

RE. DALLA. 14. 5. 14.

2491

B/F 276 H
20/4

RM

25/3 SET-6

HIGH PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY
IN BANKRUPTCY

25/3

245

B. NO. 39/90

IN THE MATTER of the Insolvency Act
1967

A N D

ve,

IN THE MATTER of GARY HORTON
JOHN BAIRD

Debtor

Hearing: 8 March 1994
Counsel: P R Heath for the Official Assignee
S J Brown for Messrs Beatson and Renwick
S R Sage for Mr Tuffery

Judgment: 14 March 1994

UNIVERSITY OF OTAGO
17 MAY 1994
LAW LIBRARY

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

Introduction

On 8 August 1990 Mr Baird was adjudged bankrupt in the High Court at New Plymouth. Under s107(1) of the Insolvency Act 1967 ("the Act") he would, ordinarily, have been discharged from bankruptcy after the expiration of three years from the date of adjudication. However, the Official Assignee lodged an objection in terms of s107(3) of the Act. As required by s109(1) of the Act, he called on Mr Baird to appear before the Court to be publicly examined. The examination is due to take place

before Master Towle in the High Court at New Plymouth on 21/22 March 1994.

The question has arisen in connection with that public examination of the Official Assignee's right to use, in his report to the Court under s109(2) of the Act and/or in the course of the examination of Mr Baird, information obtained from and contained in the transcript of the private examinations under s68 of the Act of certain other persons. The question is one of considerable public importance, involving not only the extent of the protection to be afforded to those examined privately under the Act but also the manner in which the Official Assignee is to exercise his powers under the Act.

In addition:

- The Official Assignee has filed a supplementary report which is presently subject to a direction prohibiting inspection by the public and inspection or copying by creditors
- Mr Brown, for Messrs Beatson and Renwick, seeks a direction that the Official Assignee indicate in advance of the examination whether he intends to question the bankrupt regarding certain matters of concern to his clients
- Mr Brown has indicated his intention to appear, on behalf of Messrs Beatson and Renwick, at the public examination of Mr Baird and the question of their status to be represented has been raised by Mr Heath, for the Official Assignee
- There are issues of personal concern to Mr Tuffery and to one other person who has been privately examined, Mr Christian

I consider first the question of the extent of the Official Assignee's rights and then the various other matters which have been raised.

The Official Assignee's right to use, in the public examination of a bankrupt, information obtained in the private examination of other persons

(1) The issues

There are three issues.

- (a) Is the Official Assignee precluded from using in the public examination of a bankrupt information obtained in the course of the private examination of other persons on the ground that that information is hearsay and that the other persons are not going to be called as witnesses and subjected to examination by the bankrupt's counsel?
- (b) Is the consent of the Court in terms of s68(7) of the Act a necessary pre-condition to the use by the Official Assignee in the public examination of a bankrupt of information obtained in the course of the private examination of other persons?
- (c) If consent is a necessary prerequisite for the use by the Official Assignee in the public examination of a bankrupt of information obtained in the course of the private examinations of other persons, should I grant such consent in this case?

(2) The statutory provisions

The relevant sections are ss109, 69 and 68.

These read as follows (so far as is material):

109. (1) If any objection has been entered in accordance with subsection (3) of section 107 of this Act and not withdrawn, or in

any case to which subsection (6) of that section applies, the Assignee shall, as soon as practicable after the expiration of 3 years from the date of adjudication or the date of the commencement of this Act, whichever later occurs, call on the bankrupt to appear before the Court to be publicly examined concerning his discharge, and the Court shall conduct the examination.

(2) Where the Assignee has so called on the bankrupt to appear before the Court to be examined concerning his discharge, or where the bankrupt has made an application for his discharge under section 108 of this Act, the Assignee shall prepare and file in the Court a report as to the affairs of the bankrupt, the causes of his bankruptcy, and the manner in which the bankrupt has performed the duties imposed on him under this Act or obeyed the orders of the Court and as to his conduct both before and after the bankruptcy, and as to any other fact, matter, or circumstance that would assist the Court in making its decision.

(3) Subsections (2), (4), (5), and (8) of section 69 of this Act shall, so far as they are applicable and with the necessary modifications, apply to any public examination under this section.

