IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-1212

IN THE MATTER OF	THE INSOLVENCY ACT 2006
BETWEEN	DAVID STEWART HENDERSON Applicant
AND	WESTPAC BANKING CORPORATION LIMITED & ORS Respondents

Hearing: 20 & 21 September 2010 and 17 & 18 February 2011

Appearances: Mr D Grove for Applicant
Mr D M Hughes for Respondents
Mr Malarao for Commissioner of Inland Revenue

Judgment: 9 March 2011 at 4 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***9.03.11 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

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Background

[1] Mr Henderson is a property developer who now faces bankruptcy. He has undertaken many developments in the Auckland area, with perhaps the most well-known one being Princes Wharf which includes the Hilton Hotel property. He has also carried on developments in Australia. The principal corporate vehicle by means of which he undertook property development was a company called Kitchener Group Ltd. As a result of debts incurred in Australia, he is facing a bankruptcy application in the Federal Magistrates Court at Sydney. It appears that the debts that he has personally incurred have come about through guarantees that he has given for liabilities owed by the companies through which he has operated his business.

[2] On 8 December 2008, the Commissioner obtained judgment against Mr Henderson for the sum of $3,659,181.53, together with costs and disbursements totalling another $27,378. The judgment was obtained by consent. The judgment related to Mr Henderson's liability under two guarantees given by him to the Commissioner.

[3] On 30 September 2009, the Commissioner was deemed to have served a bankruptcy notice arising from the judgment on Mr Henderson, pursuant to orders for substituted service. The bankruptcy notice was not remedied. On 2 November 2009, the Commissioner commenced a bankruptcy proceeding against Mr Henderson in the High Court at Auckland, seeking an adjudication order. On 5 February 2010, Mr Henderson served a notice of intention to oppose the Commissioner's application.

[4] On 23 February 2010, Mr Henderson filed a proposal at the High Court of Auckland ("the Proposal"). An affidavit was sworn in support of the Proposal.

[5] In summary, the Proposal made provision for payments of $500,000 on each of 30 June 2011, 30 June 2012 and 30 June 2013 to be distributed on a pro rata basis between the creditors partaking in the Proposal who had not waived their right to payment of a dividend. David John Ross was appointed interim trustee.

[6] On 24 March 2010, an initial meeting of creditors was held to consider the Proposal. The first meeting of the creditors on 24 March 2010 was adjourned to enable the trustee to resolve several outstanding issues. The trustee advised that the meeting would be re-convened at a later date at which time the creditors would be able to vote on the Proposal.

[7] A resolution was passed on 26 April 2010 ("resolution") at the second meeting of the creditors, approving the Proposal by a majority. In detail:

(a) The number of creditors voting in favour of the resolution was 24;

(b) The number voting against the resolution was 3;

(c) Percent voting in favour by number was 88.89 per cent;

(d) Percent voting in favour by value of proven claims was 89.58 per cent;

(e) Percent voting in opposition by number was 11.11 per cent;

(f) Percent voting in opposition by value of proven claims was 10.42 percent.

In summary, the total claims against Mr Henderson accepted by the trustee as at the date of the meeting was $105,560,785.41.

[8] The Commissioner voted against the Proposal at the creditors' meeting on 26 April 2010 and opposes this application for approval by the Court.

[9] After the creditors' meeting, additional creditors were recognised although their debts were not before the creditors' meeting of 26 April 2010 and were not part of the Proposal which was voted upon. Specifically, the trustee now accepts that part of Bank of Western Australia Ltd's ("BankWest") claim should have been admitted. Additionally, claims by Bridgecorp Finance Ltd (in liq) ("Bridgecorp") and Downer Construction (New Zealand) Ltd ("Downer") were not admitted.

[10] BankWest opposes the present application before the Court for approval of the compromise which Mr Henderson purportedly entered into with his creditors. The background to the BankWest claim is as follows. BankWest lent money on a development in Sydney, the Woolsheds. Mr Henderson guaranteed advances made for the purpose of this development, including those from BankWest. While Mr Henderson accepted that BankWest advanced funds for that project, he said that the actions of the bank in appointing an administrator lead to a forced sale which caused loss, which he considers ought to be set off against the amount which the bank claimed.

