

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

CIV 2010-419-1174

UNDER the Insolvency (Cross-border) Act 2006

BETWEEN STEVEN JOHN WILLIAMS
Applicant

AND ALAN GERAINT SIMPSON
Respondent

Hearing: 15 September 2010 (in chambers)

Counsel: K J Crossland and P J Morris for Applicant
No appearance by, or on behalf of Respondent

Judgment: 17 September 2010

JUDGMENT OF HEATH J

This judgment was delivered by me on 17 September 2010 at 12.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Stace Hammond, PO Box 19101, Hamilton

Introduction

[1] On 7 September 2009, Mr Simpson was adjudged bankrupt by the High Court of England and Wales (the English bankruptcy), on the petition of the Society of Lloyd's (Lloyd's). With effect from 12 January 2010, Mr Williams was appointed as trustee of Mr Simpson's bankrupt estate. No bankruptcy proceedings have been commenced in New Zealand.

[2] Mr Williams seeks an order from this Court, recognising the English bankruptcy proceeding as a foreign main proceeding.¹ Before service of the application for recognition on Mr Simpson, Mr Williams seeks interim relief.² The interim relief sought is in the form of a warrant to search premises and to seize gold and silver bullion that Mr Simpson is allegedly hiding from his creditors.³

The English proceedings

[3] Mr Simpson is a psychiatrist by profession. He practised, at times, from premises in Harley Street, London. He was also a Lloyd's Name. On 11 March 1998, Lloyd's obtained judgment against him in the sum of £163,078.92 (the English judgment).

[4] There were funds to which Mr Simpson may have been entitled that were held in the Isle of Man. On 24 February 2004, the English judgment was registered in the Isle of Man, on the basis that Mr Simpson had until 5 April 2004 to apply to set aside the registration. No such application appears to have been made.

[5] Subsequently, application was made to the High Court of the Isle of Man (the Manx Court) for the judgment to be executed. Around that time, proceedings brought by a number of Names (in which Mr Simpson was involved) against Lloyd's, based on the tort of misfeasance in public office, were working their way

¹ Insolvency (Cross-border) Act 2006, Schedule 1, art 15.

² Ibid, Schedule 1, art 19.

through the English Courts. That claim was dismissed by the High Court⁴ and an appeal against that judgment was unsuccessful.⁵

[6] An order granting execution of the registered judgment was made by the Manx Court on 20 June 2005.⁶ There is no evidence to indicate the amount of money, if any, that Lloyd's recovered through the Manx proceedings.

[7] In 2009, Lloyd's brought a petition to the High Court of England and Wales to have Mr Simpson adjudged bankrupt. The petition was brought over 11 years after the original judgment in favour of Lloyds was entered. By the time the petition was filed, the amount owing was £242,920.29, including accrued interest and costs. An order of adjudication was made on 7 September 2009.

Administration of the English bankruptcy

[8] After his adjudication, Mr Simpson provided a statutory declaration to the Official Receiver answering questions to assist in the administration of the bankrupt estate. That document is dated 7 October 2009. It included an acknowledgement by Mr Simpson that he had read s 5 of the Perjury Act 1911 (UK) and was aware that providing false information deliberately to the Official Receiver was a criminal offence.

[9] Subsequently, in correspondence with Mr Williams, Mr Simpson confirmed the accuracy of the information he supplied to the Official Receiver. For present purposes, I refer to the following information:

- a) Although in the United Kingdom when he signed the declaration, Mr Simpson disclosed his "home address" as 35 Ann Street, Hamilton, New Zealand.

³ The relief sought is based on that available in a bankruptcy in New Zealand: see ss 150 and 151 of the Insolvency Act 2006.

⁴ *Society of Lloyd's v Henderson and Ors* [2005] EWHC 850 (Comm). Judgment was delivered on 11 May 2005; for a description of Mr Simpson's role in this litigation see para 4.

⁵ *Stockwell v Society of Lloyd's* [2007] EWCA Civ 930. The appeal was dismissed on 27 July 2007.

⁶ *The Society of Lloyd's v Simpson* High Court of Justice of the Isle of Man, Common Law Division, SJ 2004/10, 20 June 2005 (Deemster Doyle).

