

**COURT OF APPEAL
OF NEW ZEALAND**

**CA: 2003-193/03
CIV: 2003-485-2225
CIV 2003-485 -893**

UNDER THE

Judicature Act 1908

IN THE MATTER OF

the will of JESSIE JOY CRESER

AND

IN THE MATTER OF

the bankruptcy of **RICHARD JOHN
CRESER** of 4 Rothwell Street, Titahi
Bay, Porirua, Facilities Manager

BETWEEN

RICHARD JOHN CRESER of 4
Rothwell Street, Titahi Bay, Porirua,
Facilities Manager

Applicant

AND

JANINE MICHELLE CRESER of 12
Tautehihi Road Kohu Kohu,
Northland
First respondent

AND

**JANINE MICHELLE CRESER AND
MARION NGAIRE CRESER** as
executors of the estate of **JESSIE
JOY CRESER**

Second respondent

AND TO

THE OFFICIAL ASSIGNEE (being a
pursuant to **S 119(2)** Insolvency
Act

**Interlocutory application to review decision of Registrar and to
amend Notice of Result in CA 193/03**

Dated: 14 August 2015

This document is filed by the applicant in person

Background

1. This application seeks to review a decision a Court of Appeal Registrar Maryanne McKennie, which on 12 August 2015 refused to accept or act upon a notice of a fraud upon the Court.
2. The Registrar has refused to take action by her own initiative to refer an allegation of criminal conduct by an officer of the Court, Roger Chapman to the New Zealand Police.
3. In October 2003, the applicant was served with a Bankruptcy Notice after two Court decisions awarded costs against him in favour of his late mother's estate. **Annex (a)**
4. The first order for costs followed a decision of the High Court in CIV 2003-485-893, which at paragraph 5 confirmed the first respondent, Janine Michelle Creser, was acting in these proceedings in her capacity as an executor of the estate.
5. The second order for costs followed a decision in the Court of Appeal in CA 193-03. The decision and intitulment on the Court of Appeal order dated 8 October 2003 unequivocally recorded who the parties were and awarded the costs to Janine Michelle Creser and another as executors nominated in the will of Jessie Joy Creser. **Annex (b)**
6. On 14 October 2003 a Notice of Result in CA 193 -03 was prepared and filed by Roger Chapman from Johnston Lawrence. The Registrar then sealed Mr Chapman's notice without ensuring that it mirrored the actual decision of the court. **Annex (c)**
7. Mr Chapman's order differed from the Court decision by claiming the Court had awarded the costs to Janine Creser personally instead of the estate as originally ordered by the Court..

8. The Official Assignee and the High Court Registrar then accepted the Bankruptcy Notice and proof of debt awarding the to the first respondent in her personal capacity.

Court Costs

9. The falsified notice resulted in the applicants bankruptcy over a costs debt not legally owed to the party claiming the debt, consequently this materially affected the outcome of all the proceedings referred to in the intitulment of this application.
10. The fraudulent notice of the costs result cited in this proceeding has only just been disclosed by the Court of Appeal.
11. Rule 53 of the Court of Appeal Rules 2005, confirm that liability of parties for Court costs is joint and several for each of two or more parties, unless the Court otherwise directs.
12. This rule should also be considered when costs are awarded in favour of two or more parties, as was the case in the underlying proceedings.

Registrar's Decision/Jurisdiction

13. The decision of the registrar on 12 August 2015, reaffirmed her claim there was no mechanism under the Court of Appeal Rules 2005 to consider the defective notice.
14. However, Rule 8 of the above rules provides that an accidental slip or omission leading to a notice of judgement that does not reflect the actual judgement may be corrected by the registrar.

Correction of accidental slip or omission

- *(1)This rule applies if—*

- *(a) any judgment or order or the reasons for any judgment or order contain a clerical mistake or an error arising from an accidental slip or omission (whether the mistake, error, slip, or omission was made by an officer of the Court or not); or*
 - *(b) any judgment or order is drawn up in a way that does not express what was actually decided and intended.*
- (2) The Court or the Registrar may correct the judgment or order or the reasons for the judgment or order on—*
- *(a) the Court's or Registrar's own initiative; or*
 - *(b) an interlocutory application made for that purpose.*
- (3) The Registrar may correct the judgment or order or the reasons for the judgment or order in accordance with subclause (2) only if the judgment or order in question was made by the Registrar.*

15. Although an allegation has been made against the author of the notice for fraud upon the Court, this notice is not considered by the applicant as an accidental slip or omission by Mr Chapman.
16. However, the Registrar has been invited to consider the notice and remedy the defect, on the basis that it was within her jurisdiction to correct the notice.
17. The applicant is now saying the Registrar is party to the fraud, because it could be deemed by the registry as an omission and the slip rule applied.
18. It has been brought to the Registrars attention that the registry omitted to ensure the notice followed the decision and orders of the Court to the letter.
19. The Registrar has now refused to make any further comment or invoke her jurisdiction to correct the notice, which mimics the behaviour of an Ostrich burying its head in the sand to avoid conflict a conflict of interest.

