IN THE COURT OF APPEAL OF NEW ZEALAND

CA168/2015
[2015] NZCA 620

BETWEEN	ROBERT ERWOOD Applicant
AND	THE OFFICIAL ASSIGNEE Respondent

Court: French, Miller and Kós JJ

Counsel: Applicant in person and D M Lester as counsel assisting
C R Vinnell for Respondent

Judgment: (On the papers) 18 December 2015 at 11.00 am

JUDGMENT OF THE COURT

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

B The applicant is ordered to pay costs to the respondent for a standard application on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by French J)

[1] On 30 March 2015 Mr Erwood filed a notice of appeal against a judgment of Gendall J delivered in the High Court at Christchurch.[1] In his judgment, Gendall J upheld the decision of the Official Assignee (the Assignee) to take various costs and expenses incurred in Mr Erwood's bankruptcy.

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1 *Erwood v Official Assignee* [2015] NZHC 390.

[2] Under r 43(1) of the Court of Appeal (Civil) Rules 2005 an appeal is to be treated as having been abandoned if the appellant does not apply for the allocation of a hearing date and file the case on appeal within three months of the appeal being brought. This provision is subject to r 43(2), which empowers the Court on application to grant an extension of time.

[3] In the case of this appeal, the three month period expired on 30 June 2015. On 26 June 2015 Mr Lester, who had been appointed by the Court in April 2015 as counsel to assist Mr Erwood, filed an application under r 43(2), seeking an extension of time for the preparation of the case on appeal until 6 August 2015. On 4 August 2015 Mr Lester sought a further extension of two weeks from the granting of any extension.

[4] The application for an extension of time is opposed by the Assignee.

[5] However, the parties agreed the application could be dealt with on the papers.

[6] It was also common ground that in determining whether to grant an extension of time, the Court should have particular regard to the reason for the delay and the merits of the appeal, as well as the principle that some latitude in compliance is permitted to litigants in person if overall justice is to be done.[2]

The reason why the appeal has not been prosecuted diligently

[7] It appears the only step taken since 30 March 2015 in preparing the case on appeal has been the circulation of an index on 4 August 2015.

[8] The explanations advanced for the delay are:

(a) There was a misunderstanding between Mr Lester and Mr Erwood. The latter assumed Mr Lester was attending to the preparation of the case on appeal. However, given his status as Court-appointed

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2 *Schmidt v Ebada Property Investments Ltd* [2012] NZCA 452; *Rabson v Gallagher* [2011] NZCA 204 at [9]; *Harris v Davies* [2007] NZCA 358 at [8].

counsel, Mr Lester had not in fact undertaken any work in the absence of a request from Mr Erwood to do so.

(b) Subsequently, Mr Lester was reluctant to incur costs in preparation of the full case without knowing whether an extension would be granted.

(c) From 3 July 2015 to 29 October 2015 the focus of the parties was on a dispute over the payment of security for costs. The Registrar declined to dispense with payment of security for costs. Mr Erwood filed an application for review of the Registrar's decision on 3 July 2015. The application was dismissed by Wild J on 8 October 2015.[3] Justice Wild then declined an application to recall that judgment on 29 October 2015.[4]

[9] In our view, the inaction is unsatisfactory and the explanations for it not compelling. While Mr Erwood is a lay litigant, he has had extensive experience in the appellate jurisdiction. He is or should be familiar with the requirements of r 43 and the role of Court-appointed counsel. We accept that logically the application relating to security for costs had to be resolved first, but that does not of itself excuse inaction. Further, the reason it took so long to resolve the security issue was because of difficulties obtaining information from Mr Erwood about his financial position. Once the information was provided, it was clear Mr Erwood was not impecunious and could pay security. He must have known that and known the case on appeal would be required.

The merits of the appeal

Background history

[10] It is well established time will not be extended for an appeal that is not genuinely arguable.[5] In order to consider the merits of Mr Erwood's appeal, it is necessary to address the background history.

