

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

**CIV-2010-404-001124
[2015] NZHC 382**

BETWEEN SOUTH PACIFIC TIMBER (1990)
LIMITED
Plaintiff
AND GRANT NORMAN KING
Defendant

Hearing: 26 May 2014

Appearances: B H Dickey and K H Kuang for the Official Assignee
Judgment Debtor appears in Person

Judgment: 6 March 2015

JUDGMENT OF ASSOCIATE JUDGE SARGISSON

This judgment was delivered by me on 6 March 2015 at 4.30 p.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Counsel: Meredith Connell, Auckland

[1] Grant Norman King was adjudicated bankrupt on the petition of South Pacific Timber (1990) Limited on 10 October 2010. This commenced Mr King's third bankruptcy.¹

[2] The Official Assignee has objected to Mr King's automatic discharge, so Mr King remains undischarged from bankruptcy.² The Assignee has summonsed Mr King to be publicly examined as required by s 295 of the Insolvency Act 2006.³ The Assignee seeks that the Court refuse an order of discharge and that it specify that Mr King may not apply until 4 November 2016 (three years after he would have been eligible for discharge).⁴

[3] In accordance with the provisions of s 295 of the Insolvency Act 2006, Mr King appeared before the Court to be publicly examined. The Assignee filed a detailed report setting out the grounds for the objection which he is required to prepare and file in advance of the public examination.⁵ The report was advertised in the required way, and served on Mr King's creditors. None formally objected to Mr King's discharge from bankruptcy, but evidently some have expressed concern to the Assignee.

[4] In terms of s 298 the issue the Court must determine is whether an order for discharge is appropriate, with or without conditions; or whether the appropriate course is to refuse discharge.

Background

[5] The Assignee has also prepared a chronology of key facts as he sees them, and he advises that:

¹ Mr King's statement of affairs was received by the Official Assignee (Assignee) on 4 November 2010. Under s 290 Insolvency Act he would therefore have been eligible for automatic discharge from bankruptcy on 4 November 2013. However on 28 August 2013 the Assignee objected to his discharge under s 292.

² Insolvency Act 2006, s 295.

³ A public examination took place on 26 May 2014.

⁴ Section 298(e).

⁵ The Assignee did so by notice dated 18 February 2014, and the public examination occurred on 26 and 27 May 2014. The OA filed submissions filed in advance of the public examination.

- (a) Mr King has been adjudicated bankrupt three times since 1991, and has been convicted of dishonesty charges including theft by misappropriation. As a result of those proceedings, he has at various points been subject to controls on his business activities under the Insolvency Act and the Companies Act 1993.
- (b) On each occasion that controls have been imposed, Mr King has breached them in various ways. Those breaches include managing a company whilst prohibited and managing a business without the consent of the Official Assignee or the Court; criminal charges arose from this conduct. Additionally, much of the conduct involved Mr King presenting himself as a businessman not subject to sanction, and had the effect of concealing income from the Official Assignee.
- (c) As a result of Mr King's conduct in business and of his breaches of these restrictions, significant loss has been caused to a number of people and organisations. As a result of Mr King's failures to declare income, the Official Assignee's ability to facilitate repayment of his debts has been hampered.

The objection

[6] The Assignee objects to Mr King's automatic discharge as he considers:

- (a) Mr King has engaged in pre-adjudication and post-adjudication conduct that warrants severe censure. He has a history of offending, persistent failure to abide by his obligations as a bankrupt, commercial impropriety, corporate mismanagement/misfeasance and has caused loss to numerous members of the public;
- (b) Such conduct is good reason to believe Mr King would pose a significant risk of harm to the business community if he were to be discharged from bankruptcy and allowed to recommence trading in an unsupervised capacity and released from the possibility of sanction.

- (c) Creditors have expressed their concern to the Assignee as to the possibility that Mr King might be discharged from bankruptcy. None have formally objected to the Court, but that is insignificant in the context of the other evidence.

Relevant statutory provisions

[7] Section 177 of the Act provides for the conduct of an examination in these circumstances. The bankrupt must attend the examination, and answer on oath all questions from the Official Assignee or any creditor who has proved a claim.

[8] Section 298 sets out the powers of the Court following the public examination. 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

[9] In conferring a discretion expressed in broad terms the legislation recognises that each case will be different and that factors of relevance will vary from case to case. The discretion is to be exercised “having regard to all the circumstances of the case” and by taking guidance provided by a consideration of the scheme and purpose of the Act.⁶

⁶ *ASB Bank v Hogg* [1993] 3 NZLR 156, at 157.

[10] The assessment of the circumstances of the case is facilitated by the provision of the Official Assignee's report, which must deal with:⁷

- (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.

