IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

CIV-2015-438-38
[2016] NZHC 1225

UNDER	the Insolvency Act 2006
IN THE MATTER OF	the bankruptcy of Debra Donaldson
BETWEEN	BANK OF NEW ZEALAND Judgment Creditor
AND	DEBRA DONALDSON Judgment Debtor

Hearing: 4 May and 8 June 2016

Counsel: J B Gilbert for the Judgment Creditor
D Donaldson in Person

Judgment: 8 June 2016

ORAL JUDGMENT OF ASSOCIATE JUDGE SMITH

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[1] On 27 July 2015 the judgment creditor (the Bank) obtained summary judgment against the judgment debtor (Ms Donaldson) and Mr Keith Alastair Donaldson, in the total sum of $38,291.90. The judgment related to credit card debts incurred by the judgment debtors.

[2] The Bank issued a bankruptcy notice against Ms Donaldson on 6 October 2015. The bankruptcy notice was served on Ms Donaldson on 3 November 2015. The bankruptcy notice claimed the sum of $38,341.90 (the judgment sum plus $50 for the costs of a certificate of the District Court judgment), together with the further sum of $796 for costs.

[3] The amount claimed in the bankruptcy notice was not paid within the time allowed for payment, and on 22 December 2015 the Bank filed an application to have Ms Donaldson adjudicated bankrupt.

[4] Ms Donaldson filed a notice of opposition to the application for adjudication, in which she set out the following grounds:

(a) Estoppel by acquiescence – Unconscionable for the promisor to renege.

(b) The due process of law has been violated.

(c) There is no injured party.

(d) My rights have been violated.

(e) There has been a miscarriage of justice.

(f) Promissory notes are to be honoured and treated as cash.

[5] The parties filed written submissions, and I heard oral argument from counsel for the Bank and Ms Donaldson on 4 May 2016. I now give judgment on the Bank's application for an adjudication order.

Background

[6] On 12 January 2014, 20 February 2014, 17 March 2014, and 14 April 2014, Mr Alastair Donaldson sent to the Bank four documents described as "promissory notes". The first two were each for $10,000 and the last two were for $5,000.

[7] The "promissory notes" were in the same general form, differing only as to date and amount. The first "promissory Note", dated 12 January 2014, was in the following terms:

PROMISSORY NOTE
$10,000.00 NZD

Pay to the Order of: New Zealand Treasury

In the Amount of: Ten Thousand and 00/100 New Zealand Dollars

For Credit to: Bank Of New Zealand for K DONALDSON, BNZ Platinum Visa no. 4999-1600-0006-6941

Routing Through: Private Prepaid Treasury Account #18237199
c/o Minister of Finance, Hon. Bill English

This negotiable instrument, tendered lawfully by Alastair Keith Donaldson ("Maker") in good faith shall evidence as debt to the Payee persuant to the following terms:

This is an unconditional promise to pay.

1 This note shall be posted in full dollar for dollar persuant to the Credit order noted above and presented to the payor, The New Zealand Treasury, c/o Minister of Finance, Hon. Bill English. After discharge of the debt, the balance of the funds is to be credited to Bank of New Zealand (PlatinumVisa) to be used for the benefit of the same.

2. This note is payable on demand.

BNZ VISA
ATT: CFO

Alastair Keith Donaldson
14 Alexandra Road
Raetihi

Date of Issue 12-1-2014

[8] While each of these documents were signed by Mr Donaldson, there is no dispute that the "promissory notes" were sent purportedly in satisfaction of the debt Mr and Ms Donaldson owed on their credit card account with the Bank, for which judgment was later entered against them in the District Court.

[9] With the "promissory note" dated 12 January 2014, Mr Donaldson sent a covering letter to the Bank, stating that the note was in payment of the stated amount, and was an acceptable form of payment under the Bills of Exchange Act 1908.

