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N2LR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 65/98

IN THE MATTER OF	the Insolvency Act 1967
AND IN THE MATTER OF	ROY WILLIAM EDWARDS (a bankrupt)
BETWEEN	ROY WILLIAM EDWARDS Applicant
AND	THE OFFICIAL ASSIGNEE Respondent

Hearing: 5 May 2003

Appearances: RB Hucker and DJ Vizor for Plaintiff
BD Tantrum for Respondent

Judgment: 13 May 2003

JUDGMENT OF SALMON J

Solicitors:
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[1] This is an application to review a decision of Master Lang refusing to discharge Mr Edwards from bankruptcy.

[2] A preliminary point arises as to whether this matter should be dealt with by way of review, or whether Mr Edwards should have appealed to the Court of Appeal. The application was heard in Court. The general rule is that where a Master hears a matter in open Court, the decision must be challenged by way of appeal rather than review. However s8(1) of the Insolvency Act 1967 provides:

> The High Court may review, rescind or vary any decision of that Court or any Judge thereof under this Act.

[3] Counsel for Mr Edwards relies on s8 in his submission that the Master's judgment may be reviewed. The Official Assignee does not challenge that contention.

[4] There is an analogy with r264 of the High Court Rules. That rule allows any party affected by an order made, or decision given on an interlocutory application, instead of appealing, to apply to the Court to vary or rescind the order or decision unless it was made with his consent.

[5] In the application of that rule, it has been held that review is appropriate in the case of an *ex parte* order, but that in the case of an *inter partes* order the review jurisdiction runs counter to the principle that an attack upon the correctness of a decision of a Court should only be made by a Court of superior jurisdiction: see *Bryant v Collector of Customs* [1984] 1 NZLR 280 (CA) and *Parat v Monaco Motors Ltd* HC AK CP204/88 5 December 1988 Anderson J. Review may, nevertheless be appropriate, in the case of an *inter partes* order where the matter was not fully argued.

[6] Section 8 is expressed in broad terms and a literal interpretation would allow this matter to be brought before the Court by way of review. Nevertheless, in circumstances where the argument before the Master was fully contested (as it was in this case) the preferable course in my view is to challenge the decision by way of appeal to the Court of Appeal. In this instance, because no challenge is raised to the

procedure adopted, and because I am satisfied that I have jurisdiction, I have decided to deal with the matter pursuant to the provisions of s8.

[7] Master Lang heard Mr Edwards' application for discharge on 19 December 2002. The following day he delivered an oral decision in which he held that the application should be adjourned part heard until such time as outstanding criminal proceedings against Mr Edwards had been concluded. On 17 April this year, after the conclusion of those proceedings, he resumed the hearing and refused to grant the application.

[8] Mr Edwards was adjudicated bankrupt on 12 August 1998. By notice of objection dated 24 May 2001 the Official Assignee objected to his discharge from bankruptcy. The application was made pursuant to s108 of the Insolvency Act. In accordance with the provisions of s109(1) Mr Edwards was publicly examined concerning his discharge and the Official Assignee filed a comprehensive report in which the grounds upon which the discharge was objected to were set out.

[9] This is not Mr Edwards' first bankruptcy. In 1986 he was adjudicated bankrupt on his own petition. Initially the Official Assignee objected to his discharge from that bankruptcy, but withdrew the objection on the basis that Mr Edwards was prohibited from being a director of, or taking part in the management of any company for a period of five years after his discharge. He subsequently breached that prohibition and was convicted and sentenced to six months periodic detention on 17 February 1999. On the same date he was convicted on a number of charges brought pursuant to the Securities Act 1978 and the Companies Act 1993 in respect of the offer to the public of shares in a company called, NZ Deer and Food Fest Ltd. On the same date he was also convicted of charges relating to the offer of shares to the public in a company called, Global Beer Club Ltd.

[10] In June 1998 Mr Edwards incorporated a company called, Worldwide Beer Club Ltd. The sole director and shareholder of that company was a Ms Dench, although she was not involved in the day to day operation of the company. Mr Edwards, between October 2000 and February 2001 advertised in various newspapers for franchisees to become involved in the company's operation. Eight

people paid a total of approximately $400,000 to secure franchises. The franchisees were only able to operate for a few months before they were advised that that company was being placed in liquidation.

[11] Mr Edwards was charged in relation to his activities in that company.

[12] He also ran a business called, Flick Life Protection Installers. He pleaded guilty to a charge concerning that business.

[13] In relation to the charges arising from the operation of the company Worldwide Beer Club Ltd, Mr Edwards pleaded not guilty and was tried before a jury. He was found guilty on charges of taking part in the management or control of the business of Worldwide Beer Club while an undischarged bankrupt. He was also found guilty of eleven charges of using a document with intent to defraud and one charge of attempting to use a document with intent to defraud.

[14] He was sentenced in respect of these matters and the matter to which he pleaded guilty by Rodney Hansen J on 9 April 2003. He received a total of five and a half years imprisonment. In the course of that sentencing the Judge noted that Mr Edwards obtained $160,000 from two victims for the sale of shares and that franchises were sold, for which the company received in excess of $400,000. One of the shareholders recovered $50,000. The franchisees recovered nothing from the liquidation of the company.

