IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

6/8

B 109/92

IN THE MATTER of the Insolvency Act 1967

AND

IN THE MATTER of the bankruptcy of JOHN KEITH EBBETT of 76 Maleme Street, Tauranga, Building Contractor

2128

A DEBTOR:

EX PARTE: FLETCHER MERCHANTS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there and elsewhere as Merchants

A CREDITOR:

Hearing: 9 October 1992

Counsel: Mr Winiata for the Debtor
Mrs KM Lellman for the Creditor

Judgment: 9 October 1992

ORAL JUDGMENT OF FISHER J

This is an application to set aside a bankruptcy notice. In some careful and well presented submissions Mr Winiata advances essentially three grounds for having the bankruptcy notice set aside:

(i) that it is based upon a multiplicity of judgments,
(ii) that it refers to the wrong amount, and
(iii) that the debtor has a counterclaim which equals or exceeds the amount of the judgment debt and which he could not have set up in the action in which the judgment was obtained.

Multiplicity of Judgments

The bankruptcy notice in this case gives notice requiring the debtor to pay the sum of $71,379.98. That sum comprises in part $425.00 being an award of costs in favour of the creditor when the debtor lost on an interlocutory matter which resulted in a discharge of an existing stay of judgment, such award being made in favour of the creditor on 17 February 1992. The balance is the sum owed under a summary judgment in the substantive proceedings themselves entered on 21 October 1991 subject to certain adjustments for a part payment in the Court by the debtor, interest and an additional amount representing the filing fee on the request for issue of bankruptcy notice.

For present purposes the point made by Mr Winiata is that in one sense the judgment debt is divisible into two distinct Court adjudications, one being the substantive one made on 21 October 1991 and the second being the ancillary interlocutory one made on 17 February 1992. Mr Winiata points out that on the authority of ***In re Mills*** (1913) 15 GLR 441, which in turn refers to certain old English authorities, it is a potentially fatal defect in a bankruptcy notice if it is based upon more than one judgment. It seems to me however that the authorities to which Mr Winiata referred are distinguishable upon the basis that they were concerned with judgments entered in distinct actions. I do not see how the debtor in a case such as the present one could be said to be in any way disadvantaged by having an ancillary interlocutory order for costs included in the same bankruptcy notice as the substantive judgment itself. Quite to the contrary, it would be inconvenient, and would cause unnecessary expense to all concerned including the debtor himself (see the distinct filing fees for each bankruptcy notice request) if a multiplicity of bankruptcy notices were called for in a situation such as the present one. I take the view that it is legitimate to include in one bankruptcy notice the sum paid with respect to a substantive judgment together with any ancillary interlocutory orders as to costs. That is supported by common sense and I can find nothing in the legislation or the authorities to the contrary.

Incorrect amount shown in notice

Secondly, Mr Winiata points out that the sum referred to in the bankruptcy notice is incorrect. It gives credit to the debtor for $22,000 as the sum paid into Court at one point by the debtor and ultimately released to the creditor. The actual sum for

which the debtor should have been given credit was $23,600. But that error must have been plain to the debtor when he received the bankruptcy notice and it is not contested by the creditor. Again I can see no possible way in which the debtor could be prejudiced by the error. All he had to do was to pay the sum claimed less the $1,600 which he knew was deductible.

That is the common sense position but one must then turn to the law. The proviso to s 20 of the Insolvency Act 1967 provides that a bankruptcy notice "[s]hall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due ..." unless within the time allowed for payment the debtor gives notice that he disputes the validity of the bankruptcy notice on the ground of the misstatement. In the present case the time allowed for payment is 14 days and within that period the debtor did file his affidavit in which he draws attention to the overstatement in the bankruptcy notice. However I do not think it follows that the notice must necessarily be set aside as invalid. The affidavit did not expressly allege that the notice was invalid and I decline to believe that in a situation such as the present one, where the debtor could not be in any way prejudiced by an obvious arithmetical error on the face of the notice, the notice should be struck down. The case is distinguishable from ***Manning v Commercial Alliances Nominees Limited*** (unreported High Court, Auckland, B 381/82, 11 November 1982, Sinclair J) where the Judge said: "I do not think it is possible to reasonably amend the bankruptcy notice so as to make it a valid and effective notice. In my view it requires so much surgery and redrafting that after the completion of the operation it would be an entirely different document ...." In that case there were complications involving the calculation of interest and the provision of further particulars. No such difficulties arise in this case. ***Manning*** is authority for the proposition that there is a judicial power to amend a bankruptcy notice. I direct that the bankruptcy notice be amended to show that the payment received was $23,600 instead of $22,000 and that the final total be amended accordingly. On that basis the second ground for setting aside the bankruptcy notice fails.