[11] BankWest rejects Mr Henderson's claims and notes they are entirely unsupported by evidence. In addition, it says that these matters have not been substantively addressed in the bankruptcy proceeding before the Australian Court, and that in any case, those issues ought to be dealt with in the Australian jurisdiction. In addition to a dispute about the amount which is owed to BankWest, BankWest opposes approval of the Proposal on the basis that it was not entered into in compliance with the provisions of the Insolvency Act 2006 ("the Act"). That, it says, is a result of the fact that BankWest as a creditor was not notified of the creditors' meetings. These issues are not the only ones that are put forward in opposition to the application for approval of the compromise. Elsewhere in this judgment I will set out a summary of other issues that require resolution.

[12] An important development that has occurred since the second creditors' meeting took place is that two creditors have changed their votes. In summary:

(a) Mrs Henderson (owed $5,631,785.29) voted against the Proposal at the meeting. However, Mrs Henderson is now said to support the Proposal. No explanation has been provided for this change of position. The circumstances in which Mrs Henderson withdrew her opposition are relevant. It appears that she may have reached an agreement with Mr Henderson that could involve a payment. Any such payment could be recovered by the Official Assignee in Mr Henderson's bankruptcy as an insolvent transaction.

(b) Goodall Trustee Services Ltd as trustee of the Number 9 Trust (owed $1,682,692.44) voted against the Proposal at the creditors' meeting and has now allegedly stated that it supports the Proposal.

The stance taken by the creditors who oppose

[13] Creditors generally are entitled to oppose approval under s 333 of the Act. That section provides as follows:

> **333 Court must approve proposal**
>
> (1) After the proposal has been accepted by the creditors, the trustee must, as soon as practicable,—
>
> (a) apply to the court for approval of the proposal; and
>
> (b) send notice of the hearing of the application in the prescribed form to the insolvent and to each known creditor.
>
> (2) The court must, before approving a proposal, hear any objection that is made by or on behalf of a creditor.
>
> (3) The court may refuse to approve the proposal if it considers that—
>
> (a) the provisions of this subpart have not been complied with; or
>
> (b) the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors; or
>
> (c) for any reason it is not expedient that the proposal be approved.
>
> (4) The court must not approve a proposal if it does not provide for the payment, before any other debts are paid, of—
>
> (a) those debts that would have priority under this Act if the insolvent was adjudicated bankrupt; and
>
> (b) the trustee's fees and expenses that are properly incurred by the trustee in respect of the proposal; and
>
> (c) costs incurred by a person other than the insolvent in organising and conducting a meeting of creditors for the purpose of voting on a proposal.

(5) Subsection (4)(a) does not apply to the extent that a creditor waives the priority that the debt of that person would otherwise have had.

(6) When it approves the proposal, the court may correct any formal or accidental error or omission, but must not alter the substance of the proposal.

The Commissioner's grounds of opposition

[14] In summary, the grounds on which the Commissioner opposes the making of the orders are those contained in s 333(3)(b) and (c), which are that:

(a) The terms of the Proposal are not reasonable or are not calculated to benefit the general body of creditors. This is because:

(i) The size of the payments under the Proposal is infinitesimal.

(ii) The Proposal is vague in respect of critical elements.

(iii) The Proposal provides no assurance of payment.

(b) It is not expedient that the Proposal be approved. This is because:

(i) It is in the public interest that Mr Henderson be adjudicated bankrupt so that:

(A) His affairs can be controlled by the Official Assignee; and

(B) The risk of further detriment to the commercial community can be minimised.

(ii) Given the depth of Mr Henderson's indebtedness, it is in the public interest that there be an investigation of his affairs by the Official Assignee.

(iii) There is a possibility that an investigation by the Official Assignee into trusts and parties related to Mr Henderson will uncover assets and/or voidable dispositions and therefore unsecured creditors such as the Commissioner will receive more from Mr Henderson's bankrupt estate than under the Proposal.

