Bryers v Official Assignee

High Court Auckland CIV-209-404-3694; [2014] NZHC 2920
14, 21 November 2014
Doogue AsJ.

Insolvency – Practice – Application for discharge by bankrupt – Whether bankrupt may file evidence in support of discharge application – Insolvency Act 2006, ss 177, 294 and 295.

Mr Bryers applied to discharge his bankruptcy under s 294 of the Insolvency Act 2006. The Official Assignee opposed the application under s 295, the issue being whether Mr Bryers had taken part in the management of an Australian company in contravention of s 149 of the Act. While the Act does not specify the procedure to be followed in respect of any application under s 294 or any opposition under s 295, in accordance with its usual practice the Official Assignee sought to rely solely on a report prepared pursuant to s 296.

Mr Bryers filed affidavits in support of his application for discharge including affidavits from third parties. The filing of these affidavits by Mr Bryers was opposed by the Official Assignee on the grounds that the statutory scheme did not contemplate evidence being adduced in this manner and that, if it became common practice, undue pressure would be placed on Official Assignee resources. The discharge application and examination hearing was adjourned to enable a ruling on this question to be obtained from the Court.

Held: 1 A bankrupt is entitled to fair treatment by the Courts, including the protections of natural justice. Where legislation has conferred on a body the power to make decisions affecting individuals, the Courts will imply procedural safeguards to ensure the attainment of fairness: s 27 of the New Zealand Bill of Rights Act 1990 (see [27], [28]).

Lloyd v McMahon [1987] AC 625 (HL) adopted.

2 Unless a bankrupt is permitted to supplement the information contained in the Official Assignee's report, there is a risk that the bankrupt will be denied the chance to put before the Court matters which support the application for discharge. The inherent nature of the process is likely to result in the bankrupt not being able to fairly put his or her side of the case adequately to the Court. It follows that the processes which are to be adopted must make proper provision for factual matters which the bankrupt wishes to advance to be placed before the Court hearing an application for discharge. That material must be taken into account by the Court when making its decision (see [38]).

3 The filing of affidavits is not procedurally inconsistent with carrying out the examination of the bankrupt. The compulsory examination of the bankrupt can still take place and the Act's requirements will not be defeated (see [44]).

4 Concerns about resources or costs cannot prejudice a bankrupt's right to procedural fairness. However the Court can be expected to exercise appropriate levels of control through the use of its case management powers (see [53]).

5 A bankrupt is entitled to put before the Court such relevant evidence as he chooses by way of affidavit. This is not confined to extracting from the Official Assignee's report the components for constructing a response to allegations of breach of obligations as an undischarged bankrupt under Part 3, Subpart 2 of the Act (see [56]).

Result: Direction that the bankrupt may file affidavits.

Observation: Part 18 of the High Court Rules regulates the commencement of certain kinds of proceedings, including cases "in which relief is claimed solely under" a number of enactments, including the Insolvency Act 2006. No other part seems to apply. Part 18 does not seem to be an apt part to apply to applications for discharge from bankruptcy, having regard to the requirement for a statement of claim and application for directions for service (see [54]).

Other cases mentioned in judgment

Anderson, Re HC Hamilton B213/89, 14 April 1992.
ASB Bank v Hogg [1993] 3 NZLR 156 (CA).
Attorney-General ex relatione Graham Maiden Ltd v Northcote Borough [1972] NZLR 510 (SC).
Brettingham-Moore v Municipality of St Leonards (1969) 121 CLR 509.
Cooper v Wandsworth Board of Works (1863) 14 CBNS 180, 143 ER 414 (Comm Pleas).
Errington v Minister of Health [1935] 1 KB 249 (CA).
Furnell v Whangarei High School [1973] AC 660 (PC).
Peters v Official Assignee [2014] NZHC 1755.
R v Deputy Industrial Injuries Commissioner, ex parte Moore [1965] 1 QB 456 (CA).
Whitelaw, Re HC Hamilton CIV-2004-419-1647, 10 September 2010.
Wiseman v Borneman [1971] AC 297 (HL).

