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IN THE MATTER of the Companies Act 1955 and  
of the Insolvency Act 1967

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IN THE MATTER of GRAEME NOEL MARSHALL a Bankrupt

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IN THE MATTER of an application by the said  
GRAEME NOEL MARSHALL under section  
188 of the Companies Act 1955 and  
section 62 of the Insolvency Act  
1967

Hearing: 15 February 1984

Counsel: D.I. Jones for Applicant  
I.A. Hansen, Official Assignee

Judgment: 23/2/84

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JUDGMENT OF COOK J.

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This is an application by Graeme Noel Marshall, a bankrupt, for orders under Section 188 of the Companies Act and Section 62 of the Insolvency Act 1967 granting leave:-

(1) To be employed by Freedom Furniture Limited, a duly incorporated company having its registered office at Christchurch and carrying on business there as a furniture manufacturer and retailer and,

(2) To take part in the management of that company subject to such conditions or limitations as may be imposed by the Court.

Section 188(1) provides that:-

"If any person being an undischarged bankrupt

acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the Court,"

he commits an offence. Before the leave of the Court may be given, notice of intention to apply must have been served on the Official Assignee and the section provides that:-

"It shall be the duty of the Official Assignee, if he is of opinion that it is contrary to the public interest that any such application should be granted, to attend on the hearing of and oppose the granting of the application."

Section 62 of the Insolvency Act 1967 is as follows:-

"Prohibition of bankrupt entering business -

(1) Except with the leave of the Assignee or the Court, no person who is adjudged bankrupt after the commencement of this Act shall before his or her discharge -

(a) Enter into or carry on any business either alone or in partnership with any person, or become a director of or directly or indirectly take part in the management of any company:

(b) Be engaged in the management or control of any business carried on by or on behalf of, or be in the employ of, any of the following persons, namely, the bankrupt's wife or husband, a lineal ancestor or descendant of the bankrupt, the wife or husband of such an ancestor or descendant, a brother of the bankrupt, the wife of such a brother, a sister of the bankrupt, and the husband of such a sister.

(2) Nothing in this section shall restrict the provisions of section 188 of the Companies Act 1955."

In the present case, notice having been given to him, the Official Assignee attended and, while stating that it was not his intention to oppose, said he had considerable doubts; that it had been his understanding, when in October 1982 he had given leave until April 1983 for the applicant to be employed in the same business (not then incorporated), that it was to give the applicant time to look for other employment. He made no submissions, but assisted by cross-examining the applicant at

some length.

There appears to be little authority in New Zealand as to the principles which apply. In R v Newth (1974) 2 NZLR 760, Quilliam J. remarked in relation to an offence under Section 188 (1) of the Companies Act:-

"It must first be observed that the offence created by the section is a very wide one and is plainly intended to limit severely the activities of an undischarged bankrupt in the affairs of a company. I have no doubt that the object of the statutory provision is not the punishment of the bankrupt but the protection of the commercial community and I think it is this principle which points clearly the way in which the section is to be interpreted. It is not, of course, an offence for an undischarged bankrupt to be employed by a company in a minor capacity, for instance, as typist or clerk or on routine duties, but I think the section prohibits such a person from taking any hand in the real business affairs of the company and the expression 'concerned in the management' is, in my view, to be regarded in that way, that is, the inquiry should be whether, upon the evidence, the accused took a hand in the real business affairs of the company."

The corresponding section in the New South Wales Companies Act was considered in In Re Altim Pty Limited (1968) 2 N.S.W.R. 762. In that case Street J. came to a similar conclusion and also stressed that an applicant who comes to the Court seeking leave must bear the onus of establishing that the general policy of the legislature laid down in the section must be made the subject of an exception in his case. He said:-

"The prohibition is entirely protective, and the power of the Court to grant leave is to be exercised with this consideration in the forefront."