(iv) In assessing the expediency of Mr Henderson's Proposal, as a factor in the Court's discretion, the votes of secured creditors, contingent creditors and related parties ought to be given less weight and/or disregarded.

(v) A number of related parties who voted for the Proposal and, will on approval of the Proposal have their rights of action against Mr Henderson compromised, are themselves indebted to the Commissioner and have been placed into liquidation. Consequently, the future liquidators' rights are being compromised and, in effect, the Commissioner's rights are being further compromised.

(vi) Mr Henderson is a risk to the integrity of New Zealand's tax system.

BankWest's grounds of opposition

[15] BankWest relies on those grounds contained in s 333(3)(a), (b) and (c).

(a) It claims that the provisions of the Act have not been complied with.

(i) In particular, BankWest was not served with the Proposal and as a result, Bankwest was unable to participate or vote at the creditors' meeting.

(ii) The Trustee failed to notify all known creditors of the Proposal and the creditors' meeting.

(b) The Proposal is not reasonable and is not calculated to benefit the general body of creditors:

(i) The proposed payments to the creditors under the Proposal are not commercially reasonable.

(ii) There is no assurance of payment to BankWest or other creditors under the Proposal.

(iii) The insolvent is the sole director and shareholder of at least two of the companies that voted in favour of the Proposal (Kitchener Group Ltd and Kitchener Rentals Ltd). Those votes from related parties and secured creditors ought to be disregarded or given less weight.

(c) It is not expedient for the Proposal to be approved.

(i) Approval of the Proposal would prevent BankWest from proceeding with its creditor's petition in Australia and from obtaining a sequestration order.

(ii) It is in the public interest that Mr Henderson be adjudicated bankrupt so that his affairs can be managed by the Official Assignee.

The respondents' claims that the applicant did not comply with the Act

[16] The first issue that should logically be dealt with is the ground of opposition raised by BankWest that it was not served with the notice of the creditors' meeting.

Service of the Proposal on BankWest: BankWest's claim that it did not receive the Proposal

[17] The first issue that should logically be dealt with is the ground of opposition raised by BankWest that it was not served with the notice of the creditors' meeting.

[18] Section 330 provides:

> **330 Provisional trustee must call meeting of creditors**
>
> (1) The provisional trustee must, as soon as practicable after the proposal is filed, call a meeting of creditors by posting to every known creditor at the creditor's last known address—
>
> (a) a notice of the date, time, and place of the meeting:
>
> (b) a summary of the insolvent's assets and liabilities:
>
> (c) a copy of the proposal and particulars of any charge or guarantee:
>
> (d) a creditor's claim form:
>
> (e) a postal vote in the prescribed form.

[19] The loan documents that the Henderson companies entered into set out specific requirements in relation to communications with BankWest. Specifically, for proper service to be effected, the contracts required that documents be personally given to an employee of BankWest:

(a) at the place where the Guarantees were arranged;

(b) any other office nominated by BankWest; or

(c) at the registered office of BankWest.

[20] In *Re Kelly ex p Structured Finance Ltd*,[1] Asher J had occasion to consider the requirement to send notice of the creditors' meeting to the creditor's last known address. Asher J said:[2]

> [T]o comply with subpart 2 every known creditor must be served. It would be unfair for a creditor not to receive fair notice, or not be able to attend the meeting, participate in any discussion and vote on the proposal.

[21] Asher J also said, in the same judgment:

> There was therefore a failure to comply with s 330(1). This failure is a matter that must be taken into account by the Court in exercising its discretion.[3]

The evidence concerning the sending of the notice

[22] Ms Cockerill from BankWest deposed that for present purposes, the guarantee gave options as to how notices were to be given. The guarantees provided that communications to the bank had to be:

(1) Given personally to one of the bank's employees at:

(a) the office where Mr Henderson arranged the guarantees:

(b) any other office the bank nominated; or

(c) the bank's registered office, which was at BankWest Tower, Level 34, 108 St George's Terrace, Perth.