Application

This was an application by a bankrupt for leave to file affidavits in support of an application to be discharged from bankruptcy pursuant to s. 294 of the Insolvency Act 2006.

A Nicholls for the bankrupt.
P Cornege for the Official Assignee.

Cur adv vult

ASSOCIATE JUDGE DOOGUE.

Background

[1] The bankrupt, Mark Ronald Bryers, made an application to be discharged from bankruptcy pursuant to s 294 of the Insolvency Act 2006 (the Act). The matter was set down for a three day hearing on an opposed basis to commence on 12 November 2014. However, shortly before the hearing, the bankrupt filed affidavits from four persons in support of his application.

[2] The Official Assignee through counsel, Mr Cornege, objected to the affidavits being filed. The fixture was not able to proceed on the scheduled day

because there would not have been time to deal with the additional affidavits. The fixture was therefore vacated and in its place a directions hearing was scheduled for 14 November 2014 to deal with the issue of whether the affidavits should or should not be read as evidence in the proceeding.

Counsel's submissions

[3] Counsel for the Official Assignee, Mr Cornege, submitted that the issue of whether a bankrupt can file material in support of his or her discharge has never been specifically addressed in the courts.

[4] The objection which was advanced by Mr Cornege as to the filing of the affidavits was essentially that the procedure which was established under the Act for hearing applications for discharge did not contemplate the filing of evidence by what Mr Cornege termed were "third parties". He submitted that the statutory framework did not intend public examinations to take the form of a typical civil trial/defended hearing.

[5] Mr Cornege accepted that on an application for discharge by a bankrupt and in circumstances where the court was hearing an objection by the Official Assignee to an automatic discharge,[1] couldn't find a footnote match it was indeed legitimate for the bankrupt to put material before the court which supported the bankrupt's position. Mr Cornege accepted that what might broadly be termed "the right to be heard" which is a recognised element of compliance with the rules of natural justice demanded such an outcome. However, he did not accept that this other material could include affidavit evidence from witnesses for the bankrupt. Exactly how the bankrupt would put material before the court, as the Official Assignee conceded he could, without filing affidavits was not explained.

[6] Mr Cornege stressed that the procedure that is followed under the current insolvency legislation, and which has been basically the same back to the 1908 equivalent legislation if not earlier, was that the procedures stipulated in the Act were inquisitorial in nature. He submitted that the type of proceeding which was envisaged involved the court carrying out an examination of the bankrupt alone under s 177.

[7] The other feature of the hearing contemplated by the Act was that the court should have before it the report of the Official Assignee. Mr Cornege also submitted, and Mr Nicholls did not dispute, that the Official Assignee did not have to appear herself for examination on the report and that he was entitled to include in the report material that may not constitute admissible evidence. Mr Cornege accepted that both sides had the entitlement to be represented by counsel and that submissions could be made by both sides.

[8] Mr Cornege stressed that the procedure prescribed by the Act did not envisage the Official Assignee filing any evidence[2] and symmetry of process required that neither should the bankrupt. He submitted that the objection/application procedures under the Act were not to be viewed as conventional civil litigation with both sides filing extensive evidence which the court would take into account. Further, should affidavits of third parties be

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1 Insolvency Act 2006, s 292.
2 Other than what is contained in the Official Assignee's report.

admitted, they would inevitably require cross-examination and the Official Assignee would be required to file affidavits in reply or a supplementary report. Mr Cornege argued that this would unduly expand the scope of public examinations.

[9] It appeared that the reason that Mr Cornege was taking this position arose from concern on his part about recent trends in cases before the court where large amounts of affidavit evidence had been admitted by the court. Mr Cornege instanced the case of *Peters v Official Assignee* which had ended up in a hearing of 11 days duration.[3] He did not criticise the Judge who presided at that hearing but rather submitted that had the point been argued before the evidence was admitted and the correct outcome obtained, such an undesirable result would have been avoided.

