IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-4847
[2014] NZHC 693

UNDER	the Insolvency Act 2006
IN THE MATTER OF	the bankruptcy of LYNETTE OLWYN BOULTON
BETWEEN	WESTPAC NEW ZEALAND LIMITED Judgment Creditor
AND	LYNETTE OLWYN BOULTON Judgment Debtor

CIV-2013-404-4848

UNDER	the Insolvency Act 2006
IN THE MATTER OF	the bankruptcy of KEVAN BOULTON
BETWEEN	WESTPAC NEW ZEALAND LIMITED Judgment Creditor
AND	KEVAN BOULTON Judgment Debtor

Hearing: 3 April 2014

Appearances: E Fox for Judgment Creditor
No appearance for Judgment Debtors

Judgment: 14 April 2014

JUDGMENT OF ASSOCIATE JUDGE BELL

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*This judgment was delivered by me on **14 April 2014** at **3:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors:
MinterEllisonRuddWatts (Edward Fox), Auckland, for Judgment Creditor

[1] These cases raise questions how the Trans-Tasman Proceedings Act 2010 affects New Zealand bankruptcy proceedings served on debtors in Australia. Parts 1 and 2 and Schedules 1 and 2 of that Act came into force on 11 October 2013.[1] Both applications were called on 3 April 2014. The debtors had taken no steps. For the case against Kevan Boulton, on 1 April 2014 I issued a minute setting out my queries. Counsel for the creditor filed submissions. The issues are new. I am not aware of any other decisions on the application of the Trans-Tasman Proceedings Act.

[2] The questions are:

(a) Is a bankruptcy notice a civil proceeding under Part 2 subpart 1 of the Trans-Tasman Proceedings Act 2010 so as to trigger the provisions of that subpart as to service and information to be given to a person served in Australia, and to do away with the need to obtain leave for service outside New Zealand?

(b) Can a bankruptcy notice be issued for service on someone in Australia, without the court fixing the time for compliance under s 17(4)(b) of the Insolvency Act 2006?

(c) Is a bankruptcy application under s 13 of the Insolvency Act 2006 a civil proceeding under the Trans-Tasman Proceedings Act?

[3] For (a) and (c), it is necessary to establish what "civil proceeding" means in the Trans-Tasman Proceedings Act. In this decision I hold that it is a proceeding for the judicial determination of some matter in the court's civil jurisdiction. A bankruptcy application is such a civil proceeding. On the other hand, a bankruptcy notice is something different. It is a formal demand on a judgment debtor to take certain steps, failing which there will be an act of bankruptcy. It is not by itself a proceeding for the judicial determination of some issue. The Trans-Tasman Proceedings Act applies to bankruptcy applications, but not to bankruptcy

1 Trans-Tasman Proceedings Act Commencement Order 2013.

notices. The rules for the service of bankruptcy notices outside New Zealand continue to apply, notwithstanding the Trans-Tasman Proceedings Act.

Facts

[4] The debtors live in Queensland, Australia. On 20 August 2013 the creditor obtained summary judgment against the debtors for NZD$1,157,956.98. On 12 November 2013 bankruptcy notices based on that judgment issued for service on each debtor. The creditor did not apply for leave to serve the bankruptcy notices out of New Zealand under s 17(3) of the Insolvency Act and r 6.30 of the High Court Rules. The creditor did not ask for an order under s 17(4) of the Insolvency Act fixing the time for compliance with the bankruptcy notices. Each notice required the debtor to comply with it within 30 working days after service.

[5] The bankruptcy notices are in the prescribed form under r 24.8(3) and Form B2 of Schedule 1 of the High Court Rules but each also contains a notice following Form 1 under r 6 of the Trans-Tasman Proceedings Regulations and Rules 2013. That provided the information under s 15 of the Trans-Tasman Proceedings Act 2010.