(4) A creditor who intends to oppose the discharge of a bankrupt on grounds other than those mentioned in the Assignee's report shall give notice of his intended opposition, setting out the grounds thereof, to the Assignee and to the bankrupt within the time prescribed by the rules.

69.

....

(2) At least 7 days' notice of the intention to hold the examination shall be advertised in the prescribed manner by the Assignee and shall be sent to the creditors.

....

(4) The Assignee, or any creditor who has proved his claim, or the counsel for the Assignee or for any creditor who has proved his claim, may, without any notice to the bankrupt, examine him.

(5) The bankrupt shall be examined upon oath, and it shall be his duty to answer all such questions as the Court puts or allows to be put to him.

....

(8) The provisions of subsections (4), (5), and (6) of section 68 of this Act shall apply in connection with any public examination under this section as if it were an examination under that section.

68. (1) *The Assignee may, at any time before or after the making of the order of discharge, summon to appear before him and examine on oath -*

(a) *The bankrupt; or*

(b) *The wife or husband of the bankrupt; or*

(c) *Any other person known or suspected to have in his possession any of the property, or any book, paper, or document relating to the affairs or property, of the bankrupt, or supposed to be indebted to the bankrupt, or whom he thinks capable of giving any information respecting the bankrupt, his trade, dealings, or property, or concerning his income from any source, or his expenditure -*

and may require the person so summoned to produce and surrender to the Assignee any book paper, or document in his custody or power relating to the dealings or property of the bankrupt.

....

(3) *The examination of the bankrupt and every such person shall be committed to writing, and the bankrupt or other person, on being required to do so, shall sign the same.*

....

(7) *Save with the consent of the Court, on the application of the Assignee and subject to such conditions as the Court may prescribe, it shall not be lawful for any person to publish a report of any examination held before an Assignee or [District Court Judge] under this section or of any matter arising in the course of any such examination; and every person who, in breach of this subsection, publishes any such report commits an offence and is liable on summary conviction to a fine not exceeding \$200.*

(8) *A person in respect of whose property an Assignee has been appointed a receiver and manager under section 27 of this Act shall for the purpose of this section be deemed to be a bankrupt.*

(3) Exclusion on the ground of hearsay

Mr Brown, for Messrs Beatson and Renwick, submits that the Official Assignee cannot incorporate in his report to the Court under s109(2) of the Act nor put to a bankrupt in the course of his examination under s109(1) of the Act information obtained by the Official Assignee from other persons in the course of the private examination of those other persons. He founds his submission on the fact that those other persons

cannot be called to give evidence in the public examination of the bankrupt.

I do not accept Mr Brown's argument, for the following reasons:

(a) In respect of incorporation of information in the Official Assignee's report:

Information obtained in the course of a private examination may be incorporated in the Official Assignee's report in any one of three ways:

- It may be quoted or summarised
- Documents obtained in the course of the private examination may be appended
- The whole of the transcript may be appended

The first and second forms of incorporation may amount to hearsay; but it seems to me that, if the Official Assignee's report is to cover all the matters required to be covered under s69(3) or s109(2), it must necessarily be in part at least hearsay.

The third form of incorporation is not, in my view, hearsay. It is merely the production of the properly authenticated record of evidence given on oath in a manner provided for by the Act.

(b) In respect of use of information in the examination:

- (i) The public examination of a bankrupt, whether under s69 or s109, is an inquisitorial process. This is evident from the following provisions:

- s109(1) provides for the Court to conduct the examination (although in practice it is usually conducted, at least in the first instance, by the Official Assignee).
 - Both sections provide for the Official Assignee to prepare and file a report (the scope of which differs somewhat depending on which section is in question at the time) but makes no provision for the bankrupt to file a reply.
 - s64(4) (which applies to an examination under s109 as well: s109(3)) provides for the Assignee or any creditor who has proved his claim, or their respective counsel, to examine the bankrupt without notice as to the matters on which the examination is to be conducted.
 - s69(5) (which also applies to examinations under s109: s109(3)) places a duty on the bankrupt *"to answer all such questions as the Court puts or allows to be put to him"*.
 - s69(7) provides that a bankrupt being publicly examined under s69 *"... shall not be deemed to have passed his public examination until the Court, by order, declares that his affairs have been sufficiently investigated and that his examination is finished."*
- (ii) Because the process is inquisitorial the restrictions on the putting of questions to a witness which would normally apply in a civil or criminal proceeding do not apply.
- (iii) The evidence obtained from other parties in their private examination is put to the bankrupt in his or her public examination not in order to prove the truth of what was said by the other persons in private examination but to obtain the bankrupt's response to what was said.

