IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2011-419-543/544
[2013] NZHC 1612

IN THE MATTER	an application for discharge from bankruptcy
BETWEEN	THOMAS SHERWOOD FULLER and SHEENA JOY FULLER Applicants
AND	OFFICIAL ASSIGNEE Respondent

Hearing: 27 June 2013

Counsel: RL Scott for applicants
PV Cornege for respondent

So 28 June 2013

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to discharge bankrupts]

This judgment was delivered by me on 28 June 2013 at 4:45pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Norris Ward McKinnon, Hamilton
Almao Douch, Hamilton

[1] The judgment debtors, who are husband and wife, were adjudicated bankrupt on 1 May 2012. My judgment recording the reasons for their adjudication was issued on 1 May 2012.

[2] The judgment debtors now apply for an order of discharge from bankruptcy. The application is made in reliance on s 294 of the Insolvency Act 2006. It is appropriate that I record that this is an application made before the operation of the automatic discharge provision, namely s 290 of the Insolvency Act 2006.

[3] Section 294 provides:

> **294 Bankrupt may apply for discharge**
>
> (1) The bankrupt may at any time apply to the Court for an order of discharge from bankruptcy.
>
> (2) However, if the Court has previously refused an application by the bankrupt for a discharge, and has specified the earliest date when the bankrupt may again apply, the bankrupt must not apply before that date.
>
> (3) The hearing of the application must be in accordance with section 177.

[4] Section 177 provides:

> **177 Conduct of examination**
>
> (1) The bankrupt must attend the examination, and may be examined as to the bankrupt's conduct, dealings, and property.
>
> (2) 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.
>
> (3) The following persons may examine the bankrupt:
>
> (a) the Assignee, or counsel for the Assignee:
>
> (b) any creditor who has proved a claim, or counsel for that creditor.
>
> (4) The bankrupt is not entitled to notice beforehand of who will ask the questions or what the questions will be.

[5] Section 298 provides:

298 **Court may grant or refuse discharge**

(1) When the Court hears an application under section 294 for discharge, or conducts the examination of the bankrupt under section 295, the Court may, having regard to all the circumstances of the case,—

(a) immediately discharge the bankrupt; or

(b) discharge the bankrupt on conditions (which may include a condition that the bankrupt consents to any judgment or order for the payment of any sum of money); or

(c) discharge the bankrupt but suspend the order for a period; or

(d) discharge the bankrupt, with or without conditions, at a specified future date; or

(e) refuse an order of discharge, in which case the Court may specify the earliest date when the bankrupt may apply again for discharge.

(2) If the Court discharges the bankrupt on the condition that the bankrupt consents to any judgment, and the bankrupt does consent, the Court may vary the judgment as it thinks appropriate.

[6] In *ASB Bank v Hogg* the court gave guidance as to the exercise of the discretion applicable in an application for discharge and said:[1]

> In conferring a discretion expressed in the broadest terms, the legislation recognises that each case will be different, that the relevant factors may vary from case to case and that the exercise of the discretion must be governed by the circumstances of the particular case having regard to the guidance provided by a consideration of the scheme and purpose of the legislation. In providing for automatic discharge after three years, the legislation recognises that it is not in the public interest that the bankruptcy should endure indefinitely. In providing for earlier discharge, s 108 recognises that continuing the bankruptcy to the end of the three years may not be in the public interest. Whether or not it is will be a matter for decision on the particular facts. In that regard, guidance is provided by s 109(2) which lists matters on which the assignee is to report to the High Court in such a case. The Court is to consider the assignee's report as to the affairs of the bankrupt, the causes of the bankruptcy, the manner in which the bankrupt has performed the duties imposed on him or her under the Act and his or her conduct both before and after the bankruptcy, and also any other fact, matter or circumstance that would assist the Court in making its decision. Clearly the Court apprised of the matter will consider the legitimate interests of the bankrupt, the creditors, and wider public concerns, but it is neither required nor entitled to impose threshold requirements in the exercise of the discretion so as to derogate from the breadth of the powers conferred under s 110. The applicant has the onus, in the sense of adducing evidence, to show

1 *ASB Bank v Hogg* [1993] 3 NZLR 156 (CA).

good cause for ordering an early discharge, but his obligation goes no further than that.

[7] Section 109 of the Insolvency Act 1967 referred by the court in *ASB Bank v Hogg* is the statutory predecessor of the current s 296.[2] Section 296 of the Insolvency Act 2006 provides:

> **296 Assignee's report**
>
> (1) The Assignee must prepare a report and file it in the Court when—
>
> (a) the bankrupt has applied under section 294 for a discharge; or
>
> (b) the Assignee has summoned the bankrupt to be examined under section 295.
>
> (2) The Assignee must report as to—
>
> (a) the bankrupt's affairs; and
>
> (b) the causes of the bankruptcy; and
>
> (c) the bankrupt's performance of his or her duties under this Act; and
>
> (d) the manner in which the bankrupt has obeyed orders of the Court; and
>
> (e) the bankrupt's conduct before and after adjudication; and
>
> (f) any other matter that would assist the Court in making a decision as to the bankrupt's discharge.

[8] The procedural rules dealing with applications for discharge from bankruptcy are set out in Subpart 9 of Part 24 of the High Court Rules.

[9] In accordance with r 24.38, the Official Assignee filed and served a report for the purposes of s 294 of the Insolvency Act 2006 (court document 34). The Official Assignee has received proofs of debt in Mr Fuller's estate in the sum of $143,908.16 and has had notice of additional creditors who have not proven in the sum of $37,563.56.

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2 Ibid.