- b) Mr Simpson had no personal assets of any significance. While bank accounts were disclosed in three different jurisdictions (New Zealand, Scotland and the Isle of Man), minimal amounts were held to his credit on those accounts.
- c) The property at Ann Street, Hamilton was leased to Mr Simpson by the BV Adams Trust. The rental was disclosed as \$NZ808 per month; \$9696 per annum.
- d) Two sources of income were disclosed. The first was from a pension plan in the United Kingdom, payments for which began in 1998.⁷ The monthly amount of the pension he received was £103.80; £1245.60 per annum. The second was a net New Zealand Superannuation payment of \$NZ1284 per month; NZ\$15,408 per annum. The exchange rate quoted in respect of all amounts stated in New Zealand dollars was \$NZ2.15 = £1.00.
- e) Mr Simpson did not own a car but had the use of one from the BV Adams Trust “to drive [his] daughter [aged 12 years] to school”.
- f) Seven creditors were disclosed, the most significant of which was Lloyd’s. That was described as having been incurred in “2009” and an “alleged debt for insurance underwriting”. A debt to the United Names Organisation (a group that defended claims by Lloyd’s against Names and attempted to bring misfeasance in public office proceedings against Lloyd’s)⁸ of £85,000 was also disclosed, covering the period between 1996 and 2009.
- g) The only debt outside the United Kingdom was in relation to a “potential income tax liability” in New Zealand, for the period between 1999 and 2009. The amount was stated to be “unknown”.

⁷ Mr Simpson previously disclosed that his date of birth was 11 September 1942, meaning that during 1998 he was either 55 or 56 years old.

⁸ See *Society of Lloyd’s v Henderson and Ors* [2005] EWHC 850 (Comm) at paras 1-8.

- h) Monthly household expenses were said to be \$NZ1548; \$NZ18,576 per annum.
- i) Mr Simpson said that he had lost about £1980 gambling, in the two years prior to his bankruptcy.
- j) Mr Simpson said he had been unemployed for 12 years, his last employer being Hong Kong University in 1993. He declared that he had “retired” in 1998, consistent with the time at which pension payments began to be made to him in the United Kingdom.

[10] I have reviewed correspondence between Mr Williams and Mr Simpson that took place following Mr Williams’ appointment as trustee in bankruptcy, on 12 January 2010. It is unnecessary to recount the correspondence exhaustively. Letters from Mr Simpson create an air of co-operation, on first reading. More detailed consideration of the contents of the correspondence paints a different picture. As will be seen, questions do arise as to the veracity of particular information supplied in response to questions from Mr Williams.

[11] The correspondence began on 10 February 2010, when Mr Williams sent forms of authority for Mr Simpson to sign to enable him to make inquiries about assets and liabilities. The letter was written to Mr Simpson at his New Zealand address in Hamilton. Responses were received from that address until 1 July 2010, when Mr Simpson wrote to Mr Williams advising a “change of address until further notice” to “The Old Surgery, 18 Heath Road, Petersfield”, Hertfordshire. Thereafter, Mr Simpson corresponded from the United Kingdom. The last letter produced from Mr Simpson is dated 26 August 2010.

[12] While signing particular forms to enable Mr Williams to make inquiries (for example directed to Her Majesty’s Inspector of Taxes), Mr Simpson declined from the outset to sign a form authorising Mr Williams to obtain information from “all third parties worldwide who hold details” of his affairs. In a letter dated 29 March 2010, Mr Simpson said:

While I am conscious of the need to co-operate with you and of the need for you to make necessary inquiries regarding my affairs in relation to matters relevant to the bankruptcy as a result of your appointment in England, I am uncertain whether co-operation requires me to sign such an open ended and wide authority. I say this not because I do not wish to assist you, but rather as a matter of principle and from the academic viewpoint that I am concerned to protect my own privacy rights and do not know whether you are entitled to obtain such a worldwide authority in respect of unnamed third parties

[13] By letter dated 7 May 2010, Mr Williams advised Mr Simpson that “upon the making of the Bankruptcy Order against [him] on the 7th September 2009, all assets worldwide [vested] inside the bankruptcy estate which [Mr Williams] now [controlled]”. Mr Williams added that a request in respect of individual entities on each occasion information was required would only delay “administration and the conclusion of” the bankrupt estate.

[14] In response, Mr Simpson advised, by letter dated 7 June 2010, that he had made his own inquiries and had “received very clear advice that [he was] under no obligation to sign [the worldwide authority] and that [he] should only sign authorities which [were] directed to specific entities”. Mr Simpson reiterated this was not reflective of an unco-operative stance but one by which valid privacy concerns could be addressed. That viewpoint was reiterated later in a letter of 15 July 2010, after Mr Simpson returned to the United Kingdom.

[15] Some correspondence after Mr Simpson returned to the United Kingdom is relevant to the present application. In a letter dated 28 July 2010,

- a) Mr Williams asked Mr Simpson directly to confirm whether he had previously traded in any gold or silver purchases which had subsequently been disposed of by him.
- b) Mr Williams stated that he understood the Petersfield address was that of a “Citizens Advice Bureau” and asked Mr Simpson to confirm his true residence in the United Kingdom, “by return”.