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3 *Erwood v Official Assignee* [2015] NZCA 478.
4 *Erwood v Official Assignee* [2015] NZCA 507.
5 *Russell v Commissioner of Inland Revenue* (2006) 22 NZTC 19,807 (CA) at [10]; *Schmidt v Ebada Property Investments Ltd*, above n 2, at [7]; *Harris v Davies*, above n 2, at [8].

[11] Mr Erwood was adjudicated bankrupt on 22 November 2007 in the High Court at Nelson. His bankruptcy was governed by the Insolvency Act 1967 (the Act).[6]

[12] As described in many judgments of this Court and the High Court, the bankruptcy has had a long and tortuous history. It resulted in a recovery by the Assignee that exceeded the debts provable in the bankruptcy by a significant margin.

[13] On 21 February 2008 Associate Judge Christiansen annulled Mr Erwood's bankruptcy under s 119(1)(a) on certain conditions.[7] The conditions included payments to the two creditors who had filed proofs of debt and payment of the Assignee's costs and disbursements. The conditions were never met and accordingly the annulment never came into effect.

[14] Five years later, Mr Erwood's bankruptcy was finally annulled, this time by MacKenzie J under s 119(1)(b) on the ground Mr Erwood's debts had been fully paid or satisfied.[8] The order was expressed to take effect from the date the judgment was delivered: 13 August 2013.

[15] The application for annulment had been made by the Assignee, who also sought orders under s 119(7) for payment of the costs of the administration of the bankruptcy. At that time, these comprised counsel's costs of $95,000 and $45,000 as a commission-based fee. Mr Erwood opposed paying any costs. It was also submitted on his behalf by a Court-appointed lawyer (Ms Levy) that it would be unfair to order payment because the level of the costs was the direct consequence of the Assignee dealing with the affairs of a person whose judgment was impaired by a serious mental disorder. It was said the content and number of the court decisions involving Mr Erwood demonstrated he had very limited ability to conduct litigation in a rational and discerning way.

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6 The 1967 Act was repealed on 3 December 2007: Insolvency Act 2006, s 443(1).

7 *Maxted v Erwood* HC Nelson CIV-2007-442-331, 21 February 2008. Section 119(1)(a) applies where the Court considers the order of adjudication should not have been made.

8 *Official Assignee v Erwood* [2013] NZHC 1827.

[16] In response to that submission, MacKenzie J stated the high level of costs incurred by the Assignee reflected the reality that Mr Erwood had, during the bankruptcy, exercised rights of appeal and challenged most, if not all, of the decisions affecting him, pursuing every point he could possibly pursue with a limited ability to distinguish the good and the bad points.[9] That, the Judge said, resulted in the Assignee incurring costs that any rational assessment of the litigation would have recognised were likely ultimately to be borne by Mr Erwood. The Judge also acknowledged the difficulties of the Assignee in dealing with Mr Erwood's approach to his bankruptcy were "considerable".

[17] The Judge went on to say, however, that Mr Erwood's limitations meant the Assignee needed to bring an independent view to how the bankruptcy could be administered at a reasonable cost, and that the Court could not approve the payment of costs and fees at the level sought without appropriate scrutiny over the steps taken by the Assignee.[10]

[18] The Judge did not consider he was in a position to undertake that scrutiny and, having regard to the further fact that Mr Erwood would need another opportunity to be heard, declined to make the order sought.[11]

[19] Although MacKenzie J declined to grant an order for costs under s 119(7), it is clear he did not consider this would leave the Assignee without any means of recovering them. The Judge stated s 119(7) was "not a prerequisite to the deduction of costs and fees properly incurred in the administration of the bankruptcy" and that there was provision for deduction under s 104(1)(a).[12] Section 104(1)(a) gives such fees and expenses a first priority in the application of the property of the bankrupt. Justice MacKenzie stated "the preferable course is to leave the Official Assignee to invoke the priority conferred by s 104(1)(a)" and deduct the monies (including fees properly incurred on the annulment application itself) under that section.[13]

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9 *Official Assignee v Erwood,* above n 8, at [30].
10 At [30].
11 At [33].
12 *Official Assignee v Erwood*, above n 8, at [34].
13 At [35].

