IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-671
[2018] NZHC 176

BETWEEN	MICHAEL EDWIN KOOIMAN Judgment debtor
AND	F M CUSTODIANS LIMITED Judgment creditor

Hearing: 5 February 2018

Appearances: Q S Haines for the applicant/judgment debtor
S D Munro and A L Davidson for the respondent/ judgment creditor

Judgment: 16 February 2018

JUDGMENT OF ASSOCIATE JUDGE SMITH

---

[1] The applicant, Mr Kooiman, applies to set aside a bankruptcy notice issued on 17 August 2017. The bankruptcy notice was based on a judgment given on 31 July 2017 on an application by the respondent (FMC) for summary judgment.

[2] The amount of FMC's judgment was $873,232.62, together with interest of $56,871.28. The bankruptcy notice was issued for the total sum of $930,103.90, together with $796 for the costs of issuing the notice.

[3] Initially FMC contended that Mr Kooiman had failed to file and serve his application to set aside the bankruptcy notice within the period of ten working days allowed by s 17(4)(a) of the Insolvency Act 2006 (the Act). However, that objection was abandoned by Mr Munro in his submissions filed shortly before the hearing.

Mr Kooiman's amended application to set aside the bankruptcy notice

[4] Mr Kooiman's setting aside application, which appears to have been prepared by him without the benefit of legal assistance, set out no fewer than 14 grounds in support. However, Mr Haines did not rely on any of them: he advised at the hearing that his instruction was that none of the grounds originally articulated by Mr Kooiman would be pursued.

[5] Instead, Mr Haines relied on a new argument, raised for the first time in his written submissions filed for Mr Kooiman on 26 January 2018. The new argument was introduced in Mr Haines' written submissions in these terms:

> It has come to Mr Kooiman's attention, by a memorandum of the respondent's solicitor dated 16 November 2017, that Mr Hutchison, the person instructing the solicitors and executing applications on behalf of the respondent does not have actual authority to take these proceedings.

[6] The written submissions were supported by a further affidavit sworn by Mr Kooiman on 26 January 2018, in which Mr Kooiman said that "… the requirements for management of [FMC] are clearly set out in [FMC's] constitution and authority claimed by Mr Hutchison is simply not supported by the constitution of FMC or [FMC's] evidence/explanation". Mr Kooiman said that he did not believe Mr Hutchison had authority of the board of FMC to issue proceedings against him, and that the judgment obtained against him by FMC was a nullity.

FMC's response to the new argument

[7] By memorandum dated 29 January 2018 counsel for FMC submitted that the Court should disregard Mr Kooiman's affidavit sworn on 26 January 2018. The affidavit was well outside the timetable dates for Mr Kooiman to file supporting and reply affidavits, and his counsel had advised on 30 November 2017 that no reply evidence would be filed. No application for leave to file further evidence had been filed, and the authority issue belatedly raised by Mr Kooiman had not been raised in the pleadings. Quite apart from those matters, FMC did not accept Mr Kooiman's allegations of lack of authority to issue the proceeding, and the matters belatedly raised by him did not raise any valid ground for setting aside the bankruptcy notice.

[8] To cover its position in the event that the Court was minded to admit Mr Kooiman's further affidavit, Mr Munro and Ms Davidson submitted with their 29 January memorandum a further affidavit from Mr Robert Paul Russell, a director of FMC, in which Mr Russell rejected Mr Kooiman's lack of authority argument.

Evidence on the lack of authority argument

Mr Kooiman

[9] As noted at [3] above, FMC initially considered that Mr Kooiman had failed to apply to set aside the bankruptcy notice in time. On 13 October 2017, it filed an application to adjudicate Mr Kooiman bankrupt, relying on his failure to comply with the bankruptcy notice that had been served on him on 24 August 2017. The application for adjudication was signed by Mr Peter Hutchison on behalf of FMC, and Mr Hutchison also signed an affidavit verifying the adjudication application.

[10] On 19 October 2017, counsel for FMC received confirmation from a Deputy Registrar that the application had been received. However, the Deputy Registrar raised a query regarding the signing of the application by Mr Hutchison on behalf of FMC.

[11] On 24 October 2017, FMC's solicitors sent an email to the Deputy Registrar (the October email) confirming that Mr Hutchison was authorised to sign documents for FMC. The email noted that Mr Hutchison had signed several other adjudication applications on behalf of FMC.

[12] FMC's solicitors provided the following advice to the Court in the October email:

> Further, we note your concerns with regards to the appropriateness of Mr Hutchison signing the application on behalf of the Judgment Creditor, F M Custodians Limited.
>
> As set out in his affidavit of 9 October 2017, Mr Hutchison is the Managing Director of Fund Managers Otago Limited, which in turn manages Capital Mortgage Income Trust Group Investment Fund (the Trust). Further, the trustee of the Trust is Trustees Executors Limited. In these proceedings the Judgment Creditor, F M Custodians Limited (FMC) is the custodial company of Trustees Executors Limited. Essentially, the parent company of the trustee is asking Mr Hutchison to sign the application based on his management knowledge and involvement with the Trust.

