**IN THE HIGH COURT OF NEW ZEALAND**
**HAMILTON REGISTRY**

**CIV 2011-470-842**

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| BETWEEN | THE OFFICIAL ASSIGNEE |
| AND | LEWTYN MICHAEL SCOTT |

Hearing: 20, 25 and 28 October 2011

Appearances: J N Foster (on 20 October) and P V Cornege (on 25 and 28 October) for Official Assignee
M D Talbot for Mr Scott on 25 October (granted leave to withdraw)
Mr Scott in person on 20, 25 and 28 October

Judgment: 3 November 2011

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## JUDGMENT OF ALLAN J

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*In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.30 pm on Thursday 3 November 2011*

*Solicitors/parties :*
*Crown Solicitor Hamilton*
*McCaw Lewis Chapman, Hamilton, Michael@mlc.co.nz*
*L M Scott, 5A Pillans Rd, Otumoetai, Tauranga*

## Introduction

[1] Mr Scott, a bankrupt, was summoned for examination by the Official Assignee (the Assignee) at Hamilton. After one agreed adjournment, Mr Scott failed to appear for examination on two successive occasions. The Official Assignee applied to this court for the issue of a warrant to arrest Mr Scott.[1] Having been arrested, Mr Scott was brought before the court on 20 October. In successive hearings on 20, 25 and 28 October, he claimed that the summons issued to him by the Assignee was a nullity for procedural reasons, and that his right to legal advice was not being observed.

[2] This judgment deals with the following issues namely whether:

(a) the summons to attend for examination served on Mr Scott is so fundamentally flawed as to be ineffective;

(b) the summons sufficiently advised him of his rights pursuant to s 23 of the New Zealand Bill of Rights Act 1990 (NZBORA), and in particular his right to consult and instruct a lawyer without delay (and more specifically his right to obtain free legal advice or legal aid);

(c) he is entitled to free legal representation in respect of hearings conducted in this court, arising out of the issue of the Assignee's summons for examination.

## Preliminary matters

[3] Mr Scott was adjudicated bankrupt on 22 July 2011. He was summoned to appear for examination by the Assignee at Hamilton on 22 August 2011. He did not attend. The examination was adjourned to 24 August 2011; he did not attend then either.

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[1] Insolvency Act 2006,. s 166.

[4] There was a further adjournment to 2 September 2011, Mr Scott being advised that an application for a warrant to arrest would be made if he did not attend the examination on that date. But he did not attend then either.

[5] Mr Scott's explanation to the Assignee was that he had not attended because he wished to take legal advice, and that he had applied for legal aid. The Assignee's position was that Mr Scott was entitled to legal advice,[2] and to make an application for legal aid, which would need to be determined prior to the examination, provided that the application was made and advanced in a timely manner.

[6] The Assignee entertained some doubt as to whether Mr Scott was in a position to qualify for legal aid, being aware that Mr Scott had received a sum of about $470,000 from a deceased estate in December 2010, and believing that a significant portion of that sum remained unaccounted for. Moreover, inquiries having been made, the Assignee ascertained from the Department of Justice that there had been no application for legal aid by Mr Scott in respect of the examination. The Assignee decided to apply for a warrant, which was granted by Peters J on 14 October 2011, without notice to Mr Scott.

[7] Following his arrest, he was brought before me on 20 October 2011. I issued a minute recording what transpired on that day. The minute notes that:

(a) Mr Scott informed the court that he consulted Mr Talbot of counsel, and that Mr Talbot was already acting for him in respect of certain matters, including those arising out of his arrest and the forthcoming examination;

(b) he also advised the court that Mr Talbot had lodged an application for legal aid in respect of matters including the examination application (apparently only on 19 October), and that he expected Mr Talbot to be in court on 20 October, he having spoken to him the previous day;

(c) Mr Talbot did not appear on 20 October.

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[2] Insolvency Act 2006, s 186.