[10] The letter contained the following statement:

> However, should you not accept this form of payment, then please return the Promissory Note, along with a full written explanation of why your organization is exempt from the legislation as outlined above, ***or*** why the Commercial Instrument is unacceptable.
>
> **Please note –**
>
> If you *do not* return the Promissory Note within 10 (ten) working days, then we are in agreement that the bill has been *paid to the written amount.*
>
> If you *do* return the Promissory Note within 10 (ten) working days, but *without* a legitimate written explanation, as to why your organization is exempt from the legislation as outlined above, *or* why the Commercial

> Instrument is unacceptable; then we are in agreement that you have turned down my legal payment and therefore my **account balance is less the amount written.**

[11] On 23 January 2014, the Bank replied to Mr Donaldson, stating that the promissory note was unenforceable and not an acceptable form of payment under the Bills of Exchange Act. The Bank advised "your Promissory Note is therefore not accepted and is returned with this letter".

[12] Mr Donaldson replied by sending two letters (to different officers of the Bank), each dated 31 January 2014. He complained that the Bank had not returned the original "promissory note" he had sent, and contended that the effect of his 12 January 2014 letter was that the Bank had therefore agreed that the bill had been paid to the written amount.

[13] Mr Donaldson made a similar argument in further letters dated 17 March 2014, and 15 May 2014, as did Ms Donaldson in an email sent to the bank on 20 March 2014 – because the Bank had failed to return the original promissory note within 10 working days, it had accepted the note as payment.

[14] It is not clear that all of the correspondence has been produced, but on 31 January 2014 and 11 February 2014 Mr Donaldson sent the Bank two documents called "Notice of Failure to Return True and Original Promissory Note".

[15] In his letter to the Bank dated 15 May 2015, Mr Donaldson offered the Bank an opportunity to "cure" any oversight or mistake on the Bank's part by acting within seven days to accept the "promissory notes", or explain why the Bank considered itself exempt from the provisions of the Bills of Exchange Act 1908. Failure to "cure" would constitute, "as an operation of law", the final admission of the facts set out in the "Presentments" and "Legal Notices" sent by Mr Donaldson, through "tacit assent to the presentment and Legal Notices".

[16] Mr Donaldson wrote again on 28 May 2014, formally advising the Bank of its "default" in failing to honour his "Presentments" and "Failed Notices".

[17] The Bank responded shortly, on 24 June 2014, referring to letters from the Donaldsons dated 12 January 2014, 20 February 2014, 27 March 2014, and 14 April 2014, and to the promissory notes and other associated documents. The letter rejected the promissory notes, which were returned with the letter. The Bank advised that the debt (then $29,982.94) was still outstanding, and that legal action would follow if payment was not made.

[18] Further correspondence was sent by Mr Donaldson in June and July of 2014, purporting to give the Bank "Notices of Default", and/or setting out detailed argument on various provisions of the Bills of Exchange Act which he said justified the contention that the Bank had accepted the notes in payment of its debt.

[19] The Bank commenced a proceeding in the District Court against Mr and Ms Donaldson in November 2014. Mr Gilbert produced at the hearing in this Court certain documents which were filed in that proceeding, without objection from Ms Donaldson. One of them was a statement of defence dated 13 January 2015, in which Ms Donaldson and Mr Donaldson expressly pleaded that they had paid their account with the Bank by the four promissory notes issued between January 2014 and April 2014.

[20] The Bank subsequently applied for summary judgment on its claims, and a case management conference was scheduled for 16 February 2015.

[21] In a Minute of the case management conference on 16 February 2016, Judge Ross noted that Ms Donaldson and Mr Donaldson had been served with notice of the conference, but had advised the Registrar by telephone that they would not attend. They had not filed any notice of opposition to the summary judgment application. Judge Ross strongly advised Mr and Ms Donaldson that they should obtain legal advice, noting that the nature of the defence, and some of their other documents, appeared to be "out of touch with reality". His Honour warned Mr and Ms Donaldson that some documents they had filed might be considered vexatious and an abuse of the Court process.