Counterclaim by Debtor against Creditor

Section 19(1)(d) of the Insolvency Act permits the debtor to avoid an act of bankruptcy by satisfying the Court "that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained". The first question in

this case is whether regardless of its merits this was a counterclaim which this debtor could not have set up in the action in which the creditor had obtained summary judgment. In that regard the position was that in his documents which were before the Master at the time of the summary judgment hearing, the debtor quite clearly did set up this counterclaim and indeed endeavoured to use it as a basis for avoiding the entry of summary judgment or failing that, a stay of execution. The Master did enter judgment but initially granted a stay and then ultimately discharged the stay.

It seems to me that on the authority of ***Sharma v ANZ Banking Group (New Zealand) Ltd*** CA 211/92, 18 August 1992, at pp 5 and 6, the debtor's counterclaim here could not be described as one which he could not set up in the action. In ***Sharma*** the Court of Appeal took the view that notwithstanding that in any proceedings a creditor had obtained judgment by an application for summary judgment, that does not preclude the debtor from filing a counterclaim if the cause of action exists at the time of the summary judgment proceedings and if there is nothing to prevent the debtor from pursuing the counterclaim against the creditor at that time. That I take to be the effect of the judgment. It appears to override the contrary view expressed in certain High Court decisions, at least in circumstances where no set-off or defence to the creditor's claim had been available, and where the debtor had been confined to an independent counterclaim which did not constitute a defence or ground to persuade the Court that there ought to be some form of deferment pursuant to R 142(2).

Mr Winiata sought to distinguish ***Sharma*** on two grounds. One was that in that case the Court of Appeal was obviously unimpressed by the merits of the alleged counterclaim. That, however, does not seem to diminish the rationale for the Courts view of the principle itself concerning the availability of a counterclaim in the context of summary judgment proceedings. Secondly Mr Winiata cast doubt upon the question whether a counterclaim had in fact been lodged or actively raised at the time of the summary judgment proceedings in that case and he therefore sought to contrast that with the present situation where this debtor plainly did raise his counterclaim at the outset.

Whether or not there is such a factual distinction, I cannot see that it could make any difference. The Insolvency Act is concerned with a counterclaim which the debtor could not have set up in the action. Indeed if he was successful in at least bringing the counterclaim to the attention of the Master at the time of the summary judgment hearing, I would have thought that, if anything, that would help to demonstrate that he had helped set it up (albeit unsuccessfully) in the action at that

time. But whether or not that be the right analysis, I cannot see that there is any answer to the more fundamental reasoning of the Court of Appeal in pages 5 and 6 of their judgment. On this basis it seems to me that the third and final ground for setting aside the bankruptcy notice fails.

I should, however, go on to comment upon the merits of the alleged counterclaim. I do this firstly in case my understanding of the ***Sharma*** decision, as applied to this case, has been faulty and secondly, because it may perhaps be of some assistance when it comes to considering other applications between the same parties which I am to hear later today. I do not presently understand how the debtor's counterclaim against the creditor could succeed. The essence of the suggested counterclaim is that a Mr and Mrs Castle owed certain money to Ryake Homes Ltd for the construction of a house for Mr and Mrs Castle. Ryake Homes Ltd through its liquidator assigned the benefit of that debt to another company, Interlock Homes Ltd, which in turn assigned it to the present debtor. On that basis the debtor says that he is entitled to the benefit of the money which Mr and Mrs Castle owed to Ryake Homes Ltd ($50,492.80). Mr and Mrs Castle have never paid that money to Ryake Homes Ltd. Accordingly I assume, for the sake of argument, that the debtor could now sue Mr and Mrs Castle for that money. Of course Mr and Mrs Castle not being parties to the present proceedings, the comments I am now making could be of no legal consequence so far as their actual liability is concerned, but I assume that to be the position for present purposes.

Instead of suing Mr and Mrs Castle, the debtor attempts to set up in his present proceedings with the creditor, a counterclaim alleging that this sum of $50,492.80 is owed by the creditor to the debtor. That is said to have come about by virtue of an approach by the creditor to Mr and Mrs Castle on the mistaken basis that that debt had been assigned to the creditor. It is alleged that both Mr and Mrs Castle (who did in fact pay that money to the creditor) and the creditor in receiving that money from Mr and Mrs Castle, were acting under a misconception in that they thought that the debt had now been assigned to the creditor. It is said to be a misconception because the assignment which the creditor took came from Ryake Developments Ltd and not from the true creditor of Mr and Mrs Castle at the time, namely Ryake Homes Ltd. Thus it is said that the whole payment by Mr and Mrs Castle to the creditor was a misconception, that it was money still owed to Ryake Homes Ltd and that therefore the debtor is now entitled to recover that money from the plaintiff. The counterclaim is said to be based upon "unlawful interference with the contract between Ryake Homes Ltd and the Castles".

