 March 2022 (after the date fixed by Associate Judge Gardiner). Ms Peng filed an affidavit dated 18 March 2022 in reply to Mr Fuati's second affidavit. Zuoru opposes allowing the filing of Mr Fuati's affidavit three months late. I deal with this point later in the judgment.

[14] Mr Fuati now says that, through recent disclosure in his criminal proceeding, he has identified new evidence that impacts his claim against Zuoru and Ms Peng. It is said he intends to recommence that claim.

### **Zuoru's application for adjudication order**

[15] Zuoru seeks orders adjudicating Mr Fuati bankrupt and as to costs, on the following grounds:<sup>3</sup>

- (a) The address that the debtor has, for the greater part of the past 6 months, resided at/carried on business at is unknown; and
- (b) The debtor owes the creditor \$25,791.90 pursuant to a sealed order obtained by the judgment creditor on and payable from 24 August 2020; and
- (c) The debtor has committed an available act of bankruptcy, as follows:
  - a. The creditor has obtained a sealed order in the amount of \$25,791.90 on 24 August 2020,
  - b. Execution of the order has not been halted by a court;
  - c. The debtor was on 28 May 2021 served with a bankruptcy notice; and
  - d. He has not by 14 June 2021 complied with the requirements of the notice or satisfied the court that he has a cross claim against the creditor; and
- (d) The creditor has no security for the debt.

### **Mr Fuati's notice of opposition to Zuoru's creditor's application for adjudication**

[16] Mr Fuati opposes the application for adjudication on the grounds that he is able to pay his debts and it is just and equitable that the Court does not make an order of adjudication.<sup>4</sup>

#### *Mr Fuati's affidavit of 3 November 2021*

[17] Mr Fuati has filed two affidavits in support of his notice of opposition. In the first affidavit, he deposes that the costs order the subject of the bankruptcy notice was

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<sup>3</sup> Creditor's application for adjudication order dated 29 November 2021 at [2].

<sup>4</sup> Notice by Debtor of intention to oppose Creditor's application dated 3 November 2021 at [2].

made after he withdrew his proceeding against Zuoru. He says he withdrew the proceeding because he was not able to secure the necessary evidence from a witness based in China.<sup>5</sup>

[18] Mr Fuati further deposes that the Commissioner has obtained restraining orders over his assets. But for the orders, he would be able to immediately pay the amount Zuoru claims in this bankruptcy proceeding.<sup>6</sup>

*Mr Fuati's affidavit of 14 March 2022*

[19] In his second affidavit, Mr Fuati deposes that in January 2022, Police provided discovery in relation to his criminal charges. From that discovery, he says he has identified new evidence informing his claim against Zuoru and Ms Peng. He now intends to restart his claim against them in the High Court.<sup>7</sup>

[20] Mr Fuati deposes that in May 2017, he agreed to loan money to Ms Peng to help her with her foreign exchange business. Ms Peng has kept all the money Mr Fuati sent her and has refused to pay it back. He says he has evidence to show Ms Peng received funds from him, including an affidavit sworn by Jun. He says further that the reason he withdrew his previous proceeding was because he was told that Mr Wang, a key potential witness, lived in China, was unable to fly to New Zealand to give evidence and was unwilling to give evidence by video conference.<sup>8</sup>

[21] Mr Fuati deposes that the new Police discovery includes evidence that Ms Peng acknowledged she received the funds into her bank account on 2 and 24 March 2018. He says the evidence points to Ms Peng taking the funds he lent her for herself. He deposes that he has become aware that Mr Wang lives in New Zealand and that, had he known that fact earlier, he would not have withdrawn his previous proceeding.<sup>9</sup>

[22] Mr Fuati says the total amount of his claim against Ms Peng and Zuoru is at least NZD 528,873. That amount exceeds the amount of Zuoru's bankruptcy claim

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<sup>5</sup> Affidavit of Judgment Debtor dated 3 November 2021 at [2].

<sup>6</sup> At [3]–[4].

<sup>7</sup> Second Affidavit of Judgment Debtor dated 14 March 2022 at [4].

<sup>8</sup> At [8]–[12].