(d) Ms Foster for the Assignee advised the court that she had spoken to Mr Talbot herself. He was on leave. He gave no indication to her that he intended to appear on Mr Scott's behalf on 20 October;

(e) the Assignee's application for examination would be adjourned for hearing in this court on Tuesday 25 October 2011 at 10 am, and that Mr Scott would be released on bail on terms set out in the minute;

(f) it would be highly desirable for Mr Talbot to be in court on 25 October;

(g) Mr Scott considered that he had been put in an impossible position, in that he had been given only a very short time to prepare for the hearing, and was currently without legal assistance. He argued that under the NZBORA he was entitled to legal advice before being required to answer questions on oath. As to that, I pointed out to Mr Scott that he did have access to legal advice, in that he had consulted Mr Talbot on the matter. The complete answer to his complaint about insufficient preparation time was that he was originally to be examined in mid-August. Accordingly, he had had two months within which to prepare for an examination hearing.

[8] On 25 October, both Mr Talbot and Mr Scott appeared. Mr Talbot advised the court that he did have instructions from Mr Scott, but only in respect of appeals against the order of adjudication and the judgment on which the adjudication was based, and an application for a stay of the order. He had applied for legal aid on those matters on behalf of Mr Scott about ten days earlier. Mr Talbot had also provided advice to Mr Scott while he was in custody, and had endeavoured to arrange for him to see a lawyer in Rotorua while he was in custody. Mr Scott had advised Mr Talbot only very recently of the fixture for 25 October, and he attended as a matter of courtesy. He had no instructions to appear for Mr Scott on the examination application, or to argue any issues arising out of Mr Scott's complaint that he lacked legal advice in this court. Mr Talbot's indication was that if legal aid was not available for the proposed examination and related appearances in this court,

he may not be able to accept instructions from Mr Scott. As yet, he did not regard himself as acting for Mr Scott in respect of the examination or any other issues attendant upon it.

[9] At that point, Mr Talbot sought leave to withdraw from the hearing. I granted leave, he having an urgent commitment in another court.

[10] Mr Scott then orally advanced several arguments which he claimed stood in the way of the Assignee's right to require an examination. He claimed that an endorsement on the summons inaccurately described his right to legal advice in respect of the examination and that the summons was null and void. He contended that he had an absolute right to free legal advice and assistance in respect of the examination and all appearances in this court, and that until he got both the court ought not to proceed further. He again complained about the lack of time available to him within which to prepare an argument, either in respect of the present hearings or for the examination itself.

[11] Mr Scott specifically asked me to record in this judgment, as I do, his complaint about the unfairness of the timetable directions given by the court. He advised the court that, contrary to Mr Talbot's advice earlier in the day, the legal application submitted to the legal aid authorities did cover the examination as well as other proceedings related to the adjudication and to the underlying judgment upon which the adjudication was based. Regrettably he did not raise the point while Mr Talbot was in court.

[12] I directed that the examination application be adjourned until 11.45 am on Friday 28 October 2011. That hearing was not scheduled for the examination itself. Rather, I intended that the court would hear argument from counsel for the Assignee and for Mr Scott as to the legal and procedural impediments which Mr Scott had identified. I asked Mr Cornegé to prepare a written synopsis of argument and e-mail it to Mr Scott, so that the latter would be on notice of the detail of the Assignee's argument.

[13] Again, Mr Scott was released on bail.

[14] When the matter was called at 11.45 am on Friday 28 October 2011, Mr Scott appeared in person. He said that Mr Talbot was not available and that he had not been able to speak to him since 25 October. He claimed that the hearing ought not to proceed and that there should be a further adjournment. He rested his adjournment application on several grounds. The first was his advice that he had filed, or was about to file, a number of appeals to the Court of Appeal. As I understood it, these appeals were against:

(a) the underlying judgment which gave rise to the order for adjudication;

(b) the order for adjudication itself;

(c) the decision of Peters J to issue the warrant;

(d) two decisions of mine, said to have been given on 20 October 2011.

[15] It is appropriate to amplify somewhat the circumstances in which Mr Scott says that he is entitled to appeal against the directions I gave on 20 October.

[16] He complains first that I declined to permit him to see a duty solicitor on that date. He is correct on that point. I declined to do so because there was no duty solicitor available in the High Court. The role of duty solicitors is to facilitate the conduct of business in police arrest courts, and to assist clients appearing in that court. I consider that Mr Scott did not require duty solicitor assistance because, as I already advised him, I intended to release him on bail on 20 October, there being no intention to make any substantive orders on that day or to continue his remand in custody.

[17] The other ground of intended appeal was my alleged refusal to make an order directing the Assignee to supply to Mr Scott documents related to the summons and to the arrest.