[16] On 12 August 2010, Mr Simpson responded to both queries, stating:

- a) He had not disposed or traded in silver or gold, so he had no details to send to Mr Williams.
- b) He had sought help from the Citizen's Advice Bureau because he was of "no fixed abode" and needed help with a "home application" and "Pension credit". He said that the Petersfield address remained his "only reliable address".

[17] In his letter of 27 August 2010, Mr Williams raised two other points:

- a) Despite Mr Simpson's position that he had not been a beneficiary of the BV Adams Trust for many years, Mr Williams asked him to provide further details of a loan from the Bank of New Zealand that took an "over-riding charge" over a mortgage in favour of Sennex Ltd,⁹ in respect of the property at 35 Ann Street.
- b) Mr Simpson was asked to confirm whether Sennex Ltd had traded in any gold or silver, in the event that the company was known to Mr Simpson.
- c) Mr Simpson was asked whether gold or silver trading had occurred through the BV Adams Trust.

[18] No reply to the letter of 27 August 2010 has been put into evidence. I infer that none has been received by Mr Williams.

The Ann Street property

[19] Records held by the Registrar-General of Land in New Zealand reveal that the original proprietor of the property at 35 Ann Street was Carrick John Clough. A search of the title identifies the following interests:

- a) A mortgage in favour of Sennex Ltd, produced on 20 May 1998.

⁹ The existence of a company of this name is in doubt: see para [32](f) below.

- b) A transfer of the property to Mr Clough and Mr Simpson jointly, produced on 25 September 2003.
- c) A mortgage to the Bank of New Zealand, produced on 25 September 2003.
- d) A priority instrument giving priority to the Bank of New Zealand mortgage over the Sennex mortgage, produced on 25 September 2003.
- e) A transfer of the property to Carrick John Clough and Victoria May Mann (the latter being a solicitor in Hamilton), produced on 30 October 2007.

[20] The mortgage in favour of Sennex Ltd was executed on 5 March 1998, by Mr Clough. The mortgage recorded that the BV Adams Trust had been created by a will on 20 November 1958 and that Mr Clough gave the mortgage “solely in his capacity as trustee with the intention of binding himself and his successor as trustee only to the extent that the assets of the trust are available or would (but for the default of the mortgagor” have been available, ... to meet his liability under” the mortgage.

[21] The mortgage in favour of the Bank of New Zealand has a priority amount of \$340,000 but, as is customary, is open-ended in relation to amounts actually secured. That mortgage was signed by both Mr Simpson and Mr Clough, on 18 September 2003. On the copy of the mortgage document disclosed to me, there is no similar provision in relation to any limitation of trustee liability, though (for the purposes of the present application) I infer the same limitation exists.

The application for interim relief

[22] The application for interim relief first came before me, on a without notice basis, on 10 September 2010, in Auckland. The application was referred to me as I was rostered to sit on circuit in Hamilton over the following three weeks.

[23] At that stage, I declined the application, which asked the Court to authorise a search of the premises at 35 Ann Street, for the purpose of ascertaining whether, as Mr Williams had been led to believe by informers, approximately \$US3,000,000 in gold and silver bullion was stored in three safes at that property. Mr Williams deposed, based on information from the anonymous informants, that he had fears Mr Simpson may dispose of the bullion through a precious metal dealer in New Zealand, meaning that the proceeds of sale could be dissipated to the detriment of Mr Simpson's creditors. While Mr Williams' affidavit was largely based on hearsay, evidence of that nature is admissible on interlocutory applications in New Zealand.¹⁰ The hearsay nature of the evidence goes to reliability and weight.

[24] On the basis of the evidence before me, I was not prepared to make an invasive order of that type but adjourned the application so that I could see counsel in chambers in Hamilton on 13 September 2010. Following that meeting, I gave counsel an opportunity to provide further evidence on which I would decide the application. I indicated that I would need better evidence of the basis on which Mr Williams believed a search warrant was required. As a result, much of the evidence to which I have already referred came to light.

[25] After producing the additional evidence, Mr Crossland and Mr Morris appeared before me in chambers on 15 September 2010. Mr Currie, the Official Assignee at Hamilton who had provided two affidavits in support of the interim relief application, also attended that hearing, in case I had any questions to put to him on the information gathered. As it happened, I did not seek any additional information.

[26] Mr Crossland, for Mr Williams, submitted that provisional relief, through the issue of a search warrant to be executed under the authority of an experienced Official Assignee, Mr Currie, and members of the New Zealand Police, should be issued. He made helpful submissions on the purpose of the Act and the extent of the jurisdiction to grant interim relief.