<sup>9</sup> At [13]–[19].

against Mr Fuati. He says that if he is not bankrupted he will file his renewed claim against Ms Peng and Zuoru within five working days.<sup>10</sup>

### **Zuoru's submissions**

[23] Mr Daniel Zhang, for Zuoru, submits that the criteria for adjudicating Mr Fuati bankrupt under s 13 of the Insolvency Act 2006 have clearly been met. Mr Fuati owes Zuoru more than \$1,000 — the bankruptcy notice is for a judgment debt of \$25,721.90. He owes further judgment debts to Zuoru and Ms Peng of approximately \$68,000. He has committed an act of bankruptcy in that he has failed to pay the judgment debts and has taken no steps to comply with, or contest, the bankruptcy notice. The debt arises from a costs order of the Court and is a certain amount. It is immediately payable, as execution of the costs order has not been halted or stayed.<sup>11</sup>

[24] Mr Zhang says the applicable case law puts the onus on the debtor to show why an order for his or her adjudication should not be made. He says Mr Fuati has not satisfied that onus. The evidence does not show that Mr Fuati is in fact able to pay his debts. It appears he has very few assets, other than the assets that are restrained. The Court cannot be confident Mr Fuati has sufficient assets to pay, and Mr Fuati has not furnished the Court with information to satisfy it that he is able to pay his debts as they fall due.<sup>12</sup>

[25] Mr Zhang says further that even if Mr Fuati could show he had a positive balance sheet, the crucial point is whether he can pay his debts within a reasonable time. The evidence is that he cannot do so. Moreover, while Mr Fuati says it would not be just and equitable to adjudicate him bankrupt, Mr Zhang contends it would be equally unjust and inequitable for his debtors to remain out of their money for an indeterminate, and likely considerable, amount of time. The Court should exercise its jurisdiction to adjudicate Mr Fuati bankrupt.<sup>13</sup>

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<sup>10</sup> At [22].

<sup>11</sup> Submissions for the judgment creditor re adjudication of bankruptcy dated 7 March 2022 at [19].

<sup>12</sup> At [21]–[24], citing *Baker v Westpac Banking Corp* CA212/92, 31 July 1993 at 4 and *Re Holdgate, ex parte Campin* HC Auckland B1545/96, 24 June 1997.

<sup>13</sup> At [25]–[27], citing *Holdgate v Blocassa* [2007] NZCA 132 at [19].

*Further submission regarding the restraining order or a stay*

[26] In anticipation of Mr Murray's argument that the restraining order over Mr Fuati's assets operates as an implied stay, thereby invalidating the bankruptcy notice, Mr Zhang made a series of oral submissions in respect of this issue.

[27] Mr Zhang submitted that the decision in *Deputy Commissioner of Taxation v Stuart-Jones*,<sup>14</sup> which is relied on by the judgment debtor as authority the proposition that the restraining order constitutes a stay, did not follow the decision in *Director of Public Prosecutions v Kunz*.<sup>15</sup> Mr Zhang submitted that the passage from the judgment relied on by the judgment debtor was obiter because in *Deputy Commissioner of Taxation v Stuart-Jones* the facts were that the restraining order was only over part of the bankrupt's property and therefore was held not to operate as a stay.

[28] Mr Zhang then submits that the reasoning of Ryan J in *Kunz*, being the main authority relied upon by the judgment debtor, is not particularly robust. He further submits that the decision is wrongly decided and has not been followed since 1993, when the decision was given. Mr Zhang submits that the proposition in the judgment that the restraining order is the same as the appointment by the Court of a receiver of a debtor's property in relation to it operating as a stay is incorrect. Mr Zhang submits that these situations are quite different, as the receiver represents creditors with a higher priority than the general creditors. It is therefore correct that the appointment of a receiver should operate as a stay as against general creditors. He submits that a restraining order under s 24 of the Criminal Proceeds (Recovery) Act 2009 (the CPRA) has no higher a priority than general creditors, and therefore should yield to the Insolvency Act.

[29] Mr Zhang then relied on *Commissioner of Police v Harrison*.<sup>16</sup> In that case, there was a contest between the CPRA and the KiwiSaver fund, covered by the KiwiSaver Act 2006. In that decision, Ellis J had to consider the respective purposes of the CPRA and the KiwiSaver Act. In that instance, Ellis J said the following:

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<sup>14</sup> *Deputy Commissioner of Taxation v Stuart-Jones* [2000] FCA 1022, (2000) 102 FCR 296.

<sup>15</sup> *Director of Public Prosecutions v Kunz* (1993) 43 FCR 374.

<sup>16</sup> *Commissioner of Police v Harrison* [2017] NZHC 3140.



