

IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2016
[2016] NZSC 54

BETWEEN ROBERT ERWOOD
 Applicant

AND THE OFFICIAL ASSIGNEE
 Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: Applicant in person
 C R Vinnell and R G Smedley for Respondent
 D M Lester as Amicus Curiae

Judgment: 16 May 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant's bankruptcy was annulled by Mackenzie J on 23 July 2013 on the basis that all creditors had been paid (see s 119(1)(b) of the Insolvency Act 1967).¹ The order was made on the application of the Official Assignee who also sought an order under s 119(7) as to a fee by way of remuneration. The Judge refused to make such an order, essentially on the basis that there were associated disputes which could not be practically resolved in the context of the annulment application.² The Judge also indicated that the Official Assignee had rights under s 104(1)(a) in relation to the amounts claimed and any decision made by the Official Assignee under that subsection could be the subject of appeal under s 86.³ Acting on this indication, the Official Assignee deducted a total of \$181,313.56 for

¹ *Official Assignee in Bankruptcy of the Property of Robert John Erwood v Erwood* [2013] NZHC 1827.

² At [35].

³ At [40].

commission, costs and disbursements. The applicant challenged this decision by way of appeal under s 86. This challenge was dismissed by Gendall J.⁴

[2] The applicant then appealed against the judgment of Gendall J.⁵ This appeal ran into difficulties in two respects. In the first place no significant progress was made in respect of the preparation of a case on appeal.⁶ Secondly, and contributing to this lack of progress, was a dispute as to security for costs,⁷ The applicant is not impecunious and there was no sensible reason for him to seek a dispensation from the requirement to pay security for costs. He was also, in the view of Wild J, non-co-operative to the point of being obstructive in relation to securing the release of funds from his bank account so as to provide security. In the end the time limit under r 43 of the Court of Appeal (Civil) Rules 2005 for the preparation of a case on appeal passed and the appeal was deemed to be abandoned.⁸ An application for an extension of time was, however, made under r 43(2). This application was dismissed by the Court of Appeal and the applicant now seeks leave to appeal against that decision.⁹

[3] In issue, therefore, is a challenge to a Court of Appeal decision declining to grant an extension of time to file a case on appeal. Such a challenge is not an obvious candidate for a grant of leave to appeal.

[4] As will be apparent from our explanation, the case in the High Court fell to be determined under the Insolvency Act 1967. Of particular relevance are:

- (a) sections 104(1)(a) and 166 which relate to the entitlement of the Official Assignee to remuneration and the recovery of expenses; and
- (b) sections 119 and 120 which address the effect of annulment.

It is necessary for us to set these out.

⁴ *Erwood v Official Assignee* [2015] NZHC 390.

⁵ *Erwood v Official Assignee* [2015] NZCA 620 (French, Miller and Kós JJ) [CA Judgment].

⁶ At [2]–[3].

⁷ See *Erwood v Official Assignee* [2015] NZCA 478 (Wild J) at [10](b), [10](c) and [11]; and *Erwood v Official Assignee* [2015] NZCA 507 (Wild J).

⁸ CA Judgment, above n 5, at [3].

⁹ CA Judgment, above n 5, at [40]–[41].

[5] Section 104(1)(a) provides:

104 Priorities

- (1) Subject to the provisions of this section and to any other enactment, the money received by the Assignee by the realisation of the property of a bankrupt shall be applied by him as follows:
 - (a) First, in payment of the fees and expenses properly incurred by the Assignee in carrying out the duties and exercising the powers of the Assignee and the remuneration of the Assignee:

And section 166 provides:

166 Remuneration of Assignees

- (1) Every Assignee is entitled to charge remuneration for carrying out his or her duties and exercising his or her powers as Assignee either—
 - (a) Of an amount equal to the amount fixed under section 166A of this Act; or
 - (b) At, or in accordance with, such rate or rates as may be prescribed under that section.

[6] Pausing at this point, the Official Assignee is entitled to remuneration under s 166 and such remuneration, along with an entitlement to reimbursement, is a first charge on the proceeds of realisation of the property of the bankrupt (under s 104(1)(a)).