(2) Sent by pre-paid post or electronically (such as by fax or telex) to any of those places.

[23] Ms Cockerill deposes that the notices given in connection with the Proposal which Mr Henderson intended to make were sent by post to a post office box number in Perth. She also deposed that BankWest did not receive the First Notice and therefore did not attend the meeting and also did not attend on the date to which the

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1 *Re Kelly ex p Structured Finance Ltd* [2009] 2 NZLR 785 (HC).
2 Ibid, at [19].
3 Ibid, at [24].

meeting was adjourned and at which the voting took place. She deposed that BankWest only found out about the Proposal when an affidavit was filed in the Australian proceeding.

[24] Mr Henderson said that when the point was reached where he was intending to enter into a compromise, he contacted Ms Cockerill, who was the person at the bank with whom he had been dealing, and advised her that he had a proposal to creditors which he would be sending to her. Mr Henderson said that Ms Cockerill directed him not to send it to her, but to send it to the bank's accountant, Deloitte. Ms Cockerill rejects this evidence.

[25] I accept Mr Henderson's evidence that Ms Cockerill said he could serve the document at Deloitte. Whatever the effect of what Ms Cockerill said was, it could not possibly have amounted to an agreement that Mr Henderson was free to serve the document by yet another means that the contractual document did not contemplate and which Ms Cockerill did not authorise.

[26] However, it was also Mr Henderson's evidence that he did not send the Proposal to Deloitte. In his evidence, Mr Henderson said he sent the letter to the "head office of BankWest". He explained that he (or, I understand, someone on his behalf) rang BankWest and asked for a physical address and a name to send it to, and was told all documents had to be sent to their GPO box. It would appear, but is not explicit, from the evidence that he made this enquiry after his conversation with Ms Cockerill.

[27] He said he "Googled" BankWest and printed out their address, which he said was Perth Head Office, GPO Box Key 237 Perth, WA 6001. I interpolate that the Google search which he produced in evidence shows the BankWest website, where under the subheading "Procurement", it lists that address. It lists a different PO Box address for BankWest "Retail", which I assume is a different department). He then sent the document by registered post to the PO Box number accordingly.

[28] Mr Hughes put it to Mr Henderson in cross-examination that he ought to have known that the Proposal had not in fact reached the bank. Mr Hughes suggested that

the tracking report showed the document arriving at a mail centre in Western Australia and nothing more. He also drew Mr Henderson's attention to the fact that the extract from the website appeared to suggest that the address which Mr Henderson selected to send the document to was in fact the address to which procurement documents were to be mailed. As to the first point, Mr Henderson was adamant that the document was delivered to the address in the tracking report.

[29] Mr Hughes also put it to Mr Henderson that he, Mr Henderson, knew that BankWest did not attend either of the two creditors' meetings which were held at Auckland on 24 March 2010 and 26 April 2010. Mr Henderson agreed that he knew that but he did not see it as his responsibility to get in touch with BankWest and warn them about the Proposal following their non-appearance at the creditors' meetings.

[30] After hearing Mr Henderson give evidence and observing him in the witness box under cross-examination, it is my view that the Court is able to conclude that the notice of the creditors' meeting was in fact delivered to the post office box in Perth to which he sent it. Mr Henderson has satisfied me that the tracking information which he obtained from the Australian Post website in fact relates to the package containing the Proposal that he sent to the BankWest post office box.

[31] I also accept, in the absence of any evidence to the contrary, the evidence of Ms Cockerill that the person who signed the acknowledgement for the document at the address to which he sent it, was not an employee of BankWest.

Did service comply with s 330?

[32] The next issue is whether service at that address was in compliance with the requirements of s 330. That leads to an examination of the term "last known address" in that section. The term does not seem to be defined in the Act itself.

[33] The fact that a creditor's legal rights can be compromised against its will by a resolution of a meeting of other creditors indicates that an opportunity to be at the meeting where such a resolution is passed is highly important. Therefore the receipt of notice which will enable this opportunity is similarly an important right.

