IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2010-409-835
[2020] NZHC 32

BETWEEN	SENG BOU (PAUL) KEUNG Applicant
AND	OFFICIAL ASSIGNEE First Respondent
	WESTPAC NEW ZEALAND LIMITED Second Respondent

Hearing:	4, 5 and 6 November 2019
Appearances:	M J Tingey for the Applicant G Caro for the First Respondent M D Pascariu and H O Meikle-Downing for the Second Respondent
Judgment:	29 January 2020
Reissued:	7 February 2020

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **29 January 2020** at **11:00am***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

*This judgment was re-issued by me on **7 February 2020** at **4:00pm***
pursuant to Rule 11.5 of the High Court Rules
(amending only the last sentence in paragraph [2])

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Registrar/Deputy Registrar

Solicitors:
Ronald W Angland & Son for the Applicant
Official Assignee, Auckland, for the First Respondent
MinterEllisonRuddWatts, Auckland, for the Second Respondent
Counsel:
Murray J Tingey, Auckland, for the Applicant

Introduction

[1] Mr Keung applies under s 309(1)(a) of the Insolvency Act 2006 to have his bankruptcy annulled claiming he should not have been adjudicated bankrupt. Such an annulment is retrospective – it operates from the date of adjudication.[1] He is not interested in annulment on any other ground, as they operate only from the date of the order of annulment. He was made bankrupt in the Christchurch High Court on 20 September 2010. He filed his statement of affairs with the Official Assignee on 9 November 2010 and was automatically discharged on 9 November 2013. He seeks the annulment to remove the stain of bankruptcy from his record.

[2] If the court annuls the bankruptcy, the Official Assignee seeks a remuneration order for $30,000.[2] That aside, an annulment will not have any practical effect. Mr Keung has resolved matters with most of his creditors, except for Westpac New Zealand Ltd. While the Official Assignee abides the court's decision, its counsel (Mr Caro) took the role of contradictor to test Mr Keung's case.

[3] The bankruptcy application on which Mr Keung was adjudicated relied on non-compliance with a bankruptcy notice, based on an order for costs of $66,155 made on 21 April 2010. Mr Keung says that the order was made in breach of natural justice. There are three main questions:

(a) Was the costs order made in breach of natural justice?

(b) Should Mr Keung have been adjudged bankrupt?

(c) Should Mr Keung's adjudication be annulled now?

[4] I find that the order for costs was made in breach of natural justice. It was made without notice to him and without giving him the opportunity to adduce evidence in opposition. Because of the breach of natural justice, the court in its bankruptcy jurisdiction should not have accepted that Mr Keung was in debt for the costs order and therefore should not have adjudicated him bankrupt. That does not however mean that his adjudication should be annulled now. Once he was adjudicated bankrupt, he

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1 Insolvency Act 2006, s 309(3)(a).

2 Insolvency Act, s 309(5).

lost standing to challenge the costs order. There are also discretionary factors that count against annulment: his insolvency when he was adjudicated, his delay and his earlier bankruptcy.

[5] There is also a side issue involving Westpac New Zealand Ltd. In his application Mr Keung said that he had settled with all his creditors. Westpac objected, saying that it had never settled with Mr Keung. More time was spent in the hearing dealing with this side issue than the main questions. The issue does not affect resolution of the main questions. I find that Mr Keung and Westpac did not make any binding agreement to settle Westpac's claim as an unsecured creditor. Because the adjudication stands, so does the discharge under s 304 of the Insolvency Act 2006. If there were an annulment, Westpac is not interested in pursuing Mr Keung on his debt to it.

Facts

The Goose Bay litigation

[6] Goose Bay is near Kaikoura. In 2007 Goose Bay Ranch Holdings Ltd bought a 314 hectare farm there from a company associated with Mr Keung. He had plans to develop the property into a farming and eco-tourism business and a sustainable hunting game park. Mr Keung was the sole director of Goose Bay Ranch Holdings Ltd. The shareholders were:[3]

(a) GBR Trustees Ltd, a trustee company associated with the Keung family – 84.6%,

(b) GBR Investment Ltd, associated with the Koulanov family – 12.2%,

(c) Three minor shareholders, one holding 1.5% and the other two .75% each, all of them relatives or associates of Mr Keung.

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[3] I have taken these figures from Associate Judge Gendall's decision in *GBR Investment Ltd v Goose Bay Ranch Holdings Ltd* [2010] NZCCLR 11 (HC). The evidence for Mr Keung gives slightly different percentages, but the differences do not matter.

[7] The Koulanov family through GBR Investment Ltd invested more than $2.9 million in the venture. They became disillusioned with Mr Keung's management. Differences grew between them and Mr Keung. That led to GBR Investment Ltd applying for Goose Bay Ranch Holdings Ltd to be put into liquidation on the just and equitable ground. Associate Judge Gendall ordered the company into liquidation.[4] He found that there was a complete breakdown of trust and confidence between the Koulanovs and Mr Keung that justified a liquidation order. While liquidation is a remedy of last resort, he considered alternative remedies, but did not find them viable.

[8] Some aspects of the proceeding can be noted. There were other defendants: Moana Investment Property Ltd, Makura Settlement Ltd and PK Construction Ltd. They were subsidiaries of Goose Bay Ranch Holdings Ltd. As GBR Investment Ltd was not a shareholder or creditor of these companies, it did not have standing to apply for their liquidation. PK Construction Ltd had been put into liquidation on a creditor's application before GBR Investment Ltd's application was heard. Associate Judge Gendall dismissed the applications against the other two defendants.

[9] In March 2009, at the start of the proceeding, interim liquidators were appointed for all the defendants. They were appointed liquidators of Goose Bay Ranch Holdings Ltd and later made resolutions for the other two defendants to be put into liquidation.

[10] The other shareholders of Goose Bay Ranch Holdings Ltd were not however made defendants. In applications on the just and equitable ground it is common to join the opposing shareholders as defendants.[5] Sometimes there is deadlock at board level, which prevents the company itself taking an active part in the proceeding. But even if there is no deadlock, opposing shareholders may oppose the proceeding in their own right. One advantage is that as parties they will have rights of appeal, if a liquidation order is made. Otherwise, on liquidation, liquidators take control of the company, including the right to take proceedings in its name, but they do not tend to

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4 *GBR Investment Ltd v Goose Bay Ranch Holdings Ltd* [2010] NZCCLR 11 (HC).

5 E.g. *Jenkins v Supscaf Ltd* [2006] 3 NZLR 264 (HC) and *SEA Management Singapore Pte Ltd v Professional Service Brokers Ltd* HC Auckland CIV-2011-404-5315, 25 January 2012.

appeal against orders appointing them.[6] Directors can no longer take proceedings in the name of the company.

[11] Mr Keung was not a defendant but gave evidence as director of Goose Bay Ranch Holdings Ltd.

[12] As noted above, GBR Trustees Ltd, the majority shareholder, was a corporate trustee. Mr Keung became its director on 13 July 2009. The GBR Trust was established under a deed of 15 August 2007. The settlor was Pui Mou Keung, Mr Keung's father. Mr Keung had the power to appoint and remove trustees. He was a discretionary beneficiary. While the liquidation application was pending, on 31 July 2009 GBR Trustees Ltd was removed as trustee and GB Management Ltd was appointed in its place. Mr Keung was director of that company. On 31 March 2010, after the liquidation order, GB Management Ltd was removed and Mr Keung was appointed trustee. The liquidators did not however recognise the change in ownership of the shares.[7] GBR Trustees Ltd and GB Management Ltd were ordered into liquidation on 20 September 2010, with the same liquidators as for Goose Bay Ranch Holdings Ltd.