Conflict of Interest

20. The new evidence the Notice of Judgment is materially different from the Court's decision, suggests the decision maker was negligent in sealing the fraudulent Court of Appeal orders.
21. The Registrars refusal to properly deal with an allegation of fraud upon the Court, now identifies the registrar of the Court of Appeal as party to these proceedings and complicit for not bringing the fraud to the attention of the appropriate authorities.
22. It is therefore a breach of the rules of fair play and natural justice for the decision maker to be in a position to deny a remedy which may consider the effect of the registry's own negligence on the outcome of proceedings.

Fraud upon the Court

23. Actions for fraud upon the court are so rare that it is difficult to provide a legal precedent to support the concept. It is acknowledged that fraud upon the court challenges one principle upon which our judicial system is based: the finality of a judgment or res judicata.
24. In *Lazurus Estates v Beazley* CA 1956, Lord Denning said: 'No Court in this land will allow a person to keep an advantage he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.'
25. Fraud upon the Court is where a material misrepresentation has been made to the court, or by the court itself. The main requirement is that the impartiality of the court has been so disrupted that it can't perform its tasks without bias or prejudice.

26. A fraud on the court only involves court officials or officers of the court and the fraud must be directed at the “judicial machinery”.
27. Fraud on the court involves wilful conduct that is deceitful and obstructionist, which injects false information into the judicial process and undermines the integrity of a proceeding.
28. Essentially, fraud upon the court requires a showing that a party has set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability to impartially adjudicate a matter because of improper conduct and misrepresentation by an officer of the Court.

Standard of Proof

29. In order to meet the necessarily demanding standard for proof of fraud upon the court there must be: (a) an intentional fraud; (b) by an officer of the court; (c) which is directed at the court itself; and (d) in fact deceives the court.
30. The alteration of the Court record was clearly intentional and not a simple mistake or error. The misrepresentation that the costs were awarded personally was continued throughout proceedings, with the respondent’s law firm of Johnston Lawrence maintaining to this day that the costs were ordered by the court to be paid to their client in her personal capacity. **Appendix (d)**
31. The effect of the falsified order was transferred from the Appeal Court after a claim for costs was presented to the High Court in the form of a Bankruptcy Notice, which again misrepresented that the costs were owed to the first respondent personally.
32. At all material times Mr Roger Chapman was an officer of the Court responsible for the accuracy of any orders submitted to the court for sealing. He had an absolute duty to comply with

directions from the court by ensuring orders submitted for sealing were in accordance with those directions

Motive for fraud on the Court

33. The bankruptcy was clearly unnecessary to recover a relatively small debt owed to a mutual estate; it was a clinical legal manoeuvre which allowed Mr Chapman to effectively thwart part (2) of the decision in CIV 2003-485-893, thereby avoiding the solemn probate proceedings contemplated by his Honour Judge Gendall.
34. Reference to the final paragraph of the Court of Appeal decision in CA 193/03 noted the serious issues raised in the hearing before them regarding probate were of sufficient concern for the Court to reduce the amount of costs they would usually have imposed against an unsuccessful party.
35. In addition to Mr Chapman's actions, those of the executors were morally reprehensible. The test for this would consider whether or not the applicant's mother if still alive would have instructed her estate to effectively sue itself to recover a relatively small debt.
36. This point is particularly relevant when you consider the testatrix changed her will after she was led to believe the applicant had numerous creditors and needed a "protective trust" to prevent the applicant's bequest being lost in bankruptcy.
37. Clearly the respondents were not concerned that by taking bankruptcy proceedings, rather than simply retaining the debt, they were jeopardising the entire corpus of the trust fund.
38. A letter from the respondent's solicitor Roger Chapman, which in addition to presenting the demand for payment on behalf of the estate, also acknowledged the ability of the respondent to take

her costs or retain the debt from the appellant's share of the estate. **Appendix (e)**

39. This matter is clearly a case where a common law debt recovery procedure has been used to trump an overarching equitable proceeding involving solemn probate of a will.
40. Section 99 of the Judicature Act 1908 provides that - *Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter the rules of equity shall prevail.*

Crimes Act

41. The registrar was referred to the Crimes Act 1961. which describes the elements of document fraud considered to be criminal conduct as follows-

256 Forgery

(1) Everyone is liable to imprisonment for a term not exceeding 10 years who makes a false document with the intention of using it to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration.

(2) Everyone is liable to imprisonment for a term not exceeding 3 years who makes a false document, knowing it to be false, with the intent that it in any way be used or acted upon, whether in New Zealand or elsewhere, as genuine.

(3) Forgery is complete as soon as the document is made with the intent described in subsection (1) or with the knowledge and intent described in subsection (2).

(4) Forgery is complete even though the false document may be incomplete, or may not purport to be such a document as would be binding or sufficient in law, if it is so made and is such as to indicate

that it was intended to be acted upon as genuine.

113 Fabricating evidence

Everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to mislead any tribunal holding any judicial proceeding to which section 108 applies, fabricates evidence by any means other than perjury.