[34] It may be assumed that a company like BankWest will consider what service arrangements will best serve the objective of certainty that it gets served with important documents. Having done so, it is entitled to insist on exact compliance.

[35] No doubt the reason why business organisations commonly specify the address at which documents should be served is for reasons of security and efficiency in that complying with a direction to send them to a specific branch or person in the bank will mean that they reach the person who has the necessary knowledge and authority to deal with them promptly.

[36] I also think that it is reasonably clear that the service arrangements, like any other contractual arrangement, can be varied in individual circumstances. There is no need, though, to consider this aspect of the matter further because Mr Henderson elected not to conform with what he said was the requirement that Ms Cockerill directed service of the documents to be at Deloitte's. If necessary, I would have assumed that an officer of the bank with appropriate authority could agree that, notwithstanding what was in the contract, a document could be served elsewhere.

[37] What is not clear is whether Mr Henderson agreed that he would serve the documents at Deloitte's. In the absence of agreement, that would not seem that he was bound to.

[38] An issue that arises in this case is: in the event of non-service at Deloitte's (which I take to be proved), where was service to take place?

[39] Mr Henderson has not established that the agreement concerning where the documents were to be served was in some way varied so that service could take place at some specified place other than that which was, admittedly, agreed to in the guarantees, and that he served the documents at the new address. In any case, he did not elect to serve the documents at any varied address.

[40] The onus is on Mr Henderson to establish that he served the documents in accordance with his contract. He has not satisfied me that he accepted a variation to the contract in that behalf. He did not say that he accepted a change, and his actions

in immediately attempting to serve the documents at an address other than at Deloitte's point away from any such agreement.

[41] That leaves only the agreed addresses as specified in the contract. While the contract authorised him to send a document by post "to any of those places", which included sending the notice to the bank's registered office at Level 34, 108 St George's Terrace, Perth, the option that he actually adopted was not one that was open to him, namely, sending the document to a post office box of the bank in Western Australia.

[42] In my view, there has been a failure to comply with the provisions of the Act.

Informal notice given that application to be made

[43] The next issue concerns the fact that Mr Henderson's evidence establishes that a draft copy of the intended Proposal was actually sent to BankWest by way of information to keep them informed of what was pending. In my opinion, the procedures under the Act and regulations will either be complied with or they will not. I do not understand that it is contended that the provision of the draft actually complied with the Act and regulations, but rather, that it bears upon the discretionary elements that the Court must weigh up when deciding whether or not to approve the compromise. There was a failure to serve a known creditor and the effect of that failure needs to be assessed. That I will do further below, but it is necessary next to say something about the factual consequences of the omission.

[44] The result was that BankWest did not attend the creditors' meeting. I am satisfied that if BankWest had been validly served, it would have attended the creditors' meeting and voted against the Proposal.

Results of failure to serve

[45] The total creditors by value voting at the meeting was $105,560,785.41. Of these, creditors holding debts of $94,559,748.15 voted for the Proposal. Creditors with debts totalling $11,001,037.26 voted against. The trustee recorded that the Proposal had been carried because a percentage of 89.58 per cent of the creditors by value voted for the Proposal and 10.42 per cent by value voted against it. In

numerical terms, 88.89 per cent voted in favour and 11.11 per cent against. Accordingly, the required majority in number and three-quarters in value of the creditors voted in support of the Proposal.

[46] Before it can be determined what effect a vote by BankWest would have had, it is necessary to determine the quantum of debt it held on which its voting rights would have been based.

The quantum of BankWest's debt

[47] It is BankWest's claim that at the time of the creditors' meeting, the amount of the debt which Mr Henderson owed to it was the sum of AUD $27,951,556.64. This has been converted at an exchange ratio of 1.2 to a resulting New Zealand dollar amount of $33,541,867.97. That means that if BankWest had taken part in the voting on the basis that its debt was of that value and voted against the proposal, the percentage by value of those supporting the Proposal would have fallen below the required 75 per cent (it would have been 68 per cent).