[22] The summary judgment application was called in the District Court at Taihape on 16 March 2015. The Court file records that Ms Donaldson had telephoned the Court that day to advise that neither she nor Mr Donaldson would be appearing that day. Still no notice of opposition had been filed. The case was adjourned to 13 April 2015 for hearing in the Court at Palmerston North. The application was further adjourned when the case was called on 13 April 2015, first to 10 June 2015 and then (when neither party appeared that day) to 27 July 2015.

[23] Counsel for the Bank filed written submission on the summary judgment application, in which the issue of the alleged promissory notes was addressed. Counsel submitted that the claimed notes were not money, had not been accepted in substitution for money, and did not amount to any kind of settlement agreement.

[24] One set of documents (the interlocutory application for summary judgment, the supporting affidavits, and a memorandum of counsel dated 10 June 2015) were served on 18 June 2015 by delivery to the Donaldsons' address for service, 14 Alexandra Road, Raetihi.

[25] Judgment was entered for the Bank on 27 July 2015. Neither Mr Donaldson nor Ms Donaldson appeared at the hearing.

The Court's jurisdiction to make a bankruptcy order.

[26] Section 13 of the Insolvency Act 2006 (the Act) provides:

> **13 When creditor may apply for debtor's adjudication**
>
> A creditor may apply for a debtor to be adjudicated bankrupt if—
>
> (a) the debtor owes the creditor $1,000 or more or, if 2 or more creditors join in the application, the debtor owes a total of $1,000 or more to those creditors between them; and
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> (b) the debtor has committed an act of bankruptcy within the period of 3 months before the filing of the application; and
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> (c) the debt is a certain amount; and
>
> (d) the debt is payable either immediately or at a date in the future that is certain.

[27] Section 37 of the Act provides:

> **37 Court may refuse adjudication**
>
> The court may, at its discretion, refuse to adjudicate the debtor bankrupt if—
>
> (a) the applicant creditor has not established the requirements set out in section 13; or
>
> (b) the debtor is able to pay his or her debts; or
>
> (c) it is just and equitable that the court does not make an order of adjudication; or
>
> (d) for any other reason an order of adjudication should not be made.

[28] The elements of s 13 of the Act have been made out in this case: the Bank has obtained a judgment for a certain amount which is excess of $1,000, and that debt is payable immediately. Ms Donaldson committed an act of bankruptcy when she failed to comply with the bankruptcy notice which was served on her on 3 November 2015.

[29] In this case, Ms Donaldson asks the Court to exercise its discretion to decline to make an order for adjudication under s 37(c) or (d) of the Act.

[30] The starting point is that the Bank, having established the elements set out in s 13 of the Act, is *prima facie* entitled to an order for adjudication.[1] That does not mean that a creditor who establishes the jurisdictional facts necessary for the making of an adjudication order is not automatically entitled to an order; it is for the debtor to show why an order should not be made. In the end, the Court's task is to balance the various considerations relevant to the case and determine whether the debtor has succeeded in showing that an order ought not to be made.[2]

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1 *Re Epirosa, ex parte Diners Club NZ Ltd* (HC) Wellington B 498/91, 6 March 1992; B 532/91. In *Re Twidle* [1916] NZLR 748 at 749; and *Re Fidow* [1989] 2 NZLR 431 (HC) at 439.

2 *Baker v Westpac Banking Corporation* CA 212/92, 13 July 1993, at 4.

Ms Donaldson's submissions

The promissory note argument

[31] Ms Donaldson refers to numerous sections in the Bills of Exchange Act which are said to support the argument that the debt was satisfied by the promissory notes Mr Donaldson sent to the Bank between January and April 2014. She also refers to ss 78 and 84 of the Stamp & Cheque Duties Act 1971, and to s 156A of the Reserve Bank Act 1989.

[32] She submits that the notes were made honestly and in good faith, and that the Bank was prima facie deemed to be the holder in due course under s 30(2) of the Bills of Exchange Act.

