

**IN THE DISTRICT COURT
AT WAITAKERE**

**CRI-2014-090-002517
[2015] NZDC 15272**

MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT
Prosecutor

v

GRANT NORMAN KING
Defendant

Hearing: 3, 4 & 5 August 2015

Appearances: S Symon and T Hu for the Prosecutor
Defendant appears in person
T Simmonds for Amicus Curae

Judgment: 11 September 2015

Reasons: 11 September 2015

REASONS FOR VERDICTS OF JUDGE K J GLUBB

Verdicts

[1] I return the following verdicts:

Charge 1 (CRN ending 805)	Guilty
Charge 2 (CRN ending 806)	Not guilty
Charge 3 (CRN ending 811)	Guilty
Charge 4 (CRN ending 807)	Guilty
Charge 5 (CRN ending 808)	Guilty
Charge 6 (CRN ending 809)	Guilty
Charge 7 (CRN ending 810)	Not guilty
Charge 8 (CRN ending 812)	Guilty

Reasons for verdicts – legal requirements

[2] In this judgment I adopt the approach endorsed by Heath J in *R v Sullivan*:¹

I conducted this trial without a jury. In *R v Connell*, the Court of Appeal explained the extent of the reasons that should be given for a trial Judge's verdicts.² Generally, all that is required is a statement of the ingredients of each charge, any relevant rules of law or practice, a concise account of the facts, and a plain statement of the essential reasons why the verdicts have been returned. When the credibility of witnesses is involved and important evidence is either accepted or rejected, that too should be stated explicitly.³

Introduction:

[3] The defendant, Mr King, faces eight charges:

- (a) 1 and 2: of taking part in the management or control of two separate businesses, Tern Marine (NZ) Limited (“Tern Marine”) and Trident Cycles (NZ) Limited (“Trident Cycles”).
- (b) 3 – 7: of wilfully misleading the Official Assignee in statements made during the currency of his bankruptcy.

¹ *R v Sullivan* [2014] NZHC 2501, at [12].

² *R v Connell* [1985] 2 NZLR 233 (CA).

³ *Ibid*, at 237.

- (c) 8: of concealing property to the value of \$500 or more, also during the currency of his bankruptcy.

[4] There is no dispute in this case that the defendant was a bankrupt during the relevant period under consideration, having been adjudicated bankrupt by the Auckland High Court on 14 October 2010.

[5] The general effect of that adjudication being that the defendant's debts were forgiven, but in consequence the defendant became subject to the controlling provisions of the Insolvency Act 2006 ("the Act") and has consequent obligations while his personal estate is then administered by the Official Assignee.

[6] The thrust of that administration being to realize assets to pay creditors whilst ensuring the bankrupt's duties and responsibilities during that period are adhered to. There is also a rehabilitative aspect to this control.

[7] There is also no dispute that the period of bankruptcy ordinarily runs for a period of three years, and in this instance the Official Assignee objected to the defendant's discharge from that state on 28 August 2013. In consequence the defendant remained an undischarged bankrupt.

[8] It is also beyond dispute that the defendant became involved with Chinese businessmen in 2012 and in that process came to be employed by both Tern Marine and latterly involved with and seemingly employed by Trident Cycles.

[9] It is also beyond dispute that the defendant was aware of the applicable restrictions, and more so, the obligations upon him whilst bankrupt. He acknowledged each both formally and by email correspondence.

[10] It is also beyond dispute that at no time did the Official Assignee grant the defendant consent to carry on the management or control of any business, as set out by s 149(1) the Act. I am satisfied that this would ordinarily be in writing and simply put, it was neither sought nor given.

[11] It is also noted that this is the defendant's third bankruptcy adjudication; having previously been adjudicated bankrupt in October 1991 and January 2005.

Issues:

[12] The issues in this case are:

- (a) Did the defendant take part in the management or control of any business, specifically Tern Marine and Trident Cycles?
- (b) Did the defendant wilfully mislead the Official Assignee in statements made during the period of his bankruptcy?
- (c) Did the defendant conceal his property during the period of his bankruptcy?

(a) Did the defendant take part in the management or control of any business?

[13] The Act contains the following provisions:

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:...

...

436 Offence by bankrupt in relation to management of companies

(1) A bankrupt commits an offence if he or she—

...

(b) fails without reasonable excuse to comply with section 149...

[14] Section 436 creates the offence of failing without reasonable excuse to comply with s 149.

