

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 72/2020
[2020] NZSC 123

BETWEEN	DAVID JOHN HAMPTON Applicant
AND	MINTERELLISONRUDDWATTS First Respondent
AND	OFFICIAL ASSIGNEE Second Respondent
AND	COMMISSIONER OF INLAND REVENUE Third Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: Applicant in person
P H Courtney and O L Wilkinson for Second Respondent
S M Kinsler for Third Respondent

Judgment: 13 November 2020

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay costs of \$1,250 to each of the second and third respondents.**
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REASONS

Introduction

[1] The applicant, Mr Hampton, applies for leave to appeal the Court of Appeal's decision dismissing two appeals; the first in which Mr Hampton sought a stay of

adjudication of bankruptcy, and the second in which he challenged a High Court order imposing conditions on his discharge from bankruptcy.¹

Extension of time

[2] Mr Hampton's notice of application was filed one day out of time. He seeks an extension of time. The Official Assignee abides the decision of the Court in this respect. The Commissioner of Inland Revenue does not oppose an extension. The extension is granted.

Background

[3] It is necessary to rehearse at more length than would be usual some of the long-running litigation background to this application in order to place it in proper context.

[4] Mr Hampton and his associated entities (the Chesterfield entities) have been engaged in a dispute with the Commissioner of Inland Revenue over their tax liability since the 1990s. In 2008, Mr Hampton commenced proceedings against the Commissioner, the Attorney-General, a solicitor and 20 departmental officers. He claimed damages for misfeasance in public office (the misfeasance claim). In March 2013, the Court of Appeal stayed that proceeding pending the filing of a statement of claim settled by a lawyer who had reviewed the available evidence.²

[5] In June 2013, Mr Hampton was adjudicated bankrupt. The first respondent, MinterEllisonRuddWatts (MERW), was the petitioning creditor. Mr Hampton filed a statement of affairs a year later in June 2014.³ He could therefore be discharged from bankruptcy on the expiry of three years from that date unless the Official Assignee objected or a creditor were granted leave by the court to object.⁴ In the event of such objection, the public examination procedures in ss 173–181 of the Insolvency

¹ *Hampton v Minter Ellison Rudd Watts* [2020] NZCA 291, (2020) 29 NZTC ¶24-069 (Clifford, Simon France and Lang JJ) [CA judgment].

² *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [116] and [119].

³ Insolvency Act 2006, s 67(1).

⁴ Sections 290 and 292.

Act 2006 are activated.⁵ In Mr Hampton's case, the Official Assignee lodged an objection and the Commissioner of Inland Revenue also applied for leave to object to the discharge. The latter also sought conditions on discharge in the public interest. Mr Hampton cross-applied to be discharged unconditionally.

[6] Venning J heard the examination and the various applications in July 2018.⁶ He ordered that Mr Hampton be discharged on 30 July 2018, subject to conditions preventing him from managing a business without leave of the High Court for four years.⁷ Mr Hampton appealed. He sought unconditional discharge but applied for a further order that the discharge be suspended pending redrafting of the misfeasance claim.

[7] Before that appeal was heard, Mr Hampton instructed senior counsel to finalise his statement of claim in the misfeasance claim. That pleading was completed in April 2019. Mr Hampton considered he could then re-enliven his misfeasance claim. But since he was a bankrupt, his interest in that claim had vested in the Official Assignee.⁸ There was no question that discharge from bankruptcy does not re-vest in the bankrupt their former property. The misfeasance claim was thus no longer Mr Hampton's to bring and he could not apply for the stay to be lifted.

[8] Mr Hampton then applied to the High Court for interlocutory orders under r 17.29 of the High Court Rules 2016 to stay both his original adjudication of bankruptcy and Venning J's discharge order. Rule 17.29 provides:

17.29 Stay of enforcement

A liable party may apply to the court for a stay of enforcement or other relief against the judgment upon the ground that a substantial miscarriage of justice would be likely to result if the judgment were enforced, and the court may give relief on just terms.

Mr Hampton hoped this procedure would have the effect of unravelling, with retrospective effect, all that had occurred pursuant to the adjudication of bankruptcy,

⁵ Section 295(1).

⁶ *Minter Ellison Rudd Watts v Hampton (A Bankrupt)* [2018] NZHC 1866.

⁷ At [71].

⁸ Insolvency Act, s 101(1).

including the divestment of the misfeasance claim. This then would give him standing to apply for the Court of Appeal's stay to be lifted.

[9] Osborne J heard this application in July 2019.⁹ The Judge held that there was no jurisdiction to entertain a stay of the original adjudication order and that r 17.29 did not provide a basis for staying Venning J's discharge order.¹⁰ The proper procedure for staying Venning J's discharge order was to apply under r 12 of the Court of Appeal (Civil) Rules 2005 pending the hearing of the discharge appeal.¹¹ The Judge nevertheless granted a stay under r 12 to protect Mr Hampton's position in the meantime.¹²

[10] In August 2019, Mr Hampton filed another appeal, this time against Osborne J's interlocutory judgment. He argued that the Judge should have gone further and stayed the bankruptcy adjudication too.

