

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

CIV 2009-470-001087

UNDER the Insolvency Act 2006
IN THE MATTER OF an appeal pursuant to Section 226
BETWEEN DESMOND EDWARD HARRIS
Appellant
AND OFFICIAL ASSIGNEE
Respondent

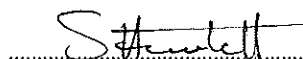
Hearing: 22 April 2010
(Heard at Rotorua)

Appearances: Appellant in person (Ms M Strawbridge as McKenzie Friend)
P V Cornegé for Respondent

Judgment: 10 May 2010

(RESERVED) JUDGMENT OF ANDREWS J

*This judgment is delivered by me on 10 May 2010 at 4pm
pursuant to r 11.5 of the High Court Rules.*


.....
Registrar / Deputy Registrar

10/05/10

STEPHEN HEWLETT
Deputy Registrar
High / District Court
Tauranga

Party/Solicitor:
Mr D E Harris, PO Box 11356, Palm Beach, Papamoa 3151
Almao Douch, PO Box 19173, Hamilton 3244

Introduction

[1] The appellant, Mr Harris, has appealed against a decision of the respondent, the Official Assignee, dated 12 November 2009. In that decision the Official Assignee declined consent for Mr Harris to be employed by a relative. The appeal is made under s 226 of the Insolvency Act 2006.

[2] The Official Assignee has submitted that the decision was reasonable, and opposes the appeal.

Background

[3] Mr Harris was adjudicated bankrupt on 10 June 2009. Before his adjudication, Mr Harris was the sole director and shareholder in two companies: Indigenous Trails NZ Ltd (ITNZ) and Indigenous Trails Ltd (ITL). Pursuant to an agreement for sale and purchase of a business ("the ASP"), dated 26 September 2008, the assets of ITNZ were sold to Mr Harris' sister, Katopua Harris-Lassey, for \$30,000, and the shares in ITL were sold to Ms Harris-Lassey for \$5000. The possession date was stated to be 1 May 2009.

[4] The ASP was conditional on a contract of agreement between ITNZ as contractor and ITL as client ("the contract of engagement") under which Mr Harris was to provide services to ITL. Clauses 1(ii) and (iii) and 3(i) of the contract of engagement provided as follows:

1. Contract of Engagement

(ii) This contract is executed contemporaneously with and meets a **Term of Sale** contained in the **Agreement for Sale and Purchase** of a business dated **26 September 2008**, between the **Contractor as 'Vendor'** and the **Katopua Irene Harris-Lassey or nominee as 'Purchaser'**.

(iii) This Contract is for the provision of Management services to be performed personally by **Desmond Edward Harris** who is the Sole Director and Shareholder of **Indigenous Trails NZ Ltd**, the **'Contractor'** and for which the **'Agreement for Sale and Purchase'** identifies **Desmond Edward Harris** of **Indigenous Trails NZ Ltd**, as being the Key employee of the **'Contractor'**, for which the Goodwill component of the purchase price is based.

...

3. Position

(i) It is mutually agreed by both parties that upon signing of this Contract, the **Contractor**, will be the **'EXCLUSIVE'** provider of **Tour Coordination, Logistical Services, Management supplier** for **ALL** activities and **Programme Development** for **Indigenous Trails Ltd.**

[5] Clause 4 of the contract of engagement set out the duties to be performed by the contractor (that is, Mr Harris):

4 Duties

(i) The **Contractor** will:

- Perform, arrange and facilitate Cultural programmes where necessary and portray these tasks in a professional and orderly manner.
- Respect and acknowledge Cultural and Indigenous values as the base of the business concept.
- Remain culturally sensitive and supportive of Indigenous beliefs and values.
- Uphold Maori Tikanga and Lore.
- Coordinate Programmes, Seminars and Activities.
- Endeavour to meet the **Client's** expectations and best practices at all times.
- Develop and create Programmes that aim to enhance and improve any existing structure, offering satisfaction and enjoyment for its **Clientele**.
- Assist and support the future Development of Programmes for growth within its Industry domestically and internationally.
- Develop Itineraries, Schedules, Placement locations, Projects and Strategic Management Modules.
- Provide ALL logistic requirements, including Inbound, Outbound and Domestic air travel where and if required for its Clientele.
- Negotiate with suppliers and strategic alliance partners.
- Ensure that ALL services provided are compliant and meet the required safety standards in accordance with New Zealand Law.
- Provide comprehensive leadership and training where required.
- Provide and arrange logistical administrative functions ensuring efficiency and delivery of services for its customers.

- Meet with the **Client** at least 'twice' a month and provide current and accurate reports outlining progress of business operations, strategies and forecasts. Location for such meetings to be determined by the **Client**.

[6] On 15 September 2009 Mr Harris applied for consent to be employed by Ms Harris-Lassey. He completed a pre-printed form headed "Affidavit Verifying Application for Consent to be Employed by a Relative". The form included pre-printed statements, with handwritten additions. Paragraphs 4 to 15 were completed as follows:

4. I wish to be employed by a relative for the following reasons:
As per the Sales and Purchase — which the Assignee has
5. The name of the business is:
Indigenous Trails Ltd
6. The name(s) of the business owner(s) is:
Katopua Harris-Lassey
7. My relationship(s) to the business owner(s) is:
Sister – (big)
8. The capital and assets that I have/will put into the business are:
—
9. My duties and responsibilities in the business will be:
Logistic/Marketing and Tour co-ordinator
10. My duties ~~will~~/will not include raising credit on behalf of the business:
Don't understand? No raising of credit
11. I ~~will~~/will not have cheque signing authority on the business bank account.
12. My anticipated income is:
Commission based on performance of sales.
13. My pre-bankruptcy employment including my role, duties, responsibilities and income was:
Managing Director — minimal income.

14. My bankruptcy ~~resulted from a business failure~~/was not related to a business failure.

15. The causes of my bankruptcy were:

Unpaid credit and dishonesty from associates not paying their accounts as per contracts.

[7] Mr Harris' application was supported by a letter from Ms Harris-Lassey. Ms Harris-Lassey refers to the contract of engagement, which she said was included in her purchase of the business of ITNZ. She referred to the contract of engagement as a "contract of service" and said:

... it is clear that the sole purpose behind the Contract of Service was that I retain [Mr Harris'] knowledge as the key component and asset I purchased when I purchased the business.

I therefore seek approval of the Official Assignee to allow Mr. Harris to continue services under the Service of Contract directly engaged as an employee to Indigenous Trails Ltd.

Mr Harris will be responsible directly to myself as the sole Director.

...

The position requires a sound knowledge and experience of the Tourism/Transport Industry and be fully aware of the responsibilities needed to undertake the expectations required for this vigorous and volatile industry.

Excellent interpersonal skills are a fundamental quality necessary for ensuring good business relationships and practices for a profitable successful business.

The cultural and commercial sensitivities in this business must be respected at all times.

Furthermore that the Company's policies, procedures and reputation is maintained and not bought into disrepute through negligence or wilful disregard.

[8] Mr Harris' application was declined by the Official Assignee by a letter dated 12 November 2009. The reasons for the refusal were set out as follows:

- Your application does not hold any benefit for the bankruptcy creditors.
- You were a prior director and shareholder of Indigenous Trails Limited which was sold to your sister just prior to your adjudication into bankruptcy. The Official Assignee considers that the role now contemplated gives you a significant degree of management and control of the business of the company.

- The Official Assignee considers employment by an unrelated third party on wages would be appropriate under these circumstances.

[9] The letter continued with a reference to the right to appeal under s 226 of the Insolvency Act, a recommendation as to seeking professional advice, and a reminder that it is an offence under s 428 of the Insolvency Act for a person to be employed by a relative without the consent of the Official Assignee. Mr Harris' appeal was filed on 3 December 2009.

