

LR 434

UNDER The Insolvency Act

BETWEEN BRIAN JOHN RICHARD
FOX

Plaintiff

A N D THE OFFICIAL
ASSIGNEE IN
BANKRUPTCY of the
property of
NICHOLAS IOANNIS
VAROUHAS a Bankrupt

Defendant

Hearing: 18 August 1987

Counsel: Henry for Plaintiff
Johnston for Defendant

Judgment: 31 August 1987

JUDGMENT OF SINCLAIR, J.

Before this Court is a notice of interlocutory application for orders pursuant to s.86 of the Insolvency Act 1967 reversing or modifying a decision of the Official Assignee.

Very briefly, the Official Assignee in Bankruptcy is administering the estate of Nicholas Ioannis Varouhas and in the course of that administration it came to his knowledge that the Plaintiff had obtained a mortgage over a property owned by the bankrupt in respect of what was said to be certain legal costs due to the Plaintiff. The mortgage was not registered but was protected by a caveat.

Eventually certain payments were made to the Plaintiff but under cover of a letter dated 3 June 1987 the Official Assignee purported to act pursuant to s.58 of the Insolvency Act by setting aside a disposition to the Plaintiff in the sum of \$8,253.56, being moneys paid to the Plaintiff from his trust account and which had been held for the credit of N.I. & I.M. Varouhas on or about 19 September 1983. Upon receipt of that notice the present application was filed on 24 June 1987 it being believed that the Official Assignee had followed the requisite steps in setting aside such a disposition as was said to have been made to the Plaintiff. A notice of opposition to the application was filed and it was then discovered that there had not been filed in this Court the original notice by the Official Assignee pursuant to s.58 of the Insolvency Act 1967.

When the matter was called in Court counsel for the Plaintiff indicated that in his view the provisions of s.58(1) were mandatory but that if there was any method of saving the present proceedings then the Plaintiff would be only too happy to go along with anything that would achieve that purpose. The Official Assignee eventually filed a notice on 14 August 1987 - and of course there has been no service subsequent to that date in that there has not been service on the Plaintiff of a copy of the notice filed on 14 August 1987. It was submitted by counsel for the Official Assignee that possibly resort could be had to

the provisions of s.86 of the Insolvency Act 1967 which gives the Court power to extend the time for appealing against any decision of the Official Assignee. However, I have come to the conclusion that that course is not available to the Court in the instant case because as there has been no service of a copy of the notice filed on 18 August last, the time referred to in s.87 has not yet begun to run.

It is, however, necessary to go back to subsection (1) of s.58 of the Insolvency Act 1967 which reads as follows:-

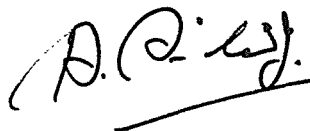
"In any case where, under any of the provisions of section 43(3) of this Act, section 54 (except subsection (3)) of this Act, sections 56, 57 and 162 of this Act and section 60 of the Property Law Act 1952, any disposition is voidable as against the Assignee or as against the appointee within the meaning of Part XVII of this Act, if the Assignee or appointee wishes to set aside the disposition, he shall do so by filing the prescribed notice in the Court and serving a copy thereof on the persons on whom service is required in accordance with regulations made under this Act."

It will be noted that the terms of that subsection are mandatory and there is no provision available for waiving, modifying or otherwise granting any indulgence in relation to the procedure laid down in that subsection. Where the Official Assignee wishes to set aside a disposition, he must first file the notice in the Court and then serve a copy on the person affected. The person then affected has 21 days, pursuant to s.86 of the Statute, within which to

appeal against the Official Assignee's decision that the Court has power to extend that period in any given case.

It necessarily therefore follows that the present proceedings are a nullity and the Official Assignee will have to file and serve the new notice but in all the circumstances, as the Plaintiff has acted bona fide in all respects, I give leave to the Plaintiff to transfer to the new file, once the notice has been filed, the affidavit filed by him in the present application and I direct that that affidavit may be read in the new proceedings as though it had been originally filed in those same proceedings. This course is adopted because it is not the Plaintiff's fault that the present position has arisen and it will save time and expense to all parties by acting in this particular way.

The question of costs on the present application is reserved.

A handwritten signature in black ink, appearing to read "A. R. King", with a horizontal line underneath it.

Solicitors:

Gubb Vlatkovich & Co, Auckland, for Plaintiff;

Grove Darlow & Partners, Auckland, for Defendant.