(4) The need for consent(a) Counsel's arguments

Mr Brown, for Messrs Beatson and Renwick, submits that the Official Assignee requires the consent of the Court under s68(7) of the Act before he may incorporate or use information obtained from any person examined privately under s68:

- in his report to the Court under s69(3) or s109(2) or
- in the private examination of any other person (including the bankrupt) under s68 or
- in the public examination of the bankrupt under either s69 or s109.

He bases his submission on the argument that such use, however limited, comes within the expression "*... publish a report of any examination held ... under this section or of any matter arising in the course of any such examination.*"

Mrs Sage, for Mr Tuffery, does not go as far as Mr Brown. She accepts that the Official Assignee may use information obtained in the course of a private examination in his report under s69(3) or s109(2) or in another private examination or in the public examination of a bankrupt without the consent of the Court so long as the original examinee is not identified and is not capable of being identified by any person present at the subsequent private or public examination.

Mr Heath, for the Official Assignee, submits that the expression "*... publish a report ...*" is not apt to cover either:

- the Official Assignee's report to the Court under s69(3) or s109(2) of the Act, or
- the putting to the bankrupt in the course of his public examination under either of those sections or to the bankrupt or another person

in the course of his private examination under s68 of statements made by other persons in the course of their private examination under s68.

He supports his submission by the following arguments:

- (i) Section 68(7), which was inserted in 1927 into s92 of the then Bankruptcy Act 1908 may have been a belated reaction to the decision of Williams J in *Petersen v Pelling* (1887) 5 NZLR SC 354 at 358, where the Judge said:

"I hold ... that the publication of the examination on oath of the bankrupt before the Official Assignee stands on the same footing with respect to publication as the examination of witnesses in an ordinary Court of justice. If that is so, it follows that a fair comment on the evidence so adduced is protected in the same way as the evidence itself would be protected."

- (ii) The expression "... *publish a report*" is ambiguous and reference to Hansard (in accordance with the rule that it is permissible to have regard to Hansard where a statutory provision is ambiguous: *Alcan New Zealand Limited v Commissioner of Inland Revenue* [1993] 3 NZLR 495) shows that the Minister of Justice, in moving the second reading of the Bankruptcy Amendment Bill containing what is now s68(7), said that the purpose of the subsection was to protect:

- persons other than the bankrupt from having their dealings with the bankrupt published "*to the outside world*";
- the bankrupt, whose statements in the course of the private examination are not able to be used against him in subsequent criminal proceedings, from having his right to a fair trial prejudiced "*by having his answers published, which answers cannot be used against him*".

(Mr Heath also referred me to the speech of the Leader of the Legislative Council when the bill was before that House; but the reasons for the amendment are not clearly stated in that passage).

- (iii) The interpretation sought to be placed on the subsection by Mr Brown will seriously impede the work of the Official Assignees, and cause a substantial increase in the demands made on this Court, because it will mean that every time an Official Assignee wishes to use material obtained in the course of a private examination either in his report to the Court under s69 or s109 or in the course of his examination of the bankrupt or another person under s68 or of the bankrupt under s69 or s109 he will require the consent of the Court to do so.

(b) My findings

I accept Mr Heath's submission, for the following reasons:

- (i) The word "*publish*" imports a far wider degree of dissemination than occurs in either the incorporation of the transcript in the Official Assignee's report in any of the three ways I have described above or use of the transcript for the purpose of examining the bankrupt. The *Shorter Oxford English Dictionary* (3rd ed, 1973) gives the following definitions of the word:

1. trans *To make publicly or generally known; to tell or noise abroad; ...* 4. ... b. *To make generally accessible or available; to place before or offer to the public ...*

- (ii) The word "*report*" imports a degree of completeness greater than that involved in the use of portions of the transcript of the private examination for the purpose of the public examination of a

bankrupt. *The Shorter Oxford English Dictionary*, in the edition already referred to, gives the following meaning of the word:

