IN THE SUPREME COURT OF NEW ZEALAND

SC 28/2012
[2012] NZSC 81

BETWEEN	ROBERT ERWOOD Appellant
AND	JANET MAXTED AND JANET MAXTED AND ALEXANDER JAMES JEREMY GLASGOW AS TRUSTEES OF THE ESTATE OF EDWARD ERWOOD Respondents

Court: McGrath, William Young and Chambers JJ

Counsel: Applicant in person
C R Carruthers QC and R P Harley for Respondents

Judgment: 3 October 2012

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $5,000 to the respondents, plus all reasonable disbursements, to be fixed if necessary by the Registrar.

REASONS

[1] Robert Erwood, the applicant, brought proceedings against his sister, Janet Maxted, in her personal capacity and against her and Alexander Glasgow as trustees of Edward Erwood's estate. The proceedings being unsuccessful, Mr Erwood was required to pay costs to the defendants, the current respondents.[1] When Mr Erwood failed to pay them, the respondents brought bankruptcy proceedings. Mr Erwood applied to set aside these proceedings, but was

1 *Erwood v Maxted* HC Nelson CIV-2003-442-363, 26 May 2006.

unsuccessful.[2] Mr Erwood brought an appeal against that decision (the bankruptcy notice appeal). Before that appeal was heard, Mr Erwood was adjudicated bankrupt. He filed a separate appeal against that decision (the adjudication appeal). Mr Erwood failed to pay security for costs with respect to the two appeals, as a consequence of which both appeals were struck out.

[2] This Court subsequently allowed an appeal from that strike-out, because it held that the Court of Appeal had overlooked the fact Mr Erwood had abandoned the adjudication appeal.[3] Because the adjudication appeal had been abandoned, Mr Erwood should not have been required to pay security for costs in respect of it and it followed that it was wrong to strike out the bankruptcy notice appeal on the ground of non-payment of security for costs.[4] This Court expressly noted, however, that, in reinstating the bankruptcy notice appeal and remitting it to the Court of Appeal for hearing, the Court was saying nothing about "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".[5]

[3] The Court of Appeal duly heard the bankruptcy notice appeal and dismissed it.[6] It is from that decision Mr Erwood now seeks leave to appeal.

[4] Although Mr Erwood is acting for himself on this application, he tells us that Mr McKenzie QC, who appeared as amicus curiae in the Court of Appeal, prepared the detailed notice of application for leave. We are grateful to Mr McKenzie for assisting Mr Erwood in that regard. We note also that Mr Erwood has prepared additional submissions, which we have also considered.

[5] Two matters are said to be of general and public importance. The first is whether someone with "a history of incapacity and known difficulties in understanding the full implications of legal process ... should have been provided with legal assistance when that person is the subject of bankruptcy proceedings".

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2 *Maxted v Erwood* HC Nelson CIV-2007-442-331, 27 September 2007.
3 *Erwood v Maxted* [2011] NZSC 23. A full history of the tangled procedural course followed is contained in that judgment.
4 At [19].
5 At [20].
6 *Erwood v Maxted* [2012] NZCA 110.

While we accept such an issue could potentially be one of general and public importance, we do not consider it can arise here because of the conclusions, first by the Associate Judge and then by the Court of Appeal, that Mr Erwood was not incapacitated and had a good understanding of the issues and the nature of the proceedings. We consider these conclusions to be reasonable. While those conclusions involved evaluative assessments rather than orthodox findings of fact, they are in effect concurrent findings, which in addition are very particular to Mr Erwood. We do not consider it appropriate to revisit those evaluations and findings on a second appeal.

[6] We would also observe that the bankruptcy proceedings were simple. Mr Erwood was not faced with a complex case involving pleadings, collecting evidence, assembling documents and the like. All that was required of him was the payment of money which he had been ordered to pay. It is far from clear that he would have behaved any differently had a litigation guardian been appointed. A litigation guardian could not have paid the money that was owed. That required a decision by him. We also note that in the various skirmishes that took place in the Court of Appeal in relation to the bankruptcy, he was, from time to time, either represented or had the assistance of an amicus, but he nonetheless continued to behave in an obdurate way.

[7] The second issue said to be of general and public importance is whether the Court can set aside a bankruptcy notice when the debtor is clearly solvent and there are means of execution readily available and known to the judgment creditors. The Court of Appeal rejected this argument on two grounds. First, it was unclear exactly what his financial position was, because of his attempts to hide his assets.[7] That was a factual finding which undermines the asserted point of general importance: he was *not* "clearly solvent". Secondly, and in any event, the Court of Appeal held that a debtor's solvency is not a ground on which a bankruptcy notice must necessarily be set aside if a debtor unreasonably refuses to pay a debt plainly owed.[8] That proposition of law is clearly right. This ground of appeal does not meet the statutory test.

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7 At [57].
8 At [57].

[8] Mr Erwood also asserted there may be "a substantial miscarriage of justice ... unless this appeal is heard". The application of that criterion in the context of civil appeals is explained in *Junior Farms Ltd v Hampton Securities Ltd (in liq)*.[9] None of the points raised under this head come close to meeting that test.

[9] No miscarriage of justice arose from the fact the bankruptcy proceeding was filed in Nelson rather than Wellington. The Court of Appeal's answer on that point is clearly right. As well, the argument is precluded by s 30 of the Insolvency Act 1967 in view of the abandonment of the adjudication appeal.

[10] The point about the Associate Judge permitting the bankruptcy process to proceed against Mr Erwood as an unrepresented and incapacitated person founders for the same reason the equivalent argument must fail under the "general and public importance" head, namely that it is factually unsupported.

[11] We have considered the other points raised by Mr Erwood. None gives us any concern whatever that a miscarriage of justice may have arisen. The simple fact is Mr Erwood was ordered to pay costs to the respondents and has refused to obey that order. He has deliberately hidden his assets. In those circumstances, an order for adjudication was plainly warranted.

Solicitors:
McFadden McMeekin Phillips, Nelson, for Respondents

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9 *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] 3 NZLR 522 (SC).