[13] GBR Investment Ltd, the successful plaintiff, sought costs against GBR Trustees Ltd, GB Management Ltd and Mr Keung, although none of them were parties to the proceeding. It sought costs against Goose Bay Ranch Holdings Ltd only as a second-best option. It did not make a formal application supported by affidavit evidence but submitted a written memorandum. It did serve the lawyer for Goose Bay Ranch Holdings Ltd, but it did not serve GBR Trustees Ltd, GB Management Ltd and Mr Keung. As they were not parties, they did not have an address for service. The lawyer for the defendants (but not P K Construction Ltd) filed a submission in response on behalf of the defendants, but the non-parties did not.

[14] Associate Judge Gendall ordered costs against the non-parties: $59,013 and disbursements of $7,142, a total of $66,155.[8] He ordered GBR Trustees Ltd and GB

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6 Companies Act 1993, s 248(1)(a), (b), s 260 and schedule 6(a).
7 Companies Act 1993, s 248(1)(d).
8 *GBR Investment Ltd v Goose Bay Ranch Holdings Ltd* HC Christchurch CIV-2009-409-613, 21 April 2010.

Management Ltd to pay costs as "the parties who are primarily responsible for the plaintiff's costs here,"[9] without addressing that they were not parties. He referred to *Re North End Motels (Huntly) Ltd*[10] and *Jenkins v Supscaf Ltd*[11] as authorities for ordering costs against opposing shareholders in applications under the just and equitable ground, but in those cases the opposing shareholders were parties to the proceeding. He did not order costs to be paid out of the assets of Goose Bay Ranch Holdings Ltd.

[15] While recognising that costs orders against non-parties are exceptional and rare, he held against Mr Keung:[12]

> In the present case I am satisfied that Mr Keung, although a non-party, through his interests is likely to have funded the defence to the present application and it is clear he also clearly controlled and directed this defence and must have believed that he and his interests stood to benefit from the litigation if the liquidation application had failed. Under all the circumstances, I take the view that it is entirely fair and proper for the costs order which is to follow in favour of the plaintiff to be made also against Mr Keung as a non-party jointly and severally with GBR Trustees Limited and GB Management Limited as shareholders.

[16] Mr Keung does not accept those findings and says that if he had been given the chance he would have given evidence as to the source of funds for the defence. More about this later when I deal with the breach of natural justice question.

The appeals and stay applications

[17] The lawyers who had acted for Goose Bay Ranch Holdings Ltd filed an appeal against the liquidation decision in the Court of Appeal under CA1/2010, apparently on Mr Keung's instructions. As the director of a company in liquidation, he could not give instructions for the appeal, but no-one seems to have taken the point. Mr Keung was not a party to the appeal. After the costs decision of 21 April 2010, an amended notice of appeal was filed on 14 May 2010 to have the costs decisions set aside. The appellants were now Goose Bay Ranch Holdings Ltd, Mr Keung, GBR Trustees Ltd

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9 At [18].
10 *Re North End Motels (Huntly) Ltd* [1976] 1 NZLR 446 (HC).
11 *Jenkins v Supscaf Ltd* [2006] 3 NZLR 264 (HC).
12 *GBR Investment Ltd v Goose Bay Ranch Holdings Ltd* HC Christchurch CIV-2009-409-613, 21 April 2010 at [20].

and GB Management Ltd. The Registrar noted that this was a separate appeal and gave the costs appeal another number, CA310/2010. The costs appeal included this ground:

> In granting costs against the Second, Third and Fourth Appellants jointly and severally as non parties in the proceedings, the Learned Judge erred in depriving the Second, Third and Fourth Appellants any real opportunity to prepare and present evidence in opposition to the Costs Order, the request for third party costs having only been included in the memoranda on costs filed by the Respondent and without any evidence on the question of costs being led by any party during the course of the proceedings.

[18] GBR Investment Ltd served a bankruptcy notice on Mr Keung based on the costs order of 21 April. Mr Keung, GBR Trustees Ltd and GB Management applied for a stay of execution pending appeal. French J dealt with the application on a *Pickwick* basis in a telephone conference. Counsel advised her that Mr Keung could not pay the costs order or provide security. She dismissed the application saying:[13]

> It is well established that the fact an appeal may be rendered nugatory by the lack of a stay is not determinative. In this case the successful party is likely to be injuriously affected by the stay. Furthermore, the grounds of the appeal relate to the Associate Judge's findings of fact which were made after hearing and seeing witnesses. Counsel told me there were issues of credibility.

That appears to be directed more at the merits of the appeal against the liquidation order, not the non-party costs order. She did not address the ground that the non-parties had not been given the opportunity to give evidence on the costs application.

[19] Mr Keung and his co-appellants applied to the Court of Appeal for a stay of execution, but without success. The Court's decision is a leading authority on factors considered in applications for a stay pending appeal.[14] It appears from the judgment that counsel focussed on the merits of the appeal against the liquidation order. The judgment records a submission that the appeal would be rendered nugatory without a stay because Mr Keung faced bankruptcy and it was unlikely that the Official Assignee would continue the appeal without funding.[15] That was prescient. The judgment does not record any submission that the costs decision was flawed for lack of opportunity

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13 *GBR Investment Ltd v Goose Bay Ranch Holdings Ltd* HC Christchurch CIV-2009-409-613, minute of 21 May 2010.

14 *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17.

15 At [14].

for the non-parties to give evidence. The Court repeated French J's point that the fact that an appeal will be made nugatory is not determinative and held that the merits were not so obvious as to be a critical factor favouring a stay.

The bankruptcy application

[20] Mr Keung did not comply with the GBR Investment Ltd's bankruptcy notice based on the costs order. GBR Investment Ltd began a bankruptcy application against Mr Keung relying on his non-compliance with the bankruptcy notice as the act of bankruptcy. Mr Keung was served in New Zealand on 7 July 2010. The application was called several times. Mr Keung was represented at a call on 2 August 2010, but not at others. The application was held over to await the Court of Appeal's decision on the stay application. Once its decision became available, the bankruptcy application was adjourned for hearing on 20 September 2010. On that day Associate Judge Osborne adjudicated Mr Keung bankrupt in his absence. It turns out that he had gone overseas for health reasons. He was suffering from stress-related illness.

[21] The adjudication was obtained regularly. The documents were in order. The application was in time under s 16 of the Insolvency Act. Mr Keung took no steps to oppose the application. He does not complain of any procedural defects in the bankruptcy application.

Events after adjudication

[22] The Official Assignee's office did not have any contact from Mr Keung until 15 October 2010. In the meantime, the Official Assignee purported to discontinue the appeal in CA1/2010. That was ineffective because Mr Keung was not a party to that appeal. The liquidators later discontinued the appeal in January 2011. On 13 October 2010 the Official Assignee discontinued the appeal against the costs order, CA310/2010. That was effective. When he found out, Mr Keung objected to the appeal having been discontinued.

[23] By 9 November 2010 Mr Keung had submitted a statement of assets and liabilities, giving assets of $4,500 and liabilities of $830,000. He returned to New Zealand.

[24] Realisations in his bankruptcy came to $665.13, a tax refund. The Official Assignee lists claims made and notifications of potential claims in the bankruptcy totalling $5,134,525.24 (plus one for an unknown amount). The Official Assignee accepted a claim by GBR Investment Ltd for $3,706,440 (including costs on the bankruptcy application). Mr Keung made an application under s 238 of the Insolvency Act challenging the Official Assignee's acceptance of the claim.[16] That claim was later resolved. The Official Assignee received advice from other creditors that their claims had been resolved – except for Westpac and Collection House, a debt collection company claiming for a Westpac credit card debt. Because there was no prospect of a dividend, the Official Assignee did not examine any of the claims except GBR Investment Ltd's. Mr Keung did not accept that all the claims were valid and wanted to take proceedings against some of the creditors.

