IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA220/2020
[2020] NZCA 611

BETWEEN	TREVOR JAMES MURRAY Applicant
AND	WEST COAST HOLDINGS LIMITED Respondent

Court:	Brown and Gilbert JJ
Counsel:	Applicant in person S A McKenna and R G Scott for Respondent
Judgment: (On the papers)	2 December 2020 at 2 pm

JUDGMENT OF THE COURT

A The application for an extension of time to file the case on appeal and apply for a hearing date is declined.

B We make no order for costs.

REASONS OF THE COURT

(Given by Gilbert J)

[1] On 28 April 2020, Mr Murray filed an appeal against a decision of the High Court delivered on 22 April 2020 adjudicating him bankrupt.[1] However, Mr Murray did not file the case on appeal or apply for the allocation of a hearing date for his appeal within three months after his appeal was brought and his appeal was accordingly deemed abandoned on 29 July 2020. Mr Murray promptly

1 *West Coast Holdings Ltd v Murray* [2020] NZHC 783 [High Court judgment].

made an application which is to be treated as an application under r 43(2) of the Court of Appeal (Civil) Rules 2005 for an extension of time to file the case on appeal and apply for the allocation of a hearing date. The respondent, West Coast Holdings Ltd (West Coast), opposes the application.

[2] Mr Murray, who is not legally represented, has satisfactorily explained the delay. In particular, he applied for a transcript of the hearing in the High Court, considering that this would provide support for the grounds of appeal he wishes to advance. The High Court declined his application for a transcript.[2] However, on 17 July 2020, Brown J directed that a transcript be provided. Mr Murray received the transcript on 31 July 2020, two days after the three month time limit had expired. West Coast is not materially prejudiced by the comparatively short delay. In these circumstances, an extension of time should be granted in the interests of justice unless we are satisfied the appeal is clearly hopeless, as West Coast contends it is. This is the critical issue on the present application.

Background

[3] Mr Murray was a director and shareholder of Enlightenz NZ Ltd (Enlightenz) which formerly occupied premises in Albany, Auckland leased from West Coast. Mr Murray personally guaranteed Enlightenz's obligations under the lease. Enlightenz was placed in receivership and in liquidation in April 2016 owing substantial sums to numerous creditors. On 14 February 2017, West Coast obtained summary judgment against Mr Murray for amounts outstanding under the lease totalling $247,250 plus costs and disbursements of $10,535.25.

[4] Three bankruptcy notices were subsequently issued in respect of this judgment. The first, issued on 24 October 2017, was apparently not served. The second, issued on 18 July 2018, was served on 27 July 2018. Mr Murray instructed Kevin Whitley, an insolvency practitioner, to respond to this notice. Mr Whitley wrote to West Coast's solicitors on 23 August 2018 proposing a possible compromise of the judgment debt:

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2 *West Coast Holdings Ltd v Murray* HC Auckland CIV 2019-404-1559, 7 May 2020 (Minute of Associate Judge Sargisson).

> Mr Murray is simply unable to meet the amount demanded by your client and his other creditors.
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> Mr Murray has approached his family members and they have agreed to offer him some assistance to perhaps resolve this matter if appropriate terms are able to be reached.
>
> Mr Murray could put a proposal under Part 5 Sub-part 2 of the [I]nsolvency Act but without your clients support it would not meet the voting requirements of 75% of value.
>
> Against this background, his suggested proposal to your client is:-
>
> a) 10% of the debt paid within 90 days
>
> b) A further 10% in six months' time
>
> c) An irrevocable commitment to support a creditors compromise offering no more than 20% to his other creditors
>
> d) This would be full and final settlement
>
> All of these requirements being interdependent.
>
> We have no doubt that this would result in a better outcome for your client than would be available if Mr Murray was adjudged bankrupt.
>
> Please advise if you require any further information to assist in your client's decision.

[5] At the bankruptcy hearing on 19 March 2020, Mr Murray told the High Court there was no response to this proposal:

> Mr Whitley followed [West Coast's solicitor] up multiple times by telephone and eventually got a response on the 23rd of October [2018] saying, "We have communicated your client's offer to mine and am awaiting instructions. We will respond accordingly. Mr Whitley followed up [with the solicitor] by phone three or four times after this time, including an email dated 6th of November [2018] asking, "Any progress?" Mr Whitley received no response.

