FEDERAL COURT OF AUSTRALIA

Kimber v The Owners Strata Plan No 48216 [2018] FCA 536

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| Appeal from: | *Kimber v The Owners Strata Plan No 48216 (No 2)* [2018] FCA 406 |
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| File number: |  |
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| Judge: | **MARKOVIC J** |
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| Date of judgment: | 3 April 2018 |
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| Date of publication of reasons: | 19 April 2018 |
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| Legislation: | *Bankruptcy Act 1966* (Cth) ss 41(6A), 41(7) |
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| Cases cited: | *Powerflex Services Pty Ltd v Data Access Corp* (1996) 67 FCR 65 |
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| Date of hearing: | 3 April 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | No Catchwords |
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| Number of paragraphs: | 27 |
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| Counsel for the Appellant: | The Appellant appeared in person |
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| Solicitor for the Respondent: | Mr D Radman of Grace Lawyers |
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ORDERS

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|  | | NSD 468 of 2018 |
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| BETWEEN: | JANELLE KIMBER  Appellant | |
| AND: | THE OWNERS STRATA PLAN NO 48216  Respondent | |

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| JUDGE: | MARKOVIC J |
| DATE OF ORDER: | 3 April 2018 |

THE COURT ORDERS THAT:

1. Dismiss the appellant’s application for an extension of time to comply with Order 2 of the orders made on 27 March 2018 or, in the alternative, a stay of that order as sought in Order 2 of the document titled “Notice of Appeal Amended”.
2. The costs of the application referred to in Order 1 are the respondent’s costs in the cause.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MARKOVIC J:

1. On 27 March 2018 I made orders in a proceeding commenced by Janelle Mary Kimber in which she sought review of orders made by a registrar of this Court on 4 May 2016: see *Kimber v The Owners Strata Plan No 48216 (No 2)* [2018] FCA 406 (***Kimber No 2***). Those orders were:

1. Set aside Order 2 made on 4 May 2016.

2. Pursuant to s 41(6A) of the *Bankruptcy Act 1966* (Cth) extend the time for compliance with bankruptcy notice 188465 issued on 19 February 2016 to the applicant to 3 April 2018.

3. The amended interlocutory application filed on 11 July 2016 be otherwise dismissed.

4. The applicant pay 40% of the respondent’s costs of the amended interlocutory application as agreed or assessed.

1. Ms Kimber’s application which was the subject of *Kimber No 2* concerned bankruptcy notice 188465 which had been issued on 19 February 2016 (**Bankruptcy Notice**) and subsequently served on her. In summary Ms Kimber had filed an application to set aside the Bankruptcy Notice which was dismissed by the registrar on 4 May 2016. She then filed the application for review of the registrar’s orders.
2. On 29 March 2018 Ms Kimber filed a notice of appeal appealing from Orders 2, 3 and 4 made on 27 March 2016 in *Kimber No 2* and on 3 April 2018 she filed a document titled “Notice of Appeal Amended” which I will refer to as the **Amended Notice of Appeal**.
3. On 3 April 2018, in my capacity as duty judge, I heard Ms Kimber’s application for “urgent relief” and a stay of the orders made on 27 March 2018 as set out in the Amended Notice of Appeal under the heading “Grounds of Appeal”. Similarly under the heading “Orders Sought” in the Amended Notice of Appeal Ms Kimber included:

For a ‘stay’ on the enforcement of the judgement (sic) orders of 27 March 2018 with a decision made in chambers asap before 4:30 pm Tuesday 3 April 2018 without an oral argument, to provide urgent relief from these proceedings, ensuring an act of bankruptcy is not imposed by the court to hear a ‘stay’ application, calling into question an extension of time for compliance ordered by the court to be met today, Tuesday 3 April 2018.