[6] By agreement with the debtors, the bankruptcy notices were served by email. That was valid service under r 6.7 of the High Court Rules. The date of service was 20 November 2013. The debtors did not take any steps under the bankruptcy notices, either to comply with them or to have them set aside.

[7] The creditor filed the bankruptcy applications on 24 February 2014. In each case the act of bankruptcy relied on is non-compliance with the bankruptcy notice. The date of each act of bankruptcy is 24 January 2014, the 30 working days for complying with the notice having expired. The creditor did not seek leave to file the bankruptcy applications out of New Zealand. The creditor did not serve with the bankruptcy application any notice under Form 1 of the Trans-Tasman Proceedings Regulations and Rules 2013. Again by agreement the creditor served the debtors by email.

[8] The debtors acknowledged service on 7 March 2014. When the matter was called on 3 April 2014 the 30 working days under s 17 of the Trans-Tasman Proceedings Act had not expired. The debtors did not appear.

Service of bankruptcy proceedings outside New Zealand before the Trans-Tasman Proceedings Act

[9] Under s 17(3) of the Insolvency Act a bankruptcy notice must be served on a debtor in New Zealand, unless the court gives permission for service outside New Zealand.

[10] Leave is also required under r 6.30 of the High Court Rules:

> **6.30 Service of other documents outside New Zealand**
>
> Any document other than an originating document required by any rule to be served personally may be served abroad with the leave of the court, which may be given with any directions that the court thinks just.

[11] The meaning of "any document other than an originating document" in r 6.30 can be seen from accompanying rules as to service outside New Zealand. Rule 6.27(1) says:

> This rule applies to *a document that initiates a civil proceeding* or is a notice issued under subpart 4 of Part 4 (third, fourth and subsequent parties) which under these rules is required to be served but cannot be served in New Zealand under these rules (an "originating document").
>
> (Emphasis added)

[12] Under r 1.3(1) a "proceeding" means any application to the court for the exercise of its civil jurisdiction other than an interlocutory application. For reasons which I will develop further in relation to the meaning of "civil proceeding" under the Trans-Tasman Proceedings Act, a bankruptcy notice does not initiate a civil proceeding. It does not, by itself, trigger any process for the exercise of the court's civil jurisdiction. It is no more than a demand issued by the court which has special significance. If the debtor does not comply with the demand in time, or the debtor does not apply in time to set aside the notice, there is an act of bankruptcy. That is one of the requirements under s 13 of the Insolvency Act for a later bankruptcy application. A bankruptcy document is not therefore an originating document, so leave is required under r 6.30 before it can be served abroad.

[13] When a debtor is out of New Zealand, service of the bankruptcy notice on the debtor is service out of New Zealand, even if the steps taken by the creditor to serve the debtor are carried out entirely within New Zealand.[2]

[14] On applications for leave to serve a bankruptcy notice out of New Zealand I generally apply the test under r 6.28(5) of the High Court Rules, but with a modification. Because a bankruptcy notice is not a civil proceeding, I look ahead to any future bankruptcy application by the creditor relying on non-compliance with the bankruptcy notice. I consider whether leave should be granted under r 6.28(5) for that bankruptcy application. I also consider whether it is appropriate for any bankruptcy of the debtor to be administered in New Zealand. If so satisfied, I generally give leave for the bankruptcy notice and the bankruptcy application at the same time.

[15] When leave is granted to serve a bankruptcy notice out of New Zealand, the court must fix time to comply with the notice under s 17(4)(b) of the Insolvency Act. For service of a bankruptcy notice in Australia, generally 20 working days is fixed, although that may be extended if substituted service is ordered, to allow extra time for the notice to come to the actual knowledge of the debtor.

[16] A bankruptcy application, on the other hand, is an originating document. Leave to serve a bankruptcy application out of New Zealand is therefore required under r 6.28. While it is an originating document, it does not come within any of the gateways under r 6.27(2). Specifically, it is not a proceeding to enforce any judgment or arbitral award under r 6.27(2)(m) because the creditor in a bankruptcy application does not need to have a judgment for the debt (although they commonly do).

