

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-404-785
[2017] NZHC 94**

IN THE MATTER of the Insolvency Act 2006

AND

IN THE MATTER of the bankruptcy of STEPHEN ROBERT
KELLY

BETWEEN BODY CORPORATE 341188
Judgment Creditor

AND STEPHEN ROBERT KELLY
Judgment Debtor

Hearing: 7 February 2017

Appearances: T P Bates for the Judgment Creditor
T Bowler for the Judgment Debtor

Judgment: 8 February 2017

**JUDGMENT OF LANG J
[on application for review of Associate Judge's decision]**

*This judgment was delivered by me on 8 February 2017 at 3.30 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

[1] In this proceeding Body Corporate 341188 (the body corporate) seeks an order adjudicating Mr Kelly bankrupt. The application for an order of adjudication is based on Mr Kelly's failure to comply with the terms of a bankruptcy notice served upon him by the body corporate on 24 May 2016.

[2] Mr Kelly applied to have the bankruptcy notice set aside, but Associate Judge Bell dismissed the application in an oral judgment delivered on 21 September 2016.¹ Mr Kelly now seeks review of the Associate Judge's decision under s 26P(1) of the Judicature Act 1908.

The debts underpinning the bankruptcy notice

[3] The bankruptcy notice required Mr Kelly to pay two judgment debts.

[4] The first related to a judgment for the sum of \$52,961.20. That sum represented unpaid levies in respect of units owned by the Final Hargreaves Trust in a development administered by the body corporate. Mr Kelly and a company called Final Hargreaves Trust Company Limited (Final Hargreaves) were the trustees of the Final Hargreaves Trust. Judge Gibson entered judgment against Mr Kelly and Final Hargreaves for reasons given in decisions issued on 23 December 2014 and 28 August 2015.²

[5] The second was a debt in the sum of \$16,567. This related to an award of costs made by Venning J following a successful appeal filed by the body corporate against an earlier decision in which the District Court had held that the body corporate was out of time to file its claim for the recovery of unpaid levies.³

The arguments for Mr Kelly

[6] Mr Kelly contends that the Associate Judge erred in deciding the following issues:

¹ *Body Corporate 341188 v Kelly* [2016] NZHC 2230.

² *Body Corporate No. 34118 v Kelly* DC Auckland CIV-2014-004-577, 23 December 2014 and [2015] NZDC 16720.

³ *Body Corporate No. 341188 v Kelly* [2015] NZHC 1647.

- (a) In concluding that Mr Kelly had not been prejudiced by the fact that two judgment debts were included within a single bankruptcy notice.
- (b) In failing to adjourn the application so as to enable Mr Kelly to proceed with an application for a re-hearing of the District Court judgment.
- (c) In failing to set the bankruptcy notice aside on the basis that Mr Kelly has a significant cross-claim against the Body Corporate.

Was Mr Kelly prejudiced by the inclusion of two judgment debts in the bankruptcy notice?

[7] Argument before the Associate Judge focussed on the technical issue of whether the bankruptcy notice was invalid because it included two judgment debts rather than one. This issue arose out of earlier English authority in which the courts had held that a bankruptcy notice could only issue for a single judgment debt.⁴ The rationale for this principle was that a bankruptcy notice seeking payment of two judgment debts would prevent the debtor from satisfying one of the notices whilst still being able to raise an arguable counterclaim, set off or cross demand in relation to the other. Recent New Zealand authority, however, is to the effect that, particularly where both judgment debts arise out of the same proceeding, there is no impediment to a judgment creditor including two judgment debts within a single bankruptcy notice unless that will cause demonstrable prejudice to the debtor.⁵

[8] The Associate Judge held that the starting point is that a bankruptcy notice should be based on a single judgment debt.⁶ However, where the debtor is not embarrassed because of the inclusion of two judgment debts, the debtor will not be prejudiced. In such cases the Court may exercise its discretion not to declare the bankruptcy notice invalid.

⁴ *Re Low, ex parte Argentine Gold Fields Ltd* [1891] 1 QB 147 (CA).

⁵ *Re Ebbett, ex parte Fletcher Merchants Ltd* HC Tauranga B109/92, 9 October 2002 at [2] per Fisher J; *Erwood v Maxted* [2012] NZCA 110 at [60]; *Far North District Council v Pollock* [2014] NZHC 2473.

⁶ *Body Corporate 341188 v Kelly*, above n 1, at [24].

[9] Mr Bowler did not argue on Mr Kelly's behalf that the Associate Judge had erred in principle. Rather, he submitted that the Associate Judge failed to recognise that Mr Kelly has suffered significant prejudice by the inclusion of two debts within the bankruptcy notice. The prejudice is said to arise because Mr Kelly is not able to satisfy one of the debts, but challenge the other. Mr Bowler submits that this is a material issue because Mr Kelly acknowledges he has no ability to challenge the award of costs made by Venning J. As a result, he has always acknowledged that he is liable to pay the body corporate the sum of \$16,567 in order to satisfy that award. He continues to maintain, however, that an order of adjudication should not be made in respect of the debt owing as a result of the District Court judgment.