[15] In terms of addressing the concept of management and what it comprises, there is a useful summary detailed in *Waters v Ministry of Economic Development* at [28] – [31]:⁴

[28] Section 382 of the Companies Act provides, as relevant:

“382 Persons prohibited from managing companies

(1)Where—

...

(b)a person has been convicted of an offence under any of section 37 to 380 of this Act or of any crime involving dishonesty as defined in section 2(1) of the Crimes Act 1961; or

...

That person shall not, during the period of five years after the conviction or the judgment, be a director or promoter of, or in any way, whether directly or indirectly, be concerned or take part in the management of, a company, unless that person first obtains the leave of the Court, which may be given on such terms and conditions as the Court thinks fit.

... ”

[29] “Management” is to be given a wide interpretation, covering activities relating to the real business affairs of a company, but is not intended to prohibit a person being involved in a minor capacity. In *R v Newth*, Quilliam J (in relation to the predecessor to s 382 in the Companies Act 1955) said that the prohibition was intended to protect the commercial community, and as such was not intended to simply prevent a person acting as a director.⁵ The focus should be on whether the person was involved “in the real business affairs of the company”⁶.

[30] In *Tregurtha v Police*, Fisher J considered that it was a question of degree as to whether a person was involved in the real business affairs of a company⁷. Fisher J approved of the discussion in *Commissioner for Corporate Affairs (Vic) v Bracht*, where Ormiston J said⁸:

... The concept of ‘management’ for present purposes comprehends activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of the corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.

... I would see the prohibition as covering a wide range of activities relating to the management of a corporation, each requiring an involvement of some kind in the decision-making processes of that corporation. That involvement must be more than passing, and

⁴ *Waters v Ministry of Economic Development* [2013] NZHC 3463.

⁵ *R v Newth* [1974] 2 NZLR 760 (SC) AT 761.

⁶ *Ibid*, at 761.

⁷ *Tregurtha v Police* HC Auckland AP 123/93, 15 October 1993.

⁸ *Commissioner for Corporate Affairs (Vic) v Bracht* (1988) 14 ACLR 728 at 733-736.

certainly not of a kind where merely clerical or administrative acts are performed. It requires activities involving some responsibility, but not necessarily of an ultimate kind whereby control is exercised. Advice given to management, participation in its decision-making processes, and execution of its decisions going beyond the mere carrying out of directions as an employee, would suffice.”

[31] In his judgment in *R v Le Noel*, Judge Thorburn referred to the judgments in *Newth*, *Tregurtha*, and *Bracht*, and set out a non-exhaustive list of indicators that could be taken into account in deciding whether a person can be described as having taken “a hand in the real business affairs” of a company⁹.

- “1. Without there being a need for the accused to be a director or office holder did he exercise any supervisory control which reflected the general policy of the company?
2. Was the accused's involvement any more than a passing involvement that would be consistent only with clerical or administrative acts expected of an employee?
3. Did the involvement of the accused include activities of responsibility and assumption of some control albeit not necessarily of an ultimate kind?
4. Did the accused give advice to management and or participate in decision-making processes?
5. Did the accused partake in the execution of or implementation of decisions made — beyond the mere carrying out of instructions as would be required of a mere employee?
6. Were the opinions of the accused given any weight in the decision-making process of management?”

[16] In *Le Noel* Judge Thorburn said:¹⁰

By taking a broad view of the totality of evidence and acknowledging its cumulative effect, I list the following indicators whilst not exhaustive, as features, should they exist, to be taken into account, and I apply a broad value judgment and overview to the evidence rather than more restrictively focusing on individual transactions or activities: ...[Listing the 6 aspects detailed above]

(1) Tern Marine

[17] Wei Li is a Chinese businessman and director of Shanghai Pangtong Investments¹¹ (“Pangtong Investments”), based in China. He became a director of

⁹ *R v Le Noel* (alternative citation *R v L*) [1998] DCR 229 at 235.

¹⁰ *Ibid*, at 282.

both Tern Marine and Trident Cycles, as well as Tern Marine (HK) Co Ltd. The evidence makes it clear that the defendant and Mr Li were acquainted through earlier employment with a company called Holdfast. The defendant had not worked for that company for some time, but it was involved in anchor manufacture.

[18] In consequence the defendant created a design for an anchor described in evidence as “basic pen drawings”.

[19] It was this anchor design which came to underpin the creation of a company in Hong Kong¹² and then in New Zealand. The intention being to market and sell this anchor in New Zealand and worldwide.

