



on 16 February 2018 dismissing Mr Kooiman's application to set aside the bankruptcy notice.<sup>1</sup>

## **Background**

[2] Mr Kooiman guaranteed a loan that had been made by the respondent, FM Custodians Ltd (FMC), to a company of which he was a shareholder. After the principal debtor had defaulted, FMC obtained summary judgment against Mr Kooiman in July 2017 for a sum of approximately \$930,000.<sup>2</sup> The bankruptcy notice against him followed shortly thereafter.

[3] Initially acting for himself, on 7 September 2017, Mr Kooiman applied to set aside the bankruptcy notice, citing some 14 grounds of challenge.

[4] On 16 November 2017, Mr Kooiman became aware of an email exchange that had occurred between the High Court Registry and solicitors for FMC on 24 October 2017. The Registry's email questioned the appropriateness of Mr Hutchison signing the creditor's application for adjudication on behalf of FMC. Mr Hutchison was the individual who had instructed solicitors to pursue the proceedings against Mr Kooiman and had executed various applications that arose in the proceedings against him. The application for adjudication had been filed on the basis that a deficiency in the form of Mr Kooiman's application to set aside the bankruptcy notice rendered it a nullity. The Registry was concerned that an application for adjudication needed to be signed by the applicant itself (that is, FMC).

[5] The email response from FMC's solicitors provided a brief description of the relevant corporate structure. FMC is the custodial company of Trustees Executors Ltd, which is the trustee of Capital Mortgage Income Trust Group Investment Fund (the Fund). Fund Managers Otago Ltd managed the business of the Fund, which had provided the advance that Mr Kooiman had guaranteed. That email referred to Mr Hutchison's affidavit filed in support of the creditor's application for adjudication, in which Mr Hutchison had confirmed his authority to swear such affidavits and sign

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<sup>1</sup> *Kooiman v FM Custodians Ltd* [2018] NZHC 176.

<sup>2</sup> *FM Custodians Ltd v Kooiman* HC Wellington CIV-2017-485-343, 7 August 2017.

applications for adjudication on behalf of FMC as a part of his role as managing director of the Fund.

[6] A fortnight later, on 30 November 2017, Mr Haines, as counsel then acting for Mr Kooiman, confirmed that no new grounds would be relied on in opposing the application for adjudication.

[7] On 26 January 2018, five working days before the hearing allocated for Mr Kooiman's application, Mr Haines filed submissions raising a new ground of challenge. He argued that Mr Hutchison did not have the actual authority of FMC to issue those proceedings, but that Mr Hutchison's authority came from Trustees Executors Ltd, it being irrelevant that that company is FMC's parent.

[8] Mr Kooiman completed an affidavit that was also sworn on 26 January 2018, attesting to his belief that the provisions of FMC's constitution had not been complied with so Mr Hutchison did not have the requisite authority of the board of FMC to issue proceedings against him. The consequence was that the summary judgment obtained against him was allegedly a nullity. There has been no appeal against the summary judgment.

[9] FMC's solicitors responded to the late challenge to Mr Hutchison's authority to bring the proceedings by objecting that Mr Kooiman required leave to raise the argument. Counsel indicated opposition to leave, given the length of time that had elapsed since confirmation that no new grounds would be raised, and the shortness of time between the argument being raised and the scheduled hearing.

[10] Against the contingency that its opposition to the argument being raised was not upheld, FMC filed an affidavit from one of its two directors, Mr Robert Russell. Mr Russell deposed that all of the steps that had been taken by Mr Hutchison in issuing proceedings against the judgment debtor (that is, swearing an affidavit in support of the application for summary judgment, issuing a bankruptcy notice and applying to have the judgment debtor adjudicated bankrupt) had been appropriately authorised by FMC. Mr Russell explained the relationship between Fund Managers Otago Ltd — the manager of the Fund (of which Mr Hutchison is the managing director) —

the trustee/supervisor (Trustees Executors Ltd) and the custodian (FMC). FMC is a wholly owned subsidiary of Trustees Executors Ltd. He referred to a custody services agreement that was operative between those three parties. Mr Russell described the custody services agreement as a document:

... under which the Supervisor [Trustees Executors], amongst other things:

- (a) nominated the Nominee [FMC] to hold the property of the Fund on its behalf; and
- (b) authorised the Manager (being Fund Managers Otago Limited) to undertake certain functions to assist the Supervisor with its custody functions, including undertaking action in the Nominee's name to recover loans owing to the Fund provided that the Manger has first informed the Supervisor of the intended action and has obtained the prior written consent of the Supervisor to such action.

[11] Mr Russell's affidavit continued:

- 8 As required, Fund Managers Otago Limited and Mr Hutchison sought and obtained the Supervisor's approval throughout the proceedings brought against the Judgment Debtor.
- 9 In short, therefore, Mr Hutchison, being the managing director of Fund Managers Otago Limited, the Manager of the Fund, has 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 the Judgment Debtor) on FM Custodian Limited's behalf (as the Nominee).

[12] This tripartite structure reflects the requirements of pt 4 of the Financial Markets Conduct Act 2013 (the Act). The money-lending arrangements undertaken by the fund manager constitute a managed investment scheme,<sup>3</sup> which requires it to have a supervisor to act as trustee for those investing in the scheme.<sup>4</sup> Depending on the terms of the trust deed, s 156 of the Act authorises the trustee/supervisor to contract a separate entity to hold the property of the fund as custodian.

[13] There was no argument that the custody services agreement described in Mr Russell's affidavit provided for the respective functions of the three parties to the agreement in terms that did not conform to the requirements of pt 4 of the Act.

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<sup>3</sup> Financial Markets Conduct Act 2013, s 9.

<sup>4</sup> Section 103.

Mr Kooiman's affidavit annexed a copy of the FMC constitution, which includes a power for its board to delegate any of its powers to others.

[14] The Associate Judge assessed the merits of the new argument about Mr Hutchison's lack of appropriate authority, before deciding that it could not avail Mr Kooiman. In doing so, the Associate Judge had regard to Mr Russell's affidavit on the contingent basis that if the new ground for Mr Kooiman's application was allowed, then the Russell affidavit would necessarily be admitted in response to Mr Kooiman's 26 January 2018 affidavit.

[15] To make out a ground for setting aside the bankruptcy notice, Mr Kooiman had either to make out a cross-claim or establish an irregularity in the summary judgment proceeding to an extent that warranted a stay of that proceeding.

[16] The Associate Judge considered the terms and purpose of r 5.37 of the High Court Rules 2016, which treats the filing of documents in a proceeding by a solicitor as warranting to the Court that the solicitor is authorised to do so.<sup>5</sup> By analogy with the circumstances in which that presumed warranty may be challenged by another party, the Associate Judge held that arguments of lack of authority such as raised by Mr Kooiman should be viewed with some caution, and the Court would require some credible evidence that the authority does not, or at least might not, exist.<sup>6</sup>

[17] In this case, FMC's solicitors were taken to have warranted to the Court under r 5.37 that they had the authority to file the summary judgment proceedings and the subsequent request for the issue of a bankruptcy notice. In addition, Mr Russell had stated on oath that the relevant approvals for Mr Hutchison to take the steps he did in FMC's name had been obtained.<sup>7</sup>

[18] Accordingly, the Associate Judge determined that Mr Kooiman could not argue that the summary judgment had been obtained by any abuse of process.<sup>8</sup> On the basis of that finding he dismissed the oral application that had been made at the hearing for

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<sup>5</sup> *Kooiman v FM Custodians Ltd*, above n 1, at [37]–[38].

<sup>6</sup> At [39].

<sup>7</sup> At [40].