[11] As Associate Judge Bell observes in *Darby v Official Assignee*, it is important to consider the underlying purposes of bankruptcy law when assessing whether to exercise the discretion to extend a bankruptcy:⁸

The purposes of bankruptcy are: administration of the estate of the bankrupt, making the bankrupt accountable for his insolvency, punishing the bankrupt for misconduct, protecting the community from the bankrupt and allowing the bankrupt to take up a commercial activity again freed from his liabilities. Looking to these purposes is useful not only on discharge applications, but also in the exercise of the discretion on bankruptcy applications and in the consideration of alternatives to bankruptcy.

[12] The principles to be applied in exercising the discretion were outlined by Richardson J for the Court of Appeal in *ASB Bank v Hogg, Re Anderson*:⁹

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

⁷ Section 296.

⁸ *Darby v Official Assignee* [2013] NZHC 22, at 14.

⁹ *Hogg*, above n 8, at 157-158.

indefinitely... guidance is provided by s 109(2)¹⁰ which lists matters on which the assignee is to report to the High Court... 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 110¹¹ 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.

[13] The onus is on the Assignee to satisfy the Court that it is in the public interest that the bankruptcy should continue for a further period; in the absence of good reasons, a bankrupt should normally obtain a discharge. However, public interest factors may mean that an order of discharge should be refused. Relevant matters for consideration include the interests of the bankrupt; the interests of the creditors; the public interest; commercial morality; and the conduct of the bankrupt.

Bankrupt's Position

[14] In examination, Mr King accepted the substance of the Assignee's report as to what had occurred before this bankruptcy, in particular the previous criminal charges. He testified, however, that there were some mitigating circumstances. Notably, he stated that although he was advertised on the Old Friends website as a self-employed boat builder, that was unintentional on his part; that some of the defaults alleged against him were in fact associated with companies controlled by his partner, Kadz Trucking, and that he did not control that company as the Assignee's report stated; and he denied intentionally misleading the Assignee as to his role at that company.

[15] This bankruptcy was brought on by debts resulting from Mr King's personal guarantee of the obligations of one of his companies, Juicy Consulting Limited, and that he did not keep financial records for that company as required under the Companies Act. As to his conduct during the bankruptcy, Mr King again accepted that he had been convicted and pleaded guilty to two charges of managing a business without the consent of the Assignee or the High Court, and six charges of dishonestly using a document in respect of his receipt of a domestic purposes benefit.

¹⁰ Now s 296.

¹¹ Now s 298.

[16] The dishonestly using a document charges related to undeclared income from two companies that, according to the Assignee, he controlled. He admitted not disclosing his employment by those companies, conducting business during his bankruptcy, and that on his statement of affairs he had listed his occupation as 'beneficiary' following two strokes.

[17] Mr King did not accept that he had spent money due to other people or companies to cover his personal living expenses, although the documentary evidence suggested that was the case, containing withdrawals associated with chemists, grocery stores, and so on, as well as large business-related deposits and withdrawals.

[18] Mr King admitted to having authority over significant aspects of at least one company, Tern Limited, a sales company; he was in charge of sales. On his evidence, however, there were reporting lines above him, namely the company directors and a manager. He denied that he was involved in the management or control of another company, Trident Limited, but admitted that he did not disclose income earned from either company, or a bank account into which that income was paid, to the Assignee. He testified that he was unaware he was required to report the income since he had already reported it to Work and Income, and believed he had reported the account.

[19] Mr King admitted that he used his bank account to pay company bills for Trident and Tern Limited, both before and after registration, but disputed the Assignee's contention that that indicated he was involved in the management of the company. That was despite the fact that the IRD had previously assessed a large tax liability in respect of a different company, Pewterworx, based on the intermingling of personal and company funds in Mr King's accounts, and the fact that he was the only employee of the company based in New Zealand.

[20] The overall impression I have from Mr King's examination is that he resorted to less than candid explanations in answer to counsel's questions. As a person who has been through the process of bankruptcy on two previous occasions, he should be aware of his obligations to report to the Assignee. His claims to ignorance and attempts to downplay his active involvement in the control of business activities

display a tendency to seize on semantic differences in order to fail to account, and should not be taken at face value. He presents as an individual who is reluctant to comply with the statutory regime governing bankruptcy.

Official Assignee's submissions

Exercise of the discretion

[21] The Assignee's concerns are essentially three-fold:

- (a) that the conditions of bankruptcy should endure such that the Assignee can properly administer Mr King's estate; and
- (b) that Mr King be made accountable for his insolvency, in the sense that he should feel the effects of the restrictions on his business activities and his income should be diverted to his creditors where appropriate; and
- (c) that the community should be protected from risks associated with Mr King's being in business.