[25] In November 2013, just before his discharge, Mr Keung started two applications under s 226 of the Insolvency Act to reverse the decisions of the Official Assignee to discontinue the appeals in CA1/2010 and CA 310/2010.[17] Mr Keung and the Official Assignee made a deed on 26 July 2016 settling these proceedings. The recitals include this:

> B. On 14 May 2010, Mr Keung filed appeal against both the Liquidation Decision (CA1/2010) and the Costs Decision (CA310/2010) in his capacity as director of GBRH and as trustee of the major shareholder (together the Appeals)…

As well as Mr Keung's undertaking to discontinue, the main operative provisions are:

> 1.1 The Official Assignee agrees to take a neutral attitude towards any actions Mr Keung might take with a view to restoring the appeals so that he can exercise them in his capacity as a trustee or director of a third party, save to the extent it may be necessary in the Assignee's view to take steps to correct any misinformation or respond to any criticism of the Assignee, his staff or agents by any party to any proceeding brought by Mr Keung for that purpose.

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16 CIV 2010-409-835.

17 CIV 2013-409-1618 and 1619.

1.2 The Official Assignee agrees that in relation to its decision to discontinue the Appeals:

(a) It discontinued the Appeals on behalf of Mr Keung in his personal capacity: and

(b) It did not discontinue the Appeals on behalf of Mr Keung in his capacity as a director of GBRH and as a trustee shareholder.

1.3 Mr Keung will pay the reasonable costs and disbursements that the Official Assignee had incurred in preparing for the Proceedings, amounting to $22,500.

[26] After his discharge Mr Keung and those associated with him took a proceeding (CIV-2015-409-157) against the Koulanovs. They settled their differences in a deed of 24 May 2017. The deed is intended to be a full and final settlement of all issues between the Keungs and the Koulanovs. Among other things, the Koulanovs agreed to relinquish and withdraw any claims in relation to Goose Bay Ranch Holdings Ltd and the Keung Group, including any costs awards, and not to oppose any application by Mr Keung to annul his bankruptcy ab initio, to cancel claims made by GBR Investment Ltd in his bankruptcy, and other matters. The Keung interests made a payment to the Koulanovs.

[27] The evidence also includes a deed of settlement between the Keung interests and a solicitor's nominee company, a creditor in Mr Keung's bankruptcy. In his affidavit of 20 February 2018, Mr Keung deposes that he had settled creditors of all four companies put into liquidation, that is, the four defendants in the liquidation application. He had also settled claims against him under personal guarantees for debts incurred by those companies. In his affidavit of 5 April 2018, he says that the only outstanding claims are by Westpac and Collection House, the company collecting the credit card debt. That is consistent with the Official Assignee's report. By the time of his annulment application, he had squared with all his creditors in his bankruptcy except for Westpac and Collection House.

[28] Mr Keung filed his annulment application on 16 September 2018 and an amended application on 12 April 2019. Associate Judge Lester transferred the case to Auckland on 12 June 2019.

Was there a breach of natural justice on the non-party costs order against Mr Keung?

[29] In *Ali v Deportation Review Tribunal* Elias J said:[18]

> The place of the principles of natural justice in the New Zealand legal system, is affirmed by s 27 of the New Zealand Bill of Rights Act 1990. They are principles established before the adoption of that Act by the common law. Fundamental to the principles of natural justice is the requirement that where the circumstances of decision making require that someone affected by it be given an opportunity to be heard, that person must have reasonable opportunity to present his case and reasonable notice of the case he has to meet. The more significant the decision the higher the standards of disclosure and fair treatment. In cases involving immigration status, high standards of fairness are required by natural justice because of the profound implications for the lives of those affected. The underlying principle was described by Fisher J in *Khalon v Attorney-General* [1996] 1 NZLR 458 at 466 in language which I adopt:
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> . . . a party should normally be given the opportunity to respond to an allegation which, with adequate notice, might be effectively refuted.

She said that in a judicial review of a decision of an administrative tribunal. It applies even more so to proceedings in this court.

[30] The context here is an application to make a non-party pay costs to the successful party. As a non-party is not formally involved in the proceeding, the court's practice requires that some formal originating document be given to them advising that the successful party is seeking costs against them and they can give a notice of opposition, evidence and be heard on the application. An originating application is typically used with affidavits setting out the case against the non-party. As an example of that practice, Mr Tingey cited Muir J's minute in *Public Trust v Silverfern Vineyards Ltd*.[19] Last year in two cases I directed that claims for non-party costs be brought by formal application.[20] I heard the applications in court, not on the papers. Following that practice gives assurance that the requirements of natural justice will be met.

[31] Having said that, I am aware of cases where there has been a less formal approach. In *Fankhauser v Strongline Buildings Ltd* I decided a claim for non-party

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18 *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220.

19 *Public Trust v Silverfern Vineyards Ltd* HC Napier CIV 2014-441-38, minute of 8 June 2016.

20 *Lepionka & Co Investments Ltd v Naldapat Ltd* [2019] NZHC 1646 at [89] and [2019] NZHC 2679, *Concrete Structures (NZ) Ltd v Smith* [2019] NZHC 2572.

costs on the papers, but I was satisfied that the non-party had responded to the plaintiff's memorandum.[21] But where shortcuts are taken, there is a greater risk that natural justice will not be followed.

[32] Costs orders against non-parties are unusual. In *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)*, they were described as exceptional. Most awards are against non-parties seen as supporting plaintiffs.[22] Awards against those supporting defendants are less common. The *Botany Downs Secondary College* case is an exception.[23] The courts have been wary of awarding costs against directors of defendants, who act bona fide and for the benefit of the company.[24] In *Botany Downs Secondary College*, Downs J ordered costs against the ultimate holding company, but not against the directors of the defendant company. Where an order is made, usually the director is found to have acted improperly. A costs award against a director who has not been served with an application for costs should be unheard of.

[33] Mr Keung says that while GBR Investment Ltd's memorandum seeking costs was served on the address for service of Goose Bay Ranch Holdings Ltd and its lawyer responded to the costs application, he did not receive it or have the opportunity to respond. If he had been, he would have given evidence to correct a submission by GBR Investment Ltd. It said that as Goose Bay Ranch Holdings Ltd and its subsidiaries were in interim liquidation (and thereby starved of funds to defend the proceeding), Mr Keung must have funded the defence. Associate Judge Gendall adopted that submission as part of his reasons for awarding costs against Mr Keung. Mr Keung says that was wrong. The source of the funding was a mortgagee of the Goose Bay property.

[34] In the hearing no-one submitted that there had not been a breach of natural justice. Counsel for the Official Assignee submitted other reasons why Mr Keung's

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21 *Fankhauser v Strongline Buildings Ltd* [2014] NZHC 2629 – a liquidation application on the just and equitable ground where costs were sought unsuccessfully against the shareholder on the other side.

22 *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2005] UKPC 39, [2005] 1 NZLR 145.

23 *Minister of Education v H Construction North Island Ltd* [2019] NZHC 1459.

24 *Taylor v Pase Developments Ltd* [1991] TLR 228 (EWCA), *Metalloy Supplies Ltd (in liq) v MA (UK) Ltd* [1997] 1 All ER 418 (EWCA) at 424-5, *Kidd v Equity Realty (1995) Ltd* [2010] NZCA 452 at [14]-[20].

application should fail. Under its settlement with the Keung interests, GBR Investment Ltd has agreed not to oppose the annulment application. Even though there is no opposition, I must still be satisfied that there was a breach of natural justice.

[35] An argument for GBR Investment Ltd might run along these lines. It served its costs memorandum on the address of service of the defendants, even though it did not serve Mr Keung in person. The same law firm acted for all the Keung interests: all the defendants in the proceeding, Mr Keung, GBR Trustees Ltd and GB Management Ltd. That law firm filed submissions in opposition to the costs application for the defendants and that can be taken as having been given for the non-parties as well as the defendants. Associate Judge Gendall made his costs decision after considering the defendants' submission. If the lawyers did not raise everything that could have been put forward on behalf of Mr Keung, that does not mean that there was a breach of natural justice.

