

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

IN BANKRUPTCY
B.271/90

IN THE MATTER of the Insolvency Act
1967

A N D

IN THE MATTER of FIDOW

Debtor

EX PARTE

REGISTERED SECURITIES
LIMITED
(IN LIQUIDATION)

Creditor

Hearing: 8 June 1990
Oral Judgment: 8 June 1990
Counsel: Christopher Muston for debtor
Lawrence Herzog for creditor

ORAL JUDGMENT OF THOMAS J.

The judgment debtor, Jennifer Irene Fidow, applies for and order staying execution of the judgment of Master Anne Gambrill given on 15 February 1990 in favour of the judgment creditor, Registered Securities Limited. The grounds stated in the application indicate that the debtor will otherwise be made bankrupt and will be unable to prosecute an appeal from that decision.

Mr Herzog, for Registered Securities, raised a preliminary point based on the fact that security for

costs in the Court of Appeal has not been given. Notice of motion of appeal was filed and served on 11 May 1990. An order was made for security for costs in the sum of \$1500.00 on 17 May. Rule 34 (1) of the Court of Appeal Rules requires security for costs to be given within 14 days after the appeal has been brought as prescribed by R 27. An appeal is "brought" under that rule, by virtue of the provisions of R 29, when the notice of motion of appeal has been served on every party affected and a duplicate lodged in the High Court appealed from. That is what has happened here. R 34 (2) then provides that if security is not so given the appeal is to be deemed to be abandoned.

It has long been established that security must be both fixed as to amount as well as given within the 14 day period after the appeal has been brought. If an application to fix security has been made and determined within the 14 day period the Court apparently then has power to extend time. Otherwise the security must be actually given. If this has not been done, the appeal is deemed to be abandoned pursuant to R 34 (2), and "a retrospective order for extension is not possible". (See McGechan on Procedure (1/11/85) 4-41, para. 34.04(2), and cases mentioned therein). The wording of the subrule is "intractable" and "imperative" and the Court lacks jurisdiction to amend or extend the notice of appeal in

any way. (See Hermans v Hermans [1961] NZLR 390, per Cleary J, at p.393).

Mr Muston, for the debtor, acknowledged that no application to fix security had been made and that the three month appeal period has expired. He argues, however, that it is open to the debtor to apply for special leave to appeal pursuant to R 27 (4) of the Court of Appeal Rules. He then sought to vary his application for a stay so that the stay would operate until such time as an application for special leave had been filed, served, and resolved.

The reason why security has not been given, Mr Muston candidly admitted, was due to the fact he had overlooked the provisions of R 34(2). I also obtained the firm impression, from other comments made by Mr Muston, that his client had difficulties in finding the amount of the security.

In considering an application for special leave under R 27 (4), the Courts have entertained as a ground in support of the application the fact that there had been a mistake or oversight on the part of the solicitors acting for the proposed appellant. However, those cases relate to the discretion of the Court to grant special leave when an appeal has not been filed within the prescribed period

of 28 days, or three months, as the case may be. The solicitor's omission in this case is not related to the bringing of an appeal within time but rather to the failure to give security within the prescribed time. In the latter case failure to give security is fatal and, thus, the appeal must be deemed to be abandoned.

I do not have an application for special leave under R 27(4) before me. None has been filed. And I do not propose to grant a stay of execution on the basis or condition that the debtor file and pursue an application, or make the assumption that any such application would be duly granted. The suggestion, if there is to be one, is that it will not, when the true purpose of the leave is not to overcome any default in filing the appeal within time, for that was done, but rather to avoid the effect of R 34(2). If the failure to comply with that subrule is to provide a valid ground for extending the time for an appeal under R 27(4), there would seem to have been little point in vesting R 34(2) with its literal intractability. But I must admit to being uncomfortable with the anomaly which results, in that a solicitor's oversight in filing a notice of appeal within the prescribed time for doing so can be granted a dispensation, whereas the same measure of oversight on the part of a solicitor in arranging security for costs is fatal to his client's cause. Possibly, the fact that "an intending appellant who anticipates

difficulty in finding the amount of the security may always apply under R 34 to the Court appealed from for modification of the amount fixed, or he [or she] may apply for security to be dispensed with before he [or she] has given notice", and the need for finality, points to the reason for the Court's absolute approach to the provision of security. (Per Cleary J, *ibid*, at p.393).

Mr Muston further submitted that the stay should issue on the limited basis he proposed pending a decision of the Legal Aid Committee in respect of the debtor's application for legal aid made on 6 March 1990. But it is now 8 June, three months later, and I cannot imagine that the application has been pursued at all vigorously. Nor am I inclined to regard this factor as relevant at this stage. Such matters as the capacity of the debtor to provide security are matters to be canvassed at the time the quantum of the security is fixed. Even if, and I express no opinion on the point, the security fixed in this case is high, as Mr Muston claims, there is no appeal from that decision and no question of waiver or dispensation now arises in this case. To entertain this reason; that is, that there is a current application for legal aid which has yet to be resolved, would be to, in effect, re-open the question of security.

In summary, the debtor did not give security

within the time prescribed and the appeal is deemed to be abandoned. As the three month period for appealing has elapsed, he cannot file a fresh appeal and give security in respect of that appeal. Nor has the debtor filed an application for special leave to bring an appeal out of time. There is, therefore, no appeal before me to provide the basis for a stay of execution, and having regard to the protracted nature of this litigation, I am not minded to hold the judgment creditor at bay any longer. The application for a stay is refused.

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a horizontal line that ends in a small flourish.

8 June 1990

Solicitors:

Martelli McKegg Wells & Cormack, Auckland, for debtor
Bell Gully Buddle Weir, Auckland, for creditor