[20] Mr Li confirmed that the pen drawings were converted to a detailed design by his IT and CAD personnel in China, and while they didn’t have a lot of experience with anchors “we believe it was good, better than other anchors”.

[21] What is also clear is that once the designs were formally developed, they were then referred to the defendant for his review.

[22] Mr Li said he “sent to Mr King to have a look” ... “whether it was good design or not”.

[23] He went on to say “the design was from the idea of Mr King and when we met in New Zealand. At the time we didn’t understand very much about anchors and we were not able to identify whether the anchor was good or bad”.¹³

[24] He went on “...then we redraw design in computer and we show him the final design. After few times and after some revision Mr King was finally agreed, believed it has good design and then we also agreed to produce it”.

¹¹ The entity that initially funded and created Tern Marine and Trident Cycles.

¹² Tern Marine (HK) Co Ltd, the sole shareholder in Tern Marine.

¹³ NOE, page 97, line 32.

[25] It seems clear from the evidence that the idea and the drawings were the defendant's, and it was worked up in China, went through a series of revisions and when the defendant agreed that it met his design specifications, it was then produced.

[26] This is important because it places the defendant very much at the centre of this new and developing enterprise.

[27] Matters progressed from there and we have in evidence Mr Li's email correspondence from 'Stone', Jun Ma,¹⁴ from September 2012, detailing the proposal for the company setup.¹⁵

[28] Mr Li said that Stone spoke good English, whereas his was not very good. It follows that the email communications with the defendant came from Stone.

[29] Whilst Mr Li accepted the detail of the proposal as set out in those emails was simply a proposal, nonetheless it provides a useful overview of just what was proposed. Importantly this venture commenced in July 2012, as evidenced by the initial payment to the defendant of \$4962.25 on 30 July 2012¹⁶. Mr Li confirmed that this was salary paid in advance for work to be done in August. Mr Li said the defendant's work involved looking for office space and also investigation of the market¹⁷.

[30] What is clear from the documentary evidence taken as a whole is that the defendant's work was more extensive than that. It included:

- Design work on the anchor;
- Locating and finalising negotiations for lease of premises, including offering to sign the lease;
- Locating, testing and finally purchasing a company vehicle, which included initially registering it in his name;

¹⁴ A second director of Tern Marine.

¹⁵ Exhibit 7/20.

¹⁶ Exhibit 2/2/16.

¹⁷ NOE, page 95, line 28.

- Receiving into his personal bank account all payments for services provided to the business and settling accounts (until the company bank account came into operation, which appears to have been from July 2013);
- Securing a patent attorney to work for the business;
- Registering the patent for the anchor personally and then later assigning that patent to Tern Marine;
- Identifying a suitable accountant for the business;
- Setting up the New Zealand company office at Mill Road, Helensville;
- Providing reports to the directors on sales and the business;
- Booking trade shows in New Zealand and overseas, which included liaising on booth sizing and then attendance at those shows in New Zealand;
- Receiving and retaining an authorisation issued on 21 February 2013 to sign approved agreements on behalf of the company.

[31] The directors, including Mr Li and Mr Ma were ordinarily based and living in Shanghai, China.

[32] They took a keen interest in the running of the business and were consulted routinely on business decisions. Any expenditure had to be authorised and receipted.

[33] Their oversight extended to the installation of video surveillance equipment, allowing Mr Li to monitor the office remotely from China via his cell phone.

[34] The issue is however, despite the clear evidence from Mr Li of the defendant's position in the company and his reporting arrangements, whether the defendant was taking part in the management or control of any business? As Fisher J said in *Tregurtha v Police*¹⁸ "one cannot escape the fact that in the end there is a question of degree".

[35] The defendant's involvement in the business is best encapsulated in an email exchange between Stone and himself. This exchange occurred shortly after Tern Marine's incorporation on 15 January 2013.¹⁹

¹⁸ Above n 7, at 6.

¹⁹ Exhibit 1/37.

[36] The initial email sought the defendant's feedback on a series of topics: the office; advertising; the patent; the anchor for the catalogue; visiting dealers and getting comments; and his plan for sales and promotion. The response from the defendant is detailed and instructive. What is apparent from the course of that series of emails, which extends over some 59 pages, is that the defendant was asked his opinion on matters of organisational significance and he provided it. It was accorded weight and it guided the decision making of the directors in China. This chain of communication makes it clear the defendant was viewed well by Mr Ma and was instrumental and involved in a number of the decisions made.