... 2. *An account brought by one person to another, esp. of some matter specially investigated ...* c. *A formal statement of the results of an investigation, or of any matter on which definite information is required, made for some person or body instructed or required to do so ...* 3. *A statement made by a person; an account, more or less formal, of some personal thing, ...* d. *An account, more or less complete, of the statements made by a speaker or speakers (as in a debate, lecture, etc), of the proceedings at a meeting, or of any occurrence or event, esp. with a view to publication in a special form, or in the newspaper press.*

- (iii) If the expression "*publish a report*" is considered to be ambiguous, then reference to the speech of the Minister of Justice in moving the second reading of the amendment which introduced s68(7) into the Act (quoted above) indicates that it was publication to the world at large that the sub-section was designed to prevent.
- (iv) The need for consent was assumed by both counsel and Judge in *Re Arataki Properties Limited* [1986] 2 NZLR 291.
- (v) A contrary interpretation would have a serious impact on the work of the Official Assignee and of this Court. It would mean that whenever an Official Assignee wished to summarise or quote; or to append the whole of the transcript of a private examination under s68 or documents obtained in the course of it, in his report to the Court under s69(3) or s109(2) or to use an extract from such a transcript in the course of his examination of the bankrupt in a public or private examination or of another person in a private examination he would require to obtain the consent of the Court before doing so. In the case of use of the transcript for the purpose of the examination of a bankrupt, the need to apply would present no great problem because it could be made in the course

of the examination. In the case, however, of incorporation in his report of information obtained from a private examination in any of the ways I have described and in the case of use of an extract from the transcript in the private examination of another person, there would be need for an application to the Court before the Official Assignee could proceed. This could delay the proceeding and lessen its effectiveness.

(vi) The potential prejudice to persons who have been examined privately under s68 is, in my view, slight because;

- In the case of incorporation in the Official Assignee's report to the Court under s69(3) or s109(2), the provisions of r66 of the High Court Rules will apply, with the automatic prohibition of searching until determination of the examination under r66(3) and the power of the Court to forbid searching after determination without leave of the Court under r66(7).
- In respect of the use of the transcript in another private examination because of the restrictions on access to that examination and the application of s68(7) to that other examination.

(5) Should consent be granted if, contrary to my finding, it is necessary?

I have examined the transcripts of the examinations of Messrs Beatson, Renwick, Tuffery, Christian and the bankrupt, together with Abbot DCJ's reasons for his ruling of 28 May 1993 and oral judgment of 15 February 1994.

Given:

- The contents of these documents
- The fact that the Official Assignee is under an obligation under s109(2) of the Act to report to the Court on:

".. the affairs of the bankrupt, the causes of his bankruptcy, and the manner in which the bankrupt has performed the duties imposed on him under this Act or obeyed the orders of the Court and as to his conduct both before and after the bankruptcy, and as to any other fact, matter or circumstance that would assist the Court in making its decision"

and therefore has a corresponding right to do so

I give consent in terms of s68(7) of the Act (if required) to the placing of these documents before the Court as part of the Official Assignee's report to the Court and to their use by the Official Assignee in the course of examining the bankrupt. This consent is given subject to the condition that the documents are not to be served on any person other than the bankrupt and are not to be available for inspection or copying by any other persons than the bankrupt or creditors who have proved in the bankruptcy. The question of whether or not it is appropriate to make a further direction under r66(7) after the determination of the examination can be considered by Master Towle.

The other matters

- (1) Directions in respect of Official Assignee's supplementary report dated 16 February 1994

In line with my rulings in respect of the incorporation and use of the transcripts of the private examinations of Messrs Beatson, Renwick, Tuffery, Christian and the bankrupt and Abbot DCJ's reasons for ruling and oral judgment, I:

- Uphold the Official Assignee's right to submit his supplementary report dated 16 February 1994 and its appendices to the Court or, if it is necessary, grant leave for him to submit them
- Direct that the report and its appendices are to be available for inspection and copying by creditors if they have proved in the bankruptcy but are not to be available for public inspection until the determination of the bankrupt's public examination and of the questions of whether or not he is to be discharged from his bankruptcy and, if so, on what terms. Inspection after that date may be further restricted by order of the Court.