¹⁰ High Court Rules 1985, rr 7.30 and 9.76. See also *Makin v Hayward* (1991) 5 PRNZ 139 (HC).

[27] Having heard from counsel, I indicated that I wished to consider the factual and legal issues raised further and that I would give a judgment in writing within the next couple of days. I am giving full reasons for judgment on a without notice application because this is the first occasion on which the scope of the interim relief provision has been considered in New Zealand and there is a need for those who may be affected by any order to understand fully the basis on which it has been granted, so that they may be advised of what steps they should take.

[28] On 16 September 2010, while judgment was reserved, I gave leave for two further affidavits to be filed in support of the interim relief application.

[29] In summary form, the order sought by Mr Crossland, for Mr Williams, involves:

- a) The issue of a search warrant,¹¹ directed to the Official Assignee at Hamilton (Mr Currie)¹² and a Deputy Assignee (Ms McCarthy) and at least one member of the New Zealand Police authorising them to enter and search 35 Ann Street, Hamilton,
 - i) to seize and take possession of any bullion or
 - ii) to seize and take possession of safes or other receptacles in which bullion is stored,
 - iii) to take any bullion to a secure location in a vault at Westpac Banking Corporation in Auckland and
 - iv) to have the process of search and seizure fully recorded by video; and

¹¹ A search warrant is sought on grounds analogous to those set out in ss 150 and 151 of the Insolvency Act 2006, in which authorises the High Court to issue a search warrant to the Official Assignee or any other person “if there is reason to believe that any relevant property is concealed in a locality”: s 150(1).

¹² Under the Insolvency Act 2006 (NZ) the Official Assignee is the statutory officer who administers all bankruptcies in New Zealand. Official Assignees are located at various cities within New Zealand. All property of a bankrupt vests in the Official Assignee: s 101 of the Insolvency Act 2006.

- v) to seize documentation and computer records relating to any property Mr Simpson may own that can be used to satisfy debts owed by him.
- b) Standard orders requiring suspension of Mr Simpson's right to transfer, encumber or otherwise dispose of his assets pending further order of the Court and entrusting the administration or realisation of his assets in New Zealand to the Official Assignee at Hamilton.¹³
- c) Providing the right for the Official Assignee to examine Mr Simpson and any other person whom he may deem appropriate about the property affairs, rights, obligations, liabilities, conduct and dealings.¹⁴

[30] Directions are also sought in relation to the hearing of the application for recognition.

The evidential basis for the interim relief application

[31] For the purposes of the present application, I find, arising out of Mr Simpson's declaration to the Official Receiver and his correspondence with Mr Williams, that:

- a) Although he carried on business as a medical practitioner in the United Kingdom, Mr Simpson has spent a good deal of his time in New Zealand, at least since 1993.
- b) Mr Simpson owns no property of substance and has limited means of supporting himself. It is likely that substantial funds were committed to defence of proceedings brought against him by Lloyd's in England and the Isle of Man and in the proceedings brought by Names, which

¹³ Insolvency (Cross-border) Act 2006, Schedule 1, art 19(1)(b).

¹⁴ Ibid, arts 19(1)(c) and 21(1)(d).

were subsequently dismissed by the High Court and Court of Appeal.¹⁵

- c) Mr Simpson appears to have engaged in limited activity that could accrue income, at least since his engagement at the University of Hong Kong which ended in 1993. He did not begin to live off his pension until 1998.
- d) Mr Simpson denies having traded in gold and silver.
- e) Mr Simpson has not been prepared to sign a worldwide authority to obtain information, in favour of Mr Williams.
- f) Mr Simpson was unable (or, more likely, unwilling) to nominate a residential address where he lived in England, from about 10 July 2010.

[32] In addition to the correspondence and documentation relating to the Ann Street property and the prior proceedings with Lloyds that have been produced by a legal secretary at the firm of solicitors instructed by Mr Williams, evidence has been provided that that indicates:

- a) Mr Simpson arrived back into New Zealand on 12 September 2010, on a Thai Airways flight.
- b) Mr Simpson has been sighted recently in New Zealand; in particular, on 13 and 14 September 2010 driving a Holden Commodore vehicle in the vicinity of the Ann Street property.
- c) Through Sennex Ltd, Mr Simpson has been a client of a firm dealing in currency bullion and derivatives for some time.

¹⁵ *Society of Lloyd's v Henderson and Ors* [2005] EWHC 850 (Comm) and *Stockwell v Society of Lloyd's* [2007] EWCA Civ 930.