[18] While it is correct that Mr Scott expressed a desire to have copies of those documents, I made no order requiring the Assignee to supply them, nor did Mr Scott seek an order. In the usual way, Ms Foster who appeared for the Crown, indicated to

the court that she would ensure that all documents reasonably required by Mr Scott would be copied to him.

[19] By reason of the existence of these pending appeals, or proposed appeals, Mr Scott claimed that the examination ought simply be adjourned until such time as all of the appeals had been determined. I declined to accede to that request. In the ordinary course of things the appeals will not be determined for a period of many months. It is contrary to public policy that an examination of a bankrupt be deferred for any substantial period, especially where, as here, the Assignee entertains certain concerns about aspects of Mr Scott's financial affairs.

[20] Mr Scott then submitted that I ought, in effect, to recuse myself, and that the hearing ought to be adjourned on that ground alone. His application for recusal was based upon the fact that he was intending to appeal against certain decisions of mine allegedly made during the hearing of 20 October. He suggested that I had a "conflict of interest" and that I was no longer able to bring an objective mind to the case because I would be prejudiced against him, upon receiving advice that he proposed to appeal.

[21] I explained to Mr Scott that judges routinely deal with proceedings in which there had been a prior indication of an intention to appeal against a previous ruling, and that the circumstances he outlined provided no basis for me to step aside.

[22] Then Mr Scott demanded that he be permitted to consult a duty solicitor before the matter proceeded any further on 28 October. Given the limited scope of the matters for argument on that day, I inquired of Mr Scott the issues upon which he required advice. He told me "it was none of my business". There being no proper basis for a direction that Mr Scott be entitled to access to a duty solicitor, I declined to direct that course. He thereupon refused to address the matters raised in Mr Cornegé's synopsis of argument, although the synopsis addressed matters which Mr Scott himself had raised orally on 25 October.

[23] At that point I indicated to Mr Cornegé and to Mr Scott that I would reserve my decision and issue a judgment during the following week. Mr Scott contented

himself with handing up to the court a 13 page print out from the Ministry of Justice website in which extensive coverage is devoted to s 23 of the NZBORA. He asked that I take that material into account. I have duly done so. I have read the whole of the material, but have devoted particular attention to the sections of the material relating to s 23(1)(b), concerning the right to counsel and to instruct a lawyer without delay.

[24] Against that somewhat convoluted background I now turn my attention to the issues for determination in this judgment.

**Was the summons defective?**

[25] The memorandum attached to the summons and forming part of it read, as relevant, as follows:

> **Memorandum**
>
> **Advice**
>
> Although it is not essential for you to consult and instruct a solicitor for the purposes of this Summons, you are recommended to consult and instruct a solicitor in this matter without delay. [*Authority: section 23(1)(b) New Zealand Bill of Rights Act 1990.*
>
> Your solicitor is entitled to be present with you during the Summons. [*Authority: section 186 Insolvency Act 2006*]
>
> **Detention**
>
> The Official Assignee in the bankruptcy of the estate of Lewtyn Michael Scott informs you that the reason for your detention from the time the summons commences is:
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> - You are the bankrupt/ you are the summonsed person
>
> (*Authority: section 23(1)(a) New Zealand Bill of Rights Act 1990 and s 165 Insolvency Act 2006*).

[26] The memorandum implies that the person upon whom the notice is served is detained from the time the summons commences.

[27] Mr Cornegé accepts that the summons is clumsily worded, given that any detention runs from the commencement of the examination, and not from the commencement of the summons.[3]

[28] So the scope of the detention is, if anything, overstated, in that Mr Scott is advised in the memorandum that he is entitled to have his solicitor with him "…during the summons". Read with the passage which refers to the commencement of the "detention", this suggests that Mr Scott was entitled to have his lawyer with him at all times following the issue of the summons. Although it incorrectly defines the period of the detention, the notice was incapable of causing Mr Scott any prejudice, and was plainly intended to carry into effect the procedure suggested in *Official Assignee v Murphy*. There, Thomas J held that a summons under the insolvency legislation ought to advise the person summoned of the right to legal advice throughout any period of detention.