[36] The argument requires acceptance of shortcuts taken by GBR Investment Ltd: no formal application and affidavits and no service on Mr Keung. It asks the court to treat service on the company as service on its director. That plays fast and loose with the separate identities of the company and its director. The costs memorandum by the company did not purport to be a response by the director. In taking shortcuts, GBR Investment Ltd took risks with observing natural justice. Mr Keung can point to prejudice through not having been served personally and not given the opportunity to give evidence in opposition to the costs application. That cannot be glossed over by relying on the shortcuts. I find that there was a breach of natural justice in the non-party costs award against Mr Keung.

Should Mr Keung have been adjudged bankrupt?

[37] If I had been sitting in the bankruptcy court on 20 September 2010 and knew only what Associate Judge Osborne did, I would have made Mr Keung bankrupt. The application was in order. The debt was a final order for costs. While there was an appeal against the order, the Court of Appeal had dismissed an application for stay of execution pending appeal, contemplating that the appeal may be made nugatory if

Mr Keung were made bankrupt. Mr Keung did not appear and had taken no steps to oppose.

[38] But that is not the test on an annulment application. The court decides the case on the facts as they were at the time of the adjudication, even if they were not before the court at the time.[25] Associate Judge Osborne did not know that the costs order was flawed because it had been made in breach of natural justice. The question here is whether that means that Mr Keung should not have been adjudicated bankrupt.

[39] On bankruptcy applications, a judgment is prima facie evidence of a debt, but it is not conclusive evidence. The usual rules as to merger of a debt in a judgment and res judicata do not apply. The court retains the power to examine whether the debtor is in truth and reality indebted to the creditor, notwithstanding the judgment. This rule is of long standing.[26] In *Ex parte Bryant* Lord Eldon said:[27]

> Proof upon a judgment will not stand merely upon that, if there is not a debt due in 'truth and reality' for which the consideration must be looked to.

In *Ex parte Kibble, in re Onslow*, James LJ said:[28]

> It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive, a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation.

Mellish LJ said:[29]

> It is quite clear that in the Court of Bankruptcy the consideration for a judgment may be investigated, particularly when the judgment has gone by default.

[40] In *Ex parte Lennox, in re Lennox*, the Court of Appeal accepted that on a bankruptcy application there could be an inquiry whether there was in truth a debt

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25 *Holdgate v Blocassa* [2007] NZCA 132 at [21].
26 For the origins see Fullagar J's judgment in *Corney v Brien* (1951) 84 CLR 343 at 354.
27 *Ex parte Bryant* (1813) 1 V & B 211 (Ch) at 214.
28 *Ex parte Kibble, in re Onslow* (1875) LR 10 Ch App 373 at 377.
29 At 378.

when the creditor relied on a consent judgment. Cotton LJ said in respect of proofs of debt, where it is accepted that the trustee in bankruptcy can go behind a judgment:[30]

> That rule is founded upon this principle — that, under whatever circumstances a judgment may have been obtained against the bankrupt, yet no act of — collusion, compromise improperly entered into, or anything else — ought to prejudice the rights of the other creditors, because the assets ought to be distributed in the bankruptcy only amongst the honest bona fide creditors of the bankrupt

After saying that he could see no ground for setting aside the judgment or staying execution, Lindley LJ said:[31]

> But it appears to me that it by no means follows as a matter of course, that the judgment creditor is entitled to have a receiving order made against his judgment debtor. Bankruptcy proceedings are not like ordinary proceedings; they are a very serious matter, not only to the debtor himself, but to all his other creditors; and, before the machinery of the Court of Bankruptcy is put in motion, it appears to me that it is, not only the right, but the duty of the Court to see at whose instance it is asked to act.

[41] In *Re Fraser ex parte Central Bank of London* Lord Esher MR said:[32]

> The mere fact that there is a judgment for the debt does not prevent the Registrar from saying that there is no good petitioning creditors' debt. The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt. In so doing, the Court of Bankruptcy does not set aside the judgment. If I may use the expression, the court goes round the judgment, and enquires into the subject matter.
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> …
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> That this is so was determined by this court in *Ex parte Lennox* 16 QBD 315, which shows that though there is a judgment which the judgment debtor cannot set aside, he may nevertheless ask the court of bankruptcy to enquire whether the debt on which the judgment was founded was a good debt, and that if the court is satisfied that it was not, it may refuse to make a receiving order in respect of the debt. The decision was based on the highest ground – viz., that in making a receiving order the court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of the creditors, who, if the order is made, will not be able to sue the debtor for their debts, in that the court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt prima facie evidence of a debt; but still the court of bankruptcy is entitled to enquire whether there really is a debt due to the petitioning creditor.

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30 *Ex parte Lennox, in re Lennox* (1885) 16 QBD 315 (EWCA) at 326.
31 *Ex parte Lennox, in re Lennox* (1885) 16 QBD 315 (EWCA) at 328.
32 *Re Fraser ex parte Central Bank of London* [1892] 2 QB 633 (EWCA) at 636.

That case is striking because the judgment debtor had applied to set aside the judgment against him. His application failed. His appeal to the Court of Appeal against that decision failed. Nevertheless, on the bankruptcy petition a receiving order was refused because he was not liable on the original debt and the Court of Appeal upheld that on appeal.

[42] In *Re Flateau ex p Scotch Whisky Distillers Ltd*, the English Court of Appeal made it clear that the court does not as a matter of course retry the case in which judgment was given against the debtor.[33] Fry LJ said that there must be "sufficient cause".[34] Lord Esher MR suggested that there should circumstances suggesting "Fraud, or collusion, or miscarriage of justice".[35]

[43] These authorities have been consistently followed in Australia. In *Petrie v Redmond* Latham CJ said in the High Court of Australia:[36]

> The court is entitled to go behind the judgment and inquire into the validity of the debt where there has been fraud, collusion or miscarriage of justice…Also the court looks with suspicion on consent judgments and default judgments.

In *Wren v Mahoney* Barwick CJ said:[37]

> The judgment is never conclusive in bankruptcy. It does not always represent itself as the relevant debt of the petitioning creditor, even though under the general law, the prior existing debt has merged in a judgment. But the Bankruptcy Court may accept the judgment as a satisfactory proof of the petitioning creditor's debt. In that sense that court has a discretion. It may or may not so accept the judgment. But it has been made clear by the decisions of the past that where reason is shown for questioning whether behind the judgment as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof. It must then exercise its power, or if you will, its discretion to look at what is behind the judgment: to what is its consideration…the emphasis is upon the paramount need to have satisfactory proof of the petitioning creditor's debt. The Court's discretion in my opinion is a discretion to accept the judgment as satisfactory proof of that debt. That discretion is not well exercised where substantial reasons are given for questioning whether behind that judgment there was in truth and reality a debt due to the petitioner.

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33 *Re Flateau ex p Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 (EWCA).
34 At 86.
35 At 85.
36 *Petrie v Redmond* (1943) QSR 75 (HCA) at 76.
37 *Wren v Mahoney* (1972) 126 CLR 212 at 224.

[44] Two other important decisions of the High Court of Australia are *Corney v Brien* and *Ramsay Healthcare Australia Pty Ltd v Compton*.[38] In the latter there had been a full trial on the merits resulting in judgment to the petitioning creditor. A non est factum defence failed. On the subsequent bankruptcy application, the debtor said that he was not indebted because of credits that could be claimed, although he had not pleaded that in the original proceeding. The creditor argued that when there had been a trial on the merits, the discretion to go behind the judgment was restricted to cases of fraud, collusion and miscarriage of justice. The High Court rejected that. It also noted the practice of a preliminary hearing to decide whether there should be an inquiry into the judgment.[39]

[45] In *Wilkins v Official Assignee* Associate Judge Christiansen referred to the Australian authorities and approved this submission by Mr Caro for the Official Assignee as to the exercise of the discretion:[40]

(a) The court can in general accept a judgment debt as sufficient proof especially when the judgment results from a defended hearing.

(b) The circumstances in which the court may inquire into the validity of a judgment debt are not closed: there are no inflexible rules about when the court may so inquire.

(c) Fraud, collusion and a miscarriage of justice are examples of the circumstances in which the court may elect to enquire into a judgment debt.