[6] Nevertheless, Mr Murray contended that West Coast wished to accept "this formal offer", but this did not occur because of its solicitor's negligent failure to communicate acceptance. For this proposition, Mr Murray relied on a memorandum filed by West Coast's solicitor on 10 March 2020. Mr Murray continued:

> [West Coast's solicitor's] statement in his memorandum from last week, the 10th of March [2020], filed with this Court said in one of the paragraphs, "However, the creditor chose not to seek adjudication at that stage, in reliance on promises and representations made by the debtor." The fact of the matter is that [the solicitors] never replied to this formal offer, despite being followed up numerous times by Mr Whitley as mentioned previously.

> [The solicitor's] statement makes it clear that the creditor wished to accept the offer and instructed [its solicitor] to accept, and this is evidenced by … his submissions of 10 March [2020] when he says, "In reliance on promises and representations made by the debtor." …

[7] In any event, the prospect of a creditors' compromise did not eventuate, and no payments were made by Mr Murray to West Coast.

[8] A third bankruptcy notice was issued by the High Court on 8 August 2019 and served on 30 August 2019. Mr Murray applied to set aside this bankruptcy notice, but his application was declined by Associate Judge Smith on 7 November 2019.[3]

High Court judgment

[9] Following a defended hearing on 19 March 2020, the High Court adjudicated Mr Murray bankrupt for reasons set out in a reserved judgment delivered on 22 April 2020. Associate Judge Sargisson was satisfied that the jurisdictional grounds for the adjudication order were made out in that Mr Murray had failed to comply with the third bankruptcy notice issued in respect of the judgment debt and there were no grounds for exercising the Court's discretion to refuse the order.[4] In particular, the Associate Judge was not persuaded that a compromise agreement had been reached with West Coast in relation to the judgment debt.[5] The Associate Judge rejected Mr Murray's contention that there had been an abuse of process.[6] Finally, the Associate Judge did not consider that further time should be allowed to enable settlement with assistance from Mr Murray's family or through recovery proceedings against a third party.[7] The Associate Judge concluded that the public interest in having Mr Murray's affairs administered by the Official Assignee outweighed any contrary private interest.[8]

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3 *West Coast Holdings Ltd v Murray* [2019] NZHC 2913.
4 At [3].
5 At [14].
6 At [16]–[17].
7 At [18].
8 At [19].

Proposed appeal

[10] Mr Murray's notice of appeal does not specify grounds. He stated that these will be detailed in submissions "including specific reference to evidence on record not included in Associate Judge Sargisson's judgment". Following receipt of the transcript, Mr Murray filed detailed submissions on 12 November 2020 in which he advances three broad contentions:

(a) He did not have a fair hearing in the High Court.

(b) Counsel for West Coast made numerous incorrect claims in written and oral submissions.

(c) The High Court judgment does not accurately reflect what was said at the hearing.

Fair hearing

[11] Mr Murray complains that the entire hearing was restricted to 45 minutes and he says he was "cut off by the [Associate] Judge in the middle of his testimony". The "testimony" referred to was Mr Murray's oral submissions. We have reviewed the transcript of the hearing including the interruptions he objects to. The Associate Judge interrupted Mr Murray on several occasions during his oral submissions to clarify his position. There is nothing unusual or wrong about that. The only other interruption complained about came after the hearing had concluded and the Associate Judge had announced that her decision was reserved. The Associate Judge then directed counsel for West Coast to file a certificate confirming that the judgment debt had not been paid.[9] At that point, Mr Murray indicated that he wished to make further submissions. The hearing having concluded, the Associate Judge appropriately declined to hear any further submissions. The time allowed for submissions was perfectly adequate given the limited scope of the issues that needed to be addressed at a hearing of this nature.

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9 High Court Rules 2016, r 24.20.