[29] There is not the slightest suggestion of actual prejudice in this case. I do not accept that the memorandum attached to the summons deprived it of legal effect, simply because it somewhat overstated the period during which Mr Scott could be said to be legally detained. In *Murphy*,Thomas J held that the period of detention ran from the commencement to the conclusion of the examination itself. That in my view is plainly right.

**Right to legal advice for the examination**

[30] Mr Scott's right to legal advice prior to and during the examination is not in dispute.[4] However, he submits that he is entitled, not only to legal advice, but free legal advice. He further argues that the memorandum attached to the summons must explain that he has the right to free legal advice, and that the summons is fundamentally flawed because it omits to do so.

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[3] *Official Assignee v Murphy* [1993] 3 NZLR 62 (HC) at 69.
[4] Insolvency Act 2006, s 186.

[31] Pursuant to s 23(1)(b) of the NZBORA, the right of a person who is detained under any enactment is to consult and instruct a lawyer without delay and to be informed of that right. In *Murphy* Thomas J explained that:[5]

> The Assignee or officer conducting an examination under ss 68 or 262A is under an obligation to inform the person to be examined of the reason for his or her detention and to inform them of their right to consult and instruct a lawyer without delay.
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> It would, of course, obviously be desirable if this advice was conveyed in the summons itself, but prudence would also suggest that it be repeated "at the time of" the commencement of the examination so as to comply with the specific terms of s 23(1).

[32] In this case the memorandum attached to the summons complied with the law as outlined by Thomas J. Neither the summons nor the memorandum refers to Mr Scott having a right either to free legal advice, or to legal aid. In my opinion, it was not required to do so.

[33] Mr Scott refers to *R v Goodwin*,[6] in support of his contention that he is entitled to free legal advice, and that the memorandum attached to the summons ought to have notified him of that right. But *Goodwin* is of limited application here. It simply considers the notion of "detention" and there is nothing in it which touches upon an entitlement to free legal advice.

[34] Where a person is to be charged with, or is suspected of committing a criminal offence, the Chief Justice's Practice Note on police questioning is relevant. That Practice Note, issued on 16 July 2007, took effect on the date of commencement of s 30 of the Evidence Act 2006. It reflects previous practice in respect of the questioning of criminal suspects, and of particular importance for present purposes, it emphasises that a person who, while in custody is asked to answer police questions, has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer those questions. The police are bound to advise the person concerned of that right, and also that it may be exercised without charge under the Police Detention Legal Assistance Scheme. But such a caution is required only in cases where a person is in custody in the context of

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[5] *Murphy, fn3, a*t 71-72.
[6] *R v Goodwin* [1993] 2 NZLR 153 (CA).

alleged criminal offending. Likewise, the Police Detention Legal Assistance Scheme covers only persons who are to be questioned about criminal offending.

[35] None of that applies here where Mr Scott was not suspected of committing a criminal offence, and where his detention by the police occurred because a warrant for his arrest had been issued by a Judge of this court for his failure to attend on examination as a bankrupt. The role of the police was confined to arresting and detaining Mr Scott until he appeared in this court. Otherwise he was of no interest to them.

[36] The provisions of the Chief Justice's Practice Note accordingly did not apply.

[37] Moreover, even when holding a suspect in a criminal context, the police are not obliged to advise of the general availability of legal aid, as distinct from legal assistance in respect of the detention itself. In any event, it is difficult to see where free legal assistance could be sourced in that case. This is not a criminal case, so criminal legal aid is not available. Aside from civil legal aid, the only options would appear to be pro bono representation, or advice obtained through a community law centre or citizens' advice bureau. But Mr Scott was not entitled to anything like that as a matter of right, and the Assignee was under no obligation to advise him of those possible options.

[38] That leaves the possibility of civil legal aid. As appears below, I consider civil legal aid is not available to Mr Scott either. But even if it is, neither the summons nor its accompanying memorandum was defective in failing to refer to the possibility of civil legal aid. The examination should not be significantly deferred pending the outcome of Mr Scott's very recent application for civil legal aid.

[39] Although the Assignee accepts that a reasonable period ought to be permitted to elapse before the examination in order for Mr Scott to apply for civil legal aid, that assumes that the application is made with some celerity. It is now two months since the first examination fixture. Mr Scott told the court that he first approached Mr Talbot on 8 September. The civil legal aid application in respect of the pending examination was, it appears, lodged only a few days ago. The delay is unexplained.