[37] It is clear that the defendant had in fact, in terms of the terminology set out in *Waters v Ministry of Economic Development*,²⁰ taken "a hand in the real business affairs" of this business.

[38] I am satisfied beyond reasonable doubt that the defendant was heavily involved in the management of the business and essentially from its inception. That business came to be registered in New Zealand as Tern Marine. In essence he was a guiding hand in the creation of this business.

[39] I find this charge proven beyond reasonable doubt.

(2) *Trident Cycles*

[40] On the evidence it is difficult to expressly demarcate the business of Tern Marine and Trident Cycles. What is clear is that Yim Zhao²¹ came to New Zealand in December 2012. Mr Li said Mr Zhao was exploring the market to see if there was an opening for the importation and distribution of bicycles. That progressed and saw bicycles exported from China to New Zealand. It saw the expansion of the premises leased at Mill Road, Helensville, which the defendant facilitated. It saw the employment of a new employee to assemble and sell those bicycles. That employee was David Silverstone. He was the defendant's daughter's boyfriend, who had recently been unemployed.

²⁰ Above n 4, at [31].

²¹ Also known as "Michael". A Chinese businessman who became a director of Trident Cycles.

[41] The lead up to Mr Silverstone's employment was essentially that he attended the first New Zealand boat show where Tern Marine exhibited the anchor. The defendant and the directors were present at that boat show. In consequence the directors and Mr Zhao got to know Mr Silverstone and subsequently interviewed him for a position with Trident Cycles. They decided to hire him and through the defendant, made him an offer of employment, their having returned to China.

[42] Mr Silverstone commenced employment from 1 August 2013 and shortly thereafter travelled to China for 10 days at the invitation of Pangtong Investments, where he learned the ropes of bicycle assembly and then returned to New Zealand. Mr Silverstone said that in his first year of employment Mr Li came to New Zealand twice and that Mr Zhao was present in New Zealand on alternate months, although Mr Li said that Mr Zhao only started coming to New Zealand from the end of 2013.

[43] Mr Silverstone also said that he received email communications from China via the defendant with instructions for him, in addition to direct communications with Mr Li and Mr Zhao. He also said that when there was no one from China in New Zealand, the defendant was in charge.

[44] In the lead up to Mr Silverstone's employment, the defendant had approached WINZ on behalf of the company seeking advice on the availability of a job seekers subsidy, should they employ Mr Silverstone. It seems he did not qualify and it was taken no further.

[45] The defendant also organised Trident Cycles' attendance at the trade show "Big Boys' Toys", organising the booth and make the necessary arrangements and signing on behalf of the company²². It is clear from the evidence of Mr Li that he too found it difficult to demarcate roles within Tern Marine and Trident Cycles. He said in essence it was one business, but two company structures. He said that the defendant was involved in sales, getting product out of containers, assembly and delivery. When he was asked if he was involved in all parts of this business in New Zealand, he said "Yes, he was involved in business in New Zealand".²³

²² Exhibit 10/37 at page 2.

²³ NOE, page 121, line 18.

[46] The issue then is whether the defendant's involvement in Trident Cycles amounts to taking part in the management or control of any business? In New Zealand there were two employees involved with the running of Trident Cycles. I conclude from the evidence that Mr Silverstone was subordinate to the defendant, even though Mr Li was unable to draw a distinction. Certainly Mr Silverstone was in no doubt. He was also making necessary arrangements for the company, but was that more than might be done by an employee?

[47] It is clear that the defendant was central to this operation and to an extent the face of the company in New Zealand. Given his involvement, even as an employee, it probably means he was involved in the management of the business. However, I am not satisfied beyond reasonable doubt that the defendant did take part in the management or control of this business, even when there was no representative from China present. Simply put, I am not satisfied on the available evidence that he had taken "a hand in the real business affairs"²⁴ of this business. Accordingly, I find this charge not proven beyond reasonable doubt.

(b) Did the defendant wilfully mislead the Official Assignee in any statement made during the period of his bankruptcy?

[48] In each charge the focus is on statements made and the detail therein. I deal with each charge separately.

(3) Not disclosing the Kiwi Bank account on the Statement of Affairs on 4 November 2010.

