

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

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

**CIV-2017-404-002177
[2020] NZHC 1260**

UNDER the Insolvency Act 2006

IN THE MATTER OF an application for a discharge from
bankruptcy

BETWEEN AN LI TAO
Applicant

AND OFFICIAL ASSIGNEE
First Respondent

STRATA TITLE ADMINISTRATION
LIMITED
Second Respondent

BODY CORPORATE 198693
Third Respondent

JIGAR PANDYA
Fourth Respondent

XIAOMEI JANG
Fifth Respondent

INLAND REVENUE DEPARTMENT
Sixth Respondent

Hearing: 8 June 2020

Appearances: Applicant in Person
C Baker for Third Respondent

Judgment: 8 June 2020

ORAL JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

Introduction

[1] The judgment debtor, Ms Tao, was adjudicated bankrupt on 29 January 2019. She now makes application for early discharge from her bankruptcy pursuant to ss 294 and 298 of the Insolvency Act 2006. The principal ground of the application is that the applicant has been previously appointed as the attorney of her parents to deal with their financial affairs.¹ They are said to be elderly, disabled in the case of her mother (cognitively impaired), who suffers from a chronic illness. Both parents are Chinese and non-English speakers. The applicant wishes to be discharged so that she can care properly for her parents. She has mentioned particular difficulties with banking, with obtaining changes in relation to the parents' mortgage and the like. Ms Tao tells me she is the only person who can carry out these necessary functions. She is an only child and the only other surviving family member, a sister of the father, lives in Beijing.

[2] The application is opposed by the original judgment creditor, the Body Corporate 198693. I note that Ms Tao's parents still reside in one of the units within the Body Corporate apartment block.

[3] The Official Assignee, who has filed a report under the legislation, will abide the Court's decision.

Factual background

[4] The circumstances leading to the applicant's bankruptcy are set out in the decision of Sargisson AJ in her judgment of 29 Jan 2019.

[5] Prior to the adjudication orders being made there was an attempt by Ms Tao to set aside the bankruptcy notice but that was unsuccessful.

[6] Sargisson AJ also noted that the creditors of Ms Tao were the Body Corporate, together with its corporate secretary and chairperson of the unit title development in

¹ On 27 January 2017, the applicant was granted enduring powers of attorney for each parent, over both their property and their personal care and welfare.

New Lynn where Ms Tao's parents own a unit. Until 25 October 2016, Ms Tao was also registered as a proprietor on the title.

[7] Disgruntled by the creditors' actions, Ms Tao brought claims against them in two sets of proceedings. She variously alleged mismanagement, fraud and conspiracy on the part of the creditors, primarily in relation to building maintenance carried out on the New Lynn property.

[8] Sargisson AJ further noted that in a comprehensive decision issued on 27 April 2016, Thomas J granted defendant summary judgment in favour of the creditors, dismissing both proceedings. Thomas J held that the creditors were entitled to costs of \$60,210, which included a 25 per cent uplift applied on the basis of Ms Tao's behaviour prolonging the trial and adding to its expense. It was of course that costs award of \$60,200 plus interest which was the outstanding debt upon which the creditors applied for adjudication. Subsequent to that judgment Ms Tao appears to have take some steps to appeal to the Court of Appeal but ultimately she was unsuccessful.

[9] Sargisson AJ further noted in her judgment² that the litigation she had just recorded was not the only litigation arising from the same events and involving Ms Tao. There was an affidavit before her Honour from the creditors' solicitor setting out six separate proceedings involving the creditors. They included a judicial review of an unsuccessful defamation claim, an appeal of an unfavourable Tenancy Tribunal order and two claims to the Human Rights Review Tribunal.

[10] Ms Tao made the application for discharge under s 294 on 12 August 2019. I note as of today's date there is approximately another 18 months to run on the bankruptcy before the three-year period expires.

[11] In his report filed in this Court on 5 February 2020, the Official Assignee has noted the creditors have filed claims totalling \$217,330.94 but the judgment debtor has no assets worth realising.

² *Strata Title Administration v Tao* [2018] NZHC 3381, at [13].

[12] I turn now to consider the relevant legal principles.

Relevant legal principles

[13] As Mr Baker has submitted, the leading authority on an application for early discharge of a bankruptcy was an earlier decision of the Court of Appeal in *ASB v Hogg* case:³

In conferring a discretion expressed in the broadest terms, the legislation recognises that each case will be different, that the relevant factors may vary from case to case and that the exercise of the discretion must be governed by the circumstances of the particular case having regard to the guidance provided by a consideration of the scheme and purpose of the legislation. In providing for automatic discharge after three years the legislation recognises that it is not in the public interest that the bankruptcy should endure indefinitely and providing for earlier discharge s 108 [the old section] recognises that continuing the bankruptcy to the end of the three years may not be in the public interest. Whether or not it is will be a matter of decision on the particular facts. In that regard guidance is provided by s 109(2) which lists matters in which the assignee is to report to the High Court in such a case. The Court has to consider the assignee's report as to the affairs of the bankrupt, the causes of the bankruptcy, the manner in which the bankrupt has performed the duties imposed on him or her under the Act and his or her conduct both before and after the bankruptcy and also as to any other facts, matter or circumstances that would assist the Court in making its decision. Clearly the Court apprised of the matter will consider the legitimate interests of the bankrupt, the creditors and wider public concerns, but it neither required nor entitled to impose threshold requirements in the exercise of the discretion so as to derogate from the breadth of the powers conferred under s 110. The applicant has the onus in the sense of adducing evidence to show good cause for ordering an early discharge but his obligation goes no further than that.