[48] But for Mr Henderson, Mr Grove in his thorough submissions made the point that there were aspects of the BankWest loan which make it questionable whether the figure claimed was actually the figure owed. Mr Grove told me that the amount of the original advance by BankWest to Mr Henderson was A$23,800,000. This is the funding that BankWest advanced to enable the Kitchener group to undertake the Woolsheds development. He said that the evidence established that the property for which BankWest provided funding was sold by the administrators, appointed by BankWest, for A$13,010,000 on 24 December 2009. Mr Grove also said that prior to BankWest lending the funds, a professional valuation of the property was obtained from Jones Lang LaSalle. The value arrived at was A$35,000,000. The valuation was given as at 6 October 2008. In the course of just over one year, the value reduced to A$13,010,000, that is, a reduction of almost A$22,000,000. Importantly, the administrators marketed and sold the building within two weeks of their being appointed. Mr Grove said that significant concerns are therefore raised by Mr Henderson as to:

(a) The initial valuation (addressed to BankWest); and

(b) The method of sale.

[49] Mr Henderson deposed that the purchaser of the property for A$13,010,000 has re-listed it for A$22,000,000. Mr Henderson's calculation of the amount due to BankWest, assuming the property had been properly marketed and sold for A$18,000,000, is that the sum due would be A$7,623,883.88. Mr Grove also said that this is an issue that cannot be resolved in this forum. It will only be relevant if the Proposal is approved and when the trustee makes a detailed investigation and determination of the quantum to participate in the Proposal.

[50] As I understand it, Mr Henderson's position is that while there is no dispute about the debt that the bank initially advanced to Kitchener No. 1 Pty Ltd ("Kitchener 1"), he (Mr Henderson), as guarantor, must be given credit for a claim which the borrower has against BankWest arising out of the circumstances of the forced sale of the Woolsheds property. No such claim has been brought to this point. Nor has one been formulated. But it would seem that what Mr Henderson has in mind is an equitable set-off against the amount which he owes to BankWest. One question that arises is whether a consideration of this kind would have affected the voting at the creditors' meeting.

[51] Mr Henderson also queries how the original amount of the advance could have risen to the point where BankWest claims that the sum owing is approximately A$28 million.

[52] As to the last point, Ms Cockerill has deposed that the increase in the quantum of the BankWest claim is due to the addition of interest charges, et cetera. Her deposition has not been challenged and she was not cross-examined.

[53] As to the drop in value, Mr Hughes for BankWest made the following points. First, the valuation that was obtained by BankWest on 31 March 2009 from Colliers International estimated the value of the property at A$16 million, in comparison to the A$13 million actually obtained on forced sale. That report makes it clear that the property development environment had changed adversely. Rates of return for this type of property had come down. There was also reference to asbestos contamination issues in relation to the sites. The report spoke of the current "uncertain times" bringing with them the risk of sudden adverse changes in value.

[54] Mr Hughes also reminded me that the BankWest facilities contained "no set-off" clauses which would prevent Kitchener 1 from claiming an abatement of the debt on the grounds advanced. He also pointed out that BankWest had not sold the property. That step had been taken by the administrators of the company, who had been appointed on 5 November 2009. In those circumstances, it is difficult to understand how BankWest could be culpable for any shortcomings in the sale process.

[55] In the New Zealand context, the Court of Appeal considered in the *Apple Fields Ltd v Damesh Holdings Ltd*[4] judgment, the extent of the duty under the predecessor to s 176 Property Law Act 2007. The Court noted that the purpose of that section is:[5]

> [T]o protect the vulnerability of those to whom the duty is owed, arising from the absence of any incentive for a mortgagee to obtain the full value of the property over and above the sum needed to clear the mortgage debt.

When there already exists such an incentive here (as the sum obtained was insufficient to clear BankWest's debt), it is less likely that the duty will be found to have been breached.

