IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2015] NZEmpC 37
CRC 22/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ROSAURO GAPUZAN Plaintiff
AND	PRATT & WHITNEY AIR NZ SERVICES trading as CHRISTCHURCH ENGINE CENTRE Defendant

Hearing: (on documents dated 26 January and 9 February 2015)

Representatives: No submissions from the plaintiff
A Shaw, counsel for the defendant
G Slevin, counsel for Official Assignee

Judgment: 26 March 2015

COSTS JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] In my judgment of 11 November 2014,[1] I made orders which had the effect of striking out Mr Gapuzan's challenge to a determination of the Employment Relations Authority.[2] I reserved costs: the issue I must resolve is whether the Court can now proceed to determine that costs issue since Mr Gapuzan has been adjudicated bankrupt.

[2] In my judgment I concluded:

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1 *Gapuzan v Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre* [2014] NZEmpC 206.

2 *Pratt & Whitney Air New Zealand Services t/a Christchurch Engine Centre v Gapuzan* [2014] NZERA Christchurch 115.

a) The Official Assignee was correct with regard to conclusions he had reached as to the vesting of property in respect of certain rights pleaded by Mr Gapuzan in his fourth amended statement of claim. I held that those rights of action vested in Mr Gapuzan's estate upon his bankruptcy; and that since the Official Assignee had determined he would not pursue those claims, they were dismissed.

b) I was satisfied that Mr Gapuzan's claim as to liability was entirely misconceived, and could not possibly succeed. I held there was no remedy which could be awarded, either that as currently pleaded by him in his fourth amended statement of claim, or as one of general damages. I held that the proceeding was frivolous and also vexatious, and that for those reasons the entire claim should be dismissed. I also held that this conclusion meant those claims which had vested in the Official Assignee would have been struck out even if he had determined that they should proceed.

c) Mr Gapuzan had applied for leave to amend his fourth amended statement of claim; since that application overlapped with points of defence he had made which were resolved against him, that application was also dismissed.

d) Finally, I recorded that as Pratt & Whitney had sought costs in relation to the present application, evidence and submissions would need to be presented in that regard. I timetabled those accordingly.

[3] On 24 November 2014, counsel for Pratt & Whitney filed a memorandum which stated that actual legal costs with regard to the interlocutory applications were $8,644.08. It was submitted that this was a reasonable fee having regard to:

a) The complex legal arguments involved.

b) The large amount of relevant documentation.

c) The fact that the interlocutory application by Pratt & Whitney was the result of a disproportionate amount of activity and applications by

Mr Gapuzan, both in this Court and elsewhere arising from the same issues.

d) Counsel referred to standard costs principles as outlined in *Victoria University of Wellington v Alton Lee*.[3] It was submitted that in the earlier decision of *Richardson v Board of Governors of Wellesley College*, Judge Travis had provided a useful analysis of the range of costs awards previously made by the Court, which were $3,800 to $6,400 per hearing day.[4] The Court of Appeal referred to that analysis with apparent approval in *Transmissions & Diesels Limited v Matheson*.[5] Counsel submitted that a proper award of costs in this matter would be $6,400 inclusive of GST.

[4] Subsequently I issued a minute requiring submissions as to whether the Court was required to take into account any particular provisions of the Insolvency Act 2006 (the IA 2006), since Mr Gapuzan had been adjudicated bankrupt on 30 May 2014.

[5] On 26 January 2015, counsel for Pratt & Whitney filed a submission with regard to the queries raised by the Court. It was submitted:

a) In *Rimene v Doherty*, Judge Ford had considered the status of a challenge where the defendant was adjudicated bankrupt in Australia when the proceeding was part-heard.[6] He held that it was necessary to consider cross-jurisdictional insolvency issues under the Insolvency (Cross-border) Act 2006, with the applicable provision in that case being art 20 the effect of which was that the High Court would need to consider whether it would recognise the Australian insolvency proceedings under that Act. If so, the High Court would need to go on and consider whether leave should be granted for the Employment Court challenge to proceed. It was also observed that art 20 preserved