[12] Mr Murray submits that the hearing was additionally unfair because of the failure by counsel of West Coast to file the certificate confirming non-payment of the debt. Mr Murray says he had the right to view and question the certificate during the hearing, but the certificate was not completed and filed until after the hearing. There is no merit in this complaint. Mr Murray does not suggest that the certificate was not filed prior to the judgment being delivered. Further, he does not dispute that the debt remains unpaid.

[13] Mr Murray next complains that the Associate Judge ignored his request to "cross-examine" counsel for West Coast and thereby breached the Evidence Act 2006 and consequently the New Zealand Bill of Rights Act 1990. This complaint is misconceived. Counsel was present to make submissions based on the evidence, not to give the evidence or be cross-examined as a witness. Mr Murray had no right to ask counsel to answer questions.

[14] We are satisfied that Mr Murray's proposed challenge to the fairness of the hearing in the High Court is devoid of merit and has no prospect of success.

Errors in submissions

[15] Mr Murray states that there were numerous incorrect claims in the submissions and "testimony" of counsel for West Coast. He claims the Court had "a responsibility to investigate unclear or contradictory evidence" and failed to do so. Further, he says he was not given an opportunity to question the "contradictory and false evidence" because of the "unfair time constraints".

[16] It appears that Mr Murray wished to investigate the reasons for the delays in bringing the application for adjudication including the circumstances surrounding the earlier bankruptcy notices and the reasons why the settlement proposal was not responded to. Mr Murray contends that the chronology demonstrates "gross negligence" by West Coast's solicitors and that counsel's "involvement in the matter needs to be understood". He says this is because the solicitors did not serve the first bankruptcy notice within the prescribed time limit and did not apply for an extension of time to do so. He claims that issuing the second and third bankruptcy notices "makes a mockery of the law". He contends that the solicitors conduct was "reckless"

and he has "suffered a penal outcome as a result". In summary, he says the "preliminaries have not been complied with" and the solicitor's "negligence in dealing with the [settlement] offer [has] resulted in [West Coast] receiving no monies and Mr Murray being adjudged bankrupt".

[17] These submissions are misconceived. The conduct of West Coast's solicitors in connection with the earlier bankruptcy notices and the so-called settlement offer was irrelevant to the limited issues requiring determination in the High Court on the adjudication application. Because the first bankruptcy notice was not served, it had no relevance to the adjudication proceedings. The only potential relevance of the second bankruptcy notice was that it prompted Mr Murray's settlement initiative. However, it is plain from the evidence that this "offer", even if it can properly be so characterised, was never accepted and did not progress. Mr Murray told the Associate Judge at the hearing "[t]he offer was made in good faith and would have been paid on the agreed dates, had I been notified of acceptance". The "offer" made in August 2018 was plainly not accepted. It had no relevance at the time the adjudication application came to be considered in March 2020.

[18] The act of bankruptcy relied on for the purposes of the adjudication application was Mr Murray's failure to respond to the third bankruptcy notice, which was served within the prescribed time limit. Mr Murray did not respond to this notice by paying, securing or entering into a formal agreement with West Coast for payment of the judgment debt. Nothing Mr Murray has raised in his submissions casts any doubt on the fact that he committed an act of bankruptcy by not complying with this notice and there was a proper jurisdictional basis for the adjudication order. Nor do his submissions raise any matter that could justify this Court interfering with the Associate Judge's exercise of her discretion to make the order. There is no dispute that Mr Murray has no material assets or income and is unable to pay his creditors.

Errors in the judgment

[19] Mr Murray has reviewed the High Court judgment and compared it line-by-line with the transcript of the hearing. We have considered all the alleged inconsistencies he claims to have identified and we are satisfied that none are material

to the judgment or could call its correctness into question. We set out below a few examples to illustrate this.

[20] Mr Murray says the Associate Judge did not accurately record his submissions as to the just and equitable grounds for refusing to adjudicate him bankrupt and that the proceeding was an abuse of process. Included in this category are the following complaints:

(a) The Associate Judge recorded "[Mr Murray] claims the parties reached a settlement agreement".[10] Mr Murray complains that "[t]he assertion of the agreement was not made by [him], but by [counsel for West Coast]". This is incorrect. Counsel for West Coast denied that any agreement was reached. It was Mr Murray who raised the issue of an agreement — for example, the transcript records Mr Murray as saying "[counsel's] statement makes it clear that the creditor accepted the offer and instructed [its solicitors] to accept".