[56] In my view, any claim for a set-off arising from an alleged breach of the mortgagee's duty is no more than a bare possibility. BankWest is able to point to reasons which could explain the fall in value. It is doubtful that it would be open to Mr Henderson that any duty was breached and if liability rested with anyone, it would be with the administrators. Finally, there is the difficulty about the "no set-off" clause in the contract.

[57] But it is important to keep in mind the alleged breach's relevance to the present application. The allegations relate to the issue of whether BankWest, had it been given notice of the creditors' meeting, might have been expected to prevail in defeating the debtor's Proposal.

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4 *Apple Fields Ltd v Damesh Holdings Ltd* [2001] 2 NZLR 586 (CA).
5 Ibid, at [56].

[58] That brings me to the next issue which is this. Mr Grove's position was that calculating the extent of the voting rights that BankWest would have been able to deploy at the meeting requires the Court to come to a view on the issue of whether the value of BankWest's debt is arrived at as a net figure, taking into account the value of securities held. Mr Grove's submission was that the realisation value of the Woolsheds properties needed to be taken into account.

[59] The view I take on that issue is that what the Court is attempting to do is to reconstruct what might have happened at the creditors' meeting had BankWest and Downer been given notice. It seems to be reasonably clear that in the context of Part 5 of the Act, the creditor is able to participate to the extent of the gross value of the debt. In other words, the value of securities held is ignored.[6]

[60] The relevant creditors' meeting in this case took place on 26 April 2010. The settlement statement issued following the realisation of the Woolsheds properties shows that settlement occurred on or about 27 April 2010. My conclusion is that at the date of the creditors' meeting, BankWest would have been able to exercise the relevant proportion of the votes available to it based upon Henderson's indebtedness of approximately A$28 million.

[61] The next consideration is that had BankWest actually attended the creditors' meeting, there may have been a dispute at the creditors' meeting about the basis upon which BankWest could vote. That is to say, the quantum of the claim may have been in issue. There does not seem to be any express statutory provision which directs how disputes as to quantum are to be resolved. Regulation 32 of the Insolvency (Personal Insolvency) Regulations 2007 gives the provisional trustee power to decide whether a claim may be admitted or rejected. The regulation provides:

> **32 Admission or rejection of claims for purposes of voting**
>
> (1) The provisional trustee has the power to admit or reject a claim for the purposes of voting at a creditors' meeting, but his or her decision is subject to appeal to the Court.

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6 *Guest v Duffy* [1991] 1 NZLR 183 (CA).

(2) If the provisional trustee is uncertain whether a claim may be admitted or rejected, he or she must allow the creditor to vote subject to that vote being declared invalid in the event of the claim being rejected for purposes of voting.

[62] As the regulations make clear, if the provisional trustee is uncertain about that matter, the correct procedure is to allow the creditor to vote subject to rights of appeal to the Court. It may be that the terms on which that power is conferred extend to the trustee being authorised to reject a claim at a certain level, but accept a claim at a reduced level. Alternatively, there may be an implied power to resolve issues of quantum. In any event, if a trustee made an erroneous decision about the quantum of the debt, there is little doubt that his or her decision could be reviewed by a court on the grounds that he or she had not complied with the relevant statute. All this leads to the conclusion that the correct approach for the trustee to take at the meeting would have been to accept the BankWest claim, leaving the parties to litigate over the issue subsequently if that was their wish. For the purposes of this judgment it must be assumed that the trustee would so act.

The Downer debt

[63] Mr Hughes advised me that he appeared as well for Downer. Downer had filed a notice of opposition dated 17 May 2010 to the present application. It is not necessary to discuss all the grounds set out in the notice of opposition but they include that Downer was not notified of the adjourned date of the creditors' meeting, being the date at which the creditors voted in favour of Mr Henderson's Proposal.

[64] Mr Grove was of the view that because Downer had not filed substantial affidavits on the central matters in dispute, its submissions should not be given weight. Downer has, as I have already noted, filed a notice of opposition and at the least one affidavit.

[65] I am unable to accept Mr Grove's submission. Downer has complied with rr 7.24 and 7.25 of the High Court Rules and is therefore entitled to be heard.