[20] Following MacKenzie J's decision, the Assignee purported to exercise her rights under s 104(1)(a) and deducted a total of $181,313.56 for commission, costs and disbursements from Mr Erwood's estate. That amount was comprised as follows:

(a) Commission of $45,101.14 based on the net value of the estate realised.

(b) Reimbursement of legal costs and disbursements of $129,381.64 incurred by the Assignee with external counsel between 7 April 2008 and 13 September 2013 relating to Mr Erwood's bankruptcy.

(c) Reimbursement of miscellaneous disbursements.

[21] Mr Erwood then filed an appeal under s 86 of the Act against the decision to make those deductions.

[22] In dismissing the appeal, Gendall J found that Mr Erwood was the author of his own misfortune, that the Assignee conducted the bankruptcy in a proper fashion, that the deducted costs were reasonable and that there were no grounds for setting the Assignee's decision aside.[14]

Are the grounds of appeal in this Court genuinely arguable?

[23] Mr Erwood has, through Mr Lester, advanced various grounds of appeal. The Assignee submits none has any merit and that the appeal is no more than a continuation of Mr Erwood's relentless pursuit of litigation.

[24] The grounds of appeal identified in the notice of appeal involve a significant element of repetition. Several are variations on the theme that it was the Assignee who was responsible (either wholly or partly) for prolonging the bankruptcy, not Mr Erwood. We do not consider this to be genuinely arguable. Justice Gendall's assessment of the facts was thorough and carefully considered and his findings about Mr Erwood's conduct supported by dicta both in this Court and the Supreme Court.

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[14] *Erwood v Official Assignee*, above n 1.

[25] In the course of his decision, Gendall J made a finding there was evidence Mr Erwood had consented to remain in bankruptcy.[15] On appeal this finding is sought to be challenged on the ground the affidavit evidence in question came from the files of the annulment proceedings and was inadmissible. No objection to the admissibility of the evidence was taken before Gendall J and it is, in our view, too late to attempt to do so now.

[26] Other grounds of appeal are based on alleged failures by Gendall J to take into account certain matters or the sufficiency of the evidence supporting the reasonableness of costs. However, on closer analysis, it is clear the Judge did take the matters into account and that his findings were amply supported by the evidence. In our view, none of the grounds of appeal advanced on this basis is tenable.

[27] A related ground of appeal is that Gendall J incorrectly recorded that a detailed list of the amounts charged by external counsel was before the Court. Justice Gendall did not have copies of all the invoices, which had been made available to Mr Erwood and Mr Lester in advance of the hearing, but he did have detailed information and analysis relating to them. We consider there is nothing in this point.

[28] Sufficiency of the evidence is also raised in relation to a finding that the Assignee's concession not to charge external legal costs relating to one aspect of the bankruptcy was limited to the costs of an unsuccessful appeal the Assignee brought in this Court. Mr Erwood argued the Assignee had conceded all external costs relating to the particular matter would be excluded. The evidence does not, however, support Mr Erwood's contention and we do not consider this ground of appeal to be genuinely arguable.

[29] Another ground of appeal is that Gendall J erred in examining whether the Assignee's actions were reasonable at the time they were taken rather than at the end of the bankruptcy with the benefit of hindsight. We know of no authority that would support such a proposition and, in our view, it is untenable.

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15 *Erwood v Official Assignee*, above n 1, at [53].

[30] Mr Erwood also claims Gendall J erred by failing to consider the warning given by MacKenzie J regarding whether Mr Erwood was an incapacitated person. Incapacity was not, however, raised with Gendall J. There is no doubt Mr Erwood does have health issues and Gendall J did take these into account. However, the Judge's findings on capacity (that Mr Erwood through his many years of being obsessed with and fixated upon litigation and disputes is more than capable of understanding legal processes) are in line with similar findings in the High Court, this Court and the Supreme Court.[16]

[31] In addition to the current grounds of appeal contained in the notice of appeal, Mr Lester raises a new ground based on s 120 of the Act. Section 120 states:

> **120 Effect of annulment**
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> (1) Where an order annulling an adjudication has been made, all property of the bankrupt vested in the Assignee under the bankruptcy, and not sold or disposed of under any contract of sale or disposition entered into by the Assignee while it was so vested is hereby revested in the bankrupt without the necessity of any conveyance, transfer, or assignment of any kind.
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> (2) An order annulling an adjudication shall not prejudice or affect the validity of any contract, sale, disposition, or payment duly made or anything duly done by the Assignee before the making of that order; and every such contract, sale, disposition, and payment shall have effect as if it had been made by the bankrupt while no order of adjudication was in force.