[33] She also relies on s 88 of the Bills of Exchange Act, relating to presentment of a promissory note for payment. Section 88(1) provides:

> **88 Presentment of note for payment**
>
> (1) Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable; but in any other case presentment for payment is not necessary in order to render the maker liable.
>
> ...

[34] Ms Donaldson submits that when the Bank (as holder in due course) had possession of the promissory notes, made payable to the payor, it did not present them to the payor, in accordance with the rules for presentment set out in s 45. (Section 45(2) provides that if the drawer of a bill is to be liable on a bill which is payable on demand, the bill must be presented, by or on behalf of the holder and at the proper place, within a reasonable time of the bill's issue).

[35] Ms Donaldson then refers to the decision of the UK Court of Appeal in *Fielding & Platt Ltd v Najjar*,[3] for the proposition that a bill of exchange or a

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3 *Fielding & Platt Ltd v Najjar* [1969] 2 All ER 150.

promissory note is to be treated as cash: it is to be honoured unless there is some good reason to the contrary.

[36] Ms Donaldson invokes the defence of estoppel by acquiescence – she says that the Bank's silence (by not returning the original promissory notes) has rendered it unconscionable for the Bank to resile from the (Donaldsons') belief that the debt has been paid. She refers to *Tradax Export SA v Dorada Compania SA*,[4] in support of the proposition that the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations. Ms Donaldson also refers to the decision of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher*,[5] and the New Zealand Court of Appeal decision in *Burberry Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd*,[6] for the general principle that an estoppel may arise in any circumstances where it would be unconscionable to permit a promisor to resile from his or her position.

[37] Ms Donaldson further submits that the relevant detriment is that occasioned by the promisee's action on the faith that the representation will be performed.[7]

[38] Other authorities referred to by Ms Donaldson in support of her estoppel submissions include *Gillies v Keogh*,[8] *Phillips v Phillips*,[9] and *Elders Pastoral Ltd v Bank of New Zealand*.[10]

[39] Ms Donaldson's next submission is that there has been a due process failure, and that her rights have been violated. She contends that she did not receive proper notice (25 working days) before the summary judgment application was heard on 27 July 2015. She rejects a suggestion by counsel for the Bank that she made a

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4 *Tradax Export SA v Dorada Compania SA* (1982) Lloyd's Rep 140 (QBD); at 157.
5 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 HCA.
6 *Burberry Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA).
7 Citing *The Commonwealth v Verwayen* (1990) 170 CLR 394 (HCA).
8 *Gillies v Keogh* [1989] 2 NZLR 327, 331.33.
9 *Phillips v Phillips* [1993] 3 NZLR 159, at 167-168.
10 *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, at 186.

telephone call to the District Court on 11 May 2015, in the course of which she is alleged to have been told that the hearing of the summary judgment application had been further adjourned following the 13 April 2015 hearing. She says that she received no notice of any hearing after the hearing of 13 April 2015, and that that was confirmed in a telephone call she made to a Deputy-Registrar at the Palmerston North District Court on 5 November 2015.

[40] Ms Donaldson submits that notice of the hearing is an absolute necessity, and that as she did not receive that notice there has been a miscarriage of justice.

[41] In addition to those submissions, Ms Donaldson challenges the Bank's claim for the costs of this proceeding, on the basis that the Bank should not have commenced the claim against her. She also contends that the Bank has failed to identify any party who has been injured by the Bank's decision not to accept Mr Donaldson's promissory notes, and that the bank referred to an incorrect account number in one of the affidavits filed in the District Court.

Discussion and conclusion

[42] The principal issue for this Court is whether the adjudication proceeding should be stayed or adjourned to allow Ms Donaldson time to apply to the District Court to set aside the judgment entered on 27 July 2015. This Court, sitting in its bankruptcy jurisdiction, has no jurisdiction to set aside a judgment of the District Court. While Ms Donaldson has had plenty of time since July of last year to make an application to the District Court to set aside the judgment, or to file an appeal against it, she has not taken either of those steps.