[46] In *Nightingale v James*, however, Associate Judge Matthews took a slightly different view.[41] He tended to regard the Australian approach as deriving from the wording of Australia's bankruptcy statute and as something of an Australian specialty. While the court in New Zealand had a discretion not to make a bankruptcy

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38 *Corney v Brien* (1951) 84 CLR 343 and *Ramsay Healthcare Australia Pty Ltd v Compton* [2017] HCA 28.
39 At [16].
40 *Wilkins v Official Assignee* [2016] NZHC 1742 at [56].
41 *Nightingale v James* [2018] NZHC 965.

adjudication and in exercising its discretion it could have regard to any judgment on which the creditor relied, it would not act as a court of appeal and would not retry the case in which judgment had been given. He put it this way:[42]

> In the end, therefore, although there are statutory differences between Commonwealth law and New Zealand law as I have outlined, the issue comes down to the same point. If it is made sufficiently clear to this Court that there is a sound reason to believe that there is a flaw in the underlying judgment, this Court will respond to it by giving time for reassessment of that judgment elsewhere, as I have noted, or by exercising the Court's discretion not to make an adjudication order. This is because this Court has to be satisfied that it is appropriate to make an adjudication order, as that order would be based on a debt it is appropriate for this Court to be satisfied that debt is properly owing…
>
> The New Zealand legislative framework enables the Court to consider issues raised in relation to an underlying judgment and, if those issues are found to be of sufficient concern, to exercise its discretion accordingly. If a Court is not satisfied that it can form a firm view, it can afford time to a judgment debtor to take the matter up by way of an application for rehearing or appeal, as the case may be. But because of the differences between the legislative provisions in Australia and New Zealand, this Court will not take the next step predicated in *Ramsay* and investigate the underlying judgment. It will not embark upon an exercise akin to a retrial of the case which gives which gave rise to the underlying judgment. Similarly, it will not engage in a process akin to an appeal. It will look at the underlying judgment to the extent that it needs to do so in order to assess the validity of the challenge to that judgment made by the judgment debtor. Then it will make a decision on whether to allow time for reconsideration of the judgment elsewhere, or to dismiss the application, or to proceed to adjudication. Beyond that it is not in my view necessary to lay down any more rigid basis on which the Court should approach the issue.

[47] I am unfortunately in respectful disagreement with Associate Judge Matthews. The differences in legislation do not require a different approach. The Bankruptcy Act 1996 (Cth) s 52(1) says:

> (a) At the hearing of a creditor's petition, the Court shall require proof of:
>
> …
>
> (c) The fact that the debt or debts on which the petitioning creditor relies is or are still owing:
>
> and, if it is satisfied with the proof of those matters, may make a sequestration order against the estate of the debtor.

[48] The New Zealand provisions are:[43]

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42 At [21]-[22].
43 Insolvency Act 2006, s 13.

Section 13:

> 13 A creditor may apply for a debtor to be adjudicated bankrupt if—
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> (a) the debtor owes the creditor $1,000 or more or, if 2 or more creditors join in the application, the debtor owes a total of $1,000 or more to those creditors between them; and…

Section 36:

> 36 The court may, at its discretion, adjudicate the debtor bankrupt if the creditor has established the requirements set out in section 13.

Section 37:

> 37 The court may, at its discretion, refuse to adjudicate the debtor bankrupt if—
>
> (a) the applicant creditor has not established the requirements set out in section 13; or
>
> (b) the debtor is able to pay his or her debts; or
>
> (c) it is just and equitable that the court does not make an order of adjudication; or
>
> (d) for any other reason an order of adjudication should not be made.

As the concepts of "debt" and "owe" are consistent through the act, there is the definition of "provable debt" in s 231(a):

> A ***provable debt*** is a debt or liability that a creditor of the bankrupt may prove in the bankruptcy.

[49] Neither the Australian nor the New Zealand statute expressly states whether a judgment is by itself conclusive as to indebtedness. Both require the court to be satisfied as to the debtor's indebtedness to the creditor but leave it to the court how that is to be established. The court's approach comes from the older English cases which are just as much part of New Zealand's bankruptcy law as Australia's.

[50] It is helpful to remember that the concept of "debt" is the same throughout the Insolvency Act. Applying the approach from the old cases allows the court to look behind judgments in another context – proposals under Part 5 subpart 2 of the Insolvency Act. They provide the opportunity for collusive claims. Sometimes an

insolvent's proposal is bolstered by claims of friends and relatives that are greater than the claims of trade creditors and give a greater chance of the proposal being approved. A debt under this part of the act is the same as a provable debt.[44] The trustee must accept or reject every claim.[45] That allows him to reject collusive claims, where there is not in truth and reality a debt. There is no good reason why the trustee should not be able to go behind a judgment to see if there is in fact a debt. Under Associate Judge Matthew's approach that would not be open.

[51] The court hearing a bankruptcy application has a discretion when a debtor asks it to look behind a judgment. It does not look into the merits of a judgment against the debtor in every case. While the scope of cases where the court will go behind a judgment is not clearly defined, the court will need to be satisfied that there is a proper basis for doing so. Often a preliminary hearing may be required. At the same time it will not be necessary in every case for the court to carry out its own inquiry. The court has other discretionary powers where the debtor disputes a judgment against him. Where judgment has been given by default, it is common to hold the bankruptcy application over while the debtor applies to have the judgement set aside.[46] Where the judgment is under appeal, the application may be halted pending the decision on appeal.[47] As Associate Judge Matthews points out, the court may also dismiss the bankruptcy application under s 37. These other discretionary powers are in addition to and do not replace the power for the bankruptcy court itself in appropriate cases to look behind the judgment to see if there is a debt in truth and reality.

[52] Now for this case. The question is what the court would have decided if Mr Keung had opposed the bankruptcy application and had put evidence before the court as to how the non-party costs order was made against him. Given the absence of service on Mr Keung and the absence of opportunity to give evidence to show that he did not fund the defence, there was a miscarriage of justice, one of the recognised grounds for going behind a judgment. There is one aspect in which this case differs from others on going behind a judgment. The cases deal with whether a judgment can be evidence of an antecedent debt. But in this case the costs order created the debt.

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44 Insolvency Act 2006, s 325(1).
45 Insolvency (Personal Insolvency) Regulations 2007, reg 36.
46 See the power to halt under the Insolvency Act s 38.
47 Insolvency Act, s 42.

There was no indebtedness for costs until Associate Judge Gendall made his order. In my judgment that difference does not matter when the order was the result of a miscarriage of justice. The order was flawed and could not be used to obtain a bankruptcy adjudication.

[53] On hearing the bankruptcy application the judge had options. He might have adjourned the case to await the outcome of the appeal, but that was risky in light of the Court of Appeal's dismissal of the stay application. It could be seen as flouting that Court's decision. But that Court had not directed that Mr Keung had to be made bankrupt. The bankruptcy court could still decide the bankruptcy application on the merits and they would show that the costs order could not be used to show that Mr Keung was in truth and reality in debt to GBR Investment Ltd. This much is clear – the judge would not have adjudged Mr Keung bankrupt.

Should Mr Keung's adjudication be annulled now?

[54] That conclusion does not mean that Mr Keung's adjudication should be annulled now. There are two issues: his standing to apply and the court's discretion.

Section 305

[55] Before I deal with those, there is a preliminary matter which does not disqualify Mr Keung's application, his discharge from bankruptcy.[48] Section 305 of the Insolvency Act says:

> A discharge is conclusive evidence of the bankruptcy and of the validity of the proceedings in the bankruptcy.

