

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 36/2019
[2019] NZSC 77

BETWEEN MICHAEL EDWIN KOOIMAN
 Applicant

AND F M CUSTODIANS LIMITED
 Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: J D Dallas for Applicant
 S D Munro and A L Davidson for Respondent

Judgment: 22 July 2019

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

[1] Mr Kooiman seeks leave to appeal a decision of the Court of Appeal, in which that Court upheld a decision of the High Court declining to set aside a bankruptcy notice.¹

Background

[2] The background to this application is, in brief, as follows. Mr Kooiman personally guaranteed a loan from FM Custodians Ltd (FMC) to a company of which he was sole director. The company defaulted. In July 2017, FMC obtained summary

¹ *Kooiman v FM Custodians Ltd* [2019] NZCA 76 (French, Dobson and Brewer JJ) [*Kooiman* (CA)].

judgment against Mr Kooiman for \$930,103.90.² A bankruptcy notice was issued against Mr Kooiman in August 2017. Mr Kooiman applied to the High Court to set aside the bankruptcy notice.³

[3] Mr Kooiman's primary argument was that a Mr Hutchison, who signed the application for adjudication on behalf of FMC, lacked actual authority from FMC to do so.⁴ Mr Hutchison is the Managing Director of a separate entity, Fund Managers Otago Ltd (FMO). FMC, FMO and a third entity, Trustees Executors Ltd (TEL), are parties to a custody services agreement under Part 4 of the Financial Markets Conduct Act 2013.⁵ According to an affidavit provided by one of FMC's directors (the affidavit), the Custody Services Agreement authorised FMO to undertake certain functions, including undertaking actions in FMC's name, provided that FMO first informed TEL and had obtained the prior written consent of TEL.⁶ Mr Kooiman submitted that the delegation of authority to Mr Hutchison was inconsistent with FMC's constitution and that in any event the affidavit was inadequate as it failed to provide copies of the necessary written consents.⁷

[4] In the High Court, Associate Judge Smith considered this challenge did not amount to a valid cross claim. This meant Mr Kooiman's failure to comply with the requirements of the bankruptcy notice remained an act of bankruptcy under s 17 of the Insolvency Act 2006.⁸ The Associate Judge did accept that if it was established that solicitors filed the bankruptcy notice without instruction, the Court could set aside a bankruptcy notice as an abuse of process. But he was clear that this was not such a case.⁹ His reasons were as follows:

- (a) rule 5.37 of the High Court Rules 2016 provides that the Court is entitled to treat a document filed by a solicitor as warranting that

² *FM Custodians Ltd v Kooiman* [2017] NZHC 1783.

³ *Kooiman v F M Custodians Ltd* [2018] NZHC 176 (Associate Judge Smith) [*Kooiman* (HC)].

⁴ At [5].

⁵ At [19].

⁶ At [19].

⁷ At [23]–[24].

⁸ At [35].

⁹ At [36].

that solicitor is authorised to file the document by the party on whose behalf the document purports to be filed;¹⁰

- (b) solicitors have an ongoing ethical duty to advise the Court promptly if they have learned that documents have been inadvertently filed without valid authority;¹¹ and
- (c) in light of this, Mr Kooiman has “at least some burden ... to produce evidence that is at least sufficient to warrant further enquiry”.¹² It is insufficient for a judgment debtor to merely question authority for filing the proceeding.¹³

[5] Associate Judge Smith considered that the challenge to authority in this case did not “go beyond the level of speculation”.¹⁴ First, FMC’s solicitors had warranted to the Court that they had authority to file (per r 5.37); second, the affidavit stated that the relevant approvals were obtained “as required”;¹⁵ and third, FMC’s solicitors confirmed at the hearing that they considered that they had authority to file the proceeding.¹⁶ In the face of that evidence, the Associate Judge was not prepared to infer an absence of written consent from FMC’s failure to produce copies.¹⁷

[6] In the Court of Appeal, Mr Kooiman repeated this argument.¹⁸

[7] The Court was satisfied that Mr Kooiman’s challenge was speculative and the affidavit was adequate evidence of the authority vested in Mr Hutchison.¹⁹

¹⁰ At [38].

¹¹ At [38].

¹² At [39].

¹³ At [39].

¹⁴ At [41].

¹⁵ At [40].

¹⁶ At [40].

¹⁷ At [41].

¹⁸ *Kooiman* (CA), above n 1, at [19]–[21].

¹⁹ At [22].

The proposed appeal

[8] In his application for leave to appeal to this Court, Mr Kooiman submits that the Court of Appeal's decision lacked a proper evidential basis. Specifically, Mr Kooiman submits that the Court should not have relied on the custody services agreement because it was not produced in evidence, and that the Court should not have relied on the affidavit.

[9] Mr Kooiman submits that, as a result, a substantial miscarriage of justice has occurred.²⁰ This is because he will be adjudicated bankrupt based on a judgment where the other party had no standing to issue proceedings. He submits further that the issue of the standing of a party (such as FMC) to bring proceedings is a matter of public interest.

[10] We do not consider this case meets the criteria in s 74 of the Senior Courts Act 2016 for the grant of leave to appeal. No issue of general or public importance arises on these facts. The outcome of any appeal would not have significant effect beyond the parties to the custody services agreement.

[11] Nor do we consider that a substantial miscarriage of justice will occur if the appeal is not heard.²¹ Having considered the reasoning given in both the High Court and Court of Appeal, we consider the argument that Mr Hutchison did not have authority to file bankruptcy proceedings against Mr Kooiman has insufficient prospects of success to justify a further appeal. Further, even if the lower Courts were in error and Mr Hutchison did not in fact have authority, there is no suggestion that another bankruptcy notice would not simply be filed against Mr Kooiman by the appropriate officer duly authorised. We therefore dismiss the application for leave to appeal.

²⁰ Senior Courts Act 2016, s 74(2)(b).

²¹ *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

[12] Mr Kooiman must pay the respondent costs of \$2,500.

Solicitors:
Anderson Lloyd, Christchurch for Respondent