- d) Significant open contract dealings occurred in the period between September 2009 and March 2010, after the commencement of the English bankruptcy.
- e) An estimated value of bullion that can be linked to Mr Simpson (or persons associated with him) is over \$NZ1,000,000.
- f) Although Sennex Ltd obtained a mortgage over the Ann Street property in 1998, no company of that name has been located on the New Zealand register. While a company of that name has been found on the English register, it was not incorporated until 2004. The priority instrument shows that Mr Clough executed that document on behalf of Sennex Ltd.¹⁶
- g) Since 11 September 2001, the export of precious metals has been made more difficult. Therefore, while the risk of moving any assets within New Zealand remains high (if the interim relief application were made on notice) the chance the property might be shifted out of the jurisdiction is less likely.

Should interim relief be granted?

(a) The scheme and purpose of the Act

[33] The Act was passed to implement the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 30 May 1997 and approved by the General Assembly of the United Nations on 15 December 1997, in a form amended and supplemented to apply to New Zealand.¹⁷ The Act provides a framework to facilitate insolvency proceedings when a person is subject to insolvency administration in one country but has assets or debts in another.¹⁸

¹⁶ See para [19](a) above.

¹⁷ Insolvency (Cross-border) Act 2006, s 3(a).

¹⁸ Ibid, s 3(b)(i).

[34] A “foreign proceeding”, for the purpose of the Act, is “a collective judicial or administrative proceeding in a foreign State, ... pursuant to a law relating to insolvency (whether personal or corporate) in which the assets and affairs of the debtor are subject to control or supervision by a judicial or other authority competent to control or supervise that proceeding, for the purpose of reorganisation or liquidation”.¹⁹ The English bankruptcy is said to fall within this definition, for recognition purposes.

[35] Generally speaking, legislation in New Zealand is interpreted on a purposive basis. Section 5 of the Interpretation Act 1999 requires the Court to interpret a statute “from its text and in light of its purpose”. However, in interpreting the Act, the Court is authorised also to have regard to “any document that relates to the Model Law on Cross-border Insolvency that originates from UNCITRAL or its Working Group for the preparation of the Model Law.”²⁰ That provision does not limit the requirement to interpret the terms of the Model Law having regard “to its international origin and to the need to promote uniformity in its application and the observance of good faith”.²¹

[36] The terms of the Model Law are reproduced in Schedule 1 to the Insolvency (Cross-border) Act 2006 (the Act).²² The primary document to which reference may be made to gain insight into the purpose of particular provisions of the Model Law (and, therefore, Schedule 1 to the Act) is the Guide to Enactment of the Model Law (the Guide to Enactment), published by the United Nations in 1999.²³

[37] There are two aspects of cross-border co-operation. First, the Model Law is designed to provide effective mechanisms to deal with cases of cross-border insolvency to promote (among other things) co-operation between Courts and other competent authorities of New Zealand and foreign States involved in cases of cross-

¹⁹ Ibid, s 4, definition of “insolvency proceeding”.

²⁰ Ibid, s 5(1)(b).

²¹ Ibid, s 5(2) and art 8 Schedule 1.

²² Ibid, s 7.

²³ The Guide to Enactment is reproduced in an Appendix to the Law Commission’s Report recommending adoption of the Model Law in New Zealand: see *Cross-Border Insolvency: Should New Zealand Adopt the UNCITRAL Model Law on Cross-Border Insolvency?* NZLC R 52 (1999) at p 115 and following.

border insolvency and to protect and maximise value of the debtor's assets.²⁴ In doing so, Schedule 1 to the Act (the adapted Model Law) specifies the powers of the Court. Second, there are cases in which an overseas Court may request the High Court of New Zealand to act in aid of and to be auxiliary to that Court in relation to the insolvency proceeding. In those circumstances, this Court "may exercise the powers that it could exercise in respect of the matter if it had arisen within" New Zealand.²⁵ This morning, Mr Crossland provided to the Registrar a copy of a Letter of Request issued by the High Court of Justice of England and Wales asking this Court to act in aid of and to be auxiliary to its jurisdiction in respect of the English bankruptcy. That request engages s 8 of the Act, entitling this Court to exercise the powers it could have exercised in respect of a New Zealand bankruptcy.

[38] Schedule 1 applies when assistance is sought in New Zealand by a foreign representative in connection with a foreign proceeding.²⁶ In this context, the term "foreign proceeding" is defined:²⁷

foreign proceeding means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;

[39] For recognition purposes, the Court is required to determine whether to recognise the foreign proceeding as a main or non-main proceeding. The terms "foreign main proceeding" and "foreign non-main proceeding" are defined:²⁸

foreign main proceeding means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;

foreign non-main proceeding means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of this article;

[40] A "foreign representative" is a person who is authorised in a foreign proceeding to administer the reorganisation or liquidation of a debtor's assets or to

²⁴ Ibid, Schedule 1, Preamble, a and d.