[14] So the key points to take from the *ASB* decision are that the applicant has the onus of adducing evidence to show good cause for an early discharge and that the Court has a very broad discretion. In the absence of good reasons, a bankrupt should normally obtain a discharge. However, public interest factors may mean that an order for early discharge should be refused.⁴

³ *ASB v Hogg* [1993] 3 NZLR, p156. Although that case was decided under the earlier legislation, the principles apply equally to the current, 2006 Act.

⁴ *Re Whitelaw* HC Hamilton CIV-2004-419-1947, 10 September 2010.

[15] As I have said, the relevant factors include the interests of the bankrupt, the interests of the creditors, the public interest, commercial morality and the conduct of the bankrupt.⁵

[16] So I now turn to my decision and to apply the various factors in this case.

Analysis and decision

[17] I have some sympathy for the position of the applicant. I am sure that as the sole carer for her elderly parents, that life is difficult. However, as Mr Baker submitted, the difficulties that the applicant is experiencing were in fact expressly dealt with by Sargisson AJ in her decision to adjudicate Ms Tao bankrupt.

[18] In relation to those concerns, Sargisson AJ made three points:

- (a) Whatever weight is to be afforded to that factor – concerns about looking after the parents – it remains only one consideration in the overall analysis;
- (b) It is no light matter to handle the financial affairs of another and given her recent track record it is not inappropriate that Ms Tao’s ability to do so is curtailed as a consequence of her adjudication;
- (c) Finally, her parents are not left without options. Health providers can still take steps in the best interests of a customer who is not competent to give informed consent where no other person is entitled to consent on their behalf. Ms Tao also has the right as a relative to seek orders under Part 1 of the Protection of Personal and Property Rights Act, including what Sargisson AJ described as generously wide orders available under s 10.

[19] Despite the concerns that Ms Tao is experiencing, I am not persuaded that it is the public interest or in the interests of the creditors to grant the application for an

⁵ *Re Whitelaw*, above n 4.

early discharge. I am particularly concerned, and I have no doubt that the Body Corporate is equally, that there does appear to be unresolved litigation between the applicant's parents and the Body Corporate and inevitably that the applicant is involved with that to some extent. There appears to be outstanding proceedings in relation to costs and body corporate levies. There is a decision, as I understand it, of the Tenancy Tribunal which Ms Tao's parents are appealing to the District Court, and it appears that the Human Rights Tribunal proceedings, which Sargisson AJ referred to, are not resolved.

[20] As I see it, if I were to accede to the applicant's application there is a real risk of her becoming further involved in the outstanding litigation and I do not see that as in the interests of either the public or the judgment creditor, the Body Corporate.

[21] I also note that the remedies that Sargisson AJ suggested in her decision of the 29 January 2019, are still available to Ms Tao. I also find it difficult to accept that there are not some practical solutions that Ms Tao might be able to avail herself of to deal with the obviously difficult and practical issues she has in assisting her parents to discharge their financial affairs. It is not a matter for me, but I do wonder if the Auckland Community Law Centre might be able to provide some assistance to Ms Tao and possibly also the Citizens Advice Bureau.

[22] As to this application, however, I find that the applicant has failed to discharge the onus to persuade me that there are good reasons for an early discharge of her bankruptcy and accordingly I find that the application should be dismissed.

[23] Before I conclude this judgment there is one further matter that I want to address which out of fairness to Ms Tao I have overlooked, and that is the challenge she makes to the authority of the Body Corporate to defend this proceeding. Ms Tao claims that the Body Corporate has not acted properly – in substance what she says is that the Body Corporate has not made a valid and proper decision to oppose her application. However, I find that that submission is in the circumstances here misguided. There is no evidence before me that the Body Corporate has acted improperly or that Mr Baker somehow lacks proper and valid instructions to oppose the application as he has. That is quite a serious allegation to make and were that to

succeed, the Court expects to be provided with the necessary probative evidence. I have not received any such evidence and I find that there is no merit to that ground as well.

Result

[24] The application by Ms Tao for a discharge from her bankruptcy pursuant to ss 294 and 298 of the Insolvency Act 2006 is dismissed. I award costs to the judgment creditor, the Body Corporate, the third respondent, on a 1A basis, plus disbursements.

Associate Judge P J Andrew