[10] Mr Cornege voiced concerns of the Official Assignee that there would not be sufficient resources available to the various Official Assignees to carry out their functions if objection/application hearings were to develop in this way. He noted that the outcome of objection/discharge application hearings was not uncommonly concerned with the court inquiring into public interest aspects of bankruptcies. He said, no doubt correctly, that that is one of the responsibilities of the Official Assignee.[4] Rarely would the Official Assignee's objection to a bankrupt's discharge result in the augmentation of the total amount available for distribution to the creditors by increasing the recoveries in the bankrupt's estate. In pursuing such matters, the Official Assignee was discharging an important public duty and any increase in the complexity of the proceedings and resulting increase in expenditure would have a dampening effect.

[11] Mr Cornege also drew attention to the fact that applications of the kind under consideration were procedurally of their own kind and had certain unique features. He agreed that the procedures which were specified for this type of hearing were relatively skeletal, being set out principally in the Act itself and with some supplementation by the High Court Rules. It was noted that while the bankrupt was required to apply to the Court where an order for discharge under s 294 is proposed, no indication is given of the procedure to be followed on such an application. He also said, and Mr Nicholls agreed, that while it could be argued that Part 18 of the High Court Rules applied in that the applications sought relief under the Act which was one of the enactments identified in that part of the Rules, that that procedure was not followed. In most cases where there was already a Court file in existence as a result of the proceedings for adjudication of the judgment debtor, the procedure followed was that the application for discharge was filed as an interlocutory application therein. Nor was there any procedure provided where the Official Assignee wished to object to a discharge pursuant to the provisions of s 295.

[12] He submitted that where the Official Assignee objects under s 295, he or she was likewise required to prepare a report,[5] and the Act does not direct or authorise the filing of affidavits. That, Mr Cornege considered, pointed to the fact that it was likely that the legislature intended that the same essential procedure should be followed where it was a case of the applicant making an application for discharge under s 294.

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3 *Peters v Official Assignee* [2014] NZHC 1755.
4 See *Re Anderson* HC Hamilton B213/89, 14 April 1992 at 28.
5 Under s 296.

[13] Mr Nicholls for the bankrupt agreed that this issue of whether affidavit evidence is permitted is not settled and therefore the practice varies. Mr Nicholls suggested that there is a discretion to be exercised on a case by case basis.

[14] Mr Nicholls submitted that it is clear that the interests of the bankrupt are matters which the court is required to take into account when considering either an application for discharge or an objection thereto. There was a burden on the bankrupt to place some material before the court in support of his or her application.[6] While the Act did not spell out the procedure, it must be assumed that the conventional means for putting evidence before the court by way of affidavit evidence, if necessary from persons other than the bankrupt, should be adopted. Mr Nicholls submitted that the position of the bankrupt was supported by certain provisions of the Evidence Act 2006 including s 7 which established that it was a fundamental principle that relevant evidence was admissible. However Mr Nicholls agreed with my suggestion in the course of argument that admissibility was a necessary, but not a sufficient, condition for establishing a right to file affidavit evidence in cases of this kind. The court also had to be satisfied that from a procedural aspect, that the filing of evidence on behalf of the bankrupt was a process that the Act and the Rules countenanced.

Issues

[15] The following are the issues which will need to be determined:

(a) What are the requirements of the law in relation to giving a bankrupt a fair hearing concerning matters relating to his discharge?

(b) Do the requirements of natural justice require that the bankrupt be given an additional opportunity to put evidence before the court, rather than being restricted to such opportunities he has to do so when he is being examined under s 177? Included in that issue is the question of whether the existing opportunities of a bankrupt to put forward material and evidence are sufficient to satisfy the requirements of natural justice.

(c) Would providing such a right to the bankrupt conflict with the objectives of the Insolvency Act and its provisions?

(d) Is there some other reason why the court ought to decline the application to permit the bankrupt to file affidavits?

(e) If the bankrupt ought to be able to supplement the evidence before the court, by what means ought that to be done?

