IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-002004
[2018] NZHC 575

UNDER	the Insolvency Act 2016
IN THE MATTER	of the bankruptcy of D G Nottingham
BETWEEN	MARTIN RUSSELL HONEY, STEPHANIE HONEY AND HEMI TAKA Judgment Creditors
AND	DERMOT GREGORY NOTTINGHAM Judgment Debtor

Hearing:	14 March 2018
Appearances:	D Grove for the Judgment Creditors Judgment Debtor in Person
Judgment:	29 March 2018

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 29 March 2018 at 4.00 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:

Foy Halse, Auckland

D Grove, Auckland

Introduction

[1] In my judgment of 27 October 2017, I set out my reasons for refusing to grant Mr Nottingham's interlocutory application to set aside the bankruptcy notice served on him by the judgment creditors.

[2] Mr Nottingham, the judgment debtor, wishes to appeal my judgment to the Court of Appeal. He has filed an application to this Court for leave to appeal, and for leave to seek that out of time. The application, filed on 13 December 2017, is opposed by the judgment creditors.

[3] At issue is whether the application ought to be granted. There is however a preliminary issue: whether it is even necessary to apply to this Court for leave.

Is the application necessary?

[4] This issue of whether leave is necessary is provided for in s 56(3) and (4) of the Senior Courts Act 2016:

> **56 Jurisdiction**
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> …
>
> (3) No appeal, except an appeal under subsection (4), lies from any order or decision of the High Court made on an interlocutory application in respect of any civil proceeding unless leave to appeal to the Court of Appeal is given by the High Court on application made within 20 working days after the date of that order or decision or within any further time that the High Court may allow.
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> (4) Any party to any proceedings may appeal without leave to the Court of Appeal against any order or decision of the High Court—
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> (a) striking out or dismissing the whole or part of a proceeding, claim, or defence; or
>
> (b) granting summary judgment.

[5] At the hearing, both sides were of the opinion that subs (3) applied presently. However, I consider it strongly arguable the present situation is caught by subs (4).

My 27 October decision dismissing an application to set aside a bankruptcy notice is, in my view, a dismissal of "part of a proceeding" — or, to frame it differently, is analogous to the striking out of a "defence". If so, then leave of this Court is not required to appeal from my 27 October decision. Rather, what Mr Nottingham needs is the Court of Appeal's leave for late filing.

[6] But in case I am wrong in this analysis, I accept it is appropriate to proceed as if subs (3) does apply. I therefore set out my reasons explaining why, if leave were required, I am satisfied that I would *not* grant leave in the circumstances.

Background

[7] I pause momentarily to refer to the background facts.

[8] On 27 August 2017, the judgment creditors filed a request for the issue of the bankruptcy notice against Mr Nottingham. The bankruptcy notice was issued on 29 August 2017. It relied on an unsatisfied costs judgment of $15,770 plus minor disbursements issued by Gilbert J in this Court on 27 April 2017.

[9] The bankruptcy notice was served on Mr Nottingham on 11 September 2017. It was in the prescribed statutory form required pursuant to ss 17 and 29 of the Insolvency Act 2006 and Form B2 of the High Court Rules.

[10] In terms of s 17 a debtor commits an act of bankruptcy if the debtor has not, within the time limit of 10 working days after service of the bankruptcy notice, complied with the requirements of the notice or satisfied the court that he or she has grounds for an order setting aside the notice. Mr Nottingham considered he had grounds for such an order. However, he needed to do two things within the 10 day time limit:

(a) make application to this Court and to support the application by affidavit to show the basis for an order to set aside the notice; and

(b) serve "within the same time" copies of the application and supporting affidavit on the judgment creditor.

[11] On 25 September 2017 Mr Nottingham filed, within time, a document called a 'notice of opposition to bankruptcy notice', which the Court and the judgment creditors have treated as an application to set aside the bankruptcy notice. He also filed a supporting affidavit.

[12] But he failed to comply with the second step: he did not serve these documents on the judgment creditors by 25 September at the latest, that is, within the 10 day time limit. The first time that the judgment creditors got notice of the documents was a day late, on 26 September 2017. Mr Nottingham sent them an email including as attachments copies of the notice of opposition dated 25 September 2017 and an unsworn affidavit of Mr Nottingham.

Mr Nottingham's argument

[13] There are two key planks to Mr Nottingham's argument.