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3 *Victoria University of Wellington v Alton Lee* [2001] ERNZ 305 (CA).
4 *Richardson v Board of Governors of Wellesley College* [1999] 2 ERNZ 199 at 35.
5 *Transmissions & Diesels Ltd v Matheson* [2002] 1 ERNZ 22 at [24], [27].
6 *Rimene v Doherty* [2014] NZEmpC 146.

to the High Court a similar discretion as is provided for in s 76(2) of the Insolvency Act 2006 (IA 2006) to allow a particular action or proceeding to continue.[7]

b) Reference was made by counsel to s 232(1)(b) of the IA 2006 which states:

> **232 What debts are provable debts**
>
> (1) A provable debt is a debt or liability that the bankrupt owes—
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> …
>
> (b) After adjudication but before discharge, by reason of an obligation incurred by the bankrupt before adjudication.

c) Counsel acknowledged that on the basis of the findings in *Rimene*, the defendant would have to apply to the High Court to have its costs application in this matter continued, should it be determined that a costs application is a "provable debt" under s 232(1)(b) of the IA 2006 in circumstances such as the present.

d) However, it was submitted that this issue was resolved by the High Court in *Kaye v Auckland District Law Society*,[8] when it considered the equivalent provision under the Insolvency Act 1967 (IA 1967) which stated:

> **87 Provable debts**
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> (1) Except as provided in subsections (2) and (3) of this section, all debts and liabilities, present or future, certain or contingent, to which the bankrupt is subject to the time of his adjudication, or to which he becomes subject is discharged by reason of any obligation incurred before the time of his adjudication, shall be debts provable in bankruptcy.
>
> …

e) Counsel relied on the following passage of the High Court in *Kaye* which discussed the scope of the section:[9]

> [W]e are not satisfied that the costs imposed on the appellant come within the prescriptions of s 87(1) of all debts and liabilities

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7 At [14].

8 *Kaye v Auckland District Law Society* [1998] 1 NZLR 151.

9 *Kaye v Auckland District Law Society*, above n 8, at 9. Counsel's emphasis.

> present or future, certain or contingent, to which the bankrupt is subject at the time of his adjudication or to which he became subject before his discharge by reason of any *obligation incurred* before the time of his adjudication. *The obligation to pay costs awarded by the Tribunal is not incurred before the time of adjudication. It is only incurred if and when the Tribunal, as the result of a hearing, decides that costs should then be paid.* The practitioner might have been subject to be brought before the Tribunal at the date of his bankruptcy, but it cannot be said that that potential created a debt or liability certain or contingent.

f) Counsel went on to submit that the principle in *Kaye* was recently applied by the Human Rights Review Tribunal in *Fehling v Appleby*[10] when considering s 232 of the IA 2006. There it was held that proceedings before the Tribunal should not be halted by a defendant's bankruptcy, essentially on similar reasoning as was adopted by the High Court in *Kaye*.[11]

g) Pratt & Whitney submitted that these authorities support the proposition that a costs award made post adjudication in favour of a defendant would not result in a "provable debt" since the obligation to pay costs awarded by the Court would not have been incurred prior to the date of adjudication. The provable debt would only be incurred if and when the Court decided that costs should be paid.

[6] Counsel for the Official Assignee helpfully provided a memorandum for the assistance of the Court on 9 February 2015. In essence, counsel stated:

a) *Kaye* states the law in relation to the provability of costs awards made against a bankrupt after adjudication, in New Zealand.

b) In the recent decision of the United Kingdom Supreme Court, *Bloom & others v The Pension's Regulator*,[12] the Supreme Court expressly overruled an authority which had been relied on by the New Zealand High Court in *Kaye*, namely *In Re A Debtor*.[13] The Supreme Court also

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10 *Fehling v Appleby* [2014] NZHRRT17.
11 At [10]-[12].
12 *Bloom & others v The Pension's Regulator* [2013] UKCE 52, alt cit *In re Nortel GMBH (in administration) and related companies* [2014] AC 209.
13 *In Re A Debtor* [1911] 2 KB 652.

expressed the view that subsequent decisions to similar effect in the United Kingdom were wrongly decided. It was submitted by counsel, however, that the New Zealand decision of *Kaye* stood nonetheless and was binding on the Official Assignee.

c) Accordingly, it was submitted that the instant proceeding was not a proceeding to recover a debt provable in the bankruptcy and was not halted by s 76(1) of the IA 2006. No authorisation was required from the High Court pursuant to s 76(2) for the costs application to continue. Further, any costs award the Court might make would give rise to a post-adjudication debt which would not be cancelled by s 304 of the IA 2006.