> While this relationship may be somewhat complex, Mr Hutchison is, as set out in his affidavit in support, authorised to swear such affidavits, and sign such applications for adjudication, on behalf of FMC. Particularly in light of the position he holds, he is in the most appropriate position to do this, and has full knowledge of the facts of the application as brought by the Judgment Creditor.
>
> Further, we note that Mr Hutchison has been permitted to sign such applications on behalf of the Judgment Creditor in similar proceedings in the past, and we refer you to the other applications **attached** to this email. We note previous applications signed by Mr Hutchison have been duly accepted for filing by the High Court in Wellington in the following proceedings:
>
> …
>
> We trust that this should sufficiently resolve any concerns you may have with regards to Mr Hutchison's authority in this proceeding.

[13] It appears that Mr Kooiman had been unaware of any potential issue over Mr Hutchison's authority to give instructions to FMC's solicitors to file the summary judgment proceeding against him. It was only when the October email was attached to a memorandum filed by FMC in this Court on 16 November 2017 that Mr Kooiman and his counsel had access to the information that they now say demonstrates that the summary judgment proceeding was filed without proper authority.

[14] In his further affidavit sworn on 26 January 2018, Mr Kooiman questioned FMC's explanation on the "authority to file" issue, as put forward in the October email. Mr Kooiman contended that Mr Hutchison's purported authority came from a third party, that did not have the power to make decisions for FMC. He annexed copies of extracts from the Companies Register for FMC, showing that Mr Hutchison is not a director of FMC — the directors are Melanie Lyn Hewitson and Robert Paul Russell. The sole listed shareholder is Trustees Executors Limited.

[15] Mr Kooiman also attached a copy of FMC's constitution, as filed in the Companies Office on 27 July 2000.

[16] Paragraphs 4 and 5 of the Constitution contain the following:

> 4. The business and affairs of the Company must be managed by, or under the direction or supervision of, the board.

> 5. The board may delegate to a committee of directors, a director or an employee of the Company or any other person, any of its powers, other than those specified in the second schedule to the Act.

[17] Mr Kooiman's contention is that the explanation set out in the October email, including in particular the statement: "Essentially, the parent company of the trustee is asking Mr Hutchison to sign the application based on his management knowledge and involvement with the Trust", does not meet the requirements in respect of the delegation of authority set out in FMC's constitution. Mr Kooiman expressed the belief that he had grounds to apply to the Court to have the summary judgment set aside, and to recover costs and damages from Mr Hutchison personally.

FMC

[18] As noted above, Mr Russell, a director of FMC, provided an affidavit in reply, rejecting any suggestion that Mr Hutchison did not have authority from FMC to issue proceedings against Mr Kooiman on FMC's behalf. He explained that Mr Hutchison is the Managing Director of Fund Managers Otago Limited, which is the Manager of the Capital Mortgage Income Trust Group Investment Fund (the Fund). The Fund was formed by a trust deed dated 18 September 2003, the terms of which were later amended and restated in a trust deed dated 18 November 2016. Trustees Executors Limited is the Supervisor of the Fund, and FMC acts as the custodial company for Trustees Executors: that is, it holds the Fund's property.

[19] Mr Russell deposed that Trustees Executors Limited as supervisor entered into a Custody Services Agreement (the Agreement) with Fund Managers Otago Limited as Manager, and FMC as "Nominee". Under the Agreement, the Supervisor (a) nominated FMC as nominee to hold the property of the Fund on its behalf; and (b) authorised the Manager (Fund Managers Otago Limited) to undertake certain functions to assist the Supervisor with its custody functions, including undertaking action in FMC's name to recover loans owed to the Fund, provided that the Manager first informed the Supervisor of the intended action and had obtained the prior written consent of the Supervisor to such action.

[20] Mr Russell then stated:

> 8. As required, Fund Managers Otago Limited and Mr Hutchison sought and obtained the Supervisor's approval throughout the proceedings brought against [Mr Kooiman].

[21] Mr Russell summarised the position by saying that Mr Hutchison, in his capacity as Managing Director of Fund Managers Otago Limited, the Manager of the Fund, had at all material times been authorised to take steps and sign documents (including specifically the commencement of proceedings, the issuing of a bankruptcy notice, and the application to adjudicate Mr Kooiman bankrupt) on behalf of FMC as Nominee under the Agreement.

Counsel's submissions

[22] In his written submissions for Mr Kooiman, Mr Haines submitted that there is no direct link of authority established in the October email between the board of FMC and Mr Hutchison. Mr Hutchison's authority appears to have come from the "parent company", Capital Mortgage Income Trust Group Investment Fund.