1. In effect, Ms Kimber sought a further extension of time to comply with the Bankruptcy Notice beyond that ordered in Order 2 or a stay of Order 2 in *Kimber No 2*. That application was opposed by the respondent (**Owners Corporation**). After hearing from the parties I made orders dismissing Ms Kimber’s application and that the costs of the application be the Owners Corporation’s costs in the cause. These are my reasons for making those orders.

# background

1. The following summary is taken from my reasons in *Kimber No 2*.
2. Ms Kimber is the registered proprietor of lot 110 in strata plan no. 48216. The Bankruptcy Notice required payment of $12,369.48 to the Owners Corporation for a judgment entered in the Local Court of New South Wales in proceeding 2009/00359785 on 7 May 2014 for $10,767.00 and interest thereon of $1,602.48.
3. On 5 April 2016 Ms Kimber lodged an application with the Court seeking a number of orders including an order that the Bankruptcy Notice be set aside. Because of an error in the title to the proceeding that application was only accepted for filing on 20 April 2016.
4. On 20 April 2016 the Court made an order pursuant to s 41(6A) of the *Bankruptcy Act 1966* (Cth) (**Act**) and r 3.03 of the *Federal Circuit Court (Bankruptcy) Rules 2006* (Cth) extending the time for compliance with the requirements of the Bankruptcy Notice up to and including 4 May 2016.
5. On 18 April 2016, unaware that Ms Kimber had lodged her application to set aside the Bankruptcy Notice and before the orders were made on 20 April 2016 extending the time for compliance with the Bankruptcy Notice, Grace Lawyers, the solicitors for the Owners Corporation, lodged a creditor’s petition online with the Federal Circuit Court of Australia (**Federal Circuit Court**). The creditor’s petition was accepted for filing on 19 April 2016.
6. On 4 May 2016 Ms Kimber’s application to set aside the Bankruptcy Notice was listed before the Court. The registrar made orders that:

1. The application filed on 20 April 2016 be dismissed.

2. The order made on 20 April be discharged.

3. The applicant pay the respondent’s costs.

1. On 20 May 2016 Ms Kimber filed her application for review of the registrar’s orders. The history of the proceeding following the filing of that application is set out in *Kimber No 2* at [11]-[15].

# Ms kimber’s submissions

1. Ms Kimber did not rely on any evidence in support of her application but she made a number of submissions that, to the extent they concerned or touched upon her application for a stay or a further extension of time to comply with the Bankruptcy Notice, I summarise below.
2. Ms Kimber submitted that, after the judgment in *Kimber No 2* had been given on 27 March 2018, on the following day, 28 March 2018, she appeared in the Federal Circuit Court where the creditor’s petition that had been filed in April 2016 by the Owners Corporation was dismissed; and that, because of the intervening Easter long weekend, she was only left with two days to comply with the Bankruptcy Notice.
3. Ms Kimber further submitted that it was unfortunate that a decision was handed down two years after the registrar’s orders had been made and that she believed that the proceedings had been unnecessarily protracted. She informed the Court that she had no other choice but to sell her apartment and that she wanted the Owners Corporation to give her that opportunity so that she could meet its debt and so that she could put into place a flexible payment plan for repayment of the amount owing.
4. Ms Kimber submitted that she had limited funds and that she was prepared to provide a specified amount, rather than paying for legal advice, to “start the process of payment”. She contended that her flexible payment plan would require time for a general meeting of the Owners Corporation to be called because the Owners Corporation was being controlled by the strata manager and a committee who were not prepared to speak with her and who referred her to their solicitors who also would not speak with her.
5. Ms Kimber explained that she was seeking a stay of the enforcement of the orders made in *Kimber No 2* or alternatively an extension of time within which to comply with the Bankruptcy Notice beyond the extension the subject of Order 2 in *Kimber No 2* so that a vote could be held at a meeting of her body corporate as to whether the proceeding should settle or continue on appeal.
6. In support of her application Ms Kimber sought to rely on s 67 of the *Civil Procedure Act 2005* (NSW) (**Civil Procedure Act**) in relation to a stay of proceedings and s 78B(5) of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). Ms Kimber alleged that there was an error in *Kimber No 2* concerning whether she in fact owed any money at the time that a default judgment was entered against her. She also referred to the *Strata Schemes Management Act 2015* (NSW) and what she considered to be unauthorised spend by the Owners Corporation on legal costs.

