IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2008-470-484
[2013] NZHC 2936

IN THE MATTER	of the Insolvency Act 2006
AND	
IN THE MATTER	of the bankruptcy of MICHAEL PHILLIP DONOVAN of 33 C 4th Avenue, Tauranga
BETWEEN	MICHAEL PHILLIP DONOVAN Judgment Debtor
AND	THE COMMISSIONER OF INLAND REVENUE Judgment Creditor

Hearing: 5 November 2013

Appearances: Mr Cornege for Official Assignee
Mr Donovan in person

Judgment: 7 November 2013

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***07.11.13at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date 7/11/13

M. Jeannie Carruthers
Deputy Registrar
High Court of New Zealand

[1] The respondent was adjudicated bankrupt in the High Court at Tauranga on 28 January 2009. On 30 July 2012 the Official Assignee filed an objection to the bankrupt's discharge from bankruptcy pursuant to section 292 of the Insolvency Act. On 7 August 2013 the Official Assignee filed an application to summon the bankrupt for public examination pursuant to section 295 of the Insolvency Act 2006.

[2] At the hearing before me on 5 November 2013 the bankrupt, Mr Donovan, was examined and I heard submissions from the Official Assignee and from Mr Donovan concerning his discharge from bankruptcy.

[3] Mr Cornegé for the Official Assignee referred me to the provisions of section 296 of the Act which provides as follows:

> **296 Assignee's report**
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> (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

[4] Mr Cornegé also referred me to the case of *ASB Bank v Hogg*,[1] which although decided in the different context of an application for the early discharge from bankruptcy, contains statements of principle which are generally taken to also have relevance to cases where the Official Assignee opposes the discharge of the bankrupt under the default statutory provisions when three years has elapsed since the order of bankruptcy was made. Given that the bankrupt was adjudicated in January 2009 it is now approaching five years since he was adjudicated.

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

[5] Limited reference to the authority of *Hogg* is required in order to capture the relevant part of that judgment for the purposes of the present case:[2]

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

[6] The main points that the Official Assignee advanced in this case for opposing the discharge were as follows:

a) the case was one which there had been a substantial deficit to the creditors because of the size of the bankrupt's debts, namely in excess of $1.4 million;

b) The bankrupt had not observed the requirements of the Act in that he had not provided the information that he was required to give to the Official Assignee;

c) he had breached the restriction contained in section 149(1)(a) of the Act against taking part in a business without the consent of the Official Assignee, and had in fact been successfully prosecuted for

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[2] At 157 - 158.

breaching that obligation which resulted in him being sentenced in the District Court.

[7] The key issue in the present case is whether the bankrupt has been indifferent to his obligations under the Act. That leads to the central factual enquiry of whether he breached his obligations by carrying on business as a loan broker or similar during the period of his bankruptcy.

[8] The fact that he entered into an unauthorised business during bankruptcy has relevance in its own regard because it is a breach of the law but also may show an indifference to accepting control over his commercial activities.

Carrying on business without approval of Official Assignee

[9] In the light of his conviction that he breached the restriction against taking part in business without the consent of the Official Assignee, it is beyond argument that Mr Donovan did so. I shall briefly set out my reasons for that conclusion.

[10] During October 2010 substantial payments that totalled approximately $172,000 were made into Mr Donovan's bank account. In the course of his examination, it was put to Mr Donovan that these payments established that he was in fact carrying on the business of a financial broker during this period. He was asked for his explanation of the money inflows into his account. One explanation that he gave was that a friend of his, a Mr Bourke, was in the throes of a marriage dissolution and that he, Mr Bourke, put money into the bank account in order to remove it from the reach of his former wife.

[11] But there were other deposits which lacked a theoretically possible explanation of the kind that he gave in regard to Mr Bourke's payments. Mr Donovan attempted a number of other explanations as to why payments were made into his bank account. The explanation that the funds were advanced for him to hold as custodian was not only impossible to understand but the plain fact is that much of the money was never transferred back out of the account and seems to have been drawn out by Mr Donovan. The fact of his background as a financial broker, and the references to commission or fees contained in some of the narrations

accompanying the payments into his account, mean that is established at least on the balance of probabilities that he engaged in loan-broking transactions for which he received commission during this period.

[12] Mr Donovan did not contest that he had no authority from the Official Assignee to carry on this type of business.

[13] As well there is the advertisement in the newspaper about starting an international bank. Interested parties were expected to contact a person by the name of Michael. The advertisement also gave the cell phone to respond to as being the same number as Mr Donovan's. Those facts coupled with the previous work history of Mr Donovan in the area of investment and lending persuade me that on the balance of probabilities it was Mr Donovan who placed the advertisement or was at least complicit in so doing. Not only does this show an indifference to his responsibilities under the Insolvency Act it also showed that he was out of touch with reality in proposing as an undischarged bankrupt to start an international bank.