[22] In submissions, counsel for the Assignee indicated that, though concerned with the administration of the bankrupt's estate, the major focuses of concern are accountability and avoiding the risk of harm to the business community.

[23] I address these concerns in turn.

Administration of the bankruptcy

[24] The Assignee is continuing the administration of the bankrupt estate. That has been hindered by Mr King's lack of cooperation and misleading conduct, which included misleading the Assignee as to his employment status, failing to disclose income earned during his bankruptcy (which would be divisible among his creditors), and concealing his property from the Assignee.

[25] Administration can continue after discharge from bankruptcy. Strictly speaking, the period of bankruptcy need not be extended beyond the normal three year term to facilitate it. However, the former bankrupt will no longer subject to the restrictions of bankruptcy, which include a restriction on travel. If Mr King were to leave the country for an extended period, this could cause significant difficulties. Nonetheless, the Assignee did not have any information that Mr King had future plans to migrate, and therefore placed less emphasis on this factor, as do I.

Making the bankrupt accountable for his insolvency

[26] The restrictions imposed by bankruptcy all go towards accountability. While Asher J's comments in *Re Kelly* illustrate that bankruptcy is not primarily a punitive regime, accountability is relevant to the decision whether or not a bankrupt should be discharged.¹² When I refer to accountability, I mean accountability both in the literal sense of accounting to creditors, and in the sense that although not the dominant interest, there is a punitive aspect to bankruptcy and a public interest in ensuring that bankrupts are not entirely insulated from the consequences of their dealings.¹³

[27] This is Mr King's third bankruptcy. In his prior bankruptcies, Mr King had no realisable assets. In the present bankruptcy, his only presently identified asset of value is his Kiwisaver fund of \$1,045.19. Mr King has continued to earn income during his bankruptcy which has not been disclosed for the benefit of his creditors. Therefore, creditors' recovery has been seriously limited.

[28] Misconduct by the bankrupt is an important consideration. A distinction can be drawn between pre-adjudication and post-adjudication misconduct. Pre-adjudication conduct must be extremely serious to justify extending the bankruptcy beyond the standard three year term; whereas if bankrupts fail to fulfil their statutory obligations by engaging in misconduct after adjudication, that conduct is assessed on the basis that they are not only engaging in misconduct in the ordinary sense, but also breaching a statutory regime that exists for the protection of the public.

¹² *Re Kelly ex parte Structured Finance Limited*, [2009] 2 NZLR 785, at [61], [63].

¹³ At [60]; *Re Trott and Joy* HC Auckland B1471/88, 14 April 1989 at 28.

[29] Mr King's conduct before and after adjudication has been less than scrupulous. His pre-adjudication conduct, as evidenced by his two prior bankruptcies and criminal history, was serious. As well as misconduct based on which formal legal action was taken, his history includes poor financial management of companies including Pewterworx Ltd, Designworx, and Juicy Consultants Ltd, and the offering of at least one personal guarantee for obligations owed by a company he controlled, in circumstances where, according to the Assignee, he should have known he would be unable to fulfil those obligations. In both prior bankruptcies, according to the Assignee, Mr King continued to thwart the restrictions of the bankruptcy regime.

[30] Post-adjudication, Mr King also misled the Assignee as to his employment during his second bankruptcy, by engaging in business without the Assignee's consent, exercising control over a company that he purported to be employed by as a labourer. He failed to disclose his employment and/or involvement in the management of four other companies; one of those failures resulted in a conviction on charges under s 436(1)(b) of the Insolvency Act. The income earned in respect of those companies was concealed as it was undeclared and paid into a bank account whose existence Mr King had not disclosed to the Assignee. Using at least one of these companies, Mr King also took money from members of the public as deposit payments for work which was never undertaken, and then dissipated the funds.

[31] On the spectrum of misconduct, Mr King's is at the high end. It is comparable to the case of *Armitage*.¹⁴ There, Mr Armitage's third bankruptcy was extended by a term of three years with conditions imposed upon discharge, because of his conduct prior to adjudication in his third bankruptcy and because his conduct during bankruptcy evidenced no change in his behaviour.

[32] Before adjudication, Mr Armitage had caused significant loss through recklessness and dishonesty, either of which would indicate a lack of commercial morality and a need to protect the community. He pleaded guilty to 21 charges of using a document with intent to defraud; many of those offences had occurred during

¹⁴ *Armitage v Established Investments Ltd (in liq)* HC Auckland CIV-2007-404-4280, 8 April 2011, at 32; upheld in *Armitage v Established Investments Ltd (in liq)* [2012] NZCA 439.

his second bankruptcy. Post-adjudication, Mr Armitage misused corporate and trust structures in order to carry on business during his bankruptcy. That amounted to “[ignoring] the disability that he was under as an undischarged bankrupt. He was deliberately contravening the Insolvency Act.”¹⁵

Instant case

[33] Here the Assignee submits that Mr King has not “done the time”. His failure to comply with the restrictions of the Insolvency Act suggests a lack of willingness to change; three bankruptcies have so far proved insufficient to rehabilitate Mr King’s conduct. He has shown he poses a serious risk of harm to the business community and to the public that comprises his potential customers. The Assignee contends that given that risk, and having regard to the authorities, an indefinite extension of Mr King’s bankruptcy is warranted, and that if such an extension is imposed, it is for Mr King to satisfy the Court that he no longer poses such a risk.

[34] I am satisfied that, whether Mr King’s repeated failures to comply with the requirements of bankruptcy were the result of ignorance or dishonesty, they have allowed him to escape accountability. He has neither felt the full effects of bankruptcy, nor readily taken the necessary steps to ensure recovery for his creditors.

Protecting the community

[35] The restraints placed upon a bankrupt during the term of bankruptcy are directed at protecting the community. At discharge, a key question is whether discharge of the bankrupt will present an unacceptable risk to the community. If someone’s insolvency has resulted in bankruptcy, that person may be more likely than persons with no previous bankruptcy to become insolvent again. That alone is not sufficient. There must be some further element creating an unusual level of risk.

[36] Having regard to the fact that this is Mr King’s third bankruptcy, Mr King’s pre-adjudication conduct and the manner in which he has conducted himself during the course of this bankruptcy, it is apparent that if Mr King were to be discharged he

¹⁵ *Armitage v Established Investments Ltd (in liq)* HC, at [32].

would pose a significant risk to the community. He has solicited funds from members of the public and hidden his assets from the Assignee. He has offered at least one personal guarantee in circumstances where he must have known that he would be unable to satisfy the debt he was guaranteeing. He has failed to comply either with the requirements of his bankruptcies, or with the standard statutory requirements governing companies. As a consequence of these failures, companies associated with Mr King have caused loss and harm to individual members of the public and to the Inland Revenue. Whether the failures were the result of actual dishonesty or of negligent failure to understand the requirements to which he was subject, they show a certain unwillingness to learn from past mistakes.

[37] In appropriate cases, the risk a bankrupt may pose to the community upon discharge can be mitigated with the imposition of conditions upon discharge under s 299. But here, the Assignee submits, there is no reason to believe that Mr King will comply with those conditions. He has not complied with the restrictions imposed upon him during the bankruptcy. Why should he do so under a less stringent post-bankruptcy regime, which allows less external oversight? That submission has some force.

[38] There can be public benefit in allowing bankrupts to reintegrate themselves within commercial activity, free from their liabilities. It is also in the interest of the bankrupt. In *Re Gaskell* the English Court of Appeal stated:¹⁶

... the overriding intention of the Legislature in all Bankruptcy Acts is that the debtor on giving up the whole of his property shall be a free man again, able to earn his livelihood, and having the ordinary inducements to industry ...

[39] Mr King asserted in examination that he has not been dishonest, and that his failures to comply with the bankruptcy regime were the result of miscommunication or error, rather than dishonesty. In the circumstances, however, either scenario poses a risk. I am particularly concerned that, despite multiple criminal charges, Mr King appears to admit legal liability but not personal fault. His behaviour in mixing company and personal funds, while denying that that indicated he had control over the companies in question, is also concerning, especially given that that exact

¹⁶ *Re Gaskell* [1904] 2 KB 478 at 482 (CA).

behaviour resulted in the substantial debt to the Inland Revenue Department which precipitated this bankruptcy. The benefit of allowing Mr King to reintegrate himself in commercial activity must be balanced against the risk to the public.


[40] I agree with the Assignee that Mr King's unscrupulousness and evident lack of desire to change are further factors pointing to the appropriateness of extending Mr King's bankruptcy for an indefinite period.

Result

[41] Having regard to the need for accountability and the ongoing risk to the public, I concur with the Assignee that it is wholly appropriate to continue Mr King's bankruptcy. A continuation will be in the overall public interest.

[42] I decline to discharge Mr King from bankruptcy.

[43] It will be a matter for Mr King to make an application to the Court if and when he seeks a discharge, and for him to satisfy the Court that discharge is appropriate. Bearing in mind that bankruptcy should not continue indefinitely, he may make an application after 4 November 2016 (but not beforehand).


Associate Judge Sargisson