As Mr Keung has been discharged from his bankruptcy, it might be thought that the section bars him from seeking an annulment under s 309(1)(a) on the ground that he should not have been adjudicated bankrupt. While he referred to the s 305, Mr Caro did not submit that it barred Mr Keung's annulment application. The Assignee's view is that there could be rare cases when an abuse of process was discovered only after

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[48] This issue was also raised in *Creser v Creser* [2014] NZHC 3267, a case under the Insolvency Act 1967. Section 115 of that act was in similar but not the same terms as s 305. Associate Judge Smith did not find it necessary to decide the point.

discharge. The bankruptcy should surely be annulled in those cases. Mr Tingey submitted that s 305 was a general provision and s 309(1)(a) can be read as a specific exception which prevails over the general. I accept that. To treat s 305 as setting a deadline for applications under s 309(1)(a) is to treat it as a limitation provision. Normally limitation provisions are more explicit. There does not seem to be any reason for limiting annulment applications under s 309(1)(a) (but not other annulment applications) to the time before discharge takes effect. Discharge and annulment are different. The administration of a bankruptcy can continue after discharge.[49] Annulment brings administration of a bankruptcy to an end, whether or not there has been a discharge. A retrospective annulment under s 309(1)(a) will undo a discharge, but the fact of discharge does not provide any reason to bar such annulment applications.

No standing to apply for annulment

[56] Once a debtor is adjudicated bankrupt the Official Assignee decides what claims should be admitted or rejected in the bankruptcy. If the bankrupt is dissatisfied with the Official Assignee's acceptance of a claim, the bankrupt may apply to the court to have the claim cancelled.[50] But the bankrupt cannot continue litigation in respect of debts he incurred before his bankruptcy. He cannot apply to set aside a judgment and he cannot appeal or continue an appeal against a judgment given before his adjudication.

[57] In *Boaler v Power* the judgment creditor relied on an order for costs in petitioning for the debtor's bankruptcy. Before the adjudication the debtor had begun a proceeding against the creditor alleging that the orders had been obtained by fraud. After adjudication he tried to continue the proceeding, but the trustee would not co-operate. It was dismissed. Farwell LJ said:[51]

> It is open to the Court in bankruptcy, if it thinks fit, to allow the debtor to contest in the Bankruptcy Court the validity of the petitioning creditor's judgment on the ground of fraud, collusion or for any other sufficient reason: *In re Flateau*. But this is the only way in which the bankrupt can contest it: the adjudication, while it stands, is conclusively binding on him: he cannot

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49 *Palmer v Official Assignee* [2011] 1 NZLR 846 (HC).
50 Insolvency Act, s 238.
51 *Boaler v Power* [1910] 2 KB 229 (EWCA) at 232.

> contest it in any other Court on the ground of fraud or on any other ground. The right to continue these three actions is a chose in action, and the bankrupt has no locus standi.

[58] In *Heath v Tang* the English Court of Appeal reviewed the authorities in the light of the then recent Insolvency Act 1986 (UK) and held that bankrupts who had sought leave to appeal against judgments on which they had been made bankrupt did not have standing. It followed old authorities. Referring to the Insolvency Act 1986, Hoffmann LJ said:[52]

> Nevertheless, the principle that the bankrupt is divested of an interest in his property and liability for his debts remains fundamental in the new code. The consequences for the bankrupt's right to litigate do not seem to us inconvenient or productive of injustice. The bankruptcy court acts as a screen which both prevents the bankrupt's substance from being wasted in hopeless appeals and protects creditors from vexatious appeals.

[59] The decision of the High Court of Australia in *Cummings v Claremount Petroleum NL* is to similar effect, making the important point that a right of appeal against a judgment is not property that vests in the trustee in bankruptcy on adjudication.[53] Instead the bankrupt lacks standing to continue the appeal.

[60] New Zealand cases have followed these cases and generally held that after adjudication it is for the Official Assignee to take any appeal against a judgment against the debtor. On adjudication the debtor loses any right to challenge the judgment debt, including by an annulment application: *UDC Finance Ltd v Wilson*,[54] *Commissioner of Inland Revenue v Hunter*,[55] *Page v Official Assignee*,[56] *Ironstone Holdings Ltd v Prasad*,[57] and *Kipping v UDC Finance Ltd*.[58]

[61] A case going the other way is *Sircombe v Auto Wholesalers Cars*.[59] The case involved identity issues – the bankrupt said that he was not the person who had incurred the debt and against whom judgment was entered in the District Court. The debt was small: $4,458. On the annulment application Master Lang directed that the

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52 *Heath v Tang* [1993] 1 WLR 1421 (EWCA) at 1427.
53 *Cummings v Claremount Petroleum NL* (1996) 137 ALR 1 (HCA).
54 *UDC Finance Ltd v Wilson* HC Christchurch B No 348/89 5 December 1989.
55 *Commissioner of Inland Revenue v Hunter* (2000) 19 NZTC 15,722 (CA).
56 *Page v Official Assignee* [2016] NZHC 1988.
57 *Ironstone Holdings Ltd v Prasad* [2013] NZHC 3529.
58 *Kipping v UDC Finance Ltd* [2012] NZHC 1707.
59 *Sircombe v Auto Wholesalers Cars* HC Whangarei CIV-2003-488-129, 2 December 2003.

bankrupt could apply to the District Court to have the default judgment set aside. The case may be seen as turning on its own facts and may be an outlier.

[62] Some bankrupts have found ways round the standing problem. In *Brooks v Clynie & Bennie (1988) Ltd*, the bankrupt obtained an annulment under s 309(1)(b) after having paid or satisfied his creditors and paid the Official Assignee's fees.[60] With the bankruptcy annulled prospectively he applied successfully to the District Court to have a default judgment set aside, proving that he had not signed the guarantee on which he had been sued. As that judgment had been the basis for his adjudication, he applied successfully under s 309(1)(a) to have his bankruptcy annulled retrospectively. In *Ironstone Holdings Ltd v Prasad*, the bankrupt had obtained a suspension of his bankruptcy under s 416 of the Insolvency Act.[61] He still had standing to apply under s 309(1)(a).

[63] Mr Keung applied under s 226 of the Insolvency Act to reverse the Official Assignee's discontinuance of his appeal against the non-party costs order. If successful, no doubt he might have funded the Official Assignee to apply to the Court of Appeal to have the discontinuance set aside. Procedurally that was an available path. On the merits the Official Assignee might have had difficulty defending the decision to discontinue the appeal so promptly after Mr Keung's adjudication without having communicated with him, when the breach of natural justice was a clearly arguable appeal ground. The Official Assignee has not put in evidence any formal legal opinion by its in-house counsel as to the merits of the appeal or the reasons for discontinuing the appeal. In this hearing Mr Caro did not justify the discontinuance. But Mr Keung faced other problems. Under s 226(3) an application to reverse a decision must be made within 15 working days after the decision or within additional time allowed by the court. Mr Keung did not apply until three years later. While time might have been extended if he had still applied early in his bankruptcy, it is hard to see time being extended by three years. Even if he succeeded in his application under s 226, reinstating the appeal in the Court of Appeal would not be straightforward. That Court takes a tough view of such applications, which must be "compelling" and are

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60 *Brooks v Clynie & Bennie (1988) Ltd* [2013] NZHC 3501.
61 *Ironstone Holdings Ltd v Prasad* [2013] NZHC 3529.

regarded as exceptional.[62] The Court had not been impressed with the appeal when it first looked at it in 2010. In the event Mr Keung did not continue with his application, withdrawing it under his settlement with the Official Assignee in 2016. That ended his attempt to have the costs order set aside.

[64] He believes, however, that he has another way round the problem: he can apply for an annulment as a trustee. Under the settlement the Official Assignee acknowledged that he had discontinued Mr Keung's personal appeal but that he had not abandoned any appeal by Mr Keung as a trustee or as a director. Mr Keung's idea is that as a trustee he can sidestep the limitations of bankruptcy. The argument does not work.

[65] Mr Keung's directorship is not an answer to the standing problem. Associate Judge Gendall ordered him to pay non-party costs because as director of Goose Bay Ranch Holdings Ltd he had run the defence and (supposedly) funded the defence. The order was against Mr Keung in person and was the basis for the bankruptcy notice and bankruptcy application.