[11] The Court of Appeal decision that Mr Hampton seeks leave to appeal addresses both the discharge appeal and the interlocutory stay of adjudication appeal.

Court of Appeal decision

Jurisdiction to stay the bankruptcy adjudication

[12] The Court of Appeal held that there was no jurisdiction under r 17.29 to stay the bankruptcy adjudication.¹³ The rule provides that a "liable party" may apply for a stay of enforcement or other relief against a judgment on the ground that a substantial miscarriage of justice will likely result if the judgment were enforced. The Court considered that Mr Hampton was not a "liable party" under a judgment, as bankruptcy is a status, not a liability. Nor could the bankruptcy be "enforced" by MERW.¹⁴ An adjudication order is not what is contemplated by r 17.2.¹⁵

⁹ *Re Hampton* [2019] NZHC 1774.

¹⁰ At [18] and [20].

¹¹ At [21].

¹² At [24]–[25].

¹³ CA judgment, above n 1, at [25].

¹⁴ At [19].

¹⁵ At [20]. Rule 17.2 provides for the method of enforcing orders.

[13] The Court considered that the procedure to address the circumstance Mr Hampton says he finds himself in is the annulment procedure contained in s 309 of the Insolvency Act. As the Court noted, Mr Hampton had applied twice under this section without success.¹⁶ The Court's view was that Mr Hampton sought, in effect, a temporary annulment, so that his assets in bankruptcy would revert to his ownership and control. This, the Court considered, is not contemplated by the Act and would cut across the bankruptcy regime entirely.¹⁷

Conditions on discharge

[14] The Court of Appeal was also satisfied that it was appropriate to impose conditions on Mr Hampton's discharge.¹⁸ The Court saw two factors of principal significance: Mr Hampton's failure to distinguish between the affairs of the various Chesterfield entities, and his lack of cooperation with the Official Assignee during the course of his bankruptcy.¹⁹ These justified the extended controls imposed by Venning J.

This application

[15] Mr Hampton made no submissions in relation to the appeal against the conditions of discharge imposed by Venning J.

[16] Mr Hampton characterises his application under r 17.29 as essentially an application for an extension of time before discharge from bankruptcy to allow him to retain the ability to proceed with the misfeasance claim. He argued that by this means he could show that he should not have been adjudicated bankrupt in the first place. He cites various cases on extension of time to apply for relief, including *Ellis v R*²⁰ and *R v Lee*.²¹

[17] Specifically, Mr Hampton says that he is in fact a "liable party" under r 17.29 because he continues to be a judgment debtor and a liable party in relation to his

¹⁶ At [23].

¹⁷ At [24].

¹⁸ At [45].

¹⁹ At [34].

²⁰ *Ellis v R* [2019] NZSC 83.

²¹ *R v Lee* [2006] 3 NZLR 42 (CA).

creditors until discharged from bankruptcy. He submits that the adjudication is an “enforcement order” under the rule because it is enforceable by the Official Assignee. Further, he argues, there is nothing in r 17.29 that precludes it from applying to judgments relating to debt recovery and enforcement. Mr Hampton also suggests that staying the bankruptcy would allow him to pursue the misfeasance claim as a cross-claim against the Commissioner’s claim in debt.

[18] Mr Hampton says that the relationship between r 17.29 and the insolvency regime is a matter of general or public importance, and that there is a risk of a substantial miscarriage of justice if the adjudication is maintained before the “alleged fraud [of the defendants in the misfeasance claim] was brought to trial for determination”. He also submits that this case will have various advantages for the integrity of the tax system and the public sector.

[19] Mr Hampton attached to his submissions an unsworn affidavit from his former wife and business partner, Ms Sisson. This is not admissible without the necessary applications (even if it had been sworn) and we have not considered its contents.

Our assessment

[20] For the reasons generally traversed in the Court of Appeal’s judgment and by the respondents in this application, we are satisfied that the applicant’s prospects of succeeding in his arguments are insufficient either to give rise to any issue of general or public importance, or to meet the heightened standard for risk of miscarriage in relation to civil appeals.²² We see no reason to depart from the Court of Appeal’s view that r 17.29 does not apply to bankruptcy adjudications, which are dealt with under Part 24 of the High Court Rules.

[21] We are also satisfied that there is no issue of general or public importance nor any risk of miscarriage with respect to the appeal against Mr Hampton’s conditions of discharge.

²² Senior Courts Act 2016, s 74(2)(a) and (b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.

[22] For completeness, we note that Mr Hampton entered for filing reply submissions to those of the respondents in this application. There is no express provision in the Supreme Court Rules 2004 for this additional step.²³ Nor did Mr Hampton apply for leave to file reply submissions. We have accordingly not referred to them.

Result

[23] The application for leave to appeal is dismissed.

[24] The applicant must pay costs of \$1,250 to each of the second and third respondents.

Solicitors:
Crown Law Office, Wellington for Second and Third Respondents

²³ See Supreme Court Rules 2004, r 20.