02913

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

B No 120/94

IN THE MATTER of the Insolvency Act 1967

AND

IN THE MATTER of the bankruptcy of

KEITH WILLIAMS of 16 Oban Road, Westmere, Seaman.

Debtor

[redacted]

EX PARTE YOLLAND ROMANIUK & GUBB, 3 Clonbern Road, Remuera, Solicitors.

Creditor

Hearing: 20 June 1994

Counsel: K.I. Bullock for Creditor
M.G. Keall for Debtor

Judgment: 20 June 1994

ORAL JUDGMENT OF FISHER J

Solicitors:

Yolland Romaniuk & Gubb, DX 5304, Remuera for Creditor
Keith Langton, Box 47-114, Ponsonby for Debtor

The debtor opposes the issue of a bankruptcy notice, the bankruptcy notice having been founded upon judgment for $1296 representing legal costs and disbursements incurred for the provision of legal services provided by the creditor to the debtor.

A preliminary point concerns the time within which the affidavit in opposition was filed. In that respect the request for issue of bankruptcy notice and the bankruptcy notice were served on Friday 5 February 1994 at 4.15 pm. The affidavit in opposition was not filed until Monday 21 February 1994. The question is whether the 14 day time limit normally applicable pursuant to s 19(1)(d) of the Insolvency Act 1967 may be extended upon the basis that the Court officers were not available for the filing of the affidavit in opposition until the following Monday.

The relevant legislation is s 19(1)(d) of the Insolvency Act which provides:

> "If a creditor has obtained a final judgment or final order against the debtor for any amount, and, execution thereon not having been stayed, the debtor has served on him in New Zealand, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act and he does not, within fourteen days after the service of the notice in a case where the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy 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:"

Also applicable is Rule 41 of the Insolvency Rules 1970 which materially provides:

> "(1) A bankruptcy notice shall be in form 15 in the First Schedule hereto.
> (2) Every bankruptcy notice shall have endorsed thereon a memorandum of the name of the person suing out the same and his address for service.
> (3) There shall also be endorsed on every bankruptcy notice an intimation to the debtor that if he has a counterclaim, set-off, or cross-demand which equals or exceeds the amount of the judgment debt or so much thereof as remains unpaid, and which he could not have set up in the action in which the judgment was obtained, he must within the time specified in the notice file an affidavit to that effect with the Registrar.
> (4) The filing of such an affidavit shall operate as an application to set aside the bankruptcy notice; and thereupon the Registrar shall fix a day for hearing the application, and, not less than 3 days before the day so fixed, shall give notice hereof both to the debtor and the creditor. If the application cannot be heard until after the expiration of the time specified in the notice as the day on which the act of bankruptcy will be complete, the time shall be deemed to have been extended until the application has been heard and determined, and until such time no act of bankruptcy shall be committed by reason only of non-compliance with the notice."

If one were to consider the wording of s 19(1)(d) in isolation then I would think it beyond argument that by the end of Saturday 19 February 1993, the requisite 14 days having expired, the debtor would be deemed to have committed an act of bankruptcy. The wider context, however, is Rule 41(4) and its purported qualifications to s 19. It is unusual for rules to qualify the mother statute in quite the way this one purports to do but

no-one ever seems to have challenged the notion that Rule 41(4), with its deeming provision as to time having been extended until an application is heard, does indeed have that effect where the appropriate pre-conditions have been satisfied. I am certainly not about to challenge that particular approach.

Counsel have referred me to ***Re Hastie*** [1926] NZLR 428 and ***Bonthorne And Another v Maude and Bolstad*** (1906) 26 NZLR 319. Those decisions deal with time limits generally but I have not found them directly relevant to the present issue. I accept Mr Keall's submission that the overall spirit of the statute taken together with the rules supports a liberal interpretation to protect the interests of the debtor. The key wording in Rule 41(4) is "the filing" of such an affidavit. I think that those words incorporate the whole procedural context in which a filing may occur. That context more immediately relates back to Rule 4 and other procedural provisions. Rule 4 in turn invokes the general provisions of the High Court Rules, which in turn incorporates Rule 15 of the High Court Rules, as to the extension of time limits where the time for doing any act at an office of the Court expires on a day on which the office is closed. The effect of Rule 15 is that if the act cannot be done for that reason then it is taken to be in time if done on the next day on which that office is open.

Notwithstanding the prima facie effect of s 19(1)(d) if seen in isolation, I accept that the intention of the statute, in combination with Rule 41, was to allow the debtor 14 days within which to file his affidavit in opposition. As Mr Keall points out, if one were to take the stricter view in the present context, it would mean that by serving the bankruptcy notice on a Saturday the creditor would effectively curtail the debtor's right to file within 14 days to some lesser period.

In the circumstances I accept that the affidavit in opposition was filed within time in the present case.

The next point, however, is that in his affidavit the debtor has to satisfy the Court that "he has a counter-claim, 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....". I have no doubt that if one were free to accept the facts alleged by the debtor in his current affidavit at face value, they would show a prima facie case for damages against the creditor. But the difficulty for the debtor is to show that such counter-claim, set-off or cross-demand could not have been set up in the action in which the judgment was obtained. In the present case the debtor did raise before the Disputes Tribunal the very allegations that he seeks to rely upon today. Indeed, as Mr

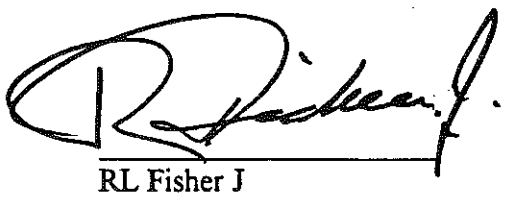
Bullock points out, it was the very presence of that allegation that gave the Disputes Tribunal the jurisdiction to resolve what was a dispute rather than a mere debt collecting exercise. Having traversed the merits of those allegations and compared them with the simple contract claim for fees and disbursements, the Referee has decided in favour of the creditor. What the debtor could have done was to raise his counter-claim , set-off or cross-demand in those proceedings not merely by way of counter allegations which were in fact traversed, but also on the specific basis that it was to be a counter-claim, set-off or cross-demand.

Mr Keall's answer to that is to point out that the debtor was necessarily appearing without legal counsel and could not be expected to understand the legal implications. It seems to me, however, that when the Act refers to a situation in which the debtor "could not set up" his counter-claim, set-off or cross-demand, that is an objective test which refers to legal opportunity rather than the subjective abilities, understandings and knowledge of the individual debtor.

The debtor has not satisfied me in terms of s 19(1)(d). I am forced to that position on the technical basis that his counter-claim, set-off or cross-demand could have been run as such in the dispute before the Referee. In case it is any consolation to the debtor I should add that, when it comes to the merits there has been nothing put forward today to cast into doubt ~~upon~~ the basis upon which the Referee decided the dispute.

In the circumstances the debtor's application to set aside the bankruptcy notice is dismissed. In terms of Rule 43 of the Insolvency Rules 1970, read in combination with Rule 41(4), I declare that the debtor's act of bankruptcy pursuant to this bankruptcy notice was for legal purposes committed today.

The debtor must pay the creditor's costs in the sum of $600 for all matters incidental to this opposition to bankruptcy notice, that sum being inclusive of disbursements.



RL Fisher J