[66] There is no dispute that while Downer received notification of the March creditors meeting, it was not given notice of the creditors' meeting on 26 April 2010. Downer's debt was $3,530,285 dollars. This too was a material lack of compliance with the requirements of Part 5. Its cumulative effect when considered together with the breaches of the Act in respect of the BankWest debt must be taken into account when determining if approval should be granted to the Proposal.

Other alleged shortcomings with voting process

[67] Besides those I set out above, there were other criticisms made of Mr Henderson's compliance with the requirements of the legislation. These include that claimants were included in the Proposal who were not disclosed to creditors prior to the creditors' meeting. Because of the view that I take concerning the failure to notify BankWest and Downer, there is no requirement to go into the various issues.

Position of the IRD

[68] Because of the view that I have taken of the evidence concerning the failure to serve BankWest, and the significant failure to comply with the provisions of Part Five, it is not necessary for me to consider the submissions by Mr Malarao on behalf of the IRD.

Conclusion on failure to comply with requirements as to service

[69] It is a matter of central importance to the Act's scheme that the requisite majority be obtained at the creditors' meeting.

[70] The judgment in *Guest v Duffy*[7] includes the following observations in respect of the last stage at which the approval of the Court is sought:

> A proposal approved by the Court is binding on all the creditors whose debts are provable under Part XV and are affected by the terms of the proposal (s 143(6)). If precluded from voting at the meeting of creditors, the creditor would have to go to the Court and argue at the hearing of the trustee's application for approval of the proposal that the terms of the proposal were not

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7 *Guest v Duffy*, above n 6, at 186.

> reasonable or were not calculated to benefit the general body of creditors (s 143(3)(b)) — or possibly under (c), that it was not expedient that the proposal should be approved. The statute envisages that a proposal should not reach the Court unless the requisite majority approval has been obtained and s 143 itself is designed to deal with those cases where, notwithstanding acceptance by sufficient creditors, the Court considers approval should be refused: it is not intended as an opportunity for reactivating the acceptance process.

[71] In deciding applications under Part 5, the Court is concerned with the number and value of "creditors" who attend a creditors' meeting. Whether they are secured or not is irrelevant.[8]

[72] My overall conclusion is that had BankWest been served with the Proposal as it was entitled to be, and hereafter attended the creditors' meeting, it would have been able to defeat the Proposal. The position is even more certain if one includes the Downer debt. This is therefore a case where the non-notification of those two creditors deprived them of the ability to defeat the Proposal. They did not just lose an opportunity to influence how the vote turned out by contributing to discussions at the creditors' meeting.

[73] The Court has a discretion under s 333 to decline approval on three discrete grounds. The legislature's intention was that in the appropriate case, the Court may decline approval because the applicant debtor has failed to comply with the procedure under the subpart in question: s 333(3)(a). Where, as here, it is clear that had the non-notified creditor attended the meeting, it would have been able to defeat the Proposal, then strong grounds will have been made out for declining approval. The first step in the three-stage process which may culminate in Court approval has not been successfully negotiated. The legislative expectation that the matter will not come before the Court until the requisite majority has voted at the creditors' meeting (which refers to a genuine majority of the kind envisaged under the Act) has not been met.

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8 Ibid, at 187.

[74] As Thorp J said in *Re Moyle ex p Tanner Sawmills Ltd*:[9]

> [S]ection 143(1) [which is similar to the current s 333(1)] makes it plain that acceptance of a proposal by the creditors is a condition precedent to the making of an application to the Court for its approval of the compromise.

[75] My decision is that the application for approval must be dismissed. I make an order accordingly. The parties should confer on the issue of costs to see if agreement is possible. If it is not, they should file memoranda as follows:

a) Respondents within 14 days;

b) Applicant 14 days thereafter.

J.P. Doogue
Associate Judge

9 *Re Moyle ex p Tanner Sawmills Ltd* HC Auckland B721/92, 21 September 1992 (Thorp J) at 6.