[32] Mr Lester submits, relying on s 120(2), that once MacKenzie J made the annulment order, all the property vested in the Assignee automatically revested in Mr Erwood and the Assignee could not thereafter purport to take money that was no longer her property to take. In his submission, s 104 only applies during the bankruptcy, that is pre-annulment. The failure to obtain the order under s 119(7) at the time of the annulment was therefore fatal to the Assignee's ability to recover the costs later.

[33] Mr Lester acknowledges that if this analysis is correct, it means MacKenzie J was wrong in holding it would still be open for the Assignee to deduct the costs

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[16] *Erwood v Official Assignee*, above n 1, at [48]–[50].

under s 104. However, Mr Lester says MacKenzie J could not give the Assignee statutory powers she did not possess.

[34] In response, counsel for the Assignee, Mr Vinnell, contends the funds that were applied to the Assignee's estate administration costs were no longer the property of Mr Erwood and so not subject to s 120. Mr Vinnell submits logic requires there to be a separation of what was Mr Erwood's property and what was required for costs. It is, he argues, the net balance that is payable on annulment. In further support of his argument that annulment did not deprive the Assignee of her right to recover costs, Mr Vinnell points out by way of example that following annulment there will always be work required to finalise accounting aspects of the estate and prepare for the return of the assets to the bankrupt. It would, he says, be perverse that those costs were not recoverable, yet that is the effect of the argument being advanced on behalf of Mr Erwood.

[35] We accept Mr Lester's contention is arguable as a matter of statutory interpretation but that does not mean an extension of time should be granted.

[36] The argument has been raised for the first time in this Court. Both parties proceeded (presumably in good faith) on the basis that MacKenzie J was correct. Further, one of the reasons MacKenzie J did not make an order under s 119(7) was in order to protect Mr Erwood's ability to challenge the level of the fees. An order under s 119(7) would have had the practical effect of precluding any subsequent challenge, whereas, because the Assignee proceeded under s 104, that gave Mr Erwood a right of appeal under s 86, which he in fact exercised.

[37] It is clear MacKenzie J never intended the Assignee to be remediless and had he appreciated that would be the effect of declining to grant the application under s 119(7), we are satisfied he would have adjourned the proceeding for the necessary scrutiny he required to take place. That scrutiny has in fact now taken place, albeit through the means of an appeal under s 86.

[38] It follows that even if the Court were to accept Mr Lester's analysis is correct, that would not be the end of the matter. The Assignee would then be able to

appeal MacKenzie J's decision. Although such an appeal would be out of time, leave would inevitably be given and the same result achieved. Alternatively, the Assignee could apply to the High Court for a recall of MacKenzie J's judgment. The Court has a discretion to entertain recall applications in exceptional circumstances, notwithstanding that the order may have been sealed.[17] These would qualify as exceptional circumstances.

[39] In short, in our view, all that an appeal on this ground could achieve would be to subject these parties to yet more litigation and more expense. It would be pointless. In those circumstances, we consider this ground of appeal is also devoid of any merit.

Outcome

[40] The lack of a satisfactory explanation for the inaction and the untenable grounds of appeal persuade us that an extension of time should not be granted.

[41] The application is accordingly dismissed and the appeal is to be treated as abandoned.

[42] There is no reason why costs should not follow the event and we accordingly order the applicant to pay the respondent costs for a standard application on a band A basis, together with usual disbursements.

Solicitors:
Anthony Harper, Christchurch for Respondent

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[17] *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 at [54]; *Rabson v Gallagher* [2012] NZCA 237 at [3]; *Wagg v Squally Cove Forestry Partnership* [2013] NZCA 612 at [4].