

- (a) dismissing Ms Zhang's application to set aside Westpac's bankruptcy notice to her;
- (b) dismissing Ms Zhang's application to set aside a summary judgment that Westpac had obtained by default against her;
- (c) dismissing Ms Zhang's application for discovery against Westpac and non-parties; and
- (d) granting Westpac's creditor's application to adjudicate Ms Zhang bankrupt.

[2] Ms Zhang, who represents herself, with the aid of a McKenzie friend, now appeals. Because she is not legally represented the appeal is somewhat unfocussed. Ms Zhang has filed broad-ranging submissions challenging the Associate Judge's decisions.

[3] Westpac contends that, following her adjudication, Ms Zhang has no standing to appeal against the first three determinations. This is because Ms Zhang's rights in relation to the first three matters have now vested in the Official Assignee. We agree. It is well settled that following adjudication the right to attack a bankrupt's judgment debt, including the very debt on which the adjudication was based, vests in the Official Assignee and the bankrupt's powers to contest the debt are gone.² If there are valid reasons for contesting the debt it is the Official Assignee who must do so.³ However, as the decision to adjudicate a debtor bankrupt is at the discretion of the court,⁴ Ms Zhang's arguments about the first three matters remain relevant insofar as they might relate to the exercise of this discretion (the fourth determination).

² See *Re Wilson ex parte UDC Finance Ltd* HC Christchurch B348/89, 5 December 1989 at 4; followed in *Commissioner of Inland Revenue v Neal* HC Auckland B1719/97, 2 October 1998 at [20]; *Hunter v Commissioner of Inland Revenue* HC Auckland B515-IM99, 28 June 2000 at [48]; and *De Alwis v Luvit Foods International* HC Auckland CIV 2002-404-1944, 24 March 2010.

³ *Re Wilson ex parte UDC Finance Ltd*, above n 2, at 4.

⁴ Insolvency Act 2006, ss 36 and 37.

Nature of the appeal and the admission of new evidence

[4] Section 13 of the Insolvency Act 2006 (the Act) sets out the requirements for when a creditor may apply to have a debtor adjudicated bankrupt. Where those requirements are met, a court may either order adjudication⁵ or refuse to do so.⁶ In this regard the court is given broad discretionary authority to decide whether to adjudicate a debtor bankrupt.

[5] Here the Associate Judge decided Westpac met the requirements for seeking adjudication of Ms Zhang pursuant to s 13 and he was satisfied an order for adjudication should be made.⁷ Ms Zhang has not raised any error by the Associate Judge on appeal regarding the s 13 requirements being established. Accordingly, all that remains is for her to appeal against the exercise of the discretion to adjudicate her bankrupt under s 36 of the Act.

[6] Appeals against the exercise of discretion are subject to stricter criteria than general appeals. To succeed, Ms Zhang must establish: (a) an error of law or principle; (b) taking account of irrelevant considerations; (c) failure to take account of a relevant consideration; or (d) the decision is plainly wrong.⁸

[7] The fact that this is an appeal against the exercise of a discretion has further consequences for Ms Zhang. She has sought to adduce new evidence on appeal through her affidavit dated 6 January 2021 (the new affidavit). The principles relating to the admission of new evidence on appeal are intended to ensure parties put up their best case at trial.⁹ For general appeals, which proceed by way of rehearing, the admission of new evidence requires that the further evidence must be fresh (meaning it could not have been obtained with reasonable diligence and produced at the trial), credible, and cogent. Evidence that is not fresh will still be admitted on appeal but only when the circumstances are exceptional and the grounds compelling.¹⁰ The

⁵ Section 36.

⁶ Section 37.

⁷ High Court judgment, above n 1, at [60] and [69].

⁸ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

⁹ *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192; approved by the Supreme Court in *Paper Reclaim Ltd v Aotearoa International Ltd (Further Evidence) (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1 at [6] n 1.

¹⁰ *Rae v International Insurance Brokers*, above n 9, at 192–193.

jurisdictional confines that attach to an appeal against the exercise of a discretion narrow these principles further.

[8] Generally, appeals against the exercise of a discretion proceed on the basis of the evidence that was before the decision-maker. The rationale being that further evidence cannot properly affect the correctness or otherwise of a discretionary decision made without such evidence.¹¹ However, in *Comalco NZ v Broadcasting Standards Authority*, which involved an appeal against a decision of the Broadcasting Standards Authority, this Court made orders requiring one of the parties in the appeal to produce to the other parties material that was not before the Authority when it made its decision.¹² The order was made on the understanding such material or parts thereof may be produced as evidence in the appeal. This was despite the appeal proceeding as if it were an appeal against the exercise of the discretion. This Court relevantly stated:¹³

The failure of the Authority to require the production of the pre-broadcast records and documents ... nevertheless meant that the Authority reached its decision without having access to all the possibly relevant material. Its decision is now the subject of an appeal, and the issues have been clarified in the course of the argument in this Court. If those issues are to be properly determined on the appeal, the High Court will need to have the additional material before it.