[23] Mr Haines further submitted that the constitution of FMC does not empower the shareholder (Trustees Executors Limited) to make decisions, manage or delegate authority for FMC or its board. He submitted that, at the very least, the matter of Mr Hutchison's authority needs to be tried in an environment and procedure that allows Mr Kooiman to fully discover the facts. It would be unsafe for the Court to rely on the judgment entered in the summary judgment proceeding, and in those circumstances the bankruptcy notice must be set aside: any lack of authority to issue the original proceeding must undermine the entire foundation of the bankruptcy notice.

[24] In his oral submissions, Mr Haines dealt with the evidence of Mr Russell. On Mr Russell's evidence, proceedings against Mr Kooiman could not have been commenced by FMC without the prior written consent of Trustees Executors Limited as Supervisor. Mr Russell's evidence is inadequate, because he has failed to provide copies of the necessary written consents. The result is that there is no actual evidence of FMC having sufficient authority to commence the summary judgment proceeding.

[25] For FMC, Mr Munro repeated his submission that the Court should not entertain Mr Kooiman's further affidavit, or the "lack of authority" argument based on it.

[26] However if that submission is not accepted, Mr Munro first submits that all Mr Kooiman has done is raise a question over the authorisation for the proceeding. Simply raising a question of that kind cannot provide a basis for setting aside the bankruptcy notice.

[27] Secondly, Mr Russell has sufficiently answered any question over the authority to commence the summary judgment proceeding. Mr Russell's evidence was that Mr Hutchison had sought and obtained the Supervisor's approval "as required", and that he had done so "throughout the proceedings". Mr Munro submits that "as required" in the context meant that Mr Hutchison *had* sought and obtained the Supervisor's approval in the proper form (in writing, prior to the commencement of the action). And the use of the expression "throughout the proceedings" clearly implied that there was a constant seeking and obtaining of relevant approvals for recovery action against debtors. The fact that Mr Russell did not produce the written approvals from the Supervisor does not justify an inference that no written authority existed, especially in circumstances where any communication by Trustees Executors Limited as Supervisor to FMC may have been privileged.

[28] Finally, Mr Munro noted that the role of "Supervisor" is expressly provided for in the Financial Markets Conduct Act 2013.[1]

The issues

[29] There are only two issues to be decided:

(a) should Mr Kooiman be granted leave to file his further affidavit sworn on 26 January 2018, and to argue the (unpleaded) "lack of authority" question?

---

[1] Financial Markets Conduct Act 2013, ss 111–119.

(b) if so, has Mr Kooiman put forward enough in his evidence and submissions to justify an order setting aside the bankruptcy notice?

[30] It will be convenient to deal with the two issues together.

Discussion and conclusions

Applicable law

[31] Section 17 of the Act materially provides:

> **17 Failure to comply with bankruptcy notice**
>
> (1) A debtor commits an act of bankruptcy if—
>
> (a) a creditor has obtained a final judgment or a final order against the debtor for any amount; and
>
> (b) execution of the judgment or order has not been halted by a court; and
>
> (c) the debtor has been served with a bankruptcy notice; and
>
> (d) the debtor has not, within the time limit specified in subsection (4),—
>
> (i) complied with the requirements of the notice; or
>
> (ii) satisfied the court that he or she has a cross claim against the creditor.
>
> …
>
> (4) The **time limit** referred to in subsection (1)(d) is,—
>
> (a) if the debtor is served with the bankruptcy notice in New Zealand, 10 working days after service; or
>
> …
>
> …
>
> (7) In subsection (1)(d)(ii), **cross claim** means a counterclaim, set-off, or cross demand that—
>
> (a) is equal to, or greater than, the judgment debt or the amount that the debtor has been ordered to pay; and
>
> (b) the debtor could not use as a defence in the action or proceedings in which the judgment or the order, as the case may be, was obtained.

[32] In order to satisfy s 17(1)(d)(ii) of the Act, the debtor must show that he or she has a genuine, triable claim against the creditor.[2]

[33] The primary emphasis of s 17(7)(b) is on the *legal* inability of the debtor to establish the cross claim as a defence in the proceeding in which the judgment was obtained. There must be cogent circumstances for the judgment debtor to be able to establish a factual inability to set up the cross claim as a defence.[3]

[34] In addition to the "cross claim" ground of opposition, there may be a limited number of circumstances in which a court may set aside a bankruptcy notice on the basis of an abuse of process on the part of the creditor. *Re Wise* was a case where a creditor had obtained a judgment by default.[4] The debtors sought orders setting aside the bankruptcy notice subsequently served by the creditor, on the basis that they had a valid defence to the creditor's claim, which they were unable to put forward because they were not aware of the court hearing that resulted in the judgment against them. Master Kennedy-Grant considered that the court had jurisdiction to grant relief to the debtors despite the limitation in s 17(7) (then s 19(1)(d) of the Insolvency Act 1967), where there was an arguable ground of defence to the claim for which judgment was given.[5]