I accept that the purpose of either section is not to penalise the bankrupt but to protect such members of the public as might have dealings with the bankrupt, were he free to carry on business in any of the capacities contemplated by either section, from loss that they might thereby suffer. The possibility of the bankrupt acting in an unbusinesslike way, whether by intention or by reason of inability, or failing to

act in a businesslike manner for either reason, so that loss results to others, is to be guarded against. Even if the Official Assignee does not see fit to oppose, an application is by no means a formality; the bankrupt must fully discharge the onus upon him that it is proper to grant leave.

In this case, the only evidence is that of the bankrupt himself. In his affidavit he speaks of his experience in the furniture business, including the establishment of his own business which appears to have grown rapidly and then failed; as he was unable to meet debts which he had guaranteed and owed a very substantial sum, he filed in bankruptcy. He states that the Freedom Furniture business was started by his mother in April 1982 - "the main purpose of the venture being investment and to give her an interest in furniture retailing which she had lost with the sale of the New Brighton business", i.e. a business previously carried on by her. He said, also, that his personal future with his companies, which at that time were in receivership, was also a consideration in establishing that business and that it would provide him with some form of employment should he become redundant. Since he became employed by the business, while he had no involvement in the financial affairs of the company, some of his duties might be seen to be managerial. He described these as consisting of general store work, assembly of furniture, delivery work to the shops and customers and some retail selling when required. He considers he has some experience and expertise to offer in the areas of buying stock and the merchandising of the company's products and their designing. He said further:-

"Buying stock would be limited to monthly expenditure limits set by the Director. Merchandising of the products involves liaison with advertising agencies and news media personnel. Expenditure would be based on monthly budget limitations. To keep in touch with furniture design and merchandising techniques would necessitate an annual visit for between one and two weeks to furniture trade fairs and exhibitions held in Australia."

I presume the last sentence refers to annual visits by the bankrupt to Australia. In setting out the staff engaged in the business, he lists himself last as "general storeman, deliveries etc."

The applicant was cross-examined by the Official Assignee as to events leading to his bankruptcy. It seems that the financial problems which arose in his companies commenced with the purchase of an expensive item of machinery intended to increase production to a substantial degree. Where the fault lay, whether with management or elsewhere, cannot be determined on the evidence available, but on such evidence as is before the Court there is nothing to indicate that the applicant acted in a dishonest way or displayed a lack of integrity.

When it comes to his involvement in the present business, however, I am not satisfied that he has been entirely frank. From his affidavit, one gains the impression that his mother, as director of the company, is the guiding force and that his main involvement is as noted above with the accent on the general store work and other work of a relatively humble nature. The accountant to the business, however, concludes his letter by saying that, as the company's accountant as well as the financial adviser to the applicant's mother, he feels concerned that, if the applicant should be precluded from participating further in the company's affairs, this could seriously undermine the company's future growth. The applicant finally acknowledged that, from a practical point of view, he was the manager. It seems that his mother, who is now 71 and whom he described in his affidavit as playing an active role in the day to day running of the company in an administrative capacity, spends only a few hours a week on the company's affairs. It is to be noted further that the staff who number only 7 or 8, include four other members of the family of whom the applicant would appear to be the senior, certainly in business experience.

Taking all matters into consideration, I am not sufficiently satisfied of his fitness to act in any sort of managerial role that I would make an unconditional order granting the leave which he seeks; at the same time I do not think he should be forced to terminate his employment immediately. The leave sought is granted but only until 30th April 1984. The application stands adjourned for further consideration, should the applicant wish to continue thereafter in the employment of Freedom Furniture Limited. If there is to be further consider-

ation given to the matter, much more needs to be before the Court. His application should be supported by affidavit evidence of persons outside the company who are competent to express an opinion as to his suitability. By that time it may be possible for annual accounts to be available and, if so, they should be produced to the Court with a report on the last year's activities of the company.



Solicitors:

A.J. Newman, Christchurch, for Applicant  
I.A. Hansen, Christchurch, Official Assignee.