[14] It is not to Mr Donovan's credit that he attempted to explain his involvement in this transaction by putting forward an improbable account of how he came to be involved. It was essentially his position that he was involved as the nominated person to take calls and receive approaches in response to the advertisement on behalf of a friend who was having treatment for cancer at the time and was not well enough to deal with these matters themselves. He said that an email address was specifically set up for him which was then inserted into the advertisement to which interested parties could reply. He did not himself, Mr Donovan said, exchange information with any respondents; he simply forwarded the emails on. Why he had to have his own email address was not properly explained. Instead of his having to have a Gmail account in his own name, it would have been just as easy for him to have been given access to his friend's account to which he could have the password as well.

[15] I am afraid I do not accept that Mr Donovan had the limited involvement in this matter that he said he did.

Suitable form of order

[16] The Official Assignee invites a condition be imposed on the discharge of Mr Donovan from bankruptcy that he not involve himself in the financial investment or lending industries. No doubt the reason for that is that it is in those areas of activity that he has breached the Act.

[17] Mr Donovan expressed the hope that he would be able to resume business in his former trade of builder. He also said that there was a possibility that he could involve himself in the business of wholesale importation of automobiles from Australia.

[18] After seeing and hearing Mr Donovan in the witness box I have formed a clear view that it would be preferable that he should not resume business in his own right. At the same time there was force in his argument that at the age of 63 years it is going to be very difficult for him to find an employer who would be interested in offering him work. Therefore if he were to resume activity in the building business, it would seem likely that he would only be able to do so if he can set up his own business.

[19] Counsel for the Official Assignee, Mr Cornegé, while accepting the practical sense of that argument, also sensibly submitted that if Mr Donovan was to resume in business at all it should be at a reasonably modest level to reduce any risks to the commercial community. Having regard to the fact that any business involved in importation of motor vehicles would inevitably involve borrowings at quite a substantial level to raise working capital, Mr Cornegé submitted that it would be undesirable for Mr Donovan to become involved in such a business. Further, he repeated his submission which was contained in his written synopsis that it would be undesirable for Mr Donovan to become involved in the finance lending and related businesses. I interpolate at this point that I am persuaded that that last submission is a sound one.

[20] I can now state my overall conclusions:

a) The starting point is that the provision of an automatic discharge reflects a legislative intention that it is not in the public interest that the bankruptcy should endure indefinitely.[3]

b) The list of issues which the statute requires the Court to have regard to shows that the Court is to consider the legitimate interests of the bankrupt, the creditors and the wider public concerns. It is the first and third of those which are relevant in this case.

c) It is relevant to the extent of the risk that Mr Donovan poses that his original debts which led to his bankruptcy were approximately $1.4 million. In the absence of other evidence that shows a continuing or sustained carelessness, incompetence or lack of application to his business affairs. That coupled with his actions of starting a business during the period of bankruptcy show that he has trouble conducting himself in a responsible way.

d) It is not however possible under the Act to eliminate all risk that may be attendant upon the release of a bankrupt from bankruptcy. Bankruptcies cannot continue indefinitely.

[21] In this case the bankrupt has now been undischarged for a period of over a year and a half in excess of the statutory period. The acceptable upper limit of the duration of this bankruptcy must now be approaching if it has not already been reached. If it is possible for a discharge to be effected in a way that gives proper weighting to public interest considerations by the addition of conditions then that is the preferable outcome that should be achieved, in my view.

[22] I conclude that the point is approaching, if not already reached, where it would be undesirable for Mr Donovan to continue as an undischarged bankrupt for any additional lengthy period. He is now 63 years of age and his financial outlook is not bright. Fairness requires if at all possible that he be given an opportunity to start

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[3] *ASB Bank v Hogg* at 157.

rebuilding his financial position. As I have said, the practical situation is that he is unlikely to be able to do that other than as a self-employed business person.

[23] Rather than the Court defining what types of business Mr Donovan is permitted and not permitted to take part in, I think the preferable course would be to attach to his discharge the condition that the approval of the Official Assignee is to be sought as to any employment or participation in a business. Such a condition can be applied pursuant to section 298(1)(d) of the Act.

[24] The conclusion is that Mr Donovan should be discharged from bankruptcy but on the conditions proposed by the Official Assignee which are that he not enter into business on his own account or engage in employment other than with the approval of the Official Assignee for a period of 18 months from his discharge from bankruptcy. I further direct that his discharge from bankruptcy is to take effect from 31 December 2013.

J.P. Doogue
Associate Judge