

UNDER The Insolvency Act 1976; and
the Judicature Act 1908

IN THE MATTER of the estate of
GRAHAM CHRISTOPHER SMITH
a bankrupt

BETWEEN JANETTE DOROTHY SMITH of
Wellington, Marketing Manager

Appellant

AND THE OFFICIAL ASSIGNEE

Respondent

Coram Hardie Boys J
Gault J
McKay J

Hearing 22 November 1991

Counsel F M Farr for Appellant
C S Chapman for Respondent

Judgment 2 December 1991

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J

Mrs Smith has applied for conditional leave to appeal to Her Majesty in Council from this Court's judgment of 4 October 1991 dismissing her appeal against the judgment of McGechan J of 28 March 1991.

Mrs Smith's husband was adjudicated bankrupt on 8 October 1990 on the petition of a creditor owed over \$5 million. While proceedings brought by the creditor to recover the debt were pending an order was made in the District Court under the Matrimonial Property Act 1976 setting aside an earlier agreement and vesting very valuable assets in the wife. The husband's whereabouts being unknown to him, the Official Assignee wished to be informed concerning the circumstances of the making of the order and of various other matters that he considered important in the administration of the estate, and so on 13 December 1990 he issued a summons pursuant to s 68 of the Insolvency Act 1967 requiring Mrs Smith to appear before him on 18 December for examination. On 14 December application was made to the High Court on her behalf to set the summons aside. Then on 7 February 1991 the Official Assignee gave notice under s 58 of the Insolvency Act setting aside the vesting of property pursuant to the District Court's order on the grounds that it was a voidable gift (s 54) or an alienation with intent to defraud creditors (s 60 of the Property Law Act 1952). On 20 February 1991 application was made to the High Court "that the decision of the Official Assignee as recorded in the said notice be reversed, set aside or otherwise annulled". In the alternative directions were sought as to "the method by which the Official Assignee may, if so minded, endeavour to establish the bona fides and merits of its decision".

McGechan J heard both applications together. He dismissed the application to set aside the s 68 summons. He held that the other application too must fail, but he adjourned it sine die. He did this because he thought there was "much to be said for obtaining information before proceedings are carried forward", having it in mind that once the examination had been completed the Official Assignee should file points of claim, Mrs Smith points of defence, and appropriate directions should be obtained as to discovery and affidavits. It is to be noted that s 58 is silent as to the procedure that is to follow filing and service of the Official Assignee's notice.

On the appeal, we accepted that in exercising his powers under s 68 the Official Assignee must act fairly and without oppression, but rejected Mr Farr's submission that it was oppressive for Mrs Smith to be examined on the subject matter of the s 58 notice once the Official Assignee had put that procedure in train. We also agreed with McGechan J that the s 58 procedure is available as a means of challenging the Matrimonial Property order, for such an order may come within the term "disposition" used in s 58. However, we saw no reason to delay that challenge as contemplated by McGechan J. Accordingly we disposed of the appeal so far as it related to the s 58 notice in this way:

The application by the appellant to reverse, set aside or annul the decision of the Official Assignee as recorded in the notice issued under s 58 is dismissed on the basis that the facts should be considered at a further hearing.

The Official Assignee is, in due course, to file an application for directions.

On the present application for conditional leave, Mr Farr expressed concern that the effect of this was finally to determine that the Matrimonial Property order had been properly set aside so that all that remained was for the High Court to make the incidental orders necessary to give effect to that result. That is not so. A careful reading of the judgment will show that it was concerned only with the jurisdictional question of whether the order could be set aside under s 58. The merits are still to be considered. The High Court is yet to determine on the evidence whether there has indeed been a gift or an alienation with intent to defraud creditors and whether in consequence the order should be set aside. It is important to go back to Mrs Smith's own application. It challenged the Official Assignee's decision to issue the notice. It was an attack in limine on jurisdictional grounds. We dismissed that application. As McGechan J treated it as a s 86 application, our order was perhaps not strictly necessary, but it makes no difference. The s 58

notice stands, and is to be disposed of in the normal course. There being no set procedure, we have adopted McGechan J's proposal that the next step is for directions to be sought. We record that Mr Chapman for the Official Assignee agreed that this is the position.

We now turn to the conditional leave application, which falls for consideration in two parts, the first being in respect of the s 68 notice. Here, rule 2(b) of the Privy Council (Judicial Committee) Rules Notice 1973 applies, and the applicant must show that the question involved is one which by reason of its great general or public importance or otherwise ought to be submitted to Her Majesty in Council for decision. Mr Farr took the high ground of civil liberty, contending that to allow examination of the opposing party to the litigation when the witness is required to answer (s 70) would give the Official Assignee powers, and an advantage, no other litigant, and not even a Police officer, has. The importance of the matter, he said, is that it could affect every spouse of every bankrupt. The proposition he wishes to urge upon their Lordships is that once the Official Assignee has commenced proceedings, he should not be permitted to act under s 68.

We cannot accept counsel's assessment of the significance of the case. In the first place, even if the proposition were correct, it would not apply, for here the summons was issued first. But much more importantly, in reality no question of principle arises in the case. There is of course a principle. The principle is that the Official Assignee must not exercise his powers oppressively. The present case is but an application of that principle, seen in the light of current attitudes towards pre-trial discovery, to the particular facts. We do not accept that the principle goes further and draws what seems an artificial distinction that depends on whether the Official Assignee is contemplating proceedings or has actually commenced them. There is an additional point, going to the residual discretion under s 2(b), and that is that the administration of this bankrupt estate should not be delayed further.

The second part of the application, in respect of the s 58 notice, also comes within rule 2(b). Mr Farr submitted that it comes within rule 2(a), but that was because of his misunderstanding as to the effect of this Court's judgment. Under rule 2(b), he submitted that the importance of the matter lies in the inroad the judgment is said to have made on the protection against creditors conferred by the Matrimonial Property Act. We doubt that there is such an inroad, but say no more about that as we are satisfied that the application for leave should not presently be granted because the proceedings are incomplete. As has often been said, and most recently in *H C Senior & Co Ltd v Body Corporate 52665* (CA 175/90, 19 November 1991) it is not appropriate to grant leave when only some issues have been dealt with in the High Court and then on appeal, with further issues remaining for decision in the High Court. This case is plainly one where that approach should be taken. It is not desirable that the case go to the Privy Council until a decision on the merits has been given.

For the foregoing reasons, the application for conditional leave is refused so far as it relates to the s 68 summons. So far as it relates to the s 58 notice, it is adjourned sine die to be brought on on 7 days notice if desired once the litigation is completed. Costs are reserved.

A handwritten signature in black ink, appearing to be 'L. Farr', written in a cursive style.

Solicitors

Farry & Co, Dunedin, for appellant
Buddle Findlay, Wellington, for respondent