IN THE SUPREME COURT OF NEW ZEALAND SC 66/2010

[2011] NZSC Trans 6

**BETWEEN** **ROBERT ERWOOD**

First Appellant

**AND** **JANET MAXTED**

**ALEXANDER JAMES JEREMY GLASGOW**

First Respondents

**AND** **THE OFFICIAL ASSIGNEE**

Second Respondent

Hearing: 18 March 2011

Court: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Appearances: Appellant appears in Person
No Appearance by or for the Respondents
P D McKenzie QC as Amicus Curiae

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**CIVIL APPEAL**

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**MR McKENZIE QC:**

May it please the Court, I appear as amicus curiae to assist the Court in relation to this appeal.

10 **ELIAS CJ:**

Thank you very much, Mr McKenzie. And Mr Erwood, you're appearing for yourself?

**MR ERWOOD:**

Well I'm not really. I'm going to get Mr McKenzie to do the talking.

**ELIAS CJ:**

All right, thank you. Well Mr McKenzie, we're very grateful for the written
5 material you've put before us. After considering it we feel that the appeal must be allowed. But is there anything that you want to add to what you put before us?

**MR McKENZIE QC:**

10 Well, in view of the decision that Your Honours have reached, I don't think there is anything further I need to put before you. There were some supplementary documents, even further ones that I thought had some relevance, but no, I think that matters could be left there, Your Honours.

15 **ELIAS CJ:**

All right, thank you.

**BLANCHARD J:**

I'm in a position to deliver the judgment of the Court. We have heard an
20 appeal against the striking out of an appeal to the Court of Appeal on the ground that the appellant, Mr Erwood, had not paid the security for costs ordered by the Court of Appeal. Leave to appeal to this Court was granted because at a late stage it has become apparent that the Court of Appeal proceeded on the basis of a crucial misapprehension about the matter.
25 The respondents have offered no opposition and, this Court being satisfied that the Court of Appeal was in error, Mr Erwood's appeal must be allowed.

The Court is grateful to Mr McKenzie QC for the assistance he has rendered as amicus in investigating and reporting to the Court on the situation.

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The background factual situation is complicated but can be summarised. A bankruptcy notice was issued against Mr Erwood by the first respondents in relation to certain judgments in their favour for costs and interest. Mr Erwood

applied to set aside the bankruptcy notice. Associate Judge Christiansen dismissed that application on 27 September 2007.
Mr Erwood appealed from that decision. This was appeal CA 567/07, which we will call the “bankruptcy notice appeal”.

On 22 November 2007 the Associate Judge dealt with the bankruptcy application and made an order adjudicating Mr Erwood bankrupt. On 26 November 2007 he appealed against the adjudication order. That was appeal CA 631/07, which we will call the “adjudication appeal”.

On 13 December 2007 Mr Erwood made an application to the Court of Appeal seeking an order for a stay of the public advertising of the bankruptcy and of the calling of a creditors’ meeting pending the hearing of the adjudication appeal. The Court looked into the merits of the appeal in some detail and granted a stay, provided that security for costs was paid.

Then the event occurred which has, in our view, derailed this matter. For some reason, Mr Erwood, who was a litigant in person, filed in the registry of the Court of Appeal a notice of abandonment of the adjudication appeal. He did this on 17 December 2007. But that notice seems to have been misfiled. Certainly it was never thereafter drawn to the attention of the Judges who were called upon to determine the issues which arose, including the question of payment of security for costs.

Security for costs in the bankruptcy notice appeal was fixed by the registrar of the Court of Appeal at $4,740. That decision was subsequently confirmed upon review by a Judge of the Court of Appeal.

On 21 December 2007, unaware of the notice of abandonment, the President extended the time for giving security in the adjudication appeal, noting that Mr Erwood had funds in excess of $300,000 and could be well advised not to seek dispensation without having first taken practical steps to pay the security, including seeking payment from some funds currently held under order of the Court.

On 5 February 2008 an Auckland barrister, Mr Soondram, wrote to the Court of Appeal advising of his concern that Mr Erwood was unrepresented. He stated that although he practised only as a criminal barrister he was willing to represent Mr Erwood if he couldn't find other counsel who practised in civil litigation.