[17] Unless the court has extended the time under r 1.19, a creditor's application must be served on a debtor at least 10 working days before the hearing of the application.[3] That applies to debtors served both inside and outside New Zealand.

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2 *Bank of New Zealand v Letele* HC Auckland CIV-2012-404-2367, 20 August 2012 at [6].

3 High Court Rules, r 24.16(1).

[18] Australia and New Zealand have both adopted cross-border insolvency legislation under the UNCITRAL Model Law on Cross-border Insolvency.[4] Even before the Trans-Tasman Proceedings Act, the Official Assignee, as a New Zealand insolvency administrator, could apply to an Australian court for recognition of a New Zealand bankruptcy and for associated relief allowing the bankruptcy to be administered and enforced in Australia. That has not changed under the Trans-Tasman Proceedings legislation. Bankruptcy and other insolvency orders are still recognised and enforced under the cross-border insolvency legislation, not under the judgment recognition provisions of the Trans-Tasman Proceedings Act.[5]

The Trans-Tasman Proceedings Act 2010

[19] The Trans-Tasman Proceedings Act 2010 gives effect to the Trans-Tasman Agreement, that is, the Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Court Proceedings and Regulatory Enforcement made at Christchurch on 24 July 2008. Australia has enacted corresponding legislation.[6]

[20] Under s 3, the purpose of the Act is to:

> 3 (1) (a) Streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency; and
>
> (b) minimise existing impairments to enforce certain Australian judgments and regulatory sanctions; and
>
> (c) implement the Trans-Tasman agreement in New Zealand law.

[21] Section 3(3) of the Act relevantly provides:

> 3 (3) This Act provides for the following matters:
>
> (a) service in Australia of initiating documents for civil proceedings commenced in New Zealand courts and tribunals:

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4 Insolvency (Cross-Border) Act 2006 (NZ), Cross-Border Insolvency Act 2008 (Cth).

5 Trans-Tasman Proceedings (Specified Australian Insolvency Judgments Excluded From Recognition or Enforcement in New Zealand and Excluded Matter) Order 2013. Australia has a similar rule – Trans-Tasman Proceedings Regulation 2012 (Cth), reg 16.

6 Trans-Tasman Proceedings Act 2010 (Cth).

(b) New Zealand courts declining jurisdiction and, by order, staying proceedings in New Zealand on the grounds that an Australian court is the more appropriate forum to determine the proceedings:

…

(f) recognition and enforcement in New Zealand of specified judgments of Australian courts and tribunals:

…

[22] Under subpart 1 of Part 2 of the Trans-Tasman Proceedings Act, a plaintiff in a New Zealand civil proceeding to which the subpart applies may serve an initiating document for a proceeding on a person in Australia without having to obtain leave of the court and without having to pass through particular gateways (as under r 6.27(2) of the High Court Rules).[7] Section 13(3) makes this clear:

> 13(3) By way of explanation, it is not necessary for the New Zealand court or tribunal—
>
> (a) to give leave to serve the initiating document in Australia; or
>
> (b) to be satisfied that there is a connection between the proceeding and New Zealand.

[23] In proceedings to which subpart 1 applies, service in Australia must be carried out in accordance with the New Zealand court's rules as to service.[8] A defendant served with an initiating document in Australia must be given prescribed information under s 15.[9] Section 17 fixes times for defendants served in Australia to file an appearance or a response document. There is a default period of 30 working days after the initiating document is served, or longer if the procedural rules of the New Zealand court so provide.[10] The court can make orders extending or shortening the time for an appearance or response document.

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7 New rule 6.36 of the High Court Rules is a consequential amendment to provide that the rules in subpart 4 of Part 6, which deal with service out of New Zealand, do not apply to initiating documents under the Trans-Tasman Proceedings Act.