²⁵ Ibid, s 8(2) and (3).

²⁶ Ibid, art 1(a) of Schedule 1.

²⁷ Ibid, article 2(a) of Schedule 1.

²⁸ Ibid, art 2(b) and (c).

act as a representative of the foreign proceeding,²⁹ while a “foreign court” includes a judicial authority competent to control or supervise a foreign proceeding.³⁰ A foreign representative may apply to this Court for recognition of the foreign proceeding.³¹

[41] Solely for the purpose of the interim relief application, I am satisfied that Mr Williams has been appointed by a foreign Court to administer a collective bankruptcy proceeding in relation to the affairs of Mr Simpson which is subject to the oversight (in different respects) of either the High Court of England and Wales or the Secretary for State. I do not foreclose any argument of that type on the substantive application, on which Mr Simpson will be heard.

[42] Article 19 of Schedule 1 sets out the relief that may be granted once an application is made for recognition of a foreign proceeding:

From the time of filing an application for recognition until the application is decided upon, the High Court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:

(a) staying execution against the debtor's assets;

(b) entrusting the administration or realisation of all or part of the debtor's assets located in New Zealand to the foreign representative or another person designated by the Court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy; and

(c) any relief mentioned in paragraph (1)(c) and (d) of article 21.

(2) As soon as practicable, after the Court grants relief under paragraph (1) of this article, the foreign representative shall notify the debtor, in the prescribed form, of the relief that has been granted.

(3) Unless extended under paragraph (1)(f) of article 21, the relief granted under this article terminates when the application for recognition is decided upon.

(4) The Court may refuse to grant relief under this article if such relief would interfere with the administration of a foreign main proceeding.

²⁹ Ibid, art 2(d).

³⁰ Ibid, art 2(e).

³¹ Ibid, art 15(1). See also the evidential provisions of arts 15(2)-(4) and 16.

[43] The references to art 21 are to the relief that may be ordered once an application for recognition of a foreign proceeding is granted. The relevant parts of art 21 provide:

(1) Upon recognition by the High Court of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including:

...

(c) suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph (1)(c) of article 20;

(d) providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities;

...

(f) extending relief granted under paragraph (1) of article 19.

*(b) The scope of art 19 of Schedule 1*³²

[44] The purpose of art 19 is to provide a mechanism to enable the Court to protect assets or the interests of creditors when concern exists that the assets may perish, be susceptible to devaluation or otherwise be in jeopardy. The emphasis is on flexibility of approach. The framers of the Model Law could not have anticipated the vast array of circumstances in which interim relief might be required. The provision is expressed in non-exhaustive terms, using the word “including” before specifying particular types of relief that might be ordered. Comparator cases in the United States under Chapter 15 of the US Bankruptcy Code (s 1519) highlight flexibility as the desired approach.³³

[45] The relief contemplated by art 19 is designed to assist the general body of creditors under a collective insolvency regime, as opposed to relief aimed at helping individual creditors to obtain execution of a judgment debt. The collective nature of

³² Article 19 is set out at para [42] above.

³³ Chapter 15 is that part of the Code that adapts the Model Law for application in the United States. Section 1519 is in material terms the same as art 19 of Schedule 1. See also *Re Ho Seok Lee* 348 BR

the bankruptcy regime supports an order, when there are risks that assets may be spirited away or having their value diminish significantly, to the detriment of those who would otherwise share in the distribution of their proceeds.³⁴

[46] The Guide to Enactment reinforces those propositions. While a recognition application is pending, collective relief must be restricted to urgent and provisional measures for the collective good.³⁵ That is consistent with interim relief extending only to the point at which the recognition decision is made.³⁶

(c) *Is a search warrant available?*

[47] Article 19 plainly contemplates entrusting assets in jeopardy into the care of an appointed representative to preserve value. It would be odd if the ability to grant such relief extended only to property known to exist and readily locatable. It seems to me that, in an appropriate case, the flexibility inherent in art 19 could justify the issue of a search warrant to ascertain whether there are assets that are being concealed that might be in jeopardy if some form of interim relief did not attach to them.

[48] Under New Zealand law, once an individual has been adjudged bankrupt, the Official Assignee has power to seek a search warrant from this Court to obtain property that is part of the estate vested in the Official Assignee. The applicant for the warrant must establish “reason to believe that any [property of the bankrupt] is concealed in a locality”.³⁷ The term “locality” is defined as “any building, aircraft, ship, carriage, vehicle, premises, or place”.³⁸

799 (Bkrcty WD Wash, 2006) at 802, applying *Re Rukavina* 227 BR 234 (Bankr SDNY 1998) at 239-240.