[7] No submissions were filed by Mr Gapuzan.

Discussion

[8] The first issue which the Court must consider is whether a costs award made in the present circumstances would amount to a provable debt. As has been properly accepted for Pratt & Whitney, were that to be the case, leave of the High Court would be needed for it to proceed with its costs application.

[9] The issue is not straightforward. In deference to the helpful submissions I have received on behalf of Pratt & Whitney and the Official Assignee, it is necessary to traverse the relevant statutes and decisions in some detail.

[10] *Kaye* was a decision of a full bench of the High Court.[14] The appellant was a barrister sole who admitted four breaches of the intervention rule brought against him by the local District Law Society. The New Zealand Law Practitioners' Disciplinary Tribunal had ordered the appellant to pay costs totalling $14,000. At the time the order was made he was a bankrupt. The Court was required to consider whether the Tribunal was competent to order payment of costs against an undischarged bankrupt. It was that question which required the Court to consider the

[14] Cartwright, Giles and Barker JJ.

impact of s 87 of the IA 1967 and it was in that context that the Court made the statement recorded earlier in this decision.[15]

[11] The Court went on to hold:[16]

a) It would have been a strange result if the Law Society had to prove in the bankruptcy of every practitioner under investigation, in case that practitioner later became the subject of a charge and hence possibly susceptible to a costs order. The Court concluded that it could not have been the case that such a strange result was in contemplation. It was also stated that between the hearing of the charge before the Tribunal and the hearing of the appeal in the High Court, the appellant had been discharged from bankruptcy. Consequently, even if s 87 of the IA 1967 were to apply, the Law Society would not be able to claim a provable debt because the appellant had obtained a release from bankruptcy.

b) The High Court also referred to the 1911 English decision of *In Re A Debtor*, in support of its conclusions. It did so in these terms:[17]

> In *In Re A Debtor* … a new trial was ordered with the costs of the first trial ordered to abide the result of the second trial. Between the two trials, the plaintiff was adjudicated but his bankruptcy was subsequently annulled. The second trial failed and he was ordered to pay costs of the first trial which he claimed had been discharged by the annulment. It was held that the first trial costs were not a contingent liability on adjudication but in the nature of interlocutory costs incurred after adjudication in a proceeding not for a provable debt and the costs were not able to be proved.

[12] It is next necessary to consider the effect of the Supreme Court decision of *Bloom*. There the Court considered r 13.12(1)(b) of the Insolvency Rules 1986. That rule stated that a debt (in relation to the winding up of a company) included:

> (b) Any debt or liability to which a company may become subject after that date by reason of any obligation incurred before that date.

[13] In his consideration of authorities relating to provisions of this kind, Lord Neuberger of Abbotsbury PSC observed that the rule under consideration was

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15 See [5](e) of this judgment.
16 *Kaye v Auckland District Law Society*, above n 8, at 10.
17 At 10.

applicable to both individual bankruptcy as well as corporate insolvency.[18] He then stated:[19]

> In my view, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to the discretion of the court. An order for costs made against a company in liquidation, made in proceedings begun before it went into liquidation, is therefore provable as a contingent liability under r 13.12(1)(b), as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became a party to the proceedings.

[14] In reaching this conclusion, His Lordship held that a number of previous costs cases including *In Re A Debtor* were wrongly decided.[20] Amongst the reasons given as to why those previous decisions should be overruled was the fact that the judgments were short in their reasoning and consisted of little but assertion, and that the legislature had progressively widened the definition of provable debts and narrowed the class of non-provable liabilities.

[15] A policy reason which supported the conclusion was:[21]

> The notion that all possible liabilities within reason should be provable helps achieve equal justice to all creditors and potential creditors in any insolvency, and, in bankruptcy proceedings, helps ensure that the former bankrupt can in due course start afresh.