[49] The Statement of Affairs ("the Statement") was filed in accordance with the requirements of s 67 of the Act on 4 November 2010.²⁵

[50] On page 10 of the Statement the defendant detailed all his bank accounts, as he was required to do. He showed four accounts with the Westpac Bank, including a Kiwi Saver account. In the Statement he made no reference to a Kiwi Bank account.

²⁴ Above n 4, at [31].

²⁵ Exhibit 1/8.

[51] Mr Chambers²⁶, in evidence said he first became aware of the existence of a Kiwi Bank account during an interview with the defendant, conducted at the Mill Road premises on 18 June 2013.

[52] In that interview he learned that all expenditure for Tern Marine was currently being paid out of the defendant's bank account from funds placed there from China.

[53] Following that interview, on 2 July 2013, a requisition for all account details held by the defendant was filed with, and subsequently answered by, Kiwi Bank. What that response established was that the defendant had been actively using this account for the receipt of income in relation to Tern Marine²⁷ from July 2012 and also for the receipt and disbursement of business expenses throughout an 11 month period.²⁸

[54] In cross examination of Mr Chambers the defendant produced Exhibit A, which showed the account had been in existence at the date of the Statement, but had a nil balance, and only started being used from 17 January 2011. On the evidence of Mr Pritchard,²⁹ it is clear that this account was in active operation from 1 July 2011 at least.³⁰

[55] The defendant also suggested that, in a separate interview, this account had been disclosed to the Official Assignee. In evidence Mr Chambers said he knew nothing of that and maintained that the first he knew of it was during the interview conducted on 18 June 2013.

[56] I am satisfied beyond reasonable doubt that the existence of this account, later used as it was for the receipt of income and the receipt and disbursement of business expenses, was not disclosed to the Official Assignee. The issue then is whether or not the failure to report the existence of the account in these circumstances was wilfully misleading.

²⁶ Principal Insolvency Officer and the lead investigator for the Official Assignee

²⁷ As it came to be known.

²⁸ Exhibit 1/38 and 2/1 to 4.

²⁹ Kiwi Bank fraud analyst.

³⁰ Exhibit 2/1 to 4.

[57] In *Babington v CIR (No. 2)*³¹ Turner J stated that a person is “wilful” when he knows what he is doing and intends to do what he is doing. In that way inadvertence or honest belief that he did not need to disclose this account could be a defence.

[58] On the evidence before me I am satisfied the defendant knew he was required to disclose all bank accounts, even when at the time of the Statement it had a nil balance, and equally by failing to do so, I am satisfied he intended not to disclose that account. I am also satisfied that by deliberately failing to disclose this account he was wilfully misleading the Official Assignee.

[59] Accordingly I am satisfied beyond reasonable doubt this charge is proven.

(4) On 20 September 2012, stating that he would not begin work for the business until October 2012.

[60] This charge is underpinned by the overriding obligation upon a bankrupt to be forthright and frank with the Official Assignee, in the Statement and subsequent notices, of changes in circumstances. This is given statutory emphasis by virtue of s 145 of the Act, which provides:

145 Bankrupt must notify Assignee of change in personal information

The bankrupt must immediately notify the Assignee of any change in the bankrupt's—

- (a) address; or
- (b) employment; or
- (c) name; or
- (d) income.

[61] Against that backdrop, the Statement indicated, and the otherwise accepted position was that, the defendant was not working, was in a receipt of a WINZ benefit and was in essence, running his household at a loss. The first communication with the Official Assignee came on 20 September 2012, as contained in a file note of the defendant's telephone call with Mr Chambers. That included the following comment:³²

³¹ [1958] NZLR 152 (SC)

³² Exhibit 1/10.

...He said that he has been offered a job from a Hong Kong based company in Auckland selling marine products and intends starting in October.

[62] For present purposes the focus is on the stated proposed start date and whether that wilfully misled the Official Assignee.

[63] The bank records and the evidence of Mr Li establish that the defendant commenced working for Pangtong Investments on 31 July 2012, when \$4,962.25 was deposited into his Kiwi Bank account. That, as mentioned, was said to be paid in advance for market research and finding office space in New Zealand. This is clearly prior to the start date indicated by the defendant of October 2012.

[64] Irrespective of whether Mr Chambers was seeking a finalised position or known position, the defendant did not tell the Official Assignee of his change of circumstances as required under the Act. That was a matter known only to him. He was duty bound to be frank and forthright. He was not. I am satisfied that he knew the obligations; he knew the restrictions; and he deliberately misstated the position. I am satisfied the file note is accurate and that the defendant wilfully misled the Official Assignee. Accordingly, I find the charge proven beyond reasonable doubt.

