

YOU CAN RUN BUT YOU CANNOT HIDE

Westpac Banking Corporation: Application of Zheng [2023] NSWSC 147

The Supreme Court of NSW has ordered payment to be made in favour of a creditor, despite failure to locate the debtor. Accordingly, debts held in Australia cannot be avoided by leaving the jurisdiction or making yourself difficult to locate.

On 27 February 2023, Robb J held in *Westpac Banking Corporation: Application of Zheng [2023] NSWSC 147* that funds paid into Court following the sale of one of the debtor's assets be released to Mr Zheng (the **Applicant**) in part satisfaction of a default judgment obtained by the Applicant in a related matter.

Background

In 2019 the Court ordered the freezing of the assets of the debtor, Ms Nina Flynn Zhu and restrained her from disposing of, or dealing with those assets.

In or about October 2021, the debtor's mortgagee, Westpac Banking Corporation (**Westpac**), applied to the Court (**Westpac Proceedings**) to have the balance of proceeds from a sale of the debtor's property following the debtor's default of her mortgage, paid into Court as Westpac could not locate Ms Zhu.

On 25 August 2022, the Applicant obtained a default judgment against the debtor in separate proceedings and subsequently filed a notice of motion pursuant to rule 55.11 of the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**) to be joined to the Westpac Proceedings to access the funds paid into Court in part satisfaction of the judgment debt.

His Honour, Robb J, gave careful consideration to the orders sought by the Applicant given the risk that other valid claims could in theory, arise from other unsecured creditors. The Applicant submitted that the release of money from funds paid into Court may still be subject to section 118 of the *Bankruptcy Act 1966* (Cth) should another creditor apply to have the debtor made bankrupt.

It was held that the practical result of any release of the funds in Court to the Applicant would be no different to a situation where the debtor had made payment to the Applicant on her own account.

Robb J adopted the principles set out by Kunc J in *Eldsure Pty Ltd v Sheridan Legal Pty Ltd [2020] NSWSC 1616* and held that:

"the Court may make an order sought to Mr Zheng under UCPR r 55.11, or alternatively, the Court may make the same order by analogy with garnishee proceedings" [25]

Formal Service Waived

The final issue to be addressed by Robb J before making an order for the release of the funds in Court was the absence of formal service on Ms Zhu by Mr Zheng as a result of her residence in the PRC and lack of appearance at the hearing of the motion.

By analogy to the garnishee process, the Court did not require formal service of the Applicant's Notice of Motion on the debtor.

Further, it was noted by Robb J that the Applicant had presented evidence of an extensive list of methods of attempted service which represented the *"significant lengths to which [the Applicant] went to provide [the debtor] notice of the application."*

The Court credited the effectiveness of electronic communications such as Facebook, LinkedIn and email in justifying the Applicant's service attempts on the debtor.

Robb J was satisfied that there was “ *a very high likelihood in fact that Ms Zhu became aware of [the Applicant's] application and that [the debtor] has decided to reside in the PRC in an attempt to avoid her creditors.*”

Conclusion

Robb J's decision demonstrates how modern technology is assisting creditors when debtors flee the jurisdiction to escape their debts.

Further, when making an application to the Court, if personal service cannot be effected, the Court now expects extensive attempts at service by means other than process servers.

His Honour's comments regarding the extensive service attempts undertaken by the Applicant demonstrate that diligent preparation for any application before the Court is necessary.

Queries

We acted for the Applicant in relation to this series of proceedings. Feel free to contact our team at Eakin McCaffery Cox to discuss how we may assist you.

This article was written by Caroline Parker and Meaghan Williamson.

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