

LOW
PRIORITY

NZLR

630
IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
IN BANKRUPTCY

B. NO. 995/93

IN THE MATTER of the Insolvency Act 1967

A N D

IN THE MATTER of THOMAS JOHN HOGAN (A BANKRUPT)

Hearing: 30 September 1996

Counsel: J H Wiles for the Bankrupt
D McInnes for the Official Assignee

Judgment: 30 September 1996

(ORAL) JUDGMENT OF MASTER KENNEDY-GRANT

Solicitor for the Debtor
PW Macy & Co
DX CP 31503

Solicitor for the Official Assignee
IA Ramsay
Office Solicitor
DX CP 24110

On 3 June 1993 Mr Hogan was adjudicated bankrupt on his own petition.

On 29 May 1996 shortly before the expiry of the three-year automatic term of his bankruptcy the Official Assignee lodged an objection to Mr Hogan's discharge from bankruptcy. Following that objection the Official Assignee called on Mr Hogan to appear before this Court for public examination in terms of s109(1) of the Insolvency Act 1967. Mr Hogan did so today.

Mr Hogan has applied for his discharge under s108 of the Insolvency Act 1967 and the Official Assignee opposes that application.

I have before me:

- (a) Mr Hogan's affidavit in support of his application for discharge;
- (b) the affidavit of Ms P K Anscombe, a Deputy Official Assignee, in opposition to that application; and
- (c) the Official Assignee's report signed by Ms Anscombe.

The Official Assignee does not oppose the application for discharge but seeks the imposition of conditions, under s110(1) and 111(1) of the Insolvency Act 1967, requiring Mr Hogan to consent to or make payment of a sum or sums of money to the Official Assignee for the benefit of his creditors and prohibiting him from carrying on a business or being involved or engaged in the management or control of a family business or acting as director or taking part directly or indirectly in the management of any company.

The grounds on which the Official Assignee seeks the imposition of these conditions as set out in Ms Anscombe's affidavit and her report are as follows:

- (a) concern that Mr Hogan is involved in the management and/or ownership of Norfolk Industries Ltd;
- (b) the fact that he sought leave to travel overseas on four occasions between July 1993 and June 1995 on behalf of the company;
- (c) that at the time that the business in which he was originally involved Superlite Signs Ltd, of which company he had been the managing director, was failing, the assets of that company were "hived down" to another company, Superlite Industries Ltd, which was subsequently sold;
- (d) at the same time Mr Hogan left Superlite Signs Ltd and started a sign business not named in the report but, taking all the documents together, clearly believed by the Official Assignee to be Norfolk Industries Ltd in direct competition with Superlite Industries Ltd;
- (e) the receipt of information from a confidential informant that the bankrupt was effectively concealing property from the Official Assignee and/or the receivers or liquidators of the Superlite companies and had arranged for those assets to be transferred into Norfolk Industries Ltd;
- (f) Mr Hogan's involvement in Norfolk Industries Ltd has raised continuing unresolved concerns on the part of the Official Assignee as to his part in the management or ownership of that company;
- (g) that it is doubtful whether the major shareholder in Norfolk Industries Ltd, Mrs Eames, had the financial ability to inject in excess of \$200,000 into the company and grounds for believing, therefore, that Mr Hogan had supplied her with funds from the failed Superlite Signs Ltd;
- (h) that Mr Hogan was receiving a salary of \$32,000 and not making a contribution to his creditors when he could be expected to be

earning considerably more given his importance to Norfolk Industries Ltd.

I approach my decision in this matter on the basis identified by Penlington J in Re Anderson (14/4/92, B 213/89, Hamilton Registry) at p19 of the unreported judgment.

The overall scheme of the Act leads me to conclude that by introducing the automatic discharge provision legislature intended that after an arbitrary period of three years in the normal case, a bankrupt should not be subject to the disabilities created by the Act. A consequence of the automatic discharge provision is that it avoids the problems and the injustices which occurred under the 1908 Act when bankruptcies unnecessarily continued for many years without discharge and with the consequence that after acquired assets vested in the Assignee. It is noteworthy that in enacting s107(2) Parliament provided that undischarged bankrupts at the commencement of the Act would not receive an automatic discharge until three years after that date. This provision tends to confirm the true purpose of the automatic discharge provision.

The logical consequences of this analysis are first that while a bankrupt is now free to apply at any time it is for him to justify discharge if he applies for such an order at any time between the date of adjudication and the third anniversary of that date, and secondly if he does not receive his discharge on the third anniversary of the adjudication because of opposition from the Assignee and/or one or more of his creditors than it is for the Assignee and/or the opposing creditor or creditors to justify their opposition.

I have to say that Ms Anscombe's affidavit and her report do no more than make the allegation that Mr Hogan has been involved in the management of Norfolk Industries Ltd.

The evidence heard by me today in the course of the public examination of Mr Hogan shows that he is the technical expert in the company although one of the directors, Mr McFee, has considerable expertise in the construction side of the signage business and Mrs Eames has gathered some knowledge in the course of a long career in the industry in which she has held, among other positions, the position of co-ordinator in one company. It is clear also on the evidence that Norfolk Industries Ltd's major clients, some of the oil companies, came to that company shortly after Mr Hogan joined the company and that Mr Hogan has been involved in the conduct of the company's business and negotiations with the oil companies. Taking the evidence as a whole, it is clear that the oil companies followed Mr Hogan from Superlite Signs Ltd. They clearly place great reliance on his abilities.

Although Mr Hogan does not admit that he left Superlite Signs Ltd to establish Norfolk Industries Ltd, it is clear that Norfolk Industries Ltd was incorporated within 4 months of Superlite Signs Ltd going into receivership and that Mr Hogan was employed by Norfolk Industries Ltd from the outset. If he didn't leave with the intention of going to Norfolk Industries Ltd or a company to be incorporated, he certainly moved to it at the first opportunity.

Although there is no direct evidence that Mr Hogan is in a management role, I consider it a reasonable inference that his importance to the business of the company is such that the company could not operate successfully without his being involved in management. The company clearly has operated

successfully and in my view it follows that he must have been involved in the management of the company.

With regard to the other grounds relied on by the Official Assignee, I make the following findings:

- (a) the "hiving-down" of the assets and business of Superlite Signs Ltd to Superlite Industries Ltd was the work of the receivers and not a matter for which Mr Hogan can be held responsible;
- (b) the evidence in my view, does not establish that Mrs Eames did not have the means to fund her share or a substantial part of her share of the shareholding of Norfolk Industries Ltd ;
- (c) the evidence does not establish that Mr Hogan has been concealing assets.

In the circumstances, I have a choice between prohibiting Mr Hogan from managing Norfolk Industries Ltd and thereby jeopardising the continued successful operation of that company and his own rehabilitation or allowing him to continue to manage that company (although recognising and emphasising that by managing it to date or being involved in the management of it to date he has been in breach of his obligations under the Insolvency Act 1967) and requiring him to make a contribution for the benefit of his creditors.


I see no benefit to the creditors, Mr Hogan personally or to the public generally in this case in adopting the first course. I therefore choose the latter course.

In the absence of evidence as to Mr Hogan's precise worth to the company and having regard to his technical expertise, I can do no more than fix the figure of his contribution at what I believe to be a reasonable one in the

circumstances. I fix that figure at \$50,000. I emphasise that that figure was the figure at which I had arrived before I invited Mr McInnes to make submissions as to what an appropriate figure would be. I have not been influenced in my decision as to the figure by what he has said.

I grant an order of discharge subject to the condition that Mr Hogan pay to the Official Assignee for the benefit of the creditors in his bankruptcy an amount of \$50,000 within the period of twelve months from today.

I order Mr Hogan and the Official Assignee each to bear their own costs.



MASTER T KENNEDY-GRANT