(5) On 21 February 2013, stated that he would only begin work for the business in the coming weeks.

[65] This charge relates to the next phone call file note, made when Mr Chambers phoned the defendant.³³

[66] There had, it seems, been no intervening communications. In the file note of their discussion the defendant is noted as saying "...the anchor designed is owned by Tern Marine (NZ) Limited (4165038)³⁴ (a Chinese company) and that he expected to be employed by the company in the coming weeks".

[67] From this email Mr Chambers confirmed that he understood there was an offer of employment, that the defendant had not yet started, but would in the coming

³³ Exhibit 1/11.

³⁴ The company registration number in NZ.

weeks and there was an expectation of income. On receipt of that information, Mr Chambers sought an updated budget document.

[68] What is important to record is that Tern Marine was registered in New Zealand on 15 January 2013 and the defendant had been heavily involved in a paid position relating to the set up of the business since July 2012. He knew that was the position; he knew his obligations; and he maintained a charade of expecting employment and income, when he was already employed, first by Pangtong Investments and then by Tern Marine, and receiving income. Mr Li confirmed in evidence that there was no formal signed contract of employment until after the incorporation, but the defendant was clearly in paid employment well ahead of any formal contract finalisation.

[69] I am satisfied that by making this statement the defendant wilfully misled the Official Assignee. Accordingly, I am satisfied beyond reasonable doubt that this charge is proven.

(6) On 5 June 2013 stated that he had no signing rights in relation to Tern Marine.

[70] This charge relates to a telephone file note of 4 June 2013³⁵ and thereafter an email exchange starting on 5 June 2013³⁶, and the reply from the defendant of 6 June 2013³⁷.

[71] Initially Mr Chambers, having received further information after correspondence in May 2013, by phone and follow up email made a detailed request of the defendant as follows:³⁸

As discussed, please provide me with the following:

- ❖ a copy of your signed employment contract
- ❖ contact details of the directors' of Tern Marine
- ❖ comprehensive details of your job description.

Please ensure your job description covers the following areas:

- ❖ a complete description of your general day to day duties

³⁵ Exhibit 1/19.

³⁶ Exhibit 1/20.

³⁷ Exhibit 1/23.

³⁸ Exhibit 1/20.

- ❖ whether you have access or signing authority of Tern Marine's bank accounts
 - ❖ whether you prepare/negotiate with potential customers into sales contract on behalf of Tern Marine
 - ❖ whether you manage the business of Tern Marine.
- Please provide that information by no later than 6 June 2013.

[72] The clear import of this request was for the Official Assignee to have better information about the defendant's employment, what financial control he had in relation to the business and whether his role was managerial in nature.

[73] The response came on 6 June 2013³⁹. In terms of signing authority on Tern Marine bank accounts, the defendant said:

"I have no access to the company's bank accounts, no signing rights and no credit cards or cash flow cards for the company, nor do I want any such rights. All money is controlled by the directors in Shanghai".⁴⁰

[74] Mr Chambers said that upon receipt of that response he did not have any information to the contrary⁴¹.

[75] What is clear from the evidence is that Tern Marine endeavoured to set up an ANZ bank account when the directors, including Mr Li, were in New Zealand in December 2012. For whatever reason, that account could not be either set up or used.

[76] It is also clear that this ANZ account was not operational until July of 2013 at the earliest. That is apparent from the fact that identifiable business related expenses continued to be paid through the defendant's Kiwi Bank account until 28 June 2013⁴².

[77] From this detail, and from what the defendant subsequently conveyed to Mr Chambers on 18 June 2013, he knew full well that the official company bank account was not operational on 6 June 2013.

³⁹ Exhibit 1/23.

⁴⁰ Ibid, paragraph 2.

⁴¹ NOE 22/21-29.

⁴² Exhibit 2/3/39.

[78] What is also clear from the evidence of Mr Li is that the defendant never had any signing authority on the official company bank accounts, nor for that matter, online access, only Mr Li retained that level of control.

[79] However, as the situation existed from July 2012, and including for the first six months of 2013, all company finances in New Zealand were transacted through the defendant's Kiwi Bank account. He was the signatory on that account and Mr Li confirmed that even he had no access to that account. In that sense this was the *de facto* company bank account. A situation the company accountant, Mr Yap, said was highly irregular⁴³.