The appeal

[10] In his notice of appeal Mr Harris set out the grounds of appeal as follows:

- 1 That the appellant is dissatisfied with the decision;
- 2 That the Official Assignee gave insufficient regard to the interests of the bankrupt, the bankrupt's creditors, and the community.

[11] Mr Harris filed a "Notice of Detailed and Specific Points on Appeal" on 24 February 2010, in response to a direction made by Stevens J in a telephone conference held on 10 February 2010. In that document Mr Harris set out the history of his bankruptcy, and his submissions on appeal. At para 12 he set out what may be seen as a summary of his submissions on appeal as follows:

- 12 The respondent has therefore applied a higher requirement level for the Appellant to be employed by a relative than to be employed by an unrelated third party.

The effect of this is to seriously jeopardise the business now owned and operated by the Appellant's sister, negatively impacting upon:

- (i) the livelihoods of the five (5) employees currently employed;
- (ii) the local indigenous subcontractor who employs 3-4 whanau;
- (iii) the local indigenous owned and operated transport company who also has employees;
- (iv) the indigenous subcontractor from a neighbouring rohe who has 2-3 employees;
- (v) those suppliers located throughout Aotearoa that Indigenous Trails supports, particularly those which are indigenous owned and/or operated;

- (vi) the student education and volunteer programmes operated by the business;
- (vii) those Maori businesses being mentored by the Appellant under the umbrella of Indigenous Trails;
- (viii) Indigenous Trails' international status as a market leader in indigenous website marketing;
- (ix) Indigenous Trails' role in developing Maori tourism operators to develop commercial operations with a commercial ethos that properly respects and acknowledges Tikanga and that does not rely on funding.

[12] In his oral submissions, Mr Harris submitted that the Official Assignee failed to consider all relevant matters in reaching the decision in that:

- a) He knowingly did not hold all relevant and material facts at the time of reaching the decision;
- b) He had consistently mixed identities and misread and misunderstood documents supplied by Mr Harris when requested; and
- c) He had used presumption to cover gaps in his knowledge or understanding, without making further enquiries.

Mr Harris further submitted that the basis on which the Official Assignee's decision was made contained a material error, that the employment sought by Mr Harris involved his having "significant managerial control". He submitted that that is not what was being sought in the application.

[13] Mr Harris accepted that the latter point is the crux of his appeal. He submitted that his application seeks employment that does not involve significant managerial control and that it does comply with the rules of bankruptcy.

[14] There are two issues to be determined on appeal. They are:

- a) The approach to be adopted to the appeal; and

- b) Whether the Official Assignee made a material error as to the employment sought by Mr Harris.

Relevant statutory provisions

[15] Section 226 of the Insolvency Act provides:

226 Appeal from Assignee's decision

- (1) A person (including the bankrupt or a creditor) whose interest, monetary or otherwise, are detrimentally affected by an act or decision to which this section applies may apply to the Court to reverse or modify the act or decision
- (2) This section applies to —
- (a) An act or decision of the Assignee; or
- (b) ...
- ...
- (4) The court may confirm, reverse, or modify the act or decision.
- ...

[16] It is also relevant to refer to reg 10 of the Insolvency (Personal Insolvency) Regulations 2007. Regulation 10 provides:

10 Bankrupt's application for Assignee's consent to enter into business

...

- (2) In deciding the application, the Assignee must have regard to the interests of the bankrupt, the bankrupt's creditors, and the community, but may otherwise decide it in his or her absolute discretion.
- (3) The Assignee may —
- (a) refuse the application; or
- (b) grant it without conditions; or
- (c) grant it subject to any conditions that the Assignee thinks fit.

[17] Finally, it is necessary to refer to s 149 of the Insolvency Act, which provides:

149 Prohibition of bankrupt entering business

- (1) An undischarged bankrupt must not, without the consent of the Assignee or the Court, either directly or indirectly, —
- (a) enter into, carry on, or take part in the management or control of any business;
 - (b) be employed by a relative of the bankrupt;
 - (c) be employed by a company, trust, trustee, or incorporated society that is owned, managed, or controlled by a relative of the bankrupt.