[43] I consider first whether the defences that Ms Donaldson proposes to raise may have any apparent merit. If it is clear that they do not, that will be a telling factor against any stay or adjournment of this proceeding to allow Ms Donaldson to apply to the District Court to set aside the judgment.

Promissory notes

[44] Ms Donaldson's makes the following arguments concerning the promissory notes:

(a) The Bank was validly paid with the "promissory notes"; or

(b) the Bank did not heed the conditions appearing on the covering letters accompanying the "promissory notes", and therefore agreed to accept the "promissory notes" as satisfaction of the debt; or

(c) The Bank's conduct has created an estoppel by acquiescence preventing it from now seeking payment of the debt.

[45] Looking at the first of those arguments, I note that there have been a number of cases in New Zealand in recent years where debtors have tried to pay debts with documents purporting to be promissory notes or bills of exchange (not being ordinary cheques or bank cheques), where the creditor has not agreed to accept payment in that form. To my knowledge, none of the debtors' arguments in those cases have succeeded.

[46] I have considered the various statutory provisions referred to by Ms Donaldson in her submissions, but I have come to the view that it is not necessary to engage in an analysis of whether or not the documents purporting to be promissory notes in this case did or did not conform to the formal requirements of the Bills of Exchange Act 1908. There is a more simple way to resolve the case, and that is that a creditor is not required to accept a promissory note or a bill of exchange as payment of a debt unless the bill of exchange or cheque is akin to cash, or the parties have agreed that payment can be made in that way.

[47] The historical position in New Zealand was that payment of an amount owing could only be made in money, unless the parties had agreed otherwise.[11] The authors of *Laws of New Zealand* observe:[12]

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11 *Plimmer v O'Neill* [1937] NZLR 950 (SC).

12 *Laws of New Zealand — Money* (looseleaf ed, LexisNexis, Wellington) at [34], citing *Plimmer v*

> The general rule is that only the production of money in authorised "legal tender" can constitute a valid tender, unless the creditor waives it or agrees to accept some other method of payment.

[48] But recent decisions of the Supreme Court and Court of Appeal have made inroads on that rule, variously holding that electronic transfers and cheques constitute payment, even absent agreement to that effect.[13] The substance of the current position is summarised by the authors of *Law of Contract in New Zealand* as follows:[14]

> These cases suggest a mode of construction that the result is more important than the means: if unconditional payment of funds has been effected, and the payee is in just as strong a position as if the specified mode of payment had been used, then the means of achieving that result are subsidiary to the result itself unless the contract very clearly requires otherwise.

[49] Some bills of exchange, such as bank cheques, may be good legal tender, but generally bills of exchange or promissory notes are not regarded as legal tender.[15] The only risk with a bank cheque is insolvency of the bank, a risk so remote that it does not distinguish the bank cheque from legal tender.[16] By contrast, the Supreme Court has held (in the context of a conveyancing transaction) that a personal cheque could not constitute payment unless the parties had agreed to it.[17]

[50] The purported promissory notes in this case are clearly not akin to cash or a bank cheque.

[51] Ms Donaldson relies on the dictum of Lord Denning in *Fielding & Platt Ltd v Najjar* that:[18]

> We have repeatedly said in this court that a Bill of Exchange or a Promissory Note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary.

O'Neill [1937] NZLR 950.

13 *Rick Dees Ltd v Larsen* [2006] 2 NZLR 765 (CA), *Rick Dees Ltd v Larsen* [2007] NZSC 39, [2007] 3 NZLR 577.

14 Burrows, Finn and Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 729.

15 *Williams v Gibbons* [1994] 1 NZLR 273 (CA), holding as much in the context of a conveyancing transaction.

16 *Rick Dees Ltd v Larsen* [2006] 2 NZLR 765 (CA) at 776.