The hearing which the Act contemplates

[16] It would appear that the procedure in the current legislation has been carried through from at least the 1908 legislation.[7] Under the earlier legislation the court was empowered in certain circumstances to examine the bankrupt upon the Assignee filing a statement to the effect that it was desirable for such to occur.[8] As well, where an application for discharge had been made and the Assignee filed a statement that it was desirable to examine the bankrupt or the creditors passed a resolution to the effect that it was desirable that the bankrupt should submit to a public examination then the application for discharge would

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6 *ASB Bank v Hogg* [1993] 3 NZLR 156 (CA).
7 Bankruptcy Act 1908.
8 Section 124.

be adjourned until the examination had been completed.[9] At the hearing of the application for discharge, the Court would examine the Assignee, and the Assignee or any creditor could oppose the bankrupt's application for an order for discharge and examine the bankrupt:[10]

> ...as to any matter or thing relating to his estate, and as to his transactions and conduct, and as to the alleged causes of his inability to pay his debts.

[17] Before the date appointed for the hearing of the application for discharge, the Assignee was required to file "a full report on the estate and the conduct of the bankrupt, and on all other matters with which it is desirable that the Court should she acquainted".[11]

[18] It is probably because the procedure envisages that the Official Assignee will make a report prior to any examination related to discharge that the Official Assignee or any creditor opposing discharge is not required by the High Court Rules to file evidence of grounds of opposition to the discharge application. The relevant High Court form simply requires that the creditor or the Official Assignee give notice of intention to oppose but not the grounds thereof.[12]

[19] There are no statutory requirements for any party objecting to a discharge to provide documents that are to be relied upon ahead of the hearing although in practice it is not unusual for the Official Assignee to produce documents as attachments to his or her report. There is no provision for anything in the nature of discovery being provided by either side or for statements of evidence to be provided.

[20] I agree that the statutory language of s 177 describes the part which the bankrupt plays in the process as being essentially a passive one. He is required to attend the examination and "may be examined" as to various matters. That is not to suggest that the question of whether he is examined or not is optional. That follows from s 177(2) which states that the bankrupt "must be examined on oath and must answer all questions that the court asks the bankrupt, or allows the bankrupt to be asked".

[21] By s 177(3), it is directed that the "following persons" may examine the bankrupt, that is the Assignee or the Assignee's counsel and any creditor or counsel for that creditor.

[22] Reading s 177(2) and (3) together suggests that the primary carriage of the examination will be with the court but that the court may permit the other two categories of person contemplated in s 177(3) to ask questions of the bankrupt.

[23] Section 177(4) states the following:

> (4) the bankrupt is not entitled to notice beforehand of who will ask the questions or what the question is will be.

[24] This however is little more than a restatement of the position that applies generally to persons who are to be cross-examined in the course of a court hearing. Although such persons are, if parties to the proceedings, undoubtedly entitled to know the nature of the case which is to be brought against them, the general position is that they are not entitled to advance notice of whether an

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9 Section 125.
10 Section 126(2).
11 Section 126(4).
12 HCR, sch 1, B8. Apparently the Rules do not prescribe a form for the application which a bankrupt makes for discharge.

opposing party is intending to cross-examine and what questions are to be asked. Further, the scheme of the Act is such that it seems that there would be no circumstances in which a bankrupt would be required to attend for examination where the Assignee has not filed beforehand a report under s 296. At least to the extent that the Official Assignee's report will identify the grounds upon which a discharge is opposed, the bankrupt before being examined will have been served a copy of that report at least five days before the hearing under r 24.38.

[25] On its own, the provisions of s 177 appear to be designed to create an inquisitorial process. Consistent with that approach the role of the bankrupt is restricted to the bankrupt attending the examination and answering questions which are put to him or her.

[26] It may be that when the progenitor of the 1967 and 2006 Acts was enacted in 1908, the desirability of making an express provision for the bankrupt to put forward his or her evidence was not obvious.

Requirement for a fair hearing

[27] A bankrupt like any other person has entitlements to fair treatment by the courts and is entitled to the protections of natural justice. Such rights are re-affirmed by s 27 of the New Zealand Bill of Rights Act 1990.

