IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 41/2021
[2021] NZSC 81

BETWEEN		SENG BOU (PAUL) KEUNG Applicant
AND		OFFICIAL ASSIGNEE First Respondent
		WESTPAC NEW ZEALAND LIMITED Second Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: M J Tingey for Applicant
M Deligiannis and O L Wilkinson for First Respondent
S C D A Gollin for Second Respondent

Judgment: 7 July 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

[1] The applicant was adjudicated bankrupt on 20 September 2010 on the basis of his non-payment of a costs order which had been made against him on 21 April 2010. He appealed against the costs order, but his applications for a stay of execution were declined in both the High Court[1] and Court of Appeal.[2] On 13 October 2010—that is, after his adjudication—the Official Assignee discontinued the appeal against the costs

1 *GBR Investment Ltd v Goose Bay Ranch Holdings Ltd* HC Christchurch CIV-2009-409-613, 21 May 2010.
2 *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17.

order. The applicant was automatically discharged from bankruptcy on 9 November 2013. The applicant has settled with his creditors, albeit on what appears to have been discounted terms.[3]

[2] In September 2018, he applied to the High Court under s 309(1)(a) of the Insolvency Act 2006 for an order annulling his bankruptcy.[4] This section provides:

> **309 Court may annul adjudication**
>
> (1) The court may, on the application of the Assignee or any person interested, annul the adjudication if—
>
> (a) the court considers that the bankrupt should not have been adjudicated bankrupt…

[3] In the High Court, Associate Judge Bell concluded that the applicant "should not have been adjudicated bankrupt" for the purposes of s 309(1)(a). This was because the applicant had not been served with the application for an order for costs against him, with the result that the order had been made in breach of natural justice.[5] The Associate Judge was of the view that if the true facts had been before the Court when adjudication was in issue, the applicant would not have been adjudicated bankrupt.[6] He concluded, however, that the applicant lacked standing to challenge his adjudication on the basis of an attack on the judgment debt.[7] He also said that in any event, he would not have exercised the discretion to annul in favour of the applicant.[8]

[4] There may have been grounds for challenge to the Associate Judge's conclusion that the applicant should not have been adjudicated bankrupt. The natural justice argument relied on before the Associate Judge was, at most, only obliquely

---

3 As we understand the course of events, Mr Keung settled with all creditors except for Westpac before the annulment application. He subsequently settled with Westpac before the Court of Appeal hearing. The Court of Appeal noted (at [30]) that "Most or all of his creditors appear to have settled for significantly less than the full amount of their claims". This is said in the applicant's submissions to be "disputed", but no particulars of the basis of the dispute have been provided.

4 *Keung v Official Assignee* [2020] NZHC 32 (Associate Judge Bell) [HC judgment].

5 At [52].

6 At [53]. See *Re Fraser, ex parte Central Bank of London* [1892] 2 QB 633 (CA) for the proposition that a court can go behind an extant judgment to determine if a debt on which the judgment is founded is in fact a good debt. See also *Re Flateau, ex parte Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 (CA) for the principle that there must be sufficient cause to go behind a judgment, including fraud, collusion or miscarriage of justice.

7 At [71].

8 At [78].

relied on in the costs appeal and stay applications.[9] As well, the applicant, who had been represented at times during the bankruptcy proceeding, did not oppose the adjudication. As it happens, however, there has been no subsequent challenge to that conclusion.

[5] The Court of Appeal dismissed the applicant's appeal.[10] It put to one side the issue of standing but held that, assuming the applicant had standing, his application should be dismissed as a matter of discretion.[11] This was on the basis of conclusions that (a) the applicant was insolvent when adjudicated; (b) there was an eight-year delay in seeking an annulment; (c) he did not pay his creditors in full but rather reached settlements with them, which reflected the then realities of the effect of his adjudication; and (d) there had been an earlier adjudication in bankruptcy.[12]

[6] We accept that there is a genuinely arguable issue as to whether the applicant had standing to seek an annulment under s 309(1)(a) of the Insolvency Act. But a conclusion in his favour on this point would not result in his appeal being allowed unless he could also successfully challenge what are now concurrent conclusions as to the exercise of the discretion.

[7] Leaving aside a contention that the High Court and Court of Appeal should have considered only "facts in existence at the time of the bankruptcy adjudication", the applicant's challenge to the exercise of discretion is based on arguments as to the factual basis of some of the reasons relied on by the High Court and Court of Appeal and the weighting given to the various considerations in favour of, or against, an annulment. There is insufficient doubt as to the entitlement of the courts to take into account what happened after adjudication (for instance, taking advantage of the adjudication to settle debts on discounted terms) to warrant granting leave. More

---

9 The costs application had been served on solicitors who acted for him and for the companies of which he was a director. The complaint in the notice of appeal and stay applications seems to have been that he had been given insufficient time to respond to the application.

10 *Keung v Official Assignee* [2021] NZCA 92 (Brown, Venning and Katz JJ) [CA judgment].

11 At [61].

12 At [58]–[59].

generally, this aspect of the appeal does not involve any matter of general or public importance and there is no appearance of a miscarriage of justice.[13]

[8] Accordingly, the application for leave to appeal is dismissed. As the first respondent did not formally oppose the application, there is no order as to costs.

Solicitors:
Ronald W Angland & Son, Leeston for Applicant
Crown Law Office, Wellington for First Respondent
MinterEllisonRuddWatts, Auckland for Second Respondent

[13] Senior Courts Act 2016, s 74(2)(a) and (b). See also *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].