³⁴ For a discussion of the approach to personal and collective claims, in the context of the Model Law provisions, see *Rubin v Eurofinance SA* [2009] EWHC 2129 (Ch) at para 47 and *Rubin v Eurofinance SA* [2010] EWCA Civ 895 at para 61(2).

³⁵ Guide to Enactment, para 137.

³⁶ Insolvency (Cross-border) Act 2006, Schedule 1, art 19(3).

³⁷ Insolvency Act 2006, s 150(1). The words in square brackets reflect the type of “relevant property” in issue in this case, to which s 150(1) refers: see s 150(3)(a).

³⁸ *Ibid*, s 150(3).

[49] The “reason to believe” test is the same as that applied when search warrants are sought in respect of suspected criminal offending, under s 198 of the Summary Proceedings Act 1957. In *R v Williams*,³⁹ the Court of Appeal expressed the view that “reasonable grounds to believe” meant an “objective and credible basis for thinking that a search will turn up the item(s) named in the warrant ...”. It is for the judicial officer determining the application to determine whether that standard has been reached.

[50] I am satisfied on the evidence before me that there is a credible basis for believing that bullion or precious metals of the type to which the application relates are concealed at the Ann Street property. The bankrupt’s denial of dealing in such metals, the absence of any reply to the question of Sennex Ltd trading in those products and the uncertainty about the corporate status of Sennex Ltd lead me to conclude that the dealings to which Mr Currie’s affidavit refer may well have been undertaken by Mr Simpson, either alone or in conjunction with Mr Clough. At least, there is a reason to believe that is the case.

[51] To the extent reliance is placed on information received by Mr Williams which has not been disclosed for fear of putting informers at risk, the information provided has, to a significant extent, been confirmed through independent inquiries made by Mr Currie in New Zealand. In *R v Williams*,⁴⁰ the Court of Appeal emphasised that information from an informer that was verified through other inquiries could be treated as more reliable by the judicial officer responsible for issuing the warrant.

[52] Any search warrant should be limited to orders this Court could make if the issue had arisen in New Zealand, in the context of a New Zealand bankruptcy.⁴¹ In that regard I have considered whether such relief should be limited to that available prior to an order of adjudication being made in this country, in respect of which the type of interim relief that could be ordered is more restrictive.⁴² On reflection, I

³⁹ *R v Williams* [2007] 3 NZLR 207 (CA) at para [213]. For a summary of what applications for warrants should contain see para [224].

⁴⁰ *Ibid*, at para [218].

⁴¹ Insolvency (Cross-border) Act 2006, s 8(3).

⁴² Insolvency Act 2006, s 50.

accept Mr Crossland's submission that I should approach the question on the basis of an extant bankruptcy, albeit one commenced in England. That approach is appropriate because the prerequisites to the status of bankruptcy have been found proved in England and have not been challenged in that jurisdiction by Mr Simpson.

[53] Because I am satisfied that this is a case in which the "reason to believe" threshold of s 150 has been passed, I hold there is jurisdiction to issue a search warrant as part of the provisional relief available under art 19. However, such relief must be tailored to ensure minimum invasion of property owned by third parties and take account of the possibility of mistake, if any items seized are subsequently found to be owned by persons other than Mr Simpson.

(d) What interim relief should be granted?

[54] There are three types of interim relief that I propose to grant to safeguard the rights of Mr Simpson's creditors, through his trustee in bankruptcy. They are:

- a) The issue of a search warrant specifically designed to enable search for and seizure of any bullion or precious metals located at the Ann Street property.
- b) Orders suspending Mr Simpson's ability to deal with any of his property situated in New Zealand, pending determination of the recognition application.
- c) Authorisation to the Official Assignee at Hamilton to conduct an examination of Mr Simpson to obtain information on oath or affirmation about assets that may be available for distribution among his creditors, through Mr Williams.

Those forms of relief will be balanced by provisions that enable any property seized to be held securely pending further order of the Court and providing adequate opportunity for third parties to contest the right of Mr Williams to the property.

[55] For the purposes of the orders I am about to make, I appoint Leslie Graeme Alexander Currie of Hamilton, Official Assignee, as the Court's agent.