8 Trans-Tasman Proceedings Act 2010, s 13(2).

9 The information must be given in the notice in Form 1 under r 6 of the Trans-Tasman Proceedings Regulations and Rules 2013.

10 There is a further qualification under s 17(1)(b).

Does subpart 1 of Part 2 of the Trans-Tasman Proceedings Act 2010 apply to a bankruptcy notice served on a debtor in Australia?

[24] The creditor says that it must follow the provisions of the Trans-Tasman Proceedings Act to serve the bankruptcy notices on the debtors in Australia. It does not need leave under s 17(3) of the Insolvency Act or under r 6.30 of the High Court Rules. The Trans-Tasman Proceedings Act overrides s 17(3) of the Insolvency Act. Because of r 6.36, subpart 4 of Part 6 of the High Court Rules, including r 6.30, does not apply to the service of initiating documents under the Trans-Tasman Proceedings Act. That is why it attached Form 1 of the Trans-Tasman Proceedings Regulations and Rules 2013 to the bankruptcy notices. It further says that because the bankruptcy notice was the initiating document, it did not need to provide a similar notice with the later bankruptcy applications. It regards the application as a continuation of a proceeding started by the notice.

[25] For that, the creditor has to show that subpart 1 of Part 2 of the Trans-Tasman Proceedings Act applies to a bankruptcy notice under the Insolvency Act. Section 12 of the Trans-Tasman Proceedings Act says:

> **12 Application of this subpart**
>
> (1) This subpart applies to a civil proceeding commenced after the commencement of this subpart… and that is—
>
> (a) civil proceeding commenced in a New Zealand court; …
>
> (2) However, this subpart does not apply to—
>
> (a) a civil proceeding that relates wholly or partly to an excluded matter; or
>
> (b) a civil proceeding that relates wholly or partly to an action *in rem*; or
>
> (c) a civil proceeding in a New Zealand tribunal declared by an order under subsection (3)(b) to be a proceeding to which this subpart does not apply.

[26] Section 4 contains definitions of "proceeding", "criminal proceeding" and "civil proceeding". Aside from a civil proceeding not being a criminal proceeding, the definitions give little assistance for the present issue.

[27] "Civil proceeding" in the Trans-Tasman Proceedings Act is used in a similar sense to "proceeding" under the definition in r 1.3(1) of the High Court Rules. It is a proceeding for a judicial determination of a matter submitted to the court in its civil jurisdiction. A civil proceeding requires a judicial determination whether to grant relief sought in the proceeding. The relief sought may be declaratory (as under the Declaratory Judgments Act 1908, or declarations given in a court's equitable jurisdiction) or creative, as when obligations are imposed. The relief may be available as of right, or only on the exercise of the court's discretion. It may take the form of judgments, orders or declarations. But if the matter initiated in the court does not involve a process by which the court is required to consider whether to grant relief in its civil jurisdiction, it is not a civil proceeding.

[28] This meaning of "civil proceeding" under subpart 1 of Part 2 of the Trans-Tasman Proceedings Act is supported by subpart 2. That provides for a New Zealand court to order a stay of a proceeding on the grounds that an Australian court is the more appropriate court *to determine the matters in issue*.[11] Likewise, s 24(1) says:

> 24(1) … the New Zealand court may, by order, stay the proceeding if it is satisfied that an Australian court -
>
> (a) has jurisdiction *to determine the matters in issue between the parties to the proceeding*; and
>
> (b) is the more appropriate court *to determine those matters*. (Emphasis added)

[29] Similarly, the notice given to a defendant served in Australia under Form 1 of the Trans-Tasman Proceedings Regulations and Rules advises the Australian defendant that the New Zealand court *can consider and make a decision* on the claim set out in the served document and that *the decision on the claim* may be enforced in Australia or New Zealand. The notice advises the defendant of the right to apply for the proceeding to be stayed if a court in Australia is the more appropriate court *to decide the claim*. It also advises of the time for taking action if the defendant served in Australia wants *to contest the claim*.