Application of the law in this case

[35] I do not consider that Mr Kooiman's "lack of authority to issue the proceeding" argument amounts to a cross-claim, as defined in s 17(7) of the Act. Rather, the argument appears to be that there was an irregularity in the summary judgment proceeding that would have resulted in a stay of that proceeding had the irregularity been raised before the judgment was entered.[6]

---

2 *Thomasen v Nigro* CA124/76, 19 July 1978; *Clark v UDC Finance Limited* [1985] 2 NZLR 636 (HC).

3 *Hardie v Booth* [1992] 1 NZLR 356 (HC) at 362.

4 *Re Wise, ex parte Benecke* HC Auckland B227/95, 21 June 1995.

5 At 6.

6 See for example *Hung v Tse* HC Auckland CIV-208-404-8568 at [13], where Harrison J said:

> While the strict view that a proceeding commenced without a solicitor's warranty of authority is a nullity no longer prevails, it is a serious irregularity which justifies a stay of proceedings until it is cured: *Edwards & Hardy Hamilton Ltd v Woodhouse* (1990) 3 PRNZ 362; *Hubbard Association of Scientologists v Anderson (No 2)* (1971) VR 577.

[36] I accept that in an appropriate case the Court might set aside a bankruptcy notice as an abuse of process where judgment has been wrongly obtained because the person who instructed the solicitors who filed the proceeding to file it, had no authority to give that instruction. But I do not consider this is such a case.

[37] The starting point is r 5.37 of the High Court Rules, which provides:

> **5.37 Solicitor's warranty as to authorisation to file documents**
>
> A solicitor by whom, or on whose behalf, a document is filed in the court is to be treated as warranting to the court and to all parties to the proceeding that he or she is authorised, by the party on whose behalf the document purports to be filed, to file the document.

[38] It seems to me that one of the principal purposes of r 5.37 was to ensure that the Court would not need to be concerned with collateral enquiries as to whether the solicitor filing had authority to do so: the Court and the defendant are entitled to rely on a warranty provided by an officer of the Court, that he or she has proper instruction to file the documents filed. And as Mr Munro acknowledged at the hearing, the solicitor would have an ongoing ethical duty to advise the Court promptly if he or she learned that documents had been inadvertently filed without valid authority to do so.

[39] Against that background, I consider that lack of authority arguments such as that now raised by Mr Kooiman should be viewed with some caution: there must be some credible evidence that the authority to file does not (or at least might not) exist. In my view it is not sufficient for a judgment debtor to merely *question* the authority for the filing of the proceeding. There must be at least some burden on the party running the "lack of authority" argument to produce evidence that is at least sufficient to warrant further enquiry.

[40] In the present case:

(a) by virtue of r 5.37, FMC's solicitors have warranted to the Court that they had authority to file the summary judgment proceeding and the request for issue of the bankruptcy notice; and

(b) Mr Russell has stated on oath that the relevant approvals were obtained "as required"; and

(c) Mr Munro confirmed at the hearing that the solicitors considered they had authority to file the proceeding.

[41] In this case I do not consider the matters raised by Mr Kooiman go beyond the level of speculation, and they have been sufficiently met by Mr Russell's affidavit and the solicitors' ongoing warranty of authority to file. I am not prepared to infer, as Mr Haines submitted I should, that no prior written consent from the Supervisor was obtained before FMC issued the summary judgment and bankruptcy proceedings. Mr Russell's evidence is clear that Fund Managers Otago Ltd and Mr Hutchison sought and obtained the Supervisor's approval "as required", and in the context "as required" could only have meant "in accordance with the procedural requirements" described at [19] of this judgment. I do not think it was incumbent on FMC in those circumstances to produce copies of the Supervisor's consent to the filing of the Court documents.

[42] For those reasons Mr Kooiman cannot argue that the summary judgment was obtained by any abuse of process. His application to set aside the bankruptcy notice would accordingly fail even if leave were granted to amend his application and file the further affidavit.

Result

[43] Mr Kooiman's oral applications for leave to amend his application to set aside the bankruptcy notice, and for leave to file a further affidavit, are dismissed.

[44] The substantive application to set aside the bankruptcy notice is dismissed.

[45] FMC is entitled to costs. If counsel cannot agree, a memorandum on costs may be filed by FMC within 20 working days. Mr Kooiman may file any reply memorandum within 15 working days of his receipt of FMC's memorandum.

Associate Judge Smith

Solicitors:
Q H Law, Otaki for the judgment debtor
Anderson Lloyd, Christchurch for the judgment creditor