[59] So, although the CPRA is partly remedially in focus, it does not purport to vindicate individual rights or provide specific redress to victims of the relevant criminal activity. By contrast, the IA has a more specific remedial purpose of rectifying (so far as possible) civil wrongs done to individuals (unpaid creditors).

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[62] ... . Although as a matter of fact, this is likely to arise only in the rarest of cases, as a matter of statutory interpretation it clearly suggests that the effective hierarchy between the interests protected by the relevant statutes is:

- (a) the KSA;
- (b) the IA; then
- (c) the CPRA.

[30] In summary, Mr Zhang submitted that a restraining order applying to Mr Fuati's assets should not operate as a stay in relation to the bankruptcy notice and the Insolvency Act should take precedence over the CPRA, having regard to the respective purposes of the Insolvency Act and the CPRA.

### **Mr Fuati's submissions**

[31] Mr Paul Murray, for Mr Fuati, submits that Mr Fuati has a triable cross-claim against Zuoru and that it is just and equitable that he not be bankrupted so he can pursue that claim. Further, the restraining order over Mr Fuati's assets prevents him from paying the amount claimed by Zuoru in circumstances where he otherwise could make payment.<sup>17</sup>

[32] Mr Murray submits that a creditor who establishes the jurisdictional threshold for adjudication is not entitled automatically to an order. In exercising its discretion, the Court can consider the interests of those directly concerned, as well as the wider public interest. The potential for further investigation by the Official Assignee is also relevant. He submits that in the context of an application to set aside a bankruptcy notice based on a cross-claim, a judgment debtor must demonstrate they have a genuine triable demand. The principles relating to cross-claims in the setting aside of

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<sup>17</sup> Synopsis of Submissions for Judgment Debtor dated 14 March 2022 at [5].

bankruptcy notices must apply equally when the Court considers the exercise of its discretion to refuse adjudication.<sup>18</sup>

[33] Mr Murray submits there is a coherent explanation why Mr Fuati did not apply to set aside the bankruptcy notice based on his cross-claim. The new evidence obtained that has caused him to restart his claim only became available in January 2022, and he should not be prejudiced by a delay outside of his control. Mr Fuati's claim is genuinely triable and it is just and equitable that he not be bankrupted so that he can continue to pursue it.<sup>19</sup>

[34] Further, Mr Murray submits that the costs judgment the subject of the bankruptcy notice has impliedly been stayed because the restraining orders over Mr Fuati's assets prevents Zuoru from levying execution against those assets. The restraining order practically prevents Mr Fuati from paying the judgment debt.

[35] In support of this proposition, Mr Murray relies on *Deputy Commissioner of Taxation v Stuart-Jones*, and the earlier decision of *Director of Public Prosecutions v Kunz*.<sup>20</sup> He also relies on *Re a Debtor* as follows:<sup>21</sup>

Thus in addition to there being no stay on the judgment there must be no other impediment to issuing execution on the judgment. ...

[36] The implied stay of execution meant the bankruptcy notice was invalid and no act of bankruptcy has occurred. It would be unjust for Mr Fuati to be bankrupted in those circumstances.<sup>22</sup>

### **Legal principles**

[37] The principal requirements for court adjudication on a creditor's application are in s 13 of the Insolvency Act:

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<sup>18</sup> At [14]–[18].

<sup>19</sup> At [19]–[23].

<sup>20</sup> *Deputy Commissioner of Taxation v Stuart-Jones*, above n 14; and *Director of Public Prosecutions v Kunz*, above n 15.

<sup>21</sup> *Re a Debtor* [1984]1 WLR 1143 (Ch) at 1153.

<sup>22</sup> Synopsis of Submissions for Judgment Debtor, above n 17, at [24]–[35].

### **13 When creditor may apply for debtor's adjudication**

A creditor may apply for a debtor to be adjudicated bankrupt if—

- (a) the debtor owes the creditor \$1,000 or more or, if 2 or more creditors join in the application, the debtor owes a total of \$1,000 or more to those creditors between them; and
- (b) the debtor has committed an act of bankruptcy within the period of 3 months before filing the application; and
- (c) the debt is a certain amount; and
- (d) the debt is payable either immediately or at a date in the future that is certain.

[38] Briefly stated, a creditor may bring a bankruptcy proceeding against a debtor who owes that creditor at least \$1,000 and who has committed an act of bankruptcy within three months before the filing of the application. The sum must be a “certain amount” and payable immediately or at a future date that is certain.