[10] The Official Assignee has received proofs of debt in Mrs Fuller's estate totalling $111,145.31. The Official Assignee is aware of other creditors who have not proven in Mrs Fuller's estate in the sum of $48,251.56.

[11] The Official Assignee reports that Westpac New Zealand Ltd, which was the applicant seeking orders of adjudication in both cases, has advised the Official Assignee of its opposition to the bankrupts being granted an early discharge, as has one other creditor, American Express.

[12] American Express and Westpac New Zealand Ltd are the largest creditors in Mr Fuller's estate, being respectively $38,653.41 and $69,410.67. Westpac New Zealand Ltd is the largest creditor in Mrs Fuller's estate in the sum of $69,410.67. American Express is not shown as a creditor in her estate.

Analysis

[13] This application was made on a single basis and with a single stated objective. The bankrupts say that they wish to refinance the home they live in and which, they said, was owned by their trust, the Ezulweni Family Trust, of which they, with another, are the trustees.

[14] Because of the above, there was no examination of the debtors of the matters usually inquired into on applications for discharge, namely

(a) The bankrupts' affairs

(b) The causes of the bankruptcy

(c) The bankrupt's performance of his or her duties under the Insolvency Act 2006

(d) The manner in which the bankrupts have obeyed orders of the court

(e) The bankrupts' conduct before and after adjudication

(f) Any other matter.

[15] Instead, the examination of the bankrupts under s 177 of the Insolvency Act 2006 focussed on the financial position of the Ezulweni Family Trust and how it might finance a repurchase of the house property at 10 Swift Place, Cambridge from Mr and Mrs Hunt in reliance on the rights to repurchase under the sale and purchase contract.

[16] The home was first purchased by the Fuller interests in 2009. At that time a loan of $223,897.09 was raised from Southern Cross Finance Ltd.

[17] In 2011 the Fullers wished to refinance. Mr Fuller said the principal reason for this was to see if they could get finance from a first-tier lender rather than by the lender that they had the finance from, which was at a higher interest rate. A scheme was devised whereby Mr and Mrs Hunt, friends of the Fullers, agreed to purchase the house for $300,000.00. They, in turn, would obtain a mortgage of $300,000 from their bank. The interest rate would be the interest rate normally charged on residential homes by a first-tier lender. As result of the sale to the Hunts and after repayment of the Southern Cross Finance Ltd, the Ezulweni Family Trust received a capital payment of $45,345.67. That money is no longer available in full for the benefit of the trust. It is one of the matters that does concern me about the scheme for borrowing which the trustees, the bankrupts, have entered into.

[18] The agreement, as I have mentioned, was, in reality, a means by which the Fullers could achieve a lower bank rate of interest. The sale and purchase agreement contains provision whereby the Fullers leased the property back from the Hunts and had a right to purchase, provided it was exercised according to the formula set out in the agreement, before November 2014.

[19] It is not necessary that I set out the full terms of the special clause in the contract, because the above suffices to set out the general position.

[20] Both Mr and Mrs Fuller acknowledge that it would be quite irresponsible of either of them to agree to any repurchase if they were required to raise more than

$100,000 to complete the purchase. Even that, having regard to their current circumstances, might be viewed as undertaking too much borrowing.

[21] Mr Fuller is a beneficiary in his late father's estate. That estate is administered in Canada. Mr Fuller, as a result of an assignment entered into 2000, has assigned his interest in his father's trust to the Ezulweni Family Trust. The current position is, if the Canadian estate distributes as Mr Fuller hopes it will do, the Ezulweni Family Trust might expect to have available to it by November of next year approximately $345,774. That is made up of an expectation that it would receive two capital payments being approximately NZ$251,000, plus periodic payments between now and November 2014 totalling $67,500, plus current term deposit reserves in a New Zealand bank of $27,274.

[22] Both Mr and Mrs Fuller properly acknowledged to me that their current application, when analysed carefully, is premature. Until the Ezulweni Family Trust knows and receives funds from the Canadian estate, or at least a substantial part of what they anticipate is due from the Canadian estate, the repurchase of 10 Swift Place cannot realistically be actioned.

[23] Counsel examined with Mr Fuller the possibility of appointing replacement trustees. The power to do so is reserved to Mr and Mrs Fuller within the trust deed. Mr Fuller was not prepared to exercise that power for reasons which need not be gone into. The option of having someone else undertaking the personal covenant that might be necessary for refinancing as trustees of the Ezulweni Family Trust really is not an acceptable option to Mr and Mrs Fuller.

[24] The result is that this application is plainly premature.

[25] I canvassed with Mr Fuller and with Mr Fuller's counsel what an appropriate direction might be pursuant to s 298(1)(e) of the Insolvency Act 2006. It will be recalled that that provision provides that if the court refuses an order of discharge, the court may specify the earliest date when the bankrupt might apply again for a discharge.

[26] It is apparent that the very earliest that the financial position might change would be 30 September 2013. An application, however, even as early as that would only be worth making if there were substantial funds advanced from Canada to the Ezulweni Family Trust so that the amount of borrowing required was within the means of the Fullers to service, something less than $100,000.

Orders

[27] Accordingly, I order that this application be refused. The bankrupts may not make application for discharge from bankruptcy before 30 September 2013. Such application should not be made for the reasons set out in this application, unless the Ezulweni Family Trust has substantial capital resources that can be applied to the purchase of the house at 10 Swift Place, assuming that is the reason for any application for discharge.

Costs

[28] The bankrupts have little resource. Counsel requested that I reserve costs on the understanding that the Official Assignee would only likely apply for same if the Official Assignee should learn that the bankrupts receive personal assets that might permit them to pay a contribution to costs.

[29] For that reason, costs are reserved.

JA Faire
Associate Judge