On the pleadings and evidence presently before me I do not see any cause of action as between the debtor and the creditor. Before there can be a cause of action for interference with contractual relations a plaintiff must, among other things, show that the defendant "must have known of, and deliberately intended to interfere with, [the principal contract between other parties], in order to harm or bring pressure to bear on the plaintiff". See ***Todd*** etc: The Law of Torts in New Zealand p 520 and the authorities there discussed. There is nothing in the pleadings or the affidavits to suggest that the creditor in this case knew that there was any contract other than the one which it believed it had validly become a party to by way of assignment, still less that the creditor deliberately intended to interfere with such a contract in order to harm or bring pressure upon a third party.

When I pointed this out, Mr Winiata with some resourcefulness suggested that perhaps some alternative cause of action might be found based upon "monies had and received", or as it might perhaps be referred to these days, restitution. Such a cause of action has not been pleaded or developed in argument, nor has Mr Winiata been able to support it with authority. The obvious course in the present situation is for the debtor to sue Mr and Mrs Castle who, on the debtor's version of events, have never paid the debt which they owe to the party to which it was actually payable. Mr and Mrs Castle would no doubt then join Fletcher Merchants as a third party alleging a restitutionary claim for money paid under a mistake and ultimately the present debtor might well obtain recompense. I accept immediately Mr Winiata's point that if there is a direct cause of action against the creditor the debtor ought to be allowed to pursue it but I am at a loss to understand what the cause of action is. I would also have thought that the debtor would have grave difficulty in overcoming the estoppel defence available to the creditor in the present situation, having regard to the creditor's dealings with a common director of both the Ryake companies. Accordingly on the papers as they are before me I can find no supportable cause of action by the debtor against the creditor of the nature presently alleged in the counterclaim.

Result

For these reasons the debtor's application to set aside the bankruptcy notice is dismissed.

Costs

Counsel have sensibly agreed, and I so order, that the bankruptcy notice in its amended form with the deduction of $1,600 referred to earlier in this judgment, shall be deemed to have been re-served in effect upon the debtor as of today. The effect of this is that the debtor now has a fresh period of 14 days within which to comply with that notice pursuant to s 19(1)(d) of the Insolvency Act, before there will be any act of bankruptcy upon which a petition could be founded. As to costs, I accept Mr Winiata's submission that there was a defect (albeit somewhat trifling) in the bankruptcy notice and that this has in part contributed to the necessity for the hearing today and the preparation and the presentation of argument upon it. In the circumstances I make no order as to the costs of and incidental to the application to set aside the bankruptcy notice.

Further applications

In addition to the application to set aside the bankruptcy notice there are before me today, applications by the debtor for directions under R 437 and by the creditor for security for costs, both relating to the debtor's counterclaim. Given my foregoing remarks on the probable merits of any such counterclaim I think it appropriate to simply adjourn these applications so that the debtor can consider whether there is any point in pursuing or attempting to pursue those proceedings.

There is also before me today an application by the creditor for an order for examination of the debtor pursuant to R 621. I am satisfied on the affidavit evidence that subject to a matter raised by Mr Winiata, this is an appropriate case for ordering pursuant to R 621(2) that the debtor attend before the Court for examination. He appears to be in penurious circumstances and his circumstances are ones of some complexity. There is of course an outstanding judgment and I am satisfied that the creditor is having difficulty executing it and that this would be an appropriate case for facilitating execution by such an examination.

Mr Winiata submits that there is a degree of inconsistency between the creditor's service of a bankruptcy notice on the one hand and pursuing conventional civil examination on the other. As he points out, the effect of s 24 of the Insolvency Act is that once a petition is filed, any execution of the judgment debt would be suspended. It seems to me, however, that a bankruptcy notice does not in itself represent bankruptcy proceedings in the sense contemplated by s 24(1). It is a

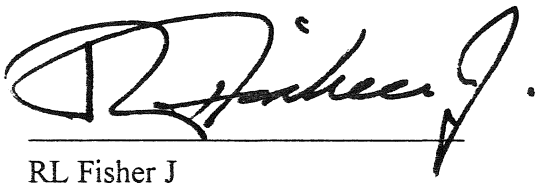
preliminary step which simply leaves it open to the creditor to elect at any time in the future to file a petition based upon the act of bankruptcy which might now occur at the expiration of 14 days from today. The creditor might never elect to take that step and I can see no reason why, until it does, it should be precluded from pursuing conventional civil remedies. In the circumstances I am prepared to make an order under R 621.

I therefore make the following orders:

(a) The defendant to attend before the Registrar of the High Court at Tauranga upon a date to be fixed by the Registrar and advised to the parties in writing at their respective addresses for service shown in these proceedings upon a minimum of seven days notice, to be orally examined as to his income and expenditure, assets and liabilities and generally as to his means for satisfying a judgment of the plaintiff and the defendant; and

(b) The defendant to bring with him at the time so ordered, any title documents, correspondence, receipts or other documentation which records or indicates the defendant's income and expenditure, assets and liabilities, or means for satisfying the judgment.

The costs on this application are reserved.



RL Fisher J