228 Dishonestly taking or using document

Everyone is liable to imprisonment for a term not exceeding 7 years who, with intent to obtain any property, service, pecuniary advantage, or valuable consideration,—

(a) dishonestly and without claim of right, takes or obtains any document; or

(b) dishonestly and without claim of right, uses or attempts to use any document.

Complicity

- 28 Complicity in criminal law refers to when someone is legally accountable, or liable for a criminal offense, based upon the behavior of another. Criminal complicity may arise if it is agreed that the Registrar had a legal duty to prevent the commission of the offense, a person fails to make an effort he is legally required to make.
- 29 Section 66 of the Crimes Act 1961 provides that everyone is a party to and guilty of an offence who—actually commits the offence; or does or omits an act for the purpose of aiding any person to commit the offence.

- 30 The New Zealand law on parties to offences stems from the statutory reformulation made in the Stephen Code of the old complex rules of complicity in the second degree and of being an accessory.
- 31 Section 66 is an important provision as it applies to all offences (unless expressly or impliedly excluded) and it treats all relevant participants as parties to the offence, holding them equally liable to the penalties for the substantive offence.
- 32 Section 66 gives the various ways in which a person can be liable as a party to an offence. Adams on Criminal Law breaks s 66(1) the primary provision into two separate categories.
- 33 Under 66(1)(a) a person is a party to and guilty of an offence if they actually commit the offence (referred to as the principal party) and secondly under s 66(1)(b)-(d) a person is a party if they help or encourage the person who commits the offence (commonly referred to as a secondary party).
- 34 13 Subsection (2) provides an additional basis for liability. It is intended for situations that differ from those contemplated in s 66(1)(b)-(d). As Adams on Criminal Law points out “section 66(1)(b)-(d) deals with offences that are intended. Liability arises where one person intentionally helps, encourages or procures another to commit the offence that is committed.

.Notice of Decision

- 35 The decision of the Court and the Notice of Decision presented for sealing on 8 October 2003 are different in respect of the intitlment.

- 36 The decision of the Court records the costs were awarded to the respondents in their capacity as executors of the estate. The decision and order of the Court both refers to the parties as **Janine Michelle Creser and Anor as executors nominated in the will of Jesse Joy Creser.**
- 37 The Notice of Decision prepared by Mr Chapman ,claims the costs on behalf of Janine Creser without any reference to the parties clearly identified by the Court as the executors of the estate in two separate judgments.
- 38 Mr Chapman then filed a bankruptcy notice fraudulently claiming the debt ordered by the Court as payable to both executors on behalf of the estate, was owed to Janine Creser personally.
- 39 Mr Chapman has clearly misrepresented the debt as being owed to Janine in her personal capacity rather than to the estate as envisaged by the Court.
- 40 The executors position is confirmed in paragraph 2 of the attached email from Johnston Lawrence dated 25 May 2015; ***"the debt was not a debt to the estate, the only debt comprised Court costs owed by Mr Creser to our client personally, our client's entitlement arose by order of the Court."*** Annex(d)
- 41 The documents from the Court file, in particular the defective Notice of Decision in CA 193/03, indicate Mr Chapman has misrepresented the Court's decision and orders which have materially affected the outcome of numerous Court decisions.

Fraudulent Bankruptcy Notice

42 The Bankruptcy Notice in **CIV: 2003-485-2225** was also invalid for the following reasons:

- I. The Bankruptcy Notice was for more than one final judgement being a final judgement amount of \$5,843.50 obtained by the second respondent in the High Court at Wellington on 2 September 2003 and also a final judgement for \$2,000.00 obtained by the second respondent in the Court of Appeal on 8 October 2003.
- II. The notice was issued without formal proof attached by way of a judgment, or alternatively a sealed order of the Court. Part 24.8 (3) of the High Court Rules prescribes that ***“A bankruptcy notice must be in form B 2 and a certified copy of the judgment or order on which the bankruptcy notice is based must be attached to it.”***
- III. Both judgements awarded the costs to the estate, therefore for the notice to be valid, it should have cited **Janine Michelle Creser** and **Marion Ngaire Creser** as executors of the estate and been presented after respondents obtained probate.
- IV. The Bankruptcy Notice was silent as to any security held by the Judgment Creditor over the applicant. A security of some \$20,000.00 was provided for the probate proceedings, proving the Court of Appeal, the respondents and their solicitors had accepted the appellant had an equitable interest in the estate.

- V. The sealed Notice of Judgement cited as a proof of debt to obtain the Bankruptcy Notice was incorrect and resulted from a fraud upon the Court
- VI. As a result of the above defects in the notice and the fraud upon the Court, the applicant cannot have performed an act of bankruptcy as defined by the Insolvency Act.

The applicant seeks;

- (a) **a declaration** that the Notice of Judgment issued by Roger Chapman was invalid because it failed to follow the decision of the Court Court
- (b) **a direction** to the Registrar to refer Mr Chapman's conduct to the New Zealand Police and Wellington District Law Society.
- (c) **a direction** to remove, M McKennie as case manager.
- (d) **an order** that the bankruptcy Notice arising from the defective Notice of Judgement is invalid.
- (e) **any other** such order or declaration as the Court sees fit.

DATED AT WELLINGTON this 14th day of July 2015

RJ Creser