[28] It is trite that at common law, a party to a proceeding is entitled to a fair hearing. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards to ensure the attainment of fairness.[13]

[29] The requirements of fairness have been described in the following terms by Wade and Forsyth:[14]

> Where an oral hearing is given, it has been laid down that a tribunal must (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; (d) allow comment on the evidence and argument on the whole case.

[30] Included in the requirements of a fair hearing is the obligation on the part of the court to consider all relevant evidence which a party wishes to submit.[15]

[31] The starting point is the proposition contained in the judgment of Byles J in the well-known case of *Cooper v Wandsworth Board of Works* that:

> Although there are no positive words in the statute requiring that the parties shall be heard, yet the justice of the common law all will supply the omission of the legislature."[16]

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13 *Lloyd v McMahon* [1987] AC 625 (HL) at 703.

14 HWR Wade and CF Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014 at 437.

15 *R v Deputy Industrial Injuries Commissioner, ex parte Moore* [1965] 1 QB 456 (CA) at 490.

16 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 143 ER 414, (Comm Pleas) at 420.

Attention therefore turns to the question of whether the collection of statutory arrangements which are in place to govern the procedures to be followed in this case is a code which has been "carefully and deliberately drafted so as to prescribe procedure which is fair and appropriate?"[17]

[32] Guidance in this area is also available from the speech of Lord Reid in *Wiseman v Borneman*:[18]

> For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

[33] An example of where principles of natural justice were used to supplement statutory procedures is *Errington v Minister of Health*, where the court concluded that objectors at public enquiries should be given a fair opportunity to meet any adverse evidence, even if the statutory provisions do not cover the case expressly.[19]

[34] That there are limits to the extent that the Court can go to in supplementing statutorily enacted procedural provisions appears from *Furnell v Whangerei High Schools Board* which approved dicta in *Brettingham-Moore v Municipality of St Leonards* where Barwick CJ said:[20]

> [I]t is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views and to support them by evidentiary material.

[35] The matters which the Official Assignee is required to report on pursuant to s 296(2) include the manner in which the bankrupt has performed the duties imposed on him under the Act and his conduct both before and after the bankruptcy and any other matters that may assist the court in making its decision.

[36] A leading authority has stated that the relevant matters that the court should take into account when making a determination on whether a bankrupt should be discharged include the conduct of the bankrupt (a matter which, as already noted the Official Assignee is required to report on) and also the interests of the bankrupt.[21] There is an onus on the bankrupt to put some material before the court as noted at [14] above.

[37] If the bankrupt were not entitled to place evidence before the court in his own right, and if it is the case that neither party should expect to be able file affidavits, the sum total of the evidence before the court would be the contents of the report of the Official Assignee together with any additional factual

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17 *Furnell v Whangarei High School* [1973] AC 660 (PC) at 679 per Lord Morris.

18 *Furnell v Whangarei High School* [1973] AC 660(PC) at 679 per Lord Morris.

19 *Errington v Minister of Health* [1935] 1 KB 249 (CA) and see discussion in Wade and Forsyth, above n 14, at 424.

20 *Brettingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509 (HCA) at 524. See also *Halsbury 's Laws of England* (5th ed, 2010, online ed) vol 61 Judicial Review at 641: "Where a particular procedure is prescribed by statute and has been followed, but it is alleged that there has nonetheless been unfairness, the court must decide whether the statute is to be treated as a comprehensive code, or whether it is necessary to supplement the prescribed procedure."

21 *Re Whitelaw* HC Hamilton CIV-2004-419-1647, 10 September 2010 at [20].

matters that emerged in the course of an examination under s 177. If the fact-finding process of the court were to be limited in this way, the outcome from the point of view of the bankrupt would be self-evidently unfair and unreasonable.