<sup>8</sup> At [42].

leave to amend Mr Kooiman's application and for the leave that was required to file his further affidavit.<sup>9</sup>

### **Grounds of appeal**

[19] All but one of the grounds of appeal to this Court relate to the authority of Mr Hutchison to act, the other ground being that the Associate Judge erred in dismissing Mr Kooiman's oral application for leave to amend his application and for leave to file a further affidavit.

[20] Mr Dallas, counsel for the appellant, submitted that respect for the separate legal identity of the three companies was critical. Mr Kooiman's contract by way of guarantee was with FMC, and he had no privity of contract with any of Fund Managers Otago Ltd, Mr Hutchison or Trustees Executors as trustee/supervisor. Arguably, where contractual obligations were owed to FMC, that was the company which had to enforce those rights. Where steps to enforce FMC's rights were taken in its name by somebody else, and their authority to do so had been questioned, then an onus arose for FMC to adduce primary evidence of the timing and terms on which FMC had delegated that authority, in this case to Mr Hutchison.

[21] Mr Dallas's written submissions contended that the provisions of the Act did not support the chain of authority for actions on behalf of FMC as described in the email response to the Court in October 2017. Mr Dallas did not develop this point in oral argument, and we see no merit in it.

### **Analysis**

[22] The short point on the appeal is whether the challenge to Mr Hutchison's authority to act on behalf of FMC is made out. Mr Kooiman's arguments depended on a requirement for proof by way of production of the primary documents recording that authority. In the face of Mr Kooiman's speculative challenge, we are satisfied that the content of Mr Russell's affidavit adequately evidences the authority vested in

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<sup>9</sup> At [43].

Mr Hutchison to take the various steps in the proceeding that he had taken, at the times he took them.

[23] This is not a situation in which a debtor of FMC in Mr Kooiman's position can resist liability on a speculative concern that the custodian, as holder of the legal rights to enforce the guarantee, cannot act in reliance on the tripartite arrangements in the custody services agreement. When pressed in oral argument, Mr Dallas could not identify any material prejudice that was suffered by Mr Kooiman from a speculative doubt about the authority of Mr Hutchison to take the steps he did for FMC. We fail to see any merit in the ground of challenge that has delayed enforcement of the summary judgment for some 18 months.

[24] The structure of arrangements required by pt 4 of the Act is designed to protect investors in managed investment schemes. Whilst the division of responsibilities in managing loan advances may not be readily understood by borrowers from the Fund, that is not of itself sufficient to require anything more by way of proof of authority to act than was available in this case.

[25] Accordingly, the appeal is dismissed.

### **Costs**

[26] Written submissions for FMC sought an award of costs on an indemnity basis if the appeal was dismissed. This was claimed on two bases. First, the contractual right to recover costs on a solicitor and client basis, which was included in the terms of Mr Kooiman's guarantee and, secondly, the conduct of the appeal, which it was submitted had been improperly commenced and continued.<sup>10</sup>

[27] Mr Dallas accepted that if the appeal was dismissed, Mr Kooiman could not avoid liability for indemnity costs, subject to the Registrar being able to review the reasonableness of their quantum, if counsel were not agreed.

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<sup>10</sup> Indemnity costs on these grounds are provided for by r 53E(3)(e) and (a) respectively of the Court of Appeal (Civil) Rules 2005.

[28] It is therefore unnecessary to decide whether we would award costs on the basis that the appeal had been improperly commenced.

[29] We accordingly allow reasonable costs in favour of FMC on an indemnity basis, with the quantum to be fixed by the Registrar if counsel are unable to agree. Given the prospect of agreement, we do not make a taxation order under r 53E(4) of the Court of Appeal (Civil) Rules 2005, but the Registrar is empowered to act under that rule once counsel confirm they have been unable to agree quantum.

### **Result**

[30] The appeal is dismissed.

[31] The respondent is entitled to costs and disbursements on an indemnity basis. Reasonable quantum is to be fixed by the Registrar in the event that counsel do not agree.

Solicitors:  
JD Dallas – Lawyer, Wellington for Appellant  
Anderson Lloyd, Christchurch for Respondent