17 *Otago Station Estates Ltd v Parker* [2005] 2 NZLR 734 (SC).

18 *Fielding & Platt Ltd v Najjar* [1969] 2 All ER 150 (CA).

[52] But, as counsel for the Bank pointed out, in that case the contract stipulated that payment was to be made by promissory notes. The Bank in this case did not sue *on the promissory notes* (assuming without deciding that they qualified as such): it sued on the underlying credit card debt. Moreover I think there was ample "reason to the contrary", entitling the Bank to refuse to regard the purported promissory notes as equivalent to cash. Anyone receiving those documents would have entertained the gravest doubts that they were genuine. Why would Mr Donaldson have had a private prepaid account with Treasury, and why should the Bank have been put to the trouble of presenting the documents to the Treasury offices in Wellington?

[53] Ms Donaldson accepted at the hearing that there is no evidence before the Court that "Private Prepaid Treasury Account #18237199 c/o Minister of Finance, Hon. Bill English" exists. She suggested that the New Zealand government would in this case pay the Bank, but when I asked her why the New Zealand government would do that she was unable to offer any clear answer. For the same reason that Ms Donaldson could not provide a satisfactory answer to that question, a creditor receiving documents such as the "promissory notes" in this case would not consider that it had received the equivalent of cash.

[54] Ms Donaldson could not point to any document or oral agreement by which the Bank actively agreed to accept payment by promissory note. Accordingly I find that there was no such agreement.

[55] Ms Donaldson submits, however, that the Bank has acquiesced in the mode of "payment" proffered by Mr Donaldson. The basis for this submission is the covering letters that accompanied the "promissory notes", in which Mr Donaldson stated that if the Bank did not return the "promissory notes" within 10 (ten) working days, or provide a legitimate written explanation as to why it was exempt from the Bills of Exchange Act and other statutes referenced by Mr Donaldson, then the Bank would be deemed to have agreed that its debt had been paid to the written amount.

[56] It is a fundamental principle of contract law that silence, without more, does not constitute acceptance of an offer made by another person. Ms Donaldson cannot

say that the Bank has accepted the promissory notes as payment simply because Mr Donaldson declared in his letters that non-response would amount to acceptance. Any obligation to respond, and the limited timeframe for doing so, would themselves have been contractual obligations, which could not have been imposed on the Bank without its agreement.

[57] In any case, the Bank *did* respond within Mr Donaldson's first 10 working day "deadline". The Bank's reply dated 23 January 2014 made it as clear as a bell that it did not agree to accept payment by promissory note, at least in the form submitted by Mr Donaldson. It returned a copy of the promissory note.

[58] Ms Donaldson submits that return of the *original* documents was necessary to avoid acceptance. The same principle is applicable. A reasonable person would not interpret any of the Bank's conduct as acceptance of Mr Donaldson's offer, and Mr Donaldson was unable to impose binding terms on the Bank unilaterally.

Did the Bank's conduct nevertheless give rise to an estoppel?

[59] Ms Donaldson submits in the alternative that the same conduct that allegedly gave rise to an agreement to accept payment by the "promissory notes" gave rise to an estoppel that prevents the Bank from now saying that it has not been paid.

[60] The Supreme Court in *Southbourne Investments Ltd v Greenmount Manufacturing Ltd* succinctly described estoppel in relation to accepting payment, albeit in the context of a conveyancing transaction:[19]

> [21] If by the failure to act in a timely way the vendor is found to have represented that the personal cheque is acceptable, and the purchaser has disadvantageously relied upon that representation, then, as this Court stated in *Otago Station Estates*, the vendor will be estopped from denying the validity of the payment effected by the personal cheque. The rationale for the estoppel is that it would be manifestly unjust, when the vendor has given the appearance of accepting the personal cheque, to allow the vendor to resile from that stance after it is too late for the purchaser to remedy the position.

[61] There can be no estoppel in this case for the following reasons.