In his e-mail to Ms King of the Assignee's office dated 22 August 2011, when seeking an adjournment, Mr Scott said that "legal aid is yet to be granted". It is plain that as early as 22 August he was aware that civil legal aid might be available, yet no application was made for more than two months. The Assignee cannot be expected to wait until Mr Scott gets around to making an application in his own time.

[40] Moreover, as signalled above, I consider that civil legal aid is not available to Mr Scott. Section 7 of the Legal Services Act 2011 provides that legal aid may be granted in respect of civil proceedings in the High Court. In my view, a summons for attendance at an examination of a bankrupt by the Assignee does not constitute a civil proceeding in this court for the purposes of the Legal Services Act. In *Gray v Legal Services Board*,[7] Potter J held that a public examination was not a proceeding, and for legal aid purposes did not therefore fall within the definition of "civil proceedings in the High Court".

[41] Subsequently in *Wickham v Malone*,[8] Master Faire (as he then was) noted that since *Gray*, Part XVI of the High Court Rules had been introduced. That Part brought bankruptcy notices under the High Court Rules. But I accept Mr Cornegé's submission that this is of little consequence in the present case. Potter J addressed the question of whether an examination falls within the definition of a "proceeding". Her reasoning applies equally in the present case. Indeed, there was perhaps a stronger argument in *Gray* than is available here, because the public examination in *Gray* was the precursor to a decision by the court as to whether a bankrupt should be discharged. The present case simply concerns an examination conducted by the Assignee, whose purpose is to gather information in order to assist in the administration of the bankrupt estate. But for Mr Scott's failure to comply with the summons and his subsequent arrest, this court would have had no involvement whatever in the examination.

[42] High Court Rule 1.3 defines the term "proceeding" as meaning "…any application to the court for the exercise of the civil jurisdiction of the court other

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[7] *Gray v Legal Services Board* (1998) 11 PRNZ 687 (HC) at 14.
[8] *Wickham v Malone* HC Hamilton CIV 2003-419-352, 27 November 2003.

than an interlocutory application". The matter presently before the court does not fall within that definition.

[43] I consider it unlikely that Mr Scott qualifies for civil legal aid because the examination before the Assignee is not a civil proceeding in this court. That being so, the summons could not possibly be faulted for failing to advise Mr Scott of a non-existent right to apply for civil legal aid.

**Legal assistance in this court**

[44] Mr Scott argued that he was entitled, as of right, to have a lawyer represent him free of charge for the purpose of presenting argument in this court on the matters determined in this judgment. I disagree. He was entitled to be represented by a lawyer and indeed, Mr Talbot did appear briefly on 25 October. The reasons for his subsequent non-involvement are not entirely clear.

[45] But Mr Scott was not entitled to free legal advice, for the same reasons as are outlined above.

**Result**

[46] For the foregoing reasons I hold that:

(a) although the memorandum attached to the summons was inaccurate in that it overstated Mr Scott's right to counsel, the inaccuracy was incapable of causing him any prejudice, and did not affect the validity of the summons;

(b) Mr Scott was not entitled to free legal assistance at the time of his arrest. He was of course entitled to legal advice which, on Mr Talbot's indication to the court, he got;

(c) Mr Scott was not entitled as of right to free legal representation on his appearances in this court.

**Next steps**

[47] This matter is to be called for mention in the Chambers List on Wednesday 9 November 2011 at 9 am. Mr Scott resides in Tauranga. Mr Cornegé agreed on 28 October that notwithstanding the fact that Mr Scott remains on bail, it will be in order for the mentions hearing to take place by way of teleconference. I indicated to Mr Scott that he could expect to be called between 9.15 am on 10 am on 9 November for that purpose. He is to make himself available. The Registrar will telephone him on his mobile: 021 679 269. Mr Scott has provided an alternative home landline 07 576 4887.

[48] I would expect that the Judge sitting in chambers on 9 November will be asked by counsel for the Assignee to allocate a fixture for the conduct of the examination before a Judge in terms of s 166 of the Insolvency Act 2006.

[49] In the meantime Mr Scott remains on bail on existing terms, save that on 28 October I added an additional condition, namely that he must not change his residence without first notifying the Assignee.

**C J Allan J**