[7] Section 119 provides:

119 When Court may annul adjudication

- (1) In any of the following cases the Court may by order, on the application of the Assignee or any person interested, annul the adjudication—
 - (a) Where the Court is of the opinion that the order of adjudication should not have been made:
 - (b) Where the Court is satisfied that the debts of the bankrupt have been fully paid or satisfied:
 - (c) Where the Court is of the opinion that the liability of the bankrupt to pay his or her debts should be revived because since the date of adjudication there has been a substantial change in the financial circumstances of the bankrupt:

- (d) Where the Court has approved a composition under Part 12 of this Act.
- (2) If an application is made on any ground specified in paragraphs (a) to (c) of subsection (1) of this section by any person other than the Assignee, a copy of the application shall be served on the Assignee in such manner and within such time as the Court may direct.
- (3) The Assignee may appear on the hearing of any application made on any ground specified in paragraphs (a) to (c) of subsection (1) of this section as if the Assignee were a party to the proceeding.
- (4) If the order of annulment is made on the ground specified in paragraph (a) of subsection (1) of this section, the adjudication shall be annulled from and after the date of the adjudication.
- (5) If the order of annulment is made on any ground specified in paragraphs (b) to (d) of subsection (1) of this section, the adjudication shall be annulled as from the date of the order.
- (6) Where application is made to the Court to annul any order of adjudication on the ground that the order ought not to have been made by reason of a defect in form or procedure, subject to section 11 of this Act, the Court may, in addition to annulling the order, exercise its powers to correct the defect and order that the petition be reheard as if no order of adjudication had been made.
- (7) Where an order of annulment is made on any ground specified in paragraphs (a) to (c) of subsection (1) of this section—
 - (a) The Court may, on the application of the Assignee, order, in addition to any costs that may be awarded, the payment of such fee by way of remuneration for the Assignee's services as the Court considers reasonable:
 - (b) Any such fee shall be paid into the Crown Bank Account:
 - (c) No commission shall be payable under section 166 of this Act in respect of any services for which any such fee is paid.

[8] As will be apparent, the annulment was under s 119(1)(b). Such annulment was not an impeachment of the original bankruptcy and there is no reason to suppose that such an annulment should displace the entitlement of the Official Assignee to remuneration and reimbursement.

[9] This view is consistent with s 119(7). If payment of a fee is directed, the Official Assignee may not recover remuneration under s 166. The clear implication of this is that if no fee is awarded, the entitlement to s 166 remuneration remains in place. As well, there is nothing in s 119(7) which addresses recovery of expenses.

There is no reason why an annulment under s 119(1)(b) should divest an Official Assignee of an already accrued right to reimbursement.

[10] The argument for the applicant however is that in this case the annulment did not take away the Official Assignee's rights to remuneration and reimbursement. This is said to be the effect of s 120(1) which provides:

120 Effect of annulment

- (1) Where an order annulling an adjudication has been made, all property of the bankrupt vested in the Assignee under the bankruptcy, and not sold or disposed of under any contract of sale or disposition entered into by the Assignee while it was so vested is hereby re-vested in the bankrupt without the necessity of any conveyance, transfer, or assignment of any kind.

The contention of the applicant is that the immediate re-vesting in the applicant of the property held by the Official Assignee at the time of the annulment meant that the Official Assignee could no longer claim remuneration or reimbursement.

[11] The Court of Appeal considered that this contention was arguable but dealt with the application for an extension of time on the basis that if it were held to be correct, the judgment of Mackenzie J (which had proceeded on the assumption that the Official Assignee's entitlements were not affected by the annulment) would be recalled or set-aside on appeal (for which an extension of time would be allowed).¹⁰ For this reason the Court considered that contention did not justify the extension of time sought.

[12] In our view the applicant's contention is incorrect. It is inconsistent with s 119(7) which is clearly premised on the assumption that the right of remuneration under s 166 is not affected by an annulment unless a substitutionary fee is ordered. As well, as is apparent from what we have said, we consider that it makes no sense. We construe s 120 as applying to the property of the bankrupt after allowing for the entitlements of the Official Assignee under s 104(1)(a).

[13] The applicant also wishes to challenge the merits of the decision by Gendall J. His challenges were reviewed by the Court of Appeal, as best it could on

¹⁰ CA Judgment, above n 5, at [34]–[39].

the material available.¹¹ We do not see its approach as giving rise to an issue of law of public or general importance and we see no appearance of a miscarriage of justice.

[14] The net effect of all of this is that there is no point of public importance in the question the applicant wants to raise on appeal, namely whether an extension of time to file the case on appeal in the Court of Appeal should have been granted. We see no likelihood of a miscarriage if leave is refused. This is for two reasons. The first is that the need for the extension was largely a problem of the applicant's own making. The second is that an appeal to the Court of Appeal is unlikely to yield any practical benefit to the applicant. The point the applicant wishes to pursue before the Court of Appeal is, on our analysis, incorrect. On the Court of Appeal's analysis it is arguable but, even if an appeal to that Court were to succeed, it would likely be followed by a successful application for recall of, or appeal against, the decision of MacKenzie J referred to above. Either way, the applicant would not succeed in claiming the amount paid to the Official Assignee as remuneration.

Solicitors:
Anthony Harper, Christchurch for Respondent

¹¹ CA Judgment, above n 5, at [10]–[30].