[66] As for trusteeship, the relevant trust is the GBR Trust. The trustees were in turn GBR Trustees Ltd, GB Management Ltd (appointed during the proceeding but before the liquidation decision) and Mr Keung (appointed after the liquidation decision but before the costs order). According to counsel, the only assets of the trust were the shares in Goose Bay Ranch Holdings Ltd. Mr Keung did not give evidence that the trust held any other assets. In his statement of assets and liabilities made in October 2010, he said that the trust had no assets. The shares were valueless. The liquidation of Goose Bay Ranch Holdings Ltd yielded nothing for creditors, let alone shareholders.[63] Presumably the shares no longer exist as the company will have been removed from the register at the end of the liquidation.

[67] Associate Judge Gendall made costs orders against GBR Trustees Ltd and GB Management Ltd as shareholders of Goose Bay Ranch Holdings Ltd, but he did not make his costs order against Mr Keung as shareholder because Mr Keung was not a

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62 *Humphries v Carr* [2009] NZCA 608 at [17].
63 Liquidators' final report, 30 September 2011.

shareholder during the proceeding. The costs decision treats Mr Keung separately from GBR Trustees Ltd and GB Management Ltd. Notwithstanding that he was appointed trustee, Mr Keung did not become a shareholder of Goose Bay Ranch Holdings Ltd. The usual automatic vesting under s 47 of the Trustee Act 1956 did not operate. That is not just because any change of ownership of the shares had to be registered in the company's share register. Any transfer of shares was barred while the company was in liquidation, unless approved by the court. Section 248 of the Companies Act says:

> (1) With effect from the commencement of the liquidation of a company,—
>
> …
>
> (d) unless the court orders otherwise, a share in the company must not be transferred:

[68] Even if the shares could be transferred, that does not mean that Mr Keung incurred any personal liability as a trustee. Presumably the earlier trustees had a right of indemnity for their liability under the costs order. That right of indemnity is secured by an equitable lien over the trust assets. A new trustee would take the trust assets subject to that equitable lien.[64] But that does not impose any personal obligation on the new trustee. There are no personal covenants in an equitable lien.[65] The new trustee holds the trust assets subject to the powers of earlier trustees under their equitable liens to have recourse to the trust assets.

[69] A new trustee might perhaps seek the court's direction whether they hold trust assets subject to liabilities to meet an earlier trustee's rights of indemnity, but that would be hollow in this case. Here Mr Keung did not take a transfer of the shares, which were in any event valueless and no longer exist. That trusteeship cannot give him standing to challenge the costs orders against the earlier trustees in this case.

[70] The trusteeship argument is in any event misdirected. Even if it could succeed, all it could do is attack the costs orders against the earlier trustees. Mr Keung's personal liability under the costs decision is separate and not affected by trusteeship

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64 See *Lemery Holdings Pty Ltd v Reliance Financial Services Pty Ltd* [2008] NSWSC 1344, (2008) 74 NSWLR 550.

65 *LSF Trustees Ltd v Footsteps Trustee Company Ltd (in liq)* [2017] NZHC 2619, [2017] NZAR 1676.

questions. He was bankrupted on his personal liability, not on the orders made against the earlier trustees.

[71] Accordingly, Mr Keung has not established standing to have his bankruptcy annulled because of the miscarriage of justice in the non-party costs order against him personally.

Exercise of the discretion

[72] Even if any of the grounds are made out under s 309(1), the court has a residual discretion whether to annul the adjudication. Three factors tell against annulling the bankruptcy, even if Mr Keung could establish standing: he was insolvent when he was made bankrupt, he delayed in applying for annulment and he had been bankrupt before.

[73] Mr Keung's statement of assets and liabilities made in October 2010 showed that he had minimal assets and that his liabilities were large - $830,000. The claims notified to the Official Assignee were much larger, although most were not examined. While Mr Keung contested some of them, especially that made by GBR Investment Ltd, he was clearly insolvent. Even if no costs order had been made against him, he still faced a serious solvency problem. That may have arisen from the liquidation of Goose Bay Ranch Holdings Ltd, which Mr Keung sees as having caused a major loss of value, but that does not take away from the fact that he was broke. While the Koulanovs may have pursued him zealously, his bankruptcy does appear inevitable. He seems to have recognised that by not opposing the bankruptcy application. If he was going to be made bankrupt anyway, there is less reason for annulling his adjudication.

[74] Delay in applying for annulment may be a ground for refusing annulment. In *Re Ponsford, ex parte Ponsford*, three months' delay was held fatal.[66] In "Annulment of Bankruptcy and Review of Sequestration Orders" Mr D A Hassall records

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[66] *Re Ponsford, ex parte Ponsford* [1904] 2 KB 704 (EWCA).

Australian cases where annulment was refused for delay.[67] In *Creser v Creser* the delay was ten years.[68] Mr Keung filed his annulment application eight years after his adjudication application and it was not heard for another year. When a bankrupt says that he should not have been adjudicated bankrupt, he can be expected to take steps reasonably soon into his bankruptcy to have the bankruptcy annulled. He would normally be motivated to have his bankruptcy set aside and to return to his position before adjudication earlier rather than later. The longer he leaves it, the more the fact of bankruptcy becomes established and the harder it is to dislodge it.

[75] Of course, time will not run against the bankrupt until he becomes aware of the circumstances that allow him to apply for an annulment. But here Mr Keung was aware that the non-party costs order against was flawed because he had appealed against it. Reasonably soon after contacting the Official Assignee, he learnt that the Official Assignee had discontinued his appeal against the judgment. Given that, the delay taken to apply for annulment cannot be reasonably explained. Mr Keung's affidavits say a lot about other matters that had been going on, but they do not provide a justification for the time taken to apply.

[76] The delay counts against him. By the time of his annulment application, his bankruptcy had run its course and was a matter of history. He had settled with most of his creditors. There were no assets to revest in him. There was nothing left for the Official Assignee to carry out. After such a long time the value of finality should not be disturbed by Mr Keung's wish to annul his bankruptcy.

[77] Mr Keung has been bankrupt once before – from 15 September 1997 to 15 September 2000. A retrospective annulment may be justified to clear the stain of bankruptcy, if there was no basis for the adjudication, but that argument is harder if the debtor has been bankrupt before and was insolvent when he was adjudicated a second time.

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67 DA Hassall "Annulment of Bankruptcy and Review of Sequestration Orders*"* (1993) 67 ALJ 761 at 765. In *Re Williams* (1968) 13 FLR 10 (Federal Court of Bankruptcy), the delay was two years, although that was not the only factor counting against the application.

68 *Creser v Creser* [2014] NZHC 3267 at [50].

[78] These discretionary factors count against an annulment, even if he had established his standing to apply.

Westpac New Zealand Ltd

[79] Westpac New Zealand Ltd claimed in Mr Keung's bankruptcy for $542,111.70. Mr Keung also owed $113,428.44 to Westpac on a credit card debt. That had been assigned to Collection House. The Official Assignee did not examine either claim because there was no prospect of a dividend. Mr Keung says that he had settled with Westpac, but it denied that and opposed his annulment application. I heard evidence and argument whether the claims had been settled, but the matter makes little difference because I have decided the annulment application without having to decide the Westpac issue. I address it in case this goes further and someone else finds a reason for treating the matter as relevant to the annulment application.

[80] Westpac seems to have assumed that Mr Keung may be applying for an annulment under s 309(1)(b), that is, that he had settled with his creditors. It wanted to make the point that he had not settled with it. However, Mr Keung's application referred only to s 309(1)(a), including the amended application I granted leave to file during the hearing. Mr Tingey made it clear that Mr Keung was seeking an annulment only under s 309(1)(a).

[81] Because it opposes his annulment, Westpac accepts that the discharge has taken effect and it has no interest in suing Mr Keung on the debts for which it claimed in his bankruptcy. On the other hand, to show his good faith in applying for an annulment, Mr Keung offered to waive any limitation defence if his bankruptcy were annulled.