Section 18(4) of the Broadcasting Act requires the Court to hear and determine an appeal “as if the decision or order appealed against had been made in the exercise of a discretion”. This means that the appeal should only be allowed if the Authority has proceeded on a wrong principle, given undue weight to some factor or insufficient weight to another, or is plainly wrong: *Fitzgerald v Beattie* [1976] 1 NZLR 265, 268 (CA); *Havelock-Green v Westhaven Cabaret Ltd* [1976] 1 NZLR 728, 730 (CA). In the present case the Authority did not have possibly relevant material before it, and so could not consider the issue of balance in the selection and editing process. It is appropriate that the Court should have this material in order to determine the appeal.

[9] A similar approach was taken earlier by a Full Court of the High Court in *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd* where the majority acknowledged the admission of further evidence did

¹¹ *Zimmerman v Director of Proceedings* HC Wellington CIV-2006-485-761, 29 May 2007 at [41]; citing *Television New Zealand Ltd v Southland Fuel Injection Ltd* HC Wellington AP298/94, 16 March 1998.

¹² *Comalco New Zealand Ltd v Broadcasting Standards Authority* (1995) 9 PRNZ 153 (CA).

¹³ At 161–162.

not sit readily with the approach to an appeal against the exercise of a discretion but found nevertheless that even in those appeals the “interests of justice may occasionally require the admission of further evidence”.¹⁴

[10] It follows that on occasion new evidence can be admitted in an appeal against the exercise of a discretion, but it must be directly relevant to proving the discretion could not have been properly exercised without the benefit of such evidence and the interests of justice must favour its admission. This will be a high test to satisfy.

[11] In the present case the new affidavit evidence of Ms Zhang satisfies none of the requirements for the admission of new evidence on appeal. Indeed, much of the affidavit is in the form of argument and opinion, which therefore would not qualify for admission at a first instance hearing. Because this new evidence is interwoven with Ms Zhang’s arguments for allowing the appeal, our reasons for why we find it inadmissible will be given at the same time as we address her arguments on the substantive matter.

Grounds of appeal

[12] On appeal Ms Zhang essentially argues that she was mistakenly adjudicated bankrupt because the Associate Judge failed to recognise she had valid claims against Westpac and a third party, Chenjiang Wu, and that these claims exceed and therefore effectively extinguish the claims Westpac made against her. She asserts:

- (a) A claim against Westpac based on alleged failure to discharge the duties s 176 of the Property Law Act 2007 (the PLA) imposes on a mortgagee when it sells the secured property. Ms Zhang contends the shortfall between the prices the properties sold for and the debt she owed to Westpac results from sales that were not at arms’ length and were made under value.
- (b) A claim for breach of contract against Mr Wu based on his failure to perform obligations owed to Ms Zhang including to manage the

¹⁴ *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd* [1993] 2 NZLR 709 (HC) at 715.

mortgaged properties on her behalf, to collect rents and pay those to Westpac.

[13] The same arguments were advanced before Associate Judge Paulsen. He carefully considered and rejected them. We agree with his analysis and the conclusions he reached. Our reasons follow.

Ms Zhang's claims against Westpac and its conduct of mortgagee sales

[14] Ms Zhang did not oppose the summary judgment application by Westpac to prove the shortfall was a debt she owed. After judgment was entered against her and a bankruptcy notice was duly served on her she took no steps within the allowed time frame to set the notice aside. By the adjudication hearing it was too late for Ms Zhang to challenge her indebtedness to Westpac. Nevertheless, the Associate Judge carefully considered the arguments Ms Zhang made against Westpac as part of the exercise of the discretion to adjudicate her bankrupt.

Were the mortgagee sales at arms' length?

[15] The Associate Judge considered whether the mortgagee sales were made at arms' length.¹⁵ Here Ms Zhang relied on the certificate of title of one of the properties (the Paremoro property) which showed the purchasers had borrowed funds from Westpac, secured by mortgage against this property, two months after they were registered on the title as proprietors. Ms Zhang also advanced examples of her internet searches which showed another bank (ANZ Bank) had sold a property to the wife of one of its executives at undervalue, and another case where a real estate agent sold a property in circumstances where there was a conflict of interest.