...

Approach on Appeal

[18] There has been some difference of view as to the approach to be taken by the Court to its appellate jurisdiction under s 226 of the Insolvency Act and its predecessor, s 86 of the Insolvency Act 1967. In *Re Callis*,¹ the test adopted was whether the Official Assignee had acted in a way in which no reasonable Assignee or liquidator could have acted. Thus the court would only interfere in the case of fraud, lack of bona fide exercise of the Assignee's discretion, or unreasonableness. In *Murray v Official Assignee*,² Penlington J concluded that the appeal should be de novo and not merely an enquiry as to whether the decision of the Assignee was correct. His Honour noted that the court's function was to consider what in its view is the correct decision on the evidence before the court, measured by the standard of reasonableness, although due regard must be had to the decision of the Assignee.

[19] In *Rao v Official Assignee*,³ Clifford J stated at [24] and [25]:

[24] My view, having reviewed the authorities, is that I am required to consider the merits of the application on a de novo basis and determine, in my own assessment, what decision is reasonable under the circumstances, based on the material presented to me at the hearing. In doing so, however, I must pay due regard to the decision of the Assignee and take into account

¹ *Re Callis; Callis v Pardington* (1996) 7 NZCLC 261,211 (CA).

² *Murray v Official Assignee* HC Hamilton B318/92, 9 September 1992.

³ *Rao v Official Assignee* HC Wellington CIV-2006-485-4, 17 October 2007.

the Assignee's functions in administering the estate and giving effect to the policy of the Act. The Act provides for the Assignee to exercise his or her discretion in administering the bankrupt's estate and if the Court interferes too readily that statutory policy will be frustrated.

[25] In assessing the merits of the application I am guided by the standard of reasonableness.

[20] On behalf of the Official Assignee, Mr Cornegé submitted that a "hybrid" approach to appeals should be taken, where a de novo consideration of the issue should not be undertaken unless the court is satisfied that the Official Assignee has clearly made an error or the decision is clearly unreasonable. Having reviewed the authorities cited to me, I accept that the test is correctly stated in *Rao*. The court should consider the application de novo, but have regard to the Assignee's decision.

[21] The fact that reg 10 of the Insolvency (Personal Insolvency) Regulations refers to the Official Assignee's "absolute discretion" does not, in my view, mean that the relevant test under s 226 should change. It may be that more consideration should be given to the Assignee's decision, and the scope of what is "reasonable" is enlarged. Nonetheless, I consider that the merits of the application should still be considered on a de novo basis, with regard to the Assignee's reasons for the decision.

Submissions on appeal

[22] As noted earlier, Mr Harris said in the course of his oral submissions that the crux of his appeal was that the Official Assignee made a material error in taking the view that the employment he sought involved "significant managerial control". He said that the Official Assignee had not based his decision to refuse consent to the employment on his application, rather, the Official Assignee had relied on the contract of engagement. He submitted that the application sought to modify the role set out in the contract, so as to eliminate the management features in order that the employment would not breach the bankruptcy rules. He submitted that he was fully aware of the bankruptcy rules, and anxious to comply with them.

[23] With respect to the employment sought, Mr Harris submitted that the critical features of the role are cultural liaison, product development and sales, and overseeing delivery of product. He submitted that "overseeing delivery" did not

involve any “significant managerial involvement”. This was because being employed by a “cultural” company, he is bound by his elders and he is bound by Tikanga Maori, which means that he must answer first and foremost to kaumatua in different parts of New Zealand. He submitted that any product that is delivered by ITL, anywhere, has to be approved and signed by local iwi and hapu beforehand.