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[19] *Southbourne Investments Ltd v Greenmount Manufacturing Ltd* [2007] NZSC 62, [2008] 1 NZLR 30.

[62] First, there is nothing amounting to a representation by the Bank that the "promissory notes" were or would be accepted. Quite the opposite—prompt correspondence indicated that the first of them was rejected. The Donaldsons had no reason to form any (erroneous) belief that the Bank would accept their "promissory notes" - any reasonable person in their position would have expected the Bank to reject the documents. Nor is there any evidence that they or either of them acted to their detriment in reliance on the belief that the Bank would accept the "promissory notes" in satisfaction of its debt. Ms Donaldson has not identified any way in which she relied upon any such representation.

[63] I accordingly conclude that Ms Donaldson has no arguable defence based on the "promissory notes" (or the Bank's response to them).

Due process, miscarriage of justice and violation of rights

[64] These grounds of opposition concern the service of documents relating to the summary judgment proceedings in the District Court.

[65] The basis of the submission is that Ms Donaldson says that she had no knowledge of the hearing on 27 July 2015, and she was in any event out of New Zealand in the period from 18 June 2015 to 15 August 2015. Ms Donaldson produced a travel itinerary and boarding passes which establish that she was out of New Zealand in that period.

[66] Ms Donaldson refers to r 12.14 of the District Court Rules 2014, which applies in circumstances where a party does not appear at an application for summary judgment. The rule provides:

> **12.14 Setting aside judgment**
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> A judgment given against a party who does not appear at the hearing of an application for judgment under rule 12.2 or 12.3 may be set aside or varied by the court on any terms it thinks just if it appears to the court that there has been, or may have been, a miscarriage of justice.

[67] The essential issue on any application under the rule would be whether there has been, or may have been, a miscarriage of justice in the entry of judgment on the Bank's application.

[68] This is not a case like *Singapore Airlines Ltd v Mistry*,[20] where there was no proper service of the application for summary judgment, and it was clear that the judgment should be set aside on that account alone. In this case, Ms Donaldson acknowledges that she received the summary judgment application and the supporting affidavit at the end of January 2015, and it is clear that she was aware of the hearings on 16 February 2015, 16 March 2015, and 13 April 2015.

[69] For reasons which she has not explained, Ms Donaldson decided not to attend any of those hearings. Nor was any notice of opposition filed in accordance with r 12.9 (although Mr and Ms Donaldson had filed a statement of defence to the Bank's statement of claim).

[70] The Court Minute of the hearing on 16 March 2015 records that the application was adjourned to 13 April 2015 in the Palmerston North District Court "for judgment to be entered". Presumably Ms Donaldson was aware of this, but she still did not appear when the case was called on 13 April 2015.

[71] Further, it appears from Ms Donaldson's affidavit that she expected the Court to make a decision on the summary judgment application on 13 April 2015. She says in her affidavit that she told the Palmerston North District Court Deputy-Registrar with whom she spoke on 5 November 2015 that "there was supposed to be a ruling in Palmerston North District Court on 13 April 2015 for a summary judgment..."

[72] While Ms Donaldson's apparent inaction in response to the summary judgment application has not been explained, it does appear that she and Mr Donaldson made a deliberate decision not to participate in the various Court hearings in the District Court.

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[20] *Singapore Airlines Ltd v Mistry* [2014] NZHC 1055.

[73] It appears now that she has thought better of that view. In her submissions, she stated that "[the] unsuccessful defence in the District Court are contributed to Debtor relying on legal counsel from a friend, who we have recently realized that she was not giving us the correct legal information that apply to our case and so we have not asked or used her advise for a while."

[74] It appears that Ms Donaldson did not advise the Court that she would be out of New Zealand for a period between June and August 2015, but in any event she was not entitled to personal service of the further affidavit which the Bank filed or of notice of the new hearing – she and Mr Donaldson had provided an address for service when they filed their statement of defence, and the Bank was entitled to leave further documents for Ms Donaldson at that address in accordance with r 6.1 of the District Court Rules.