[16] The Associate Judge found there was nothing to prove the purchasers of the Paremoro property were clients of Westpac at the time they purchased this property. Further, the fact they later borrowed from Westpac to complete the purchase could not of itself support a breach of s 176 of the PLA by Westpac. The evidence of the conduct

¹⁵ High Court judgment, above n 1, at [23].

of the other bank and the real estate agent was found to be irrelevant.¹⁶ We agree with these findings, which are self-evident.

Were the mortgaged properties sold at undervalue?

[17] The Associate Judge found the subject properties were not sold at undervalue.¹⁷ Westpac had produced expert valuation evidence prepared in October 2017 by registered valuers, Hollis and Scholefield Ltd (H&S), to support the achieved sale prices. H&S had assessed a market sale value of the Paremoro property at \$800,000 and a forced sale value of \$650,000–\$700,000, including GST). This property sold in February 2018 for \$840,000. The other property (the Hillcrest property) was assessed as having a market sale value of \$1.4 million and a forced sale value of \$1.2 million, including GST. This property sold in February 2018 for \$1,622,880.¹⁸

[18] Ms Zhang relied on earlier valuations given in 2016 from Bayleys Real Estate Ltd (Bayleys) which attributed higher values to both properties as well as capital valuations for the properties issued in November 2017. Bayleys gave the Paremoro property a market value as at February 2016 of \$1,725,000. A capital valuation issued in November 2017 valued it at \$1,275,000. Bayleys' market value assessment for the Hillcrest property as at April 2016 was \$3,350,000. The November 2017 capital valuation valued it at \$2,400,000. Ms Zhang told the Associate Judge she had obtained this information from a telephone call with Auckland Council.

[19] The Associate Judge gave sound reasons why the November 2017 capital valuations did not provide an accurate guide to the market value of the subject properties.¹⁹ He was not critical of H&S for referring to capital valuations dated 2014 as these were all that were available in October 2017. He identified errors of approach in the valuations by Bayleys, and found those valuations were out of date by the time the properties sold.²⁰ Moreover, the Bayleys valuations did not consider a forced sale of either property.²¹

¹⁶ At [24]–[27].

¹⁷ At [52].

¹⁸ At [30]–[31].

¹⁹ At [42].

²⁰ At [43]–[44].

²¹ At [48].

[20] The Associate Judge found there were other problems with the Bayleys valuation of the Paremoremo property. Bayleys had identified certain improvements as adding value to this property. However, the improvements were unconsented and unlawful; accordingly, rather than adding value they adversely impacted on the property's value.²²

[21] We are satisfied there was a proper basis for the views the Associate Judge formed on the available valuations and his preference for relying on those prepared by H&S.

[22] The Associate Judge then gave six reasons why he was satisfied Westpac took all reasonable steps to obtain the best possible price for both properties at the time of sale in February 2018 and therefore why Ms Zhang had no arguable defence to the summary judgment.²³ We find his reasoning unimpeachable.

[23] In short, in relation to the mortgagee sale of the properties we are satisfied the Associate Judge identified and applied the relevant legal principles.²⁴ He carefully and properly considered the evidence relevant to Ms Zhang's alleged claim against Westpac. In our view, his conclusion that this claim had no prospect of success was the only available conclusion on the evidence and the law.

[24] There is the separate question of Ms Zhang's new evidence on appeal. We consider her new affidavit is simply an attempt by her to bolster the arguments she made before the Associate Judge. The new evidence adds nothing material to what was before the Associate Judge. Moreover, in her new affidavit Ms Zhang purports to give opinion evidence to show that the true value of the mortgaged properties was higher than the prices they sold for. She then gives her opinion on how and why the properties were sold under value, and why the sales were not at arms' length. However, Ms Zhang lacks the necessary qualifications and expertise to give such evidence. Accordingly, this evidence is inadmissible under s 23 of the Evidence Act

²² At [45]–[47].

²³ At [51]–[52].

²⁴ *Zhang v Westpac*, above n 1, at [21]–[22]. At [40], the Associate Judge found the sale prices of both properties were below the values assessed by Bayleys in 2016 and the November 2017 capital valuations, but nevertheless higher than Westpac's valuations.

2006.²⁵ This necessarily also precludes the new evidence from meeting any of the criteria for the admission of further evidence on appeal, as discussed above at [8]–[10].

The application for discovery

[25] The Associate Judge’s rejection of Ms Zhang’s application for discovery against Westpac has no bearing on the exercise of the adjudication discretion under appeal. The Associate Judge held that, given his finding Ms Zhang did not have an arguable defence or counterclaim against Westpac, the making of a discovery order would serve no purpose.²⁶ We agree. The conclusions the Associate Judge reached on the mortgagee sales of the subsequent properties (with which we agree) rendered Ms Zhang’s application for discovery otiose.