[39] There are further relevant provisions in Part 2 of the Act. Section 17 provides that a debtor commits an act of bankruptcy if:

- (a) a creditor has obtained a final judgment or a final order against the debtor for any amount;
- (b) execution of the judgment or order has not been halted by a court;
- (c) the debtor has been served with a bankruptcy notice; and
- (d) the debtor has not, within the relevant time limit, complied with the requirements of the notice or satisfied the court that he or she has a cross claim against the creditor.

[40] The relevant time limit where the debtor was served with the bankruptcy notice in New Zealand is 10 working days after service.

[41] When hearing a creditor's application, a court may, among other things, adjudicate the debtor bankrupt if the creditor has established the s 13 requirements;<sup>23</sup> refuse to adjudicate the debtor bankrupt if those requirements are not established, or if the debtor is able to pay his or her debts, or if it is just and equitable that the court does not make an order of adjudication, or for any other reason;<sup>24</sup> or halt the application for adjudication.<sup>25</sup>

[42] The Court may also halt or refuse the creditor's application for adjudication if the debtor has appealed against the judgment or order underlying the bankruptcy notice and that appeal is still to be decided.<sup>26</sup>

### **Analysis**

[43] The issues to be dealt with are:

- (a) Has the judgment creditor made out the s 13 requirements?
- (b) Does the restraining order obtained under the CPRA operate as a stay in the execution of the judgment creditor's judgment under s 17(1)(b) of the Insolvency Act?
- (c) Does Mr Fuati have an arguable case as a claimant against Ms Peng and Zuoru?
- (d) Having regard to the answers to the above questions, is it just and equitable that the adjudication order be made?

*Are the requirements of s 13 made out by the judgment creditor?*

[44] It is clear that the requirements of s 13 are made out. Mr Fuati has committed an available act of bankruptcy for the purposes of s 17. He has not challenged the bankruptcy notice that was served on him.

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<sup>23</sup> Insolvency Act 2006, s 36.

<sup>24</sup> Section 37.

<sup>25</sup> Section 38.

<sup>26</sup> Section 42.

*Does the restraining order obtained under the CPRA operate as a stay on execution of the judgment creditors' judgment under s 17(1)(b) of the Insolvency Act?*

[45] In my view, it is arguable that the restraining order against Mr Fuati obtained by the Police under the CPRA operates as an implied stay for the purposes of s 17(1)(b) of the Insolvency Act. Mr Zhang submitted that in cases such as *Penning v Steel Tube Supplies Pty Ltd*,<sup>27</sup> where the property was subject to the appointment of a receiver, the order of priority of creditors of the bankrupt suggests that a restraining order should operate as a stay because the receiver's interest is in priority to general creditors. The judgment in *Commissioner of Police v Harrison*<sup>28</sup> suggests that as a matter of policy, the CPRA yields to the Insolvency Act for the benefit of general creditors. If this authority is followed, the assets subject to a restraining order under the CPRA should be available to satisfy general creditors under the Insolvency Act. However, the policy issues considered in the *Harrison* decision are not determinative in the present case, and the argument that the restraining order operates as an implied stay for the purposes of s 17(1)(b) of the Insolvency Act remain open to the judgment debtor.

[46] There are, however, two other issues which impact on whether, even if the restraining order under the CPRA does operate as a stay for the purposes of s 17(1)(b) of the Insolvency Act, this is sufficient to prevent the adjudication order being made:

- (a) First, in the judgment of Harland J, relating to the variation of the restraining order, Mr Fuati was held to have identified unrestrained assets being furniture, a diamond ring and a deposit on a shop. Arguably, this means the restraining order is not over all of Mr Fuati's assets, although, given the judgment of Harland J was delivered in May 2021, those assets could have been dissipated. As noted in the *Stuart-Jones* decision, the restraining order must be over all the judgment debtor's assets to operate as a stay. Harland J allowed a certain amount to be released from the restrained funds to meet living expenses of Mr Fuati and his partner. Mr Murray, on behalf of Mr Fuati, has argued that excluding living expenses from the restrained

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<sup>27</sup> *Penning v Steel Tube Supplies Pty Ltd* (1988) 18 FCR 568.

<sup>28</sup> *Commissioner of Police v Harrison*, above n 16.

assets should not mean the restraining order is only over part of the assets.