[16] This policy factor was supported by a 1982 report[22] which stated that it was a basic principle of the law of insolvency that every debt or liability capable of being expressed in money terms should be eligible for proof, so that the insolvency administration could deal comprehensively with, and in one way or another discharge, all such debts and liabilities.[23]

[17] For the purposes of the present proceeding, the question is whether this principle applies rather than the contrary conclusion reached by the High Court in

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18 *Bloom & others v The Pension's Regulator*, above n 13 at [87].

19 At [89]; Lord Sumption JSC; Lord Mance and Lord Clarke of Stone-Cum-Ebony JJSC agreed with this conclusion.

20 At [136].

21 Lord Neuberger at [93].

22 Report of the Review Committee on Insolvency Law in Practice (1982) CMND 8558, at 1289.

23 Referred to in *Bloom & others v The Pension's Regulator*, above n 13, per Lord Neuberger at [92].

Kaye.[24] The starting point must be the New Zealand decision of *Kaye* and whether it is binding in the current context. I consider that it is not, for two reasons.

[18] First, the facts which were considered in *Kaye* are different from those in the present case. Mr Kaye was adjudicated bankrupt on 27 March 1995,[25] and charges were not laid until 15 August 1996 with supplementary charges being laid on 3 September 1996.[26] The High Court in that instance was required to consider a situation where, at the date of bankruptcy the disciplinary charge had yet to be laid against the practitioner, although it appears the appellant was the subject of investigation at the time. That differs from the present case because the proceeding in this Court was commenced prior to adjudication, not after.[27]

[19] Secondly, *Kaye* involved a consideration of s 87 of the IA 1967. That section was replaced by s 232 of the IA 2006. Although not expressed in materially different terms, the latter section must be interpreted in the context of a statute which has updated objects. The Explanatory Note of the Bill which subsequently became the IA 2006, stated that the proposed legislation reflected changes in societal views of bankruptcy which had developed since the 1960s when New Zealand's personal insolvency law was previously reviewed.[28] An important objective was the modernisation of the insolvency legislation. It was stated that the introduction of the legislation was to give effect to the Government's overall objective of, inter alia, enabling individuals in bankruptcy to participate again fully in the economic life of the community.[29] I consider that these policy objectives of the IA 2006 are consistent with those referred to by Lord Neuberger in *Bloom*, as referred to earlier

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[24] There are two decisions: *Auckland Council v Mawhinney* [2014] NZHC 297, per Doogue AJ; and *Fehling v Appleby*, above n 11, which have been decided in New Zealand since the delivery of the judgment by the Supreme Court in *Bloom & others v The Pension's Regulator*. It appears that in neither case was the Court/Tribunal referred to *Bloom*. That decision has been followed in other jurisdictions; see *Lo Shing Kin v Sy Chin Mong Stephen* [2014] HKCFA 109.

[25] *Complaints Committee of ADLS v Kaye*, 29 April 1997, oral decision.

[26] Advice of Executive Director's Department of New Zealand Law Society received on 19 March 2015.

[27] The proceeding was commenced on 10 July 2012 and Mr Gapuzan was adjudicated bankrupt on 30 May 2014.

[28] Insolvency Law Reform Bill, Explanatory note, 1 and 2.

[29] Insolvency Law Reform Bill, Explanatory note, at 2.

in this judgment,[30] and are part of the context within which the text of s 232 must be construed.

[20] This conclusion suggests that a costs order made in this proceeding made against Mr Gapuzan as a bankrupt would be a contingent debt provable in his bankruptcy.

[21] I recognise that any final determination of this Court will be for the High Court, since it is the Court vested with the jurisdiction to grant leave under the IA 2006. I consider that if Pratt & Whitney wish to pursue an application for costs, it will be necessary for it to make an application to the High Court for leave to do so under s 76(2) of the IA 2006.

[22] If such leave is granted, I shall then consider the merits of the costs application.

B A Corkill
Judge

Judgment signed at 1.45 pm on 26 March 2015

[30] See [13]-[15] of this judgment.