[80] Additionally, it is also clear that on 21 February 2013 Mr Li granted the defendant a formal signing authority as the New Zealand representative of the company to sign approved agreements⁴⁴.

[81] While it is possible to read the question and the response literally, that fails to recognise the purpose of the request for information, and moreover, the defendant's overarching obligations. In the administration of a bankrupt's estate the Official Assignee is duty bound to identify potential financial risk associated with the bankrupt's affairs. When that question was asked the defendant knew full well that all company finances in New Zealand were being channelled and managed by him through his Kiwi Bank account. He was the account holder, he had signing authority over that account, and that is precisely the information that the Official Assignee was seeking. While his answer may have been literally accurate as it related to the ANZ account, it was entirely misleading as it related to the *de facto* company account, his Kiwi Bank account.

[82] He knew that was the position, and he must have known why the Official Assignee was seeking that information. In responding in the way he did, I am satisfied he deliberately misled the Official Assignee regarding the true position and his role in the financial administration and transactions that were being undertaken by him for the company.

⁴³ NOE 88/23-30.

⁴⁴ Exhibit 1/32.

[83] Whilst it is unnecessary for present purposes, it is not difficult to infer what the Official Assignee's response to that detail would have been. However, by failing to respond accurately as required, the defendant prevented the Official Assignee from taking any action.

[84] I am satisfied that by making that statement the defendant wilfully misled the Official Assignee. Accordingly, I find this charge proven beyond reasonable doubt.

(7) On 19 December 2013, stated that his role with Trident Cycles was limited to aiding Mr Zhao and Mr Silverstone, and that Mr Silverstone was a director of the company

[85] The focus of this charge is again on a telephone conversation file note⁴⁵ in which the defendant is said to have identified his role in the company as assisting Mr Zhao and Mr Silverstone and going on to name Mr Silverstone as a director.

[86] In point of fact, the directors of that company were Wei Li, Jun Ma and Yim Zhao. The company was also registered in New Zealand on 10 June 2013 and its focus, as detailed, was the sale of bicycles.⁴⁶ The evidence established that Mr Silverstone was an employee of the company and certainly not a director. He was however an important member of the company's New Zealand staff.

[87] In cross examination it was suggested to Mr Chambers that he had made a mistake in his recording of the statement, and the defendant had not said that Mr Silverstone was a director. Rather he suggested to Mr Chambers that he had mixed up Mr Silverstone for Stone, given the similarity in their names.

[88] Mr Chambers had no independent memory of that conversation, and said he could "only refer to my note of the conversation". He maintained that the defendant had not mentioned 'Stone' and said in response "...that's not what you told me"⁴⁷. He would not accept the possibility of a mistake in either the recording, or for that matter, in what he was told.

⁴⁵ Exhibit 1/55.

⁴⁶ Exhibit 11/41 and 11/42.

⁴⁷ NOE 66/2.

[89] In the end it is clear that the detail is inaccurate. It is equally clear that the Official Assignee and Mr Moore⁴⁸ sourced a copy of the company incorporation, although there is no evidence before me about when that was done. Importantly, the identity of the directors was a matter of public record and it was readily available.

[90] It is difficult to resolve this dispute. However, in the circumstances I do not need to. There seems little doubt that the defendant did assist both Mr Zhao and Mr Silverstone with the business, as detailed in the letter of 23 December 2013. Moreover nothing turns on the “claimed misrepresentation” of Mr Silverstone as a director; certainly it was not said in an effort to divert attention from the actions or the role of the defendant on this occasion.

[91] Accordingly, even if the accuracy of the file note is accepted, I am not satisfied that by making that statement, the defendant wilfully misled the Official Assignee. I am not satisfied beyond reasonable doubt that this charge is proven.

(c) Did the defendant conceal property during the period of his bankruptcy?

(8) *Concealing property*

[92] The particulars of this charge record that “the defendant concealed \$58,650.00 in income received from work carried out for Tern Marine (NZ) Ltd and Trident Cycles (NZ) Ltd”.

[93] What I note is that the particulars are not elements of the charge as such, rather they simply serve to identify the scope of the charge itself.

[94] In essence, those particulars could equally refer to “income received from his Chinese business connections between 30 July 2012 and 30 December 2013”.

⁴⁸ Another investigator for the Official Assignee.