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[11] Section 21(1).

[30] The issue and service of a bankruptcy notice does not by itself start a process for the judicial determination of some issue. A bankruptcy notice calls on the judgment debtor to take certain steps, namely to pay the amount of a judgment debt, or to secure or enter into a new formal agreement with the creditor for payment of the debt or, alternatively, obtain the court's approval for terms of payment, or to satisfy the court that there is a counterclaim, set-off or cross-demand that equals or exceeds the amount of the judgment debt that could have been set up in the proceeding in which the judgment was obtained. The failure to take any of those steps results in the judgment debtor committing an act of bankruptcy under s 17 of the Insolvency Act. The act of bankruptcy is one of the requirements under s 13 for a creditor's application for adjudication.

[31] While the bankruptcy notice is issued out of the court, it is in the end no more than a very formal demand. The consequence of non-compliance with the demand is that the debtor may face a bankruptcy application, but that is a separate civil proceeding. The service of the bankruptcy notice may trigger other civil proceedings: an application to set aside the bankruptcy notice either on the counterclaim ground or in the court's inherent jurisdiction, or an application for the court to approve terms of payment. But the notice is not itself a document initiating a civil proceeding.

[32] In these cases, the information the creditor gave each debtor in Form 1 of the Trans-Tasman Proceedings Regulations and Rules told the debtor what steps he or she might take on the "claim" made in the notice. There was however no claim on which the court was to make a decision. Liability under the judgment the subject of the notice had already been established. The bankruptcy notice was not a "claim" as that word was used in the form.

[33] Are there any matters pointing the other way? There are, but in my judgment they do not count against the position set out above. One of them is the drafting of the prescribed form of bankruptcy notice. A judgment creditor may demand payment of the costs of the bankruptcy notice. There is a note as to the costs that may be claimed:

> The amount claimed for costs in paragraph 2 must be determined as if the proceeding were a category 2 proceeding…

Under this a bankruptcy notice appears to be a "proceeding." Under the relevant costs provisions of the rules, a bankruptcy notice is treated as a step in a proceeding.[12] That use of "proceeding" does not however help in deciding the meaning of "civil proceeding" in a different setting, the Trans-Tasman Proceedings Act.

[34] Another consideration is the apparent inconsistency in that one bankruptcy process, a notice under s 17 of the Insolvency Act, has one set of rules for service in Australia, and another process, an application under s 13, has different rules. The inconsistency arises because of the difference in the processes: one is no more than an elaborate demand, the other leads to a determination of a claim. The Trans-Tasman Proceedings Act only deals with the requirements of the second. It is not intended to apply more widely.

[35] For these reasons I find that a bankruptcy notice is not a "civil proceeding" under s 12 of the Trans-Tasman Proceedings Act 2010. As it is not, the requirements under s 17(3) of the Insolvency Act and r 6.30 of the High Court Rules to obtain leave to serve a bankruptcy notice out of New Zealand still apply. Equally, the creditor was not required to give the debtors the information under s 15 of the Trans-Tasman Proceedings Act 2010.

Was the creditor required to obtain an order fixing time for compliance under s 17(4) of the Insolvency Act?

[36] Whether or not the Trans-Tasman Proceedings Act applies to a bankruptcy notice, the creditor was still required to obtain an order under s 17(4)(b) fixing the time to comply.

[37] In this case, the creditor chose 30 working days as the period to comply with the notice, relying on s 17 of the Trans-Tasman Proceedings Act. That fixes a default period for the time given to a person served in Australia to file an appearance or response document in a New Zealand civil proceeding. It does not fix the time to

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[12] High Court Rules, Part 14 generally and in particular Schedule 3, step 44.

comply with a bankruptcy notice. In these cases the creditor adopted a period which is longer than the court normally fixes when a bankruptcy notice is to be served in Australia. Nevertheless, that does not exempt the creditor from the need to obtain an order under s 17(4)(b) of the Insolvency Act.