[75] An affidavit sworn on 7 July 2015 establishes that a copy of the Bank's supplementary affidavit was delivered to Ms Donaldson's address for service on 18 June 2015. A copy of counsel's memorandum dated 10 June 2015, which expressly referred to the hearing scheduled for 27 July 2015, was served at the same time. Mr Donaldson declined to accept the documents, and they were left at his feet.

[76] If there was any arguable irregularity over the service which was effected on 18 June 2015, it would be that (arguably) two sets of documents should have been delivered, one for Mr Donaldson and one for Ms Donaldson. But against that, Mr and Ms Donaldson had not filed separate statements of defence – they both signed the same document.

[77] Considering all of those factors, I think any irregularity in service would have been minor. I do not think it reasonably arguable for Ms Donaldson that any deficiency in service was sufficient on its own, without considering the merits of Ms Donaldson's case, to amount to a miscarriage of justice.

[78] I refer in that regard to the decision of Duffy J in *Pulman v Orix New Zealand Ltd*, where the learned Judge considered that whether a judgment which has been

irregularly obtained should be set aside *ex debitae justitiae* (i.e. without considering the merits of the dispute) turns on the degree of irregularity in a particular case.[21]

[79] When one looks at the merits of the case, it is clear that Ms Donaldson has no arguable defence to the Bank's claims. The defences based on the "promissory notes" and estoppel are clearly hopeless, and Ms Donaldson has not advanced anything else which might have amounted to a defence to the Bank's claims. The truth appears to be that Ms Donaldson, for whatever reason, simply elected not to participate in the District Court process. She now wishes to put forward her defences, and she has done so forcefully and in considerable detail. But she has not taken any step in have the District Court judgment set aside, and that is a further factor which tells against her on the question of whether a stay or adjournment should be granted.

[80] I conclude that there is no basis for a stay or adjournment arising out of the circumstances in which the judgment was entered in the District Court.

No injured party

[81] There is no merit in Ms Donaldson's submission that no-one has been "injured" in this case. Mr and Ms Donaldson incurred debts on their credit card that they have apparently been unable to pay, and the Bank has been out of pocket to that extent. It has sued the Donaldsons and obtained a judgment against them for that "injury", and I have held that the Bank was entitled to reject the "promissory notes" sent to it by Mr Donaldson. It remains a creditor of Ms Donaldson in a sum certain which exceeds $1,000, and as such has standing to bring the present application for an adjudication order.

Wrong account number

[82] Ms Donaldson submits that an error was made in one of the affidavits filed by the Bank, in that the wrong account number was stated. There is nothing in this. Any such minor error could not have provided Ms Donaldson with a defence to the Bank's claims.

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[21] *Pulman v Orix New Zealand Ltd* (2008) 18 PRNZ 955 (HC), at [20].

[83] I conclude that there is no merit in any of the arguments that Ms Donaldson might raise if she were given further time to apply to the District Court to set aside its judgment.

[84] Finally, I record that at the commencement of today's hearing Ms Donaldson sought to tender further material in support of a contention that this Court has no jurisdiction to hear the Bank's adjudication application. No such argument was pleaded in her notice of opposition, nor was it argued in the submissions she made for and at the hearing on 4 May 2016. Further, there is no apparent basis on which any such argument could be supported. I accordingly declined leave to Ms Donaldson to make further submissions.

Conclusion and orders

[85] Ms Donaldson has not advanced any reasons why an adjudication order should not be made. The Bank's prima facie entitlement to an adjudication order must therefore prevail.

[86] I make the following orders:

(a) An order adjudicating Ms Donaldson bankrupt.

(b) Costs on scale 2B to the Bank, plus disbursements as fixed by the registrar.

[87] The foregoing orders are timed at 11.50am.

Associate Judge Smith

Solicitors:
Turner Hopkins, Auckland for the judgment creditor
D Donaldson, Raetihi in person