[14] First, he places responsibility for the delay in serving the documents squarely with the Registry of the Court. He explains that he filed the documents by post but Registry failed to return service copies to him in sufficient time for him to serve the documents within the statutory time limit. This failure, he submits, gives rise to an injustice that the Court has the discretion to remedy under ss 417 and 418. He asks the Court to exercise this discretion by waiving the time limit for service or extending it to the actual day of service.

[15] Second, Mr Nottingham makes submissions about Parliament's legislative intention. In his view, Parliament *must* have intended for ss 417 and 418 to empower the Court to allow brief extensions of time or to waive minor non-compliance with the time-limits in the context of an application to set aside a bankruptcy notice.

[16] There is, of course, a long line of authorities — referred to in my 27 October judgment — establishing that the Court's jurisdiction to extend time limits does *not* apply in this context. But Mr Nottingham submits these authorities are distinguishable as decided under the previous Insolvency Act 1967; or alternatively, that they are simply wrong. He adds that it would be of real benefit, not simply to himself but to

others, to have the Court of Appeal determine whether these authorities are still good law.

Analysis

[17] Neither plank of Mr Nottingham's argument succeeds in my view. I begin with the issue of Parliamentary intention.

[18] The question of law Mr Nottingham wishes to argue has been dealt with at length by case law dealing with substantially similar provisions (ss 10 and 11 of the 1967 Act). The courts have stated time and again that these provisions of general import do not exhibit a legislative intention to disturb the clear statutory time limit for filing and serving an application to set aside a bankruptcy notice.

[19] As Associate Judge Gendall observed in *Re Memelink ex p SANCO (NZ) Ltd*:[1]

> It is clear from judgments such as *Scott v ANZ Banking Group (NZ) Limited*, and *Gillon v Blueprint Developments Limited*, that once the tenth working day after service of a bankruptcy notice, not counting the day of service has passed, an act of bankruptcy occurs. Accordingly, provisions be they in the Insolvency Act 2006or elsewhere which provide for some extension of time for bringing and serving applications will not assist. Blankly put, they cannot undo an event which has occurred, namely the act of bankruptcy.
>
> (internal citations omitted)

[20] There would need to be express and clear terms in the 2006 Act for me to be satisfied Parliament intended to depart from long-established case law. Given such terms are noticeably missing, I can only conclude that Parliament intended to preserve the current position. Accordingly, I am unable to see any merit in the legal issue that Mr Nottingham wishes to have determined on appeal.

[21] Turning to the specific circumstances of this case, I do not consider Mr Nottingham will suffer any serious injustice if leave is refused. The application for leave to appeal was filed several days out of time. Taking a realistic and pragmatic view, Mr Nottingham cannot push responsibility for the delay in serving his

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1 *Re Memelink ex p SANCO (NZ) Ltd* HC Wellington CIV-2008-485-2691, 10 March 2009 at [11].

application to set aside onto the Court Registry. It was fully open to Mr Nottingham to either:

(a) visit Registry to ask for service copies; or

(b) serve his own copies on the judgment creditors within time and then provide the official service copies a couple of days later once he received them in the post.

[22] He did neither, and could offer the Court no explanation for this oversight.

[23] The judgment creditors are entitled to rely on Mr Nottingham's act of bankruptcy and procced with their bankruptcy application. Balancing Mr Nottingham's suggestion of injustice against the legitimate interests of the judgment creditors, I am simply not persuaded that justice would be achieved by giving leave to appeal out of time.

[24] I am reminded that the threshold for granting leave to appeal is high: leave should only be granted where the circumstances warrant incurring further delay.[2] Given Mr Nottingham can point to no serious injustice if leave is refused, and furthermore, he brings no seriously arguable issue of law, further delay is not warranted in the circumstances.

[25] Finally, I note that Mr Nottingham will yet have the opportunity to defend the judgment creditor's application at his adjudication and, in that context, raise any proper grounds he may have for the Court to refuse to bankrupt him.

Result

[26] The application is declined.

[27] As costs follow the event under the statutory costs regime, the judgment creditors are entitled to costs on a 2B basis and disbursements as fixed by the Registrar.

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2 *Finewood Upholstery Limited v Vaughan* [2017] NZHC 1628 at [8]; *A v Minister of Internal Affairs* [2017] NZHC 887.

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Associate Judge Sargisson