# consideration

1. Ms Kimber’s application concerned the operation of Order 2 made in *Kimber No 2*. She required further time to put in place a payment plan and was concerned that without further time she would commit an act of bankruptcy.
2. Pursuant to r 36.08 of the *Federal Court Rules* *2011* (Cth) an appellant may apply to the Court for an order to stay the execution of a proceeding until their appeal is heard and determined. In order to grant a stay the Court must be satisfied that there is a reason or an appropriate case to warrant the exercise of discretion in the appellant’s favour: see *Powerflex Services Pty Ltd v Data Access Corp* (1996) 67 FCR 65 at 66. The Civil Procedure Actand s 78B of the Judiciary Acthave no role to play.
3. I was not satisfied that Ms Kimber had demonstrated that there was a reason or that this was an appropriate case in which the Court would exercise its discretion in her favour for a number of reasons.
4. First, the matter was not an appropriate one for a grant of a stay. That is a stay of Order 2 made in *Kimber No 2* would not achieve Ms Kimber’s desired outcome. Indeed it may have had the somewhat strange outcome of putting Ms Kimber in the position of having until 4 May 2016 to comply with the Bankruptcy Notice and thus having committed an act of bankruptcy at a much earlier date.
5. Secondly, this is not a matter where, in the absence of a stay, the appeal will be rendered nugatory. Without wishing to foreclose on what may in fact occur, there are several possible outcomes of an appeal including that Ms Kimber may be entirely successful on appeal or, if not successful, that she may nonetheless be able to seek a further order extending time for compliance with the Bankruptcy Notice from a Full Court of this Court.
6. Thirdly, while the commission of an act of bankruptcy is a serious matter and one which understandably Ms Kimber wishes to avoid, she has not provided the Court with a sufficient reason as to why the Court would exercise its discretion and order a stay, beyond the assertion that she now, two years after the service of the Bankruptcy Notice, wishes to reach a settlement with the Owners Corporation.
7. Fourthly, while of lower order, it was also relevant that the solicitor for the Owners Corporation informed the Court that, although he had no instructions and gave no undertaking, he would strongly advise his client not to file a creditor’s petition in circumstances where Ms Kimber had filed a notice of appeal seeking to appeal from the orders made in *Kimber No 2*.
8. In the alternative Ms Kimber seeks a further extension of time within which to comply with the Bankruptcy Notice. The power to extend time to comply with a bankruptcy notice is found in ss 41(6A) and 41(7) of the Act. As submitted by the Owners Corporation, at the time of Ms Kimber’s application, the preconditions for the exercise of the power to extend time under s 41(6A) or for the deemed extension under s 41(7) to operate simply did not exist. They could not given that Ms Kimber’s application for a review of the registrar’s orders had been dealt with by the judgment in *Kimber No 2*. At the time of Ms Kimber’s application for a further extension of time:
9. no proceeding had been instituted by Ms Kimber to set aside the judgment or order in respect of which the Bankruptcy Notice was issued as required by s 41(6A)(a) of the Act;
10. there was no extant application to set aside the Bankruptcy Notice before the Court as required by s 41(6A)(b) of the Act; and
11. there was no extant application before the Court pursuant to s 41(7) for an order setting aside the Bankruptcy Notice on the basis that Ms Kimber had a counter-claim, set-off or cross demand in relation to which the Court had not made a determination.

# conclusion

1. For those reasons I dismissed Ms Kimber’s application and ordered that the costs of the application be the Owners Corporation’s costs in the cause.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic. |

Associate:

Dated: 19 April 2018