[10] I do not see how Mr Kelly can be prejudiced by the inclusion of the two judgment debts in the bankruptcy notice. First, it was open to Mr Kelly to pay the debt owing in respect of the undisputed award of costs within the 14 day period stipulated in the bankruptcy notice. He could then have opposed the making of an order of adjudication based on the other debt. Furthermore, in the event that Mr Kelly paid the costs awarded by Venning J outside the period required by the bankruptcy notice I consider it unlikely that the Court would make an order of adjudication based solely on the basis that he failed to pay the debt within that period.

[11] It is also difficult to see why Mr Kelly has delayed so long in paying the costs awarded against him by Venning J to date. During the hearing before me, Mr Bowler advised me that his client intends to pay that sum within the next five days. Mr Kelly would obviously be wise to do so, because the body corporate has now filed an application to have him adjudicated bankrupt. This is due to be called for the first time on 16 February 2017. If Mr Kelly has not paid the costs awarded by Venning J by that date, it is highly likely that an order of adjudication will be made.

[12] For present purposes, however, I see no prejudice to Mr Kelly in the inclusion of both judgment debts within the single bankruptcy notice. This ground of review fails as a result.

Should the Associate Judge have adjourned the application pending disposition of Mr Kelly's application for a re-hearing in the District Court?

[13] Mr Bowler advised me that Mr Kelly has applied for a re-hearing of the District Court judgment and this has been given a firm fixture before Judge Gibson on 14 March 2017. He submitted that the Associate Judge had been wrong to finally determine Mr Kelly's application to have the bankruptcy notice set aside when the result of the application for a re-hearing is not yet known. Mr Bowler urged me to revisit this issue in order to prevent a miscarriage of justice occurring.

[14] Nothing in the Associate Judge's decision suggests that he was ever asked to adjourn the hearing to enable the application for a re-hearing to be heard in the District Court. Furthermore, the Associate Judge was of the view that the District Court judgment was final and he was required to treat it as such until such time as it was set aside.⁷

[15] I accept, however, that in appropriate cases this Court has the discretion to adjourn an application to set aside a bankruptcy notice in order to allow the debtor an opportunity to challenge the judgment on which the notice is founded.⁸ This Court usually exercises that discretion where it is faced with an application for an order that the debtor be adjudicated bankrupt. Mr Kelly still has the opportunity to oppose the body corporate's application to have him adjudicated bankrupt. He can include within his grounds of opposition the fact that his application for a re-hearing of the District Court judgment has now been given a firm fixture. The Judge who presides on 16 February 2017 will then be able to determine whether the body corporate's application for an order of adjudication should be adjourned until such time as the outcome of the application for re-hearing is known.

[16] For this reason I am satisfied that Mr Kelly is presently not at risk of being the subject of a miscarriage of justice if the Court does not halt the bankruptcy proceedings at this point. This ground of review fails as a result.

⁷ *Body Corporate 341188 v Kelly*, above n 1, at [28].

⁸ *Re Hawkin ex parte Official Assignee* HC Auckland CIV-2008-404-6712, 16 March 2009.

Did the Associate Judge err in failing to set the bankruptcy notice aside on the basis that Mr Kelly has a cross-claim against the body corporate for an amount that exceeds the amount claimed in the bankruptcy notice?

[17] Mr Kelly has issued a proceeding against the body corporate in this Court seeking damages of just under \$2 million. That claim is presently in abeyance until such time as the bankruptcy proceedings have been determined.

[18] The Associate Judge accepted that Mr Kelly was not able to advance the cross-claim in the proceeding in respect of which the body corporate obtained judgment against him in the District Court. He considered, however, that there were numerous obstacles to the cross-claim.

[19] It is not necessary to describe or re-evaluate the strength of the cross-claim because it currently faces an insurmountable obstacle. Any claim relating to losses suffered in respect of the units can only be brought by the owner of those units. As I have already recorded, the units are presently owned by the Final Hargreaves Trust, the trustees of which are Mr Kelly and Final Hargreaves. Any actions in respect of that trust must be taken by the trustees acting in concert. Mr Kelly has no standing to bring any claim against the body corporate on his own. Furthermore, Final Hargreaves was placed in liquidation on 18 March 2015. As a result, the liquidator of Final Hargreaves would need to join with Mr Kelly in making the claim against the body corporate and, to date, the liquidator has not done so. Mr Kelly's cross-claim as presently framed therefore has no prospect of success.

[20] During the hearing, Mr Bowler advised me from the bar that he had just received information to the effect that another company was appointed to replace Final Hargreaves as a trustee of the Final Hargreaves Trust before Final Hargreaves was placed in liquidation. That information is not, however, formally before the Court and cannot be taken into account in relation to the present application. The short point is that Mr Kelly has no standing to bring any claim against the body corporate without the support of his co-trustee. For that reason alone it would have been inappropriate to set the bankruptcy notice aside on the basis of the existence of the cross-claim. Again, however, Mr Kelly remains free to advance this argument in support of his opposition to the body corporate's application for an order of

adjudication. At that point he can update the Court regarding the identity of the present trustees of the Final Hargreaves Trust and their attitudes to the cross-claim.

Result

[21] The application for review of the Associate Judge's decision is dismissed.

Costs

[22] The body corporate is entitled to costs on a Category 2B basis together with disbursements as fixed by the Registrar.

Lang J

Solicitors: