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**LOW  
PRIORITY**

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY  
IN BANKRUPTCY

B. NO. 2593/92

IN THE MATTER of the Insolvency Act 1967

A N D

IN THE MATTER of KIMBERLEY ANN GRAY (a bankrupt)

Hearing: 27 May 1997

Counsel: CJ LaHatte for the bankrupt  
T Clark for the Official Assignee

Judgment: 5 JUN 1997

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**(RESERVED) JUDGMENT (No 2) OF MASTER KENNEDY-GRANT**

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Solicitors for the Bankrupt  
Judith Collins & Associates  
PO Box 5016 Auckland

Solicitors for the Official Assignee  
I A Ramsey  
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### Introduction

The bankrupt was adjudicated on her own petition in December 1992. In terms of s107(1) of the Insolvency Act 1967 she would have been automatically discharged in December 1995, on the third anniversary of her adjudication, had it not been for the fact that the Official Assignee entered an objection in terms of s107(3) of the Act prior to the third anniversary of her adjudication. He subsequently followed his objection up with a call on the bankrupt to appear before this Court to be publicly examined concerning her discharge.

The bankrupt has herself applied for her discharge in terms of s108. She also sought to avoid her examination on the ground of the Official Assignee's delay (for a period of over a year after entering his objection to her automatic discharge) in calling on her to appear before the Court to be publicly examined.

I overruled the bankrupt's challenge to the Official Assignee's call in my first judgment delivered on 27 May 1997 and examined the bankrupt the same day.

It now falls to me to decide what order I should make in respect of the bankrupt's discharge.

### The Court's powers

In terms of s110(1) of the Act, the Court has power to do one of the following things:

*(a) Grant an immediate order of discharge:*

*(b) Grant an order of discharge subject to such conditions (including consenting to any judgment or order for the payment of any sum of money) as it thinks fit, or suspend an order for discharge for such time as it thinks fit:*

- (c) Grant an order of discharge with or without such conditions as it thinks fit to take effect at a specified future date:*
- (d) Refuse an order of discharge, in which case the Court may specify the earliest date on which the bankrupt may apply again to the Court for an order of discharge.*

The orders sought by the Official Assignee and the bankrupt

The Official Assignee seeks the order that the bankrupt make payment of a single sum of money, or total contributions by instalments, to her bankrupt estate equivalent to the total value of her interest during bankruptcy in a particular property (I will refer to the details of this matter in the next section of my judgment) and that the bankrupt remain bankrupt until she has made such payment, either in one lump sum or by instalments.

This order comes within either s110(1)(b) or (c) of the Act.

The bankrupt seeks an immediate order of discharge in terms of s110(1)(a).

My decision

In her two reports the Deputy Official Assignee alleges that the bankrupt has:

- (a) unlawfully misled the Official Assignee;
- (b) concealed assets from the Official Assignee;
- (c) obtained credit without disclosing her status as a bankrupt;
- (d) obtained credit fraudulently; and
- (e) failed, without reasonable cause, to comply with the duties set out in s60 of the Insolvency Act 1967 in that she failed to advise the Official Assignee of all her employment or income.

Charges based on these allegations were considered at a depositions hearing in February of this year and the debtor was committed for trial on charges relating to the second to fourth of the allegations. The Official Assignee has decided not to lay further informations in respect of the first and fifth allegations.

So far as the first allegation is concerned, I consider that it essentially covers the same ground as the second allegation and do not therefore propose to consider it further.

So far as the fifth allegation is concerned, the bankrupt has given evidence from which it is clear that she failed to comply with her obligation to advise the Official Assignee of changes in her income but that she made some attempt to advise him of changes of address.

The Official Assignee's second to fourth allegations relate primarily (although not exclusively) to the conduct of the bankrupt in respect of a property at Churchill Road, Pukekawa. This property was owned by her before her bankruptcy. The memorandum of transfer of the property into her name was dated 26 March 1991. It was not registered until 7 August 1992; but, on the evidence given in the course of the examination, it appears that this may have been due to the failure of the bankrupt's previous solicitor to act promptly. On 7 August 1991 the bankrupt entered into an agreement for the sale of the property to a Mr Peter B Dyson and a Ms Penelope Jane Dyson ("the Dysons"). The resulting memorandum of transfer was executed on 9 July 1992 and registered on 7 August 1992. The delay was not explained but presumably was caused by the same inefficiency of the bankrupt's previous solicitor as I have already referred to. The property was put on

the market by the Dysons in June 1994 and sold by them in July 1995. They received a sum of \$20,594.67 from the sale.

The case for the Official Assignee is that Penelope Jane Dyson was in fact the bankrupt. The evidence in support of this allegation is overwhelming; and, indeed, the identity of the bankrupt and Penelope Jane Dyson in the context at least of the transactions described above was admitted by the bankrupt in the course of her examination.

The Official Assignee contends that the sale by the bankrupt to Mr Dyson and herself (under the name of Penelope Jane Dyson) in July 1992 was entered into in an attempt (successful as it turned out) to place the property beyond the reach of the Official Assignee. He contends that the bankrupt had an interest in the property after its sale to the Dysons and an interest in the nett proceeds of the eventual sale of the property by them. He seeks an order requiring the bankrupt to pay the equivalent of the value of that interest to him for the benefit of her creditors.

The bankrupt denies that she had any interest in the property once she had sold it to the Dysons. She says that she held the property as a trustee for Mr Dyson. She explains that she did this because:

- (a) Mr Dyson is unable to read and write;
- (b) he needed somebody to assist him and protect his interests;
- (c) she was an obvious person, because of her relationship with him and her greater experience in the field of property dealing.

She says that her relationship with Mr Dyson ceased before the agreement to sell to the Dysons was entered into but that she continued

to remain friendly with him and with his family, hence her assistance to him.

In judging the truth of this explanation I have had regard to the following factors:

- (a) the Official Assignee's reports do not contradict the bankrupt's statements regarding her relationship to Mr Dyson and his family and his disabilities;
- (b) the sale to the Dysons was entered into in August 1991 nearly a year before the bankrupt admits to realising she was insolvent and the Official Assignee has not led any evidence as to her state of mind at that time;
- (c) the fact that, on her own admission in the statement of affairs filed by her after her adjudication, she was aware in July 1992 (the same month in which the memorandum of transfer to the Dysons was executed) that she was insolvent;
- (d) the fact that she provided no satisfactory explanation of why she took the name Penelope Jane Dyson (which is the name of one of Mr Dyson's sisters) rather than any other name;
- (e) the fact that she showed herself in the course of her examination to be an evasive witness, eg:
  - (i) early in her examination she said, in answer to a question as to how often she had used the name Penelope Jane Dyson, that she had used it only four or five times and she specifically denied that she had ever used it as a matter of course, yet:
    - all the evidence contained in the Official Assignee's reports and the documents put before the Court in the course of her examination showed that she used that

name throughout her course of conduct in relation to the Churchill Road property from 1992 to 1994 and that for a five month period - December 1994 to May 1995 - she used the same name in the course of her employment at a massage parlour

- the Official Assignee's principal report shows that she used the name in February 1992, September 1994 and February 1995 in connection with applications for credit, in the first case an application by herself alone for a ANZ Visa Card, in the second case a joint application with Mr Dyson for a loan of \$14,045 from Allied Finance Ltd, in the third case a joint application with Mr Dyson for a loan of \$247,000 from Trust Bank for the purchase of a property in Waiuku.
- (ii) she maintained in her examination that she had only worked at the massage parlour for some 10 weeks over the period December 1994 - May 1995 rather than the 24 weeks showed by the wage records of that business, in which her signature appears against each week's payment;
- (iii) she initially maintained that, despite the fact she held the licence for the massage parlour for a period, she was not during that period in a managerial position, yet she later accepted, in questioning by me, that as far as she was concerned she was managing the parlour although her employers might not have regarded her as doing so;
- (f) the fact that on her own evidence she is uncommonly ready to assist others by passing herself off under a false name (Penelope Jane Dyson) or passing herself off as holding a position (that of the licence holder of a massage parlour) when she is not that

person or really has no responsibility in respect of the business she has the licence for.

The first and second factors favour acceptance of the bankrupt's evidence.

The third factor is, in my view, inconclusive. The relevant date is not that of the memorandum of transfer but that of the agreement for sale and purchase.

The other three factors have caused me considerable concern regarding the bankrupt's veracity. Yet, I have to confess that I also at times found her persuasive. I am forced to ask myself, Is the bankrupt a simple, uncomplicated person, who acts spontaneously and without thinking of the implications of what she is doing or is she an intelligent person who is basically dishonest or, at the very least, is dishonest when it suits her? In the end I have concluded that she is an intelligent person who, at the very least, is dishonest when it suits her.

The consequence of that finding is that I must regard her explanation of her actions with suspicion. If I reject her explanation, as I believe I ought to do, what finding should I make on the issues of:

- (a) whether she retained an interest in the property ; and
- (b) if so, what interest and how is such interest to be valued?

As to the first of these issues, as I reject her explanation, there is no innocent explanation for what she did and the only conclusion I can reach is that she retained an interest in the property.



The next question is, What interest did she retain? In the absence of credible evidence that Mr Dyson contributed to the purchase of the property and/or that there was an agreement between them that he was to have an interest in the property, I find that she retained the entire beneficial interest in the property.

The third question is, How is the value of that interest to be determined? Exhibit "E" to the Deputy Official Assignee's supplementary report shows that the Dysons received a total of \$40,918.33 from the sale of Churchill Rd, Pukekawa in July 1995. This sum was made up as follows:

Initial deposit less agent's commission	\$2,075.00
Balance of deposit	\$20,000.00
Net sale price after taking above and sale expenses into account	<u>\$18,843.33</u>
	<u>\$40,918.33</u>

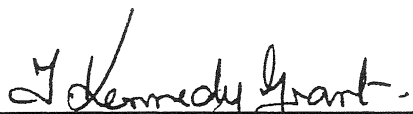
In the light of this evidence, I find that the value of the interest retained in the property at Churchill Road, Pukekawa, by the bankrupt was \$40,918.33

In all the circumstances, I consider that it is appropriate to make an order intended to enable the Official Assignee to recover the benefit obtained by the bankrupt as a result of her failure to disclose her assets to him. I am not, however, prepared to prolong the bankruptcy until the debt has been paid. The bankruptcy has already been extended unnecessarily.

#### Orders

I therefore make the following orders:

- (a) The bankrupt is discharged from bankruptcy subject to her consenting to judgment in favour of the Official Assignee for the sum of \$40,918.33 together with interest on that sum from 28 July 1995 (the date of sale of the Churchill Road, Pukekawa property) at the rate of 11% per annum.
- (b) Order (a) is to lie in Court pending the signing of the necessary consent by the bankrupt.

  
MASTER T KENNEDY GRANT

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