[82] Westpac claims $542,111.70 as the shortfall owing after a mortgagee's sale. The bank lent funds to Mr Keung on the security of a first mortgage over an undeveloped property at 51 Heberden Avenue, Sumner, Christchurch. The 2,700m² site was steep, on a cliff and posed challenges for development. It was not considered subdivisible (although Mr Keung does not accept that). In the property crash of 2008-2009 its value fell. Mr Keung defaulted under the mortgage and Westpac served a notice under s 119 of the Property Law Act 2007 on Mr Keung in May 2010. He did

not comply with it and Westpac became entitled to sell the property under its mortgage. Mr Keung advised the bank that he owned the property as trustee for Keung Developments Ltd. This was news to the bank. The loan documents made no reference to Mr Keung borrowing as a trustee. The bank took the usual steps by a mortgagee considering the exercise of a power of sale, obtaining a valuation and asking land agents for marketing advice. The valuer assessed the property as having a forced sale value of $115,000. The bank was facing a significant loss.

[83] Matters took a turn for the worse. Christchurch had its first earthquake on 4 September 2010. Mr Keung was made bankrupt on 20 September 2010. The property was offered for sale by auction on 10 December 2010 but did not sell. The property remained listed for sale, with Westpac dropping its asking price. The even more disastrous earthquake of 22 February 2011 followed. The Scarborough Hill area of Sumner, where the property is located, was regarded as a high risk area (even though Mr Keung later obtained geotechnical reports as to the property's stability). In August 2011 Westpac got an offer for the property – for $8,000. It accepted and in early October 2011 an agreement was made to sell at that price.

[84] With that, Mr Keung successfully applied without notice for an injunction restraining the sale. He alleged a breach of duty under s 176 of the Property Law Act. Keung Developments Ltd was also a plaintiff. Mr Keung relied on his trusteeship to say that his bankruptcy did not bar him from suing. The lawyers acting for Mr Keung in this proceeding were not the lawyers who had acted for his interests in the Goose Bay litigation. The new lawyers also acted for Mr Eder, a friend of Mr Keung who was prepared to help him out. Westpac cancelled the agreement to sell.

[85] Mr Keung suggests that he did not instruct the lawyers. They were acting for Mr Eder instead. He would have it that he could not negotiate with Westpac because of his bankruptcy. Mr Caro was not aware of any disability on bankrupts to negotiate with their creditors during their bankruptcy and I am not either. Mr Tingey did not submit that there was in law any such disability.

[86] The facts do not support the suggestion that the lawyers were acting only for Mr Eder. After all, they had started the proceeding naming Mr Keung as one of the

plaintiffs, relying on his power as a trustee to take proceedings in respect of a trust asset. In correspondence the lawyers negotiated on behalf of both Mr Keung and Mr Eder as to the terms of purchase and whether there should be any release from debts. Significantly the heading of a letter of 20 December 2011 recording an agreement makes it clear that Mr Keung was a party. Given that he says that the negotiations led to a release of his debt, it is odd that he denies being a party to the negotiations.

[87] The negotiations resulted in Westpac selling the property to Mr Eder for $16,000. Mr Keung's lawyers recorded the arrangements in the letter of 20 December 2011 to Westpac's lawyers, which included:

> **Agreement**
>
> 6. The parties hereby agree:
>
> 6.1 That the plaintiffs consent to the Eder agreement being entered into by the defendant;
>
> 6.2 That upon execution of the Eder agreement by the defendant and the said Keith Eder, the Interim Injunction shall be set aside with no issue as to costs and:
>
> 6.2.1 The plaintiffs shall use their best endeavours to obtain the setting aside of the Interim Injunction as soon as is practicable; and
>
> 6.2.2 The defendant will cooperate with such steps as may be reasonably necessary to obtain the setting aside of the injunction within a time that reasonably practicable.
>
> 6.3 That upon settlement of the sale of the property to Kevin Eder or nominee, the proceeding shall be discontinued with no issues as to costs and:
>
> 6.3.1 The Notice of Discontinuance shall be promptly filed upon settlement of the aforesaid sale and if required, both parties will, by their solicitors, sign the Notice of Discontinuance with no issue as to costs.
>
> 7. The plaintiff, Seng Bou Keung, acknowledges that any balance outstanding under the mortgage in favour of Westpac and his credit card remain as amounts that may properly be claimed in his bankruptcy.

[88] The parties performed. The sale to Mr Eder went ahead. The interim injunction was discharged. The plaintiffs discontinued the proceeding. Westpac kept

its claim in the bankruptcy for the shortfall after the sale and Collection House claimed for the credit card debt. The agreement left Westpac as an unsecured creditor of Mr Keung in his bankruptcy. It did not give those rights away under the agreement.

[89] Initially Mr Keung relied on the agreement of 20 December 2011 to say that Westpac had released his debt to it, but clearly it remained a creditor in his bankruptcy. He switched tack to say that Westpac had agreed to surrender its rights as a creditor earlier in the negotiations. But any such suggestions were obviously overtaken by the agreement of 20 December.

[90] All the same, I refer to some of the correspondence between the parties. The variables the parties dealt with included the price for the sale of the property, release of the credit card debt (Westpac said that it could not release that debt because it had assigned it to Collection House), release of Mr Keung's personal liability under the loan and release of the debt of Keung Corporation Ltd (another Keung entity). As would be expected, the lines of communication were client to lawyer to the other side's lawyer to their client.

[91] On 3 November 2011, Mr Keung's lawyers sent to the bank's lawyers a proposed agreement for Mr Eder to buy the property for $75,000, including special terms that this was in full and final settlement of all Westpac's claims against Mr Keung and any of his companies and that Westpac would withdraw its claim in Mr Keung's bankruptcy. In a reply of 17 November Westpac's lawyers rejected that proposal and made a counter-proposal, which would leave Mr Keung's credit card debt still owing as well as the debt of Keung Corporation Ltd. Mr Keung's lawyers' letter of 25 November made another proposal: to increase the price to $95,000 with the credit card and Keung Corporation debts also released.

[92] On 29 November Westpac's lawyers accepted the increased price and the release of the Keung Corporation Ltd debt but said that the credit card debt would not be released. On 30 November Mr Keung's lawyer invited Westpac to reconsider, with a suggestion how the credit card debt might be addressed. In an email of 9 December 2011 Westpac's lawyers said that the bank would settle for a sale at $75,000 but would not release Mr Keung from his personal liability for the shortfall, the credit card debt

and the Keung Corporation debt. In response Mr Keung's lawyers purported to accept the offer in the letter of 17 November, "but with your clients suggested assignment of the debt" (apparently a reference to the credit card debt). On 14 December Westpac's lawyers replied that the proposal of 17 November had been rejected in the letter of 25 November and that the parties had not reached agreement. That accurately states the position. It stayed that way until Mr Keung's letter of 20 December. There was no agreement before that letter.

[93] It was put to Mr Ng, a bank officer, that he had settled the bank's claim in a telephone conversation with Mr Keung. I accept his evidence that he did not speak with Mr Keung during this period and that all communications were through lawyers. If there had been any direct contact between the bank and Mr Keung and an agreement to release the bank's claims in Mr Keung's bankruptcy had been negotiated, I would expect at least one of the parties to have recorded the arrangement and advised their lawyer who would ordinarily confirm the arrangement with the other side's lawyer. There is no evidence that anything of that sort took place.

[94] In summary, when it agreed to sell the Heberden Avenue property to Mr Ederp for $16,000 under the agreement of 20 December 2011, the bank did not release Mr Keung from his debt for the shortfall or his credit card debt. It remained a creditor in his bankruptcy. Nor did it release the debt in the earlier negotiations.

Result

[95] Mr Keung's application to annul his bankruptcy is unsuccessful and accordingly it is dismissed.

[96] I invite counsel to confer as to costs. If they cannot agree, memoranda may be filed, and I will decide costs on the papers.

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Associate Judge R M Bell