(b) The Associate Judge recorded that Mr Murray "was unable to say what [West Coast] had agreed to".[11] Mr Murray says he was able to provide the specifics of the agreement, namely the terms set out in Mr Whitley's letter quoted at [4] above. Mr Murray said that Mr Whitley never received a response to this offer. According to Mr Murray, this was because of West Coast's solicitor's negligence. The suggestion that West Coast accepted the offer is wholly untenable on the evidence. In any case, Mr Whitley's letter does not appear to constitute a formal offer. It refers to "family members" having "agreed to offer" Mr Murray "some assistance" to "perhaps" resolve the matter "if appropriate terms are able to be reached". This is not the usual language of a formal offer capable of immediate acceptance and thereby creating a legally binding agreement. The proposal was also dependent on a creditors' compromise at a similarly discounted level being achieved with Mr Murray's other creditors.

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10 High Court judgment, above n 1, at [7(a)].
11 At [7(a)].

(c) The Associate Judge referred to "an earlier bankruptcy notice" whereas there were three altogether.[12] The Associate Judge did not need to refer to the first bankruptcy notice because it was not served.

(d) The Associate Judge summarised Mr Murray's submission as including a challenge to the bona fides of counsel for West Coast who had allegedly been "deliberately pursuing him to prolong his misery".[13] Mr Murray says he made no reference to "prolonging his misery". Rather, he says he "questions their abuse of process to escape liability risk to their client for their failure to administer the settlement, and their complete disregard to justice". Contrary to Mr Murray's submission, there was no settlement to administer. Mr Murray stated at the hearing that the "offer was made in good faith and would have been paid on the agreed dates, had [he] been notified of acceptance" and that the matter "should have been concluded in 2018". Mr Murray also stated at the hearing that if West Coast's solicitors had acted properly he "would be clear of bankruptcy now". He also referred to the repeated issue of bankruptcy notices being used "as a weapon". While Mr Murray did not use the word "misery", the Associate Judge's summary adequately captures the gist of his submission.

(e) The Associate Judge recorded that Mr Murray had requested time to come up with funds to enable a settlement, explaining that his daughter and son-in-law had earlier indicated they could "possibly assist".[14] Mr Murray complains that the Associate Judge's wording shows she did not understand the formality of the agreement, as the document was not presented. We have already addressed this issue. Mr Whitley's letter refers to family members having "agreed to offer him some assistance" to "perhaps resolve this matter if appropriate terms are able to be reached". There was no material error here.

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12 At [7(b)].
13 At [7(c)].
14 At [7(d)].

[21] In addressing whether the jurisdictional requirements for an order for adjudication were satisfied, the Associate Judge stated it was not in dispute that Mr Murray had committed an act of bankruptcy within the three-month period preceding the adjudication application by failing to comply with the (third) bankruptcy notice.[15] Mr Murray says this was an error because West Coast "was satisfied with the compromise". This is plainly wrong. West Coast's forbearance cannot be equated to acceptance of the settlement proposal. There is no evidence that any compromise was ever agreed to; Mr Murray's own evidence and submissions demonstrate the contrary.

Conclusion

[22] The proposed appeal has no prospect of succeeding. The evidence demonstrates that the judgment debt was never compromised, Mr Murray did not comply with the (third) bankruptcy notice by paying the judgment debt or otherwise, and he committed the act of bankruptcy upon which the adjudication application was based. Nothing in Mr Murray's submissions indicates a tenable basis to challenge the order for adjudication. In these circumstances, the interests of justice are best served by declining the present application for an extension of time.

[23] Given that Mr Murray is a bankrupt and the size of the unpaid judgment debt, we make no order for costs.

Result

[24] The application for an extension of time to file the case on appeal and apply for a hearing date is declined.

[25] We make no order for costs.

Solicitors:
McKenna King, Hamilton for Respondent

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15 At [9].