[95] Sections 420 and 427 of the Act provide:

420 Offences in relation to property

- (1) ...A bankrupt (B) commits an offence if B—
 - (a) conceals or removes any part of B's property—
 - (i) within 2 months immediately before any unsatisfied judgment or order for payment of money is obtained against B; or
 - (ii) at any time after an unsatisfied judgment or order for payment of money is obtained against B; or
 - (b) with intent to defraud B's creditors or any of them, makes, or causes to be made, any gift, delivery, or transfer of, or charge over, B's property.
- (2) A bankrupt (B) commits an offence if, after an application for B's adjudication has been filed, or within 2 years immediately before the application is filed, B—
 - (a) conceals any part of B's property to the value of \$500 or more; or
 - (b) conceals any debt due to B or due from B; or
 - (c) fraudulently removes any part of B's property to the value of \$500 or more.

...

427 Defence of absence of intent

...

- (2) A bankrupt (B) does not commit an offence under any of the following provisions if B proves that at the material time B had no intent to defraud:
 - (a) section 420(2)(a) or (b):

...

[96] In this context, property is defined widely in s 3 of the Act:

3 Interpretation

property means property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise

[97] It follows this would include income received, and given the value is said to be \$58,650.00, that would be in excess of \$500.

[98] As was noted in *R v Rippin* at [10] - [11]:⁴⁹

[10] “Conceal” is not defined by the Act but in accordance with the *Concise Oxford Dictionary*, ninth edition 1995, it means “to keep secret”, “not allow to be seen” or “hide”. It is therefore a deliberate not an accidental or inadvertent act.

[11] Both the Crown and Mr Rippin’s counsel accept this definition. The Crown further submits that a failure to reveal or disclose may initially be inadvertent but may subsequently become a conscious act of concealment when, for example, a person has forgotten to disclose something, subsequently realises he or she has not disclosed it and deliberately decides to keep it undisclosed.

[99] Throughout the period of his bankruptcy, the defendant had a continuing obligation to immediately disclose any change in his employment or income.

[100] The banking records independently confirm that he started receiving income from Pangtong Investments on 30 July 2012 and subsequently from Tern Marine (HK) Co Ltd on 29 November 2012⁵⁰.

[101] Without repeating evidence already summarized, I am satisfied that at no time prior to 18 June 2013 was the Official Assignee aware of the existence of the Kiwi Bank account. I am also satisfied that there was no disclosure of the full extent of the defendant’s income.

[102] Although he signalled an expectation of income to Mr Chambers on 21 February 2013⁵¹, the defendant only finally confirmed that he was in fact receiving total income of \$3,500 per month, as detailed in his updated budget form dated 1 May 2013⁵², received by the Official Assignee on 22 May 2013⁵³.

[103] Initially it was thought that his salary was \$3,500 per month, but it became clear on the evidence that he was also in receipt of commission in advance of \$1,500 each month⁵⁴.

⁴⁹ *R v Rippin* Auckland DC CRI-2012-004-005351, 11 June 2013, Judge Ryan.

⁵⁰ Exhibit 2/2/21.

⁵¹ Exhibit 1/11.

⁵² Exhibit 1/16.

⁵³ Exhibit 1/15.

⁵⁴ Exhibit G.

[104] While there had been mention of the potential of commission on sales; on the available evidence, at no time was the Official Assignee ever advised of the advance commission payments.

[105] I am satisfied that the defendant was fully aware of his obligations. I am equally satisfied that he deliberately refrained from advising the Official Assignee immediately as required.

[106] In fact it was almost 10 months before the updated budget form was filed, and then about six weeks before the Official Assignee got access to the detail of the defendant's Kiwi Bank account.

[107] I am satisfied that the defendant deliberately kept his income hidden, and I find this amounted to a concealment from 30 July 2012 through until 22 May 2013, when he disclosed the fact of income, if not the bank account details. Additionally, that he did not disclose and kept hidden the fact of advance commission payments throughout the period in question.

[108] Having so found, the onus then shifts to the defendant to prove an absence of intent to defraud. Fundamentally, there is no such evidence. However, even if there was a suggestion that inferences are available for the Court to consider, I am satisfied beyond reasonable doubt that the defendant acted deliberately, and that he knew he was in breach of his statutory obligations. Additionally there is no evidence of an honest belief that he was entitled so to act. Accordingly I find this charge proven beyond reasonable doubt.

A handwritten signature in black ink, appearing to be 'K J Glubb', with a stylized, wavy line extending from the bottom of the signature.

K J Glubb
District Court Judge