The third party claim against Mr Wu

[26] The next question is whether Ms Zhang’s alleged claim for breach of contract against Mr Wu provides a basis for finding the Associate Judge was wrong to adjudicate her bankrupt. In making his decision, the Associate Judge found that Ms Zhang’s claim against Mr Wu was not a ground to refuse or delay Westpac’s adjudication application.²⁷ First, he found this claim had little prospect of success. In his view there was little evidence to support the existence of a contract between Ms Zhang and Mr Wu. Second, Mr Wu was understood to be living in China which would make bringing legal proceedings against him in New Zealand difficult. In accordance with *Ellis v NZI Finance Ltd*, the Associate Judge found that a claim that has no realistic prospect of being heard for a long time should not deprive a creditor of its normal rights, including adjudication of the debtor.²⁸ We agree with these reasons. Further, we note it would have been open to the Official Assignee to pursue a claim against Mr Wu if satisfied the claim merited pursuit.²⁹

²⁵ See discussion in John Katz QC *Expert Evidence in Civil Proceedings* (Thomson Reuters NZ, Wellington, 2018) at 44.

²⁶ High Court judgment, above n 1, at [59].

²⁷ At [68].

²⁸ *Ellis v NZI Finance Ltd* CA253/89, 24 July 1990.

²⁹ Insolvency Act, sch 1(b) provides that the Assignee may begin, continue, discontinue and defend legal proceedings relating to the property of the bankrupt.

[27] As matters have turned out, the Official Assignee has disclaimed bringing a claim against Mr Wu on the ground it lacks merit. The new affidavit of Ms Zhang has attached an email chain of correspondence with the Official Assignee's office relating to this matter. This circumstance reinforces the wisdom of the Associate Judge's decision not to treat the claim against Mr Wu as a ground for refusing adjudication.

[28] In her new affidavit Ms Zhang purports to provide opinion evidence on why the Official Assignee would be unable to pursue a claim against Mr Wu in China. However, she has not established that she has the necessary expertise to provide opinion on matters of Chinese law. Accordingly, her evidence on this topic is also inadmissible. Further, we do not understand the Associate Judge to have thought the Official Assignee could bring a claim based on Chinese law against Mr Wu in China.

[29] Now that the Official Assignee has disclaimed bringing any claim in this country against Mr Wu, Ms Zhang can apply to the High Court pursuant to s 119(2) of the Insolvency Act for the rights to this claim to be vested in her. Thus, the adjudication is not necessarily a bar to her pursuit of the claim against Mr Wu. Insofar as Chinese law may give Chinese nationals the ability to bring claims against each other for breaches of obligations occurring in foreign countries, that seems to us to be a matter for the Chinese courts to determine. This is not an issue that the Associate Judge considered, and thus it had no bearing on his decision to adjudicate Ms Zhang bankrupt.

[30] It follows that the Associate Judge was right to find the claim against Mr Wu provided no basis for refusing to adjudicate Ms Zhang bankrupt. His decision in this respect cannot be faulted.

General considerations relating to conduct of adjudication hearing

[31] Ms Zhang also contends that her case before the Associate Judge was rushed and she was not given a proper opportunity to be heard. However, we observe that the Associate Judge took great trouble to afford Ms Zhang an opportunity to be heard, despite her failure to take legal action at the appropriate times.

[32] Ms Zhang also contends that the Associate Judge should have adjourned the adjudication hearing to enable her to apply for legal aid to instruct a lawyer. The Associate Judge's initial decision to refuse an adjournment, applied for by Ms Zhang at the beginning of the adjudication hearing, was understandable.³⁰ Ms Zhang had many opportunities earlier on to oppose the steps Westpac were taking against her, yet she failed to act until the very end stage when she was facing a bankruptcy application. By that time, her prior delay and Westpac's entitlement to pursue its remedies against her provided sound reasons for proceeding. Even so, the Associate Judge permitted a three-day adjournment after the hearing had commenced to enable Ms Zhang to resolve childcare difficulties. He also stood back after considering her various arguments against adjudication and looked to see if there was anything else standing in her favour.³¹ He was right to find there was nothing in that regard.

[33] Both at the hearing and in her written submissions on appeal Ms Zhang raised other matters which were outside the notice of appeal, and we find irrelevant to the essential issues raised by her appeal. We see no need to address those other matters.

[34] In short, we find no error in the Associate Judge's decision to adjudicate Ms Zhang bankrupt.

Result

[35] The appeal is dismissed.

[36] The appellant is to pay the respondent's costs as for a standard appeal on a band A basis with usual disbursements.

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³⁰ *Zhang v Westpac New Zealand Ltd* [2019] NZHC 2319.

³¹ High Court judgment, above n 1, at [69].