The President directed that both appeals be called on 17 March 2008 to determine whether they should be struck out for failure to provide security. Mr Erwood sought an adjournment because of his difficulty in finding a lawyer. That was refused. The hearing on 17 March took place by way of video link with Mr Soondram in counsel for the first respondents. Counsel appeared for the Official Assignee. Mr Erwood was not present at the hearing and was therefore unaware until later of what took place between the Court and counsel.

At the hearing Mr Soondram advised that he was authorised to give authority for the Official Assignee to pay the security of $4,740 fixed in the bankruptcy notice appeal using funds under the control of the Assignee. The Court indicated at the hearing its concern that Mr Erwood may have misled the Court in relation to a particular matter, with the consequence that it was considering making an increased costs order against him.

The Court reserved its judgment. On the next day the Court received a medical report referring to the appellant's mental health and proposing the appointment of a guardian ad litem.

The Court delivered its judgment on 19 March 2008. It made an "unless" order providing that unless the appellant paid security in relation to the adjudication appeal, which the Court now fixed at $20,000, by 5.00 pm on 20 March 2008, both appeals would be struck out. In other words, although there were separate appeals and separate sums fixed for security in relation to each appeal, the Court would strike out *both* appeals if the sum fixed in relation to the adjudication appeal was not paid. This was unusual but it is unnecessary

for us to consider whether the Court was justified in linking the two proceedings in this way or whether the sum fixed was excessive in the circumstances.

5 Payment was made of the security fixed in relation to the bankruptcy notice appeal immediately after the hearing. On 20 March 2008, before time had expired under the Court's orders, Mr Erwood filed a memorandum drawing the Court's attention to the fact that he had "told the Court to join (amalgamate) [the bankruptcy notice appeal] into [the adjudication appeal] into one appeal".
10 He also said that if the Court would not do that, then he wished to amend the grounds of the adjudication appeal "so I only have one appeal". He said that the Court had never addressed "my request to join [the bankruptcy notice appeal] into [the adjudication appeal] made on 17 December 2008 [sic] ... My request has not been dealt with".

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No response was made to this memorandum, presumably because the members of the Court, understandably, did not know what Mr Erwood was talking about. It is to be noted that Mr Erwood's memorandum would certainly not have led the Court to doubt that the adjudication appeal was still extant.
20 It seems that Mr Erwood, through confusion or memory lapse, was at this time under the impression that he had a "live" adjudication appeal. Certainly Mr Soondram did not know that the notice of abandonment had been filed and, in any event, he does not seem to have been involved at this stage.

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On 7 April 2008 the President issued a minute advising that security for costs in relation to the adjudication appeal had not been paid as directed by the Court and that "the result is, in terms of the unless order, both appeals are now struck out".

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Mr Erwood made an application seeking recall of the Court's judgment of 19 March 2008. For reasons that are not of present relevance, that application was not heard until 19 October 2009 and was then dismissed on 18 November 2009. Mr Erwood then sought leave to appeal out of time to

this Court against the order striking out the bankruptcy notice appeal. It was not until he did so on 7 July 2010 that the existence of the notice of abandonment of the adjudication appeal emerged.

5 From this summary of the facts, it is obvious that the bankruptcy notice appeal should not have been struck out for non-payment of security for costs. The security ordered in relation to that appeal was duly paid. The strike-out order was made only because security for costs had not been provided in relation to the adjudication appeal. But, as that appeal had already been 10 abandoned, plainly the Court of Appeal could not fix security for costs in relation to it, link the two appeals for the purpose of payment, and then strike out the bankruptcy notice appeal for non-compliance.

Accordingly, we allow the appeal, reinstate the bankruptcy notice appeal and 15 remit the proceeding to the Court of Appeal for hearing. In consequence, the costs order made by the Court of Appeal is also set aside. In doing so, we have given no consideration to the merits of the bankruptcy notice appeal or its efficacy in circumstances where there is now no challenge by way of appeal against the adjudication.

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So the formal orders of the Court are: The appeal is allowed. The appeal to the Court of Appeal is reinstated. The proceeding is remitted to the Court of Appeal for hearing and the costs order in the Court of Appeal is set aside.

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**MR McKENZIE QC:**

As Your Honours please.

**ELIAS CJ:**

30 Thank you Mr McKenzie, we are very grateful to you for your assistance in this matter. Thank you Mr Erwood. We will now retire. Thank you.

**COURT ADJOURNS: 10:16 AM**