[38] Plainly there is a good argument that unless a bankrupt is permitted to supplement the information contained in the Official Assignee's report, then there is a risk that the bankrupt will be denied the chance to put before the court matters which support his application for discharge. That is because the Official Assignee as opposing party may not view those matters as being relevant and may be unwilling to put them forward. Alternatively, the Official Assignee may simply not know of those matters. After all, matters such as the conduct of the bankrupt prior to the insolvency which are relevant to the issue of discharge will largely be within the sole knowledge of the bankrupt. Accordingly, the inherent nature of the process is likely to result in the bankrupt not being able to fairly put his or her side of the case adequately to the court. It follows that the processes which are to be adopted must make proper provision for factual matters which the bankrupt wishes to advance to be placed before the court that is hearing an application for discharge. That material must be taken into account by the court when making its decision.

Would an objective of the Act be defeated by allowing the bankrupt to provide evidence?

[39] Reference has ben made to *Wiseman v Borneman* (above) where Lord Reid restricted supplementation of the statutory procedure to cases where that would not frustrate the apparent purpose of the legislation.

[40] It is clear from the scheme of the statute that the requirement for an examination by the court of the bankrupt is a central feature of the discharge regime. It is understandable that the legislature should have taken the view that it is important for the court to be able to compel the bankrupt to come to court to take the oath or affirmation and then respond to questions which he or she must answer. Such a process means that unlike an adversarial tie hearing, the examination does not have as its starting point the adduction of evidence which the bankrupt wishes to put before the court and which he or she will generally have prepared in anticipation of the hearing. Indeed in many cases the bankrupt will not have any information that he or she wants to put before the court and would not want to appear before the court at all. Regardless of that position, the bankrupt must appear and effectively be cross-examined.

[41] The advantages of such an examination include that by these means the Assignee is able to extract information that cannot be obtained from any other source and which would not be forthcoming from the bankrupt on a voluntary basis.

[42] In order to properly assess the issue one has to envisage how the course of the hearing would be affected by affidavits being filed.

[43] The way in which hearings of this kind are usually conducted is that the bankrupt is required to go into the witness box and is then sworn or makes an affirmation to tell the truth. The bankrupt is generally examined by counsel for the Official Assignee. While the bankrupt has counsel present, conventionally

that counsel does not carry out anything in the nature of a re-examination at the conclusion of the examination. At the end of the examination, the record of the examination must be read over to, and signed by, the bankrupt.[22]

[44] In my view, filing affidavits is not procedurally inconsistent with also carrying out the examination of the bankrupt. The compulsory examination of the bankrupt can still take place. That requirement of the Act would not be defeated by permitting him/her to also file affidavit evidence.

[45] It is necessary to deal with a further point that Mr Cornege raised which was that the procedure established under the Act for hearing applications for discharge did not contemplate the filing of evidence by what Mr Cornege termed were "third parties" and any subsequent cross-examination. This is a different point from considering whether admitting additional evidence over and above what comes before the court through the Assignee's report would have the tendency to defeat the objective of the Act. I consider that the correct response is that if there is no objection to importing the new procedure on the grounds just discussed, the fact that what is proposed is an innovation does not carry the argument much further. It is necessary to remember that the courts will read statutes in a way which ensures that they continued to reflect matters such as contemporary social needs.

[46] In *Attorney-General ex relatione Graham Maiden Ltd v Northcote Borough* Wild CJ traced certain legislation back to 1900 and then commented that:[23]

> ... while times change and new sentiments and tastes emerge "the law shall be considered as always speaking". In my opinion, then, the statutory power must be read in the light of modern ideas.

[47] It can also be said that while hearings of this kind are identified in the Act as "examinations" that term does not fully describe the process. In addition the examination of the bankrupt, opposed discharge hearings invariably involve the bankrupt or counsel making submissions which the Official Assignee or counsel on his behalf responds to. The same process is followed in cases where the Official Assignee has filed an opposition to the statutory discharge provided for in s 292 of the Act. To that extent current practice already supplements the minimal procedural requirements of the Act and the High Court Rules.

[48] The legislation deals solely with the examination process. The statute was silent on the point of what other procedures, if any, it needed to make provision for to guide the court in the task of determining how it should exercise the discretion to discharge.