(2) The application for a direction that the Official Assignee indicate in advance of the examination whether or not he intends to question the bankrupt on particular matters

Given the inquisitorial nature of the proceeding, the fact that even in adversarial proceedings a party is not entitled to an indication as specific as that sought by Mr Brown and the provision of s69(4) (incorporated into an examination under s109 of the Act by s109(3)) that:

The Assignee, or any creditor who has proved his claim, or the counsel for the Assignee or for any creditor who has proved his claim, may, without any notice to the bankrupt, examine him.

(emphasis added), I have no hesitation in rejecting the application for directions that the Official Assignee indicate in advance whether he intends to examine the bankrupt on particular matters.

I direct that Mr Brown's note on the matters in respect of which he sought a direction not be searched, inspected or copied without leave of the Court.

(3) Messrs Beatson and Renwick's status to appear on the public examination of Mr Baird

The only persons accorded status to appear at the public examination of a bankrupt under s109 are the Official Assignee, the bankrupt, and the creditors who have proved in the bankruptcy.

For that reason, I hold that Messrs Beatson and Renwick have no status to appear at the public examination of Mr Baird.

(4) Mr Tuffery's concern

In his original report dated 15 October 1993, the Official Assignee reported certain admissions made by Mr Tuffery in the course of his private examination under s68.

In circumstances which have not been made clear, the press learned of these admissions and published them. Mr Tuffery, wishing to redress the wrong he believes he has suffered as a result of that publication, seeks the consent of the Court to incorporating the transcript or part of the transcript of his private examination in a statement he wishes to make to the press. Mr Heath, for the Official Assignee, indicates that he has no objection to consent being given for this purpose.

Section 68(7) requires an application for consent of the Court to publication to be made by the Official Assignee. In view of Mr Heath's indication that the Official Assignee does not object to Mr Tuffery being given the right he seeks and the Official Assignee's indication in correspondence with Mr Tuffery that he would be prepared to make the necessary application, I propose to treat the application as made by the Official Assignee and to grant it.

I direct that the correspondence between the Official Assignee and Mr Tuffery on this point is not to be searched, inspected or copied without the leave of the Court.

(5) Mr Christian's concern

Mr Christian's concern is expressed thus in a letter to the Court by the partner of his firm acting for him:

So far as Mr Christian is concerned, he has no difficulty with the evidence obtained from him being put to Mr Baird at the public examination. There is however one aspect of the matter which does concern Mr Christian and our firm. To the uninitiated attending the public examination or reading a report of it in the newspaper (or hearing a report on the radio) it might appear that Mr Christian has voluntarily breached his ethical obligation of confidentiality towards Mr Baird. Those involved of course know that that is not the case - once Mr Baird became a bankrupt the Official Assignee stepped into his shoes and was entitled to disclosure of his files from his solicitor just as much as Mr Baird was before his bankruptcy. Also of course Mr Christian was obliged to answer questions at the private examination. We would ask that Master Kennedy-Grant consider this aspect in determining the appropriate directions but we do not feel that we need to have an appearance next Tuesday on behalf of Mr Christian. The writer has also discussed this aspect of the matter with Mr Heath, counsel for the assignee.

As a result of the discussions between counsel referred to in the letter, Mr Heath, for the Official Assignee, has suggested that counsel for the Official Assignee make a statement at the beginning of the public examination of Mr Baird that, when questions are put to the bankrupt in relation to what Mr Christian has produced or said, that that has been done under an appropriate waiver of privilege from either the trustees of the family trust or the Official Assignee.

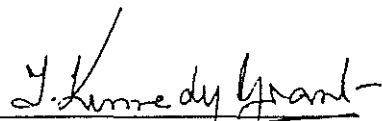
I approve of that suggestion and direct that such a statement be made.

Directions regarding the hearing

I will deliver further directions regarding the time and place of the public examination after a conference to be held at 4.45 pm on Monday, 14 March 1994.

Costs

The costs of the Official Assignee's application for directions in respect of the interpretation of s68(7) of the Act and for consent under that section if necessary are reserved.


MASTER T KENNEDY GRANT

Solicitors

Stace Hammond Grace & Partners, Hamilton, for the Official Assignee
Billings & Co, New Plymouth, for Messrs Christian and Tuffery
Morrison Morpeth, Wellington, for Messrs Beatson and Renwick