Does the Trans-Tasman Proceedings Act apply to the bankruptcy applications?

[38] The bankruptcy applications are civil proceedings under subpart 1 of Part 2 of the Trans-Tasman Proceedings Act. They seek judicial determination of an issue, whether the debtors should be adjudicated bankrupt. Bankruptcy applications are not subject to any of the exclusions under s 12(2)-(4). Accordingly, the creditor was required to give the debtors the information under s 15, that is, the information in Form 1 of the Trans-Tasman Proceedings Regulations and Rules. Under s 17, the debtors had 30 working days after being served in which to file any appearance or response documents.

[39] The creditor did not meet these requirements. The bankruptcy applications were initiating documents under the Trans-Tasman Proceedings Act. The debtors needed to be informed under s 15 that for those proceedings they had the rights described in Form 1 of the Trans-Tasman Proceedings Regulations and Rules. Giving them that information with the bankruptcy notice was not compliance with s 15. That gave them misleading information as to the bankruptcy notice, and was inadequate to tell them about steps to be taken for the bankruptcy applications.

[40] As the applications were called within 30 working days of the debtors being served, the time for them to file responses under s 17 had not elapsed. That however could be cured by adjourning the proceeding.

What are the effects of the creditor's non-compliance with the Insolvency Act and the Trans-Tasman Proceedings Act?

[41] The defects are:

(a) The creditor should have obtained leave to serve the bankruptcy notices outside New Zealand, but did not.

(b) The creditor should have obtained an order fixing the time for compliance with the bankruptcy notices to be served out of New Zealand, but did not.

(c) The creditor attached to the bankruptcy notices forms under the Trans-Tasman Proceedings Regulations and Rules, when they were not required.

(d) The creditor did not give the information required under s 15 of the Trans-Tasman Proceedings Act for the bankruptcy applications.

[42] On the other hand, the creditor did not require leave to serve the bankruptcy applications out of New Zealand, as they were civil proceedings under the Act.

[43] The omission to give the information under s 15 of the Trans-Tasman Proceedings Act is not fatal. Section 16 makes that clear:

> **16 Consequences of failing to provide information**
>
> (1) Failure to comply with section 15(1) does not invalidate—
>
> (a) the proceeding; or
>
> (b) any step taken in, or in respect of, the proceeding.
>
> (2) However, the commencement New Zealand court or tribunal may, on an application by the defendant under subsection (3), make an order setting aside (wholly or in part, and on any terms as to costs or otherwise that it considers appropriate)—
>
> (a) the proceeding; or
>
> (b) any step taken in, or in respect of, the proceeding.
>
> (3) The defendant's application can only be made—
>
> (a) within a reasonable time after the defendant becomes aware of the failure; and
>
> (b) before the defendant has taken any fresh step after the defendant becomes aware of the failure.

[44] If the debtors are prejudiced by the failure to provide information under s 15, they must take the point by applying under subs (3). So far they have not taken any steps in the proceeding.

[45] The matter is otherwise with the bankruptcy notices. Non-compliance with a bankruptcy notice is an act of bankruptcy under s 17 of the Insolvency Act. If there was no valid bankruptcy notice, then neither debtor has committed an act of bankruptcy in failing to comply with it. Do the defects invalidate the notices?

[46] Section 418 of the Insolvency Act 2006 says:

> **418 Defects in proceedings**
>
> (1) A proceeding under this Act must not be invalidated or set aside for a defect (which includes misdescription, misnomer, or omission) in a step that must be taken as part of, or in connection with, the proceeding, unless a person is prejudiced by the defect.
>
> (2) The Court may order the defect to be corrected, and may order the proceeding to continue, on the conditions that the Court thinks appropriate in the interests of everyone who has an interest in the proceeding.