[24] Mr Harris submitted that within ITL, there is a kaumatua, who is the local Taurangamoana chief. Day to day management control of ITL is, he submitted, in the hands of Ms Harris-Lassey. He submitted that Ms Harris-Lassey is responsible for all accounts and financial management. Her team includes accountants and business mentors engaged through Te Wananga O Aotearoa. In contrast, he submitted, his role relates only to tour products, and is the cultural component: working with networks of Maori providers throughout New Zealand, training Maori guides, making sure the delivery is ready to go to the market, marketing, and overseeing maintenance of overall cultural integrity. He submitted that he has no influence in managerial decisions and no involvement in actual management of ITL.

[25] On behalf of the Official Assignee, Mr Cornegé submitted that the Official Assignee had been faced with an application by Mr Harris to take up employment with a company (ITL) of which he had formerly been sole director and shareholder. ITL was to carry out, at least in part, the business of a company (ITNZ) which appeared to have been insolvent. He submitted that the Official Assignee’s concern is that in order to protect creditors and the community generally, Mr Harris should not be in a managerial position, and certainly should not be involved in essentially running the companies he was running at the time of his bankruptcy.

[26] Mr Cornegé noted that Mr Harris’ oral submissions were on the basis that he does not dispute that he should not be in a managerial role in ITL. He noted that Mr Harris had been at pains to say that he would have no managerial role. However, Mr Cornegé submitted, what was before the Official Assignee was an application that referred to the contract of engagement. Based on that information which was, he submitted, all that was before the Official Assignee, the Official Assignee could not be confident that Mr Harris would not be employed in a managerial role. He

submitted that on the information before the Official Assignee, that position was both reasonable and correct under the law.

[27] Further, Mr Cornegé submitted that even putting aside the terms of the contract of engagement, similar concerns clearly arose. He submitted that in reality, there must be a residual concern that Mr Harris will not be able to avoid exercising day to day control of what was, in fact, his business. Mr Harris knows the business best, and Mr Cornegé submitted that notwithstanding the terms of any employment agreement, it is likely that Mr Harris will “in reality” run the business as he did before.

Discussion

[28] I have approached this appeal on a de novo basis, having reviewed the application made to the Official Assignee.

[29] There can be no doubt that the contract of engagement can only be seen as describing services which involved a significant managerial role. At cl 1(iii) it is expressly stated that the contract is for the provision of “management services to be performed personally by Desmond Edward Harris”. Clause 3(i) expressly describes the contractor’s role as “management supplier for ALL activities”. The duties set out at cl 4(i) do not exclude or limit the services to be provided to something that is at less than a “managerial” level.

[30] Mr Harris submitted that para 9 of his affidavit in support of the application for consent to the employment limited the potential scope of his employment to a non-managerial level. In my view, para 9 cannot be read in that way. In para 4 of the affidavit Mr Harris said that he wished to be employed “as per the Sales and Purchase”, of which the contract of engagement formed part. Paragraph 9 does not expressly limit the “managerial” scope of the contract of engagement, nor can it, in my view, be seen as doing so by implication. Nor does the supporting letter from Ms Harris-Lassey make it clear, in any way, that it is intended that Mr Harris’ role in ITL is to be in any way different from that set out in the contract of engagement.

[31] Accordingly, and having considered the matter afresh, I am not satisfied that the Official Assignee made a material error in making the decision to refuse consent to Mr Harris' employment by ITL, on the basis that the employment sought involved a significant managerial role.

[32] Mr Harris submitted that if I were to reach that conclusion, then it was open to me to "reverse, vary or modify" the Official Assignee's decision, rather than simply dismiss his appeal. He submitted that it was open to the Court to give consent to the employment, on the basis of his submissions as to what his role was to be. I do not consider that to be appropriate. The better course, if Mr Harris wishes to pursue the matter, is for Mr Harris to make a fresh application. The application should be supported by affidavit evidence that is clear as to the nature of the role sought to be approved, and by affidavit evidence on behalf of ITL, again setting out the nature of the employment and containing information on which the Official Assignee could properly make a decision on the application.

Result

[33] The appeal is dismissed.