- (b) Secondly, Ms Peng's affidavit suggests Mr Fuati does have other unrestrained assets. Mr Zhang has submitted that the fact that bank accounts that are referred to in Ms Peng's affidavit are not covered by the restraining order does not mean that those accounts do not exist. Mr Zhang submits that it is unclear what the Police considered, or did not consider, in formulating the restraining order and this is not evidence that the other unrestrained bank accounts do not exist.

[47] On balance, I believe there is an arguable case that the restraining order under the CPRA does operate as an implied stay under s 17(1)(b). However, there is no evidence before the Court showing what assets of Mr Fuati are restrained and, if he had access to those assets, he would be able to pay the debt. Mr Zhang's submissions pointed out that in the restraining order the only assets which are specifically attributed to Mr Fuati are the BMW car under [3][a][xiii] and the bank account under [3][a][xxiv].

[48] Similarly, there is no evidence before the Court that Mr Fuati does not have unrestrained assets which could be used to pay the debt. Therefore, assuming the restraining order does operate as a stay, and the *Stuart-Jones* and *Kunz* decisions are applicable, the Court cannot be satisfied that the stay should apply.

[49] Mr Fuati could have filed an affidavit setting out his assets, both restrained and unrestrained, but he has chosen not to do so. Consequently, the argument that the adjudication order should not be made by reason of the restraining order acting as a stay cannot be accepted by the Court on the evidence before it.

*Does Mr Fuati have an arguable case in his claim against Ms Peng and Zuoru?*

[50] Mr Zhang has submitted that Toogood J in his judgment delivered on 1 August 2019 held:<sup>29</sup>

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<sup>29</sup> *Fuati v Peng* [2019] NZHC 1859.

[24] I am not persuaded that the plaintiffs have a good arguable case against Nick Jin. Each of the plaintiffs' claims against him appears to be factually flawed and misconstrued in law.

[51] Mr Zhang has also submitted that because the proceedings were discontinued at an early stage it is not possible for the Court to make any assessment of the strength of Mr Fuati's claim. In the light of the judgment of Toogood J, and Mr Zhang's submissions, I consider that there is not sufficient evidence before the Court for the Court to form a view that Mr Fuati has a arguable case against Ms Peng and Zuoru.

[52] Mr Murray has submitted on behalf of Mr Fuati that new evidence resulting from the Police disclosure in relation to the case against Mr Fuati has allowed him to renew his claim against Ms Peng and Zuoru. The evidence appears to be that at the time Ms Peng was supposed to make repayment of the alleged loans to Mr Fuati, her bank accounts were frozen by Court order. Mr Murray says this gives context as to why the repayments were not made when due. Secondly, he points to evidence relating to Mr Wang being located in New Zealand throughout. He therefore suggests that Mr Wang may now be available to give evidence. It has been submitted that Mr Wang's evidence is critical to Mr Fuati's case against Ms Peng and Zuoru.

[53] Mr Zhang disputes that Ms Peng's accounts being frozen (or partially frozen) was not known to Mr Fuati before the Police disclosure. He says Mr Fuati knew that the accounts were frozen.

[54] I am of the view that the evidence of Ms Peng's account being frozen (whether known to Mr Fuati previously or not) does not assist Mr Fuati in establishing an arguable case against Ms Peng and Zuoru.

[55] Mr Zhang submitted, and Ms Peng's affidavit reinforces this point, that the evidence regarding Mr Wang being in New Zealand is disputed and reliance should not be placed on it. Mr Fuati has filed a further affidavit dated 30 March 2022 detailing the information provided in the Police disclosure regarding Mr Wang being located in New Zealand. Ms Peng has sworn an affidavit in reply dated 6 April 2022 in which she continues to cast doubt on whether the Mr Wang the Police have identified in

New Zealand is the same Mr Wang in China who was to give evidence on behalf of Mr Fuati and Jun in the substantive proceeding.

[56] As Mr Zhang has pointed out, Mr Fuati became aware of the new evidence regarding Mr Wang potentially being in New Zealand in January 2022, but Mr Fuati has not placed any evidence before the Court of trying to contact Mr Wang to arrange for him to give evidence.

[57] Overall, I am not persuaded that the fresh evidence which Mr Fuati claims as being available from the Police disclosure improves his case against Ms Peng and Zuoru to the level of being an arguable case. I therefore conclude that this is not sufficient as a cross-claim to justify refusing an adjudication order.

**Result**

[58] As a result of the above findings, I make the order adjudicating Mr Fuati bankrupt.

[59] Costs are awarded to the judgment creditor on a 2B basis.

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**Associate Judge Taylor**