[47] Section 418 has been used to excuse immaterial defects in bankruptcy notices: *Wickham v Moloney, Re Dental Council of New Zealand, ex parte Gibson* and *Re Stockco Ltd, ex parte Denize*.[13] Sometimes the power to cure a defect can be used before the time for compliance has expired, as when a debtor applies to set aside a bankruptcy notice and has challenged its validity. That may still give the debtor the chance to avoid committing an act of bankruptcy. But once the time for complying with the notice has expired, it is too late to carry out any corrective surgery on the bankruptcy notice. The notice must stand or fall as it is, without any retrospective amendments. If a bankruptcy notice is invalid, it cannot be retrospectively validated. That would be to the prejudice of the debtor.

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[13] *Wickham v Moloney* HC Hamilton CIV-2003-419-352, 27 November 2003; *Re Dental Council of New Zealand, ex parte Gibson* (2010) 19 PRNZ 900 (HC) and *Re Stockco Ltd, ex parte Denize* HC Auckland CIV-2011-404-3557, 31 October 2011.

[48] In *Best v Watson*,[14] the Court of Appeal dealt with s 11 of the Insolvency Act 1967, a provision similar to s 418 of the present Insolvency Act:

> In our view the section has to be given its full meaning and is not to be read subject to any limitations not required by the statutory language. There must, of course, be proceedings before the Court before rectification may be directed under s 11. So if the document is so defective that it is a nullity there is nothing before the Court capable of rectification. The distinction between nullity and irregularity is well recognised in other areas of the law (see, for instance, *New Zealand Institute of Agriculture Science Inc v Ellesmere County* [1976] 1 NZLR 630, particularly at p 636; and *Police v Thomas* [1977] 1 NZLR 109). In that latter case Cooke J, referring to s 204 of the Summary Proceedings Act 1957 which is in essentially the same terms as s 11 of the Insolvency Act, said at p 121: "No doubt s 204 is unavailable if a defect is so serious as to result in what should be stigmatised as a nullity." He went on to observe that "nullity or otherwise is apt to be a question of degree".
>
> We think that the same considerations apply under s 11. That provision may be invoked in any case where the proceedings are defective and however the defect may be characterised. It will always be a question of degree whether or not it can be said that, notwithstanding failure to comply with an apparently mandatory requirement of the Act or of the Rules, there is before the Court what can fairly be described as proceedings under the Act; and that question should not be approached in a mechanical or technical way.

[49] In *Re Rowles*,[15] a bankruptcy notice had been served out of New Zealand without leave first having been obtained.[16] Master Towle held that this was a defect that could not be cured under s 11 of the 1967 Act. *Best v Watson* was cited. Master Towle held that the defect was not a procedural irregularity but a matter of substance. He held that leave could not be granted retrospectively.

[50] In that case, the time for compliance with the bankruptcy notice was the 14 days allowed for compliance in New Zealand under the 1967 Act. In this case the period given for compliance was longer. In that case there does not seem to have been any prejudice to the debtor in being given the same period of notice as would be given to a debtor served in New Zealand. Instead, Master Towle focused on the failure to obtain leave and held that that went to substance.

[51] I follow that authority. The failure to obtain leave plus the failure to obtain an order fixing time for compliance went to the validity of the bankruptcy notices.

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14 *Best v Watson* [1979] 2 NZLR 492 (CA) at 494.

15 *Re Rowles* HC Auckland B1463/90, 3 December 1990, Master Towle.

16 Under the Insolvency Act 1967, leave to serve a bankruptcy notice abroad was also required.

The court cannot issue a bankruptcy notice for service out of New Zealand without a judge permitting service abroad and fixing the time for compliance. The bankruptcy notices in these cases were nullities. The debtors did not commit acts of bankruptcy in not complying with them.

[52] I dismiss both bankruptcy applications.

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Associate Judge R M Bell