[56] I make the following orders:

- a) A search warrant shall issue authorising the Official Assignee at Hamilton, together with such assistants as may be necessary, to enter and search the dwelling, garage and any other outbuildings situated at 35 Ann Street, Hamilton to search for and to seize any safes or other receptacles containing bullion or other precious metals. In doing so, they are authorised to use force to enter the premises, whether by breaking open doors or otherwise, and to break open any safe or receptacle in order to ascertain whether bullion or other precious metals are stored in them. The warrant is issued subject to the following additional conditions:
 - i) The warrant shall be executed by the Official Assignee at Hamilton and at least one constable.
 - ii) Any items seized shall be taken immediately, under Police guard, to the premises of Westpac Banking Corporation in Auckland where they shall be stored in a secure vault pending further order of the Court.
 - iii) The execution of the search warrant shall be filmed in its entirety and a video cassette or DVD recording what has taken place shall be filed in Court and served on Mr Simpson, Mr Clough and Ms Mann as soon as practicable after the search has been undertaken.
 - iv) If the execution of the warrant does not occur in the presence of Mr Simpson, the Official Assignee at Hamilton shall leave a written notice in a prominent place in the dwelling stating the date and time when the warrant was executed, the buildings

which were searched and the names of those involved in the execution process.⁴³ The notice shall also contain a list of property seized during the course of the search. Otherwise, the provisions of s 151 of the Insolvency Act 2006 apply.

- v) The Official Assignee at Hamilton shall file and serve a report of what occurred during the search within 48 hours of completion of the search process. Service shall be effected on the persons identified in para [56](d) below.

- b) Suspending Mr Simpson's right to transfer, encumber or otherwise dispose of any of his assets situated in New Zealand.⁴⁴

- c) Authorising the Official Assignee at Hamilton to summon Mr Simpson to be examined before an Associate Judge of this Court at 10am on Tuesday 21 September 2010. The summons may require Mr Simpson to produce and surrender to the Court any document in his possession or control relating to his property, conduct or dealings. The conduct of the examination shall be in accordance with s 166 of the Insolvency Act 2006.⁴⁵ No expenses need be tendered to Mr Simpson to attend examination.

- d) The application for recognition and all documents filed in relation to the interim relief application, together with Minutes issued by me and this judgment shall be served on the following people:
 - i) Mr Simpson

⁴³ Insolvency Act 2006, s 151(2) and (3).

⁴⁴ Insolvency (Cross-border) Act 2006, Schedule 1, arts 19(1)(c) and 21(1)(c).

⁴⁵ I have not overlooked that ss 165 and 166 of the Insolvency Act 2006 permit examination before either the Official Assignee or a District Court Judge. In my view, the powers conferred by arts 19(1)(c) and 21(1)(d) entitle me to formulate the basis of examination in a manner otherwise consistent with the examination provisions of the Act. An Associate Judge, who is experienced in dealing with insolvency issues, will be able to rule on any questions raised on behalf of Mr Simpson and to determine what questions and what documents he is compelled to produce.

- ii) Mr Clough and Ms Mann, as registered proprietors of the property at 35 Ann Street
 - iii) The Commissioner of Inland Revenue, a potential creditor disclosed by Mr Simpson.
- e) Any person claiming an interest in any property seized may apply to the Court for an order requiring the property to be returned to them. Such application shall be heard contemporaneously with the application for recognition.
- f) All orders are made on the basis that the undertaking as to damages filed by Lloyd's extends to any losses caused to any person in the event that property is owned by third parties and has been, therefore, wrongfully seized.

[57] The application for recognition is set down for hearing before me at 11.45am on 1 October 2010. The following timetabling orders are made:

- a) Any amended application and any further affidavits in support shall be filed and served by 5pm on 22 September 2010. Affidavit evidence is required on English law to confirm that the proceeding falls within the definition of "foreign proceeding".⁴⁶ That affidavit should also extend to indicating how any tax debt owed in New Zealand will be treated as part of the distribution process of assets realised in the English bankruptcy.⁴⁷
- b) Any notice of opposition and affidavits in opposition shall be filed and served by 5pm on 29 September 2010.

⁴⁶ Insolvency (Cross-border) Act 2006, Schedule 1, art 2(a).

⁴⁷ For example, see *Government of India v Taylor* [1955] AC 491 (HL) and *Peter Buchanan Ltd v McVey* [1955] AC 516n.

- c) The solicitors for Mr Williams shall compile a paginated bundle of all documents to be referred to at the hearing of the application which shall be filed and served by 3pm on 30 September 2010.
- d) Any affidavits from deponents overseas may be filed by the stipulated time through the forwarding of scanned and signed email copies to the Registrar at phoebe.peters@justice.govt.nz, on an undertaking that the originals shall be filed as soon as practicable. Service may be effected in a similar way.

[58] Leave to apply generally is reserved.

[59] All questions of costs are reserved.

[60] I thank counsel for their comprehensive and helpful submissions.

P R Heath J

Delivered at 12.00pm on Friday 17 September 2010