[49] The legislature when enacting the predecessor statutes as far back as the 19th century, may well have considered that the simple statutory provisions which they were considering would establish an adequate procedure for dealing with the typical type of insolvency with which Assignees were then concerned. For example, the complexities that are not uncommonly encountered when dealing with bankrupts who have been involved in large-scale corporate structures such as finance companies could not have been foreseen and, of

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22 Section 178.

23 *Attorney-General ex relatione Graham Maiden Ltd v Northcote Borough* [1972] NZLR 510 (SC) at 515.

course, developments such as cross-border insolvency arrangements were then far in the distance. As well, the sensitivity to individual rights under doctrines of natural justice may not have been as fully developed as it was to become during the 20th century.

[50] Whatever the true reasons for this occurrence, the practices and procedures of the court when dealing with applications for discharge and objections for discharge, although perhaps once adequate, cannot be viewed in that light today.

[51] To the extent that there is no current provision in the Act or the High Court Rules for advance notice of the evidence to be given by way of affidavit or statements of evidence, the procedure applicable to discharge applications and accompanying examinations is out of step with the orthodox requirements observed in most other civil litigation in the High court and elsewhere.

Resourcing Implication

[52] I deal next with the point that any decision making the procedure to be followed more complicated would place an additional burden on the scarce resources available to the Official Assignee. This does not appear to me to be a satisfactory response to the problem under discussion for the court to conclude that while it might be necessary in order to provide a fair hearing for there to be supplementation of the court procedures by allowing the bankrupt to file affidavits, that course unfortunately cannot be taken because it would adversely impact the Official Assignee's resources. The authorities earlier referred to make it clear that procedural fairness is not a requirement which the court is entitled to ignore.

[53] In any case, assuming that the concerns of the Official Assignee about cost- blowouts are correct, the court is not without the means to exert control. It is conventional that considering procedural questions, the court is required to keep in mind the need for proportionality of response. The objective of the High Court Rules themselves is to secure the just, speedy and inexpensive determination of any proceeding or interlocutory application. The court has adequate powers to maintain control. Evidence must be relevant; prolixity in documents is not permitted. Duplication and unnecessary proliferation of documents can be mitigated by suitable case management directions.

The High Court Rules

[54] One final observation that is made is that prior to the hearing I invited counsel to consider whether an application for discharge could be seen as falling within Part 18 of the High Court Rules. At the hearing there was a wider discussion about the application of the High Court Rules generally. So far as Part 18 was concerned, the proceedings in which that part of the Rules apply includes cases "in which relief is claimed solely under" a number of enactments, including the Insolvency Act 2006.[24] There did not seem to be any other part of the Rules which expressly applied. Part 18 does not seem to be an apt part to apply to applications for discharge from bankruptcy, having regard to the requirement for a statement of claim and application for directions for service.[25]

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24 HCR 18.1.
25 HCR 18.4.

[55] Counsel addressed how applications for discharge and objections to discharge fitted within the Rules. The picture that emerged was that there are some provisions under Part 24, subpart 9 which had limited application to the processes of applying for discharge and objecting to discharge. However, the issue in consideration was not one which provision had already been made for under the Rules.

Conclusion

[56] I conclude that in order for the bankrupt to be given a fair hearing he should have an entitlement to put before the court such relevant evidence as he chooses by way of affidavit. I do not consider that he should be confined to extracting from the Official Assignee's report the components for constructing his response to the allegations that he has been in breach of his obligations as an undischarged bankrupt under Part 3, Subpart 2 of the Act.

[57] I consider that the bankrupt in this case ought to be granted leave to file and serve affidavits relating to relevant matters in the litigation. The essential issue to be addressed is whether or not he has been taking part in the management of an Australian company contrary to s 149.

[58] Counsel should confer on a timetable for filing the evidence and also for giving any notices requiring deponents to be available for cross-examination.

Application granted.

Solicitors for Bryers: *Edwards Clark Dickie* (Auckland).

Reported by: Steve Keall, *Barrister*