[15] The Judge referred to the Victim Impact Reports which he described as "a series of harrowing accounts of heartbreak and pain for those people whom you defrauded". He said:

> Your heartless deception has torn the lives of many good people apart. It has affected their children also as you will have seen. The ripples of your offending have spread to engulf whole families.

[16] The Judge referred to the fact that the applicant's record of dishonest business dealings goes back over 20 years. In 1992 he was sentenced to two years imprisonment for multiple charges of fraud and theft by failing to account. Those offences span the period 1983 to 1985. In 1999 he was sentenced to six months

period detention. The Judge considered that the applicant's offending in this case had a number of features which made it one of the most serious cases of its kind. He referred to aggravating factors as including the substantial sum involved, the blatant dishonesty of the means employed to extract money from victims, the devastating effect of the frauds on the victims and the previous convictions for the same or similar kinds of offending. Finally, the Judge referred to the personal benefit which Mr Edwards and his co-offender obtained from the offending.

[17] Master Lang took all these matters into account when considering the application for discharge from bankruptcy. He referred to authority which indicated that when considering whether a bankrupt should receive a discharge the Court must have regard not only to the interests of the bankrupt and his creditors, but also to the interests of the public and of commercial morality. He recorded the submissions made on the bankrupt's behalf by Mr Hucker. Mr Hucker's submission made before the Master and in this Court, was that even in serious cases of misconduct involving significant loss, an order of discharge was usually granted at around the four year mark and that Mr Edwards had been bankrupt at the time of the hearing before the Master for four years eight months.

[18] Mr Hucker submitted that the penal aspects of the bankruptcy legislation had been satisfied.

[19] The Master accepted that was the case, although noting that that finding was "tempered by the fact that in reality Mr Edwards has proceeded over the last five years as if the order of adjudication did not exist". He referred to the significant and detailed steps taken by Mr Edwards to conceal the fact of his bankruptcy from those with whom he dealt.

[20] He gave the following reasons for his conclusion that the application should be refused. First, he said it would be difficult to impose appropriate conditions for a person serving a term of imprisonment. Second, he considered there would be difficulties for the appropriate authorities in monitoring conditions imposed upon a person serving such a term and that that was a concern because the Court could have no confidence in the applicant complying with the conditions that were imposed. He

concluded that the only way in which the Court could ensure that the public was protected was to refuse the application.

[21] In dismissing the application he also made an order pursuant to s110(1)(d) of the Act, that the earliest date upon which Mr Edwards may apply again to the Court for an order of discharge is two months prior to the date upon which he is due to be released from prison.

[22] Before me, Mr Hucker, for the applicant, relied strongly on the decision of Robertson J in *Official Assignee v Webb* HC GIS B69/88 4 August 1989. In that judgment the Judge cited, with approval, the principal in Spratt & MacKenzie, *Law of Insolvency* 2nd ed.:

> The jurisdiction to suspend an order of discharge is a penal jurisdiction and the length of refusal should be apportioned to the just infliction of punishment on the bankrupt. Where the object of a punishment has been achieved in relation to both the bankrupt and the community generally, the discharge should be granted.

As page 5 of Webb Robertson J referred to the automatic discharge provision introduced in the 1967 Act. He said:

> It must be viewed as a clear policy change on the part of the legislature. It is an unequivocal indication that the restrictions and encumbrances placed on a bankrupt including the provisions with regard to not entering into business are to be in place for a period of three years but no longer in the generality of cases.

[23] Mr Hucker submitted that there was no real difficulty in imposing conditions and that an inability to monitor was not a proper reason for declining an order for discharge. He submitted that the Master had wrongly exercised his discretion and that his decision should be set aside and the applicant immediately discharged.

[24] Neither Mr Hucker nor Mr Tantrum referred the Court to two decisions subsequent to that of Robertson J which are relevant to the issue before the Court. The first is the decision of the Court of Appeal in *Re Hogg* [1993] 3 NZLR 156. The judgment of the Court was delivered by Richardson J. He referred to the differences in approach between the view expressed in Webb and that expressed by

Penlington J in *Re Anderson* HC HAM B213/89 14 April 1992. The Court of Appeal preferred the approach of Penlington J. At page 157 the Court said:

> In conferring a discretion expressed in the broadest terms the legislation recognises that each case will be different, that the relevant factors may vary from case to case and that the exercise of the discretion must be governed by the circumstances of the particular case having regard to the guidance provided by a consideration of the scheme and purpose of the legislation. In providing for automatic discharge after three years, the legislation recognises that it is not in the public interest that the bankruptcy should endure indefinitely. In providing for earlier discharge, s108 recognises that continuing the bankruptcy to the end of the three years may not be in the public interest. Whether or not it is will be a matter for decision on the particular facts.

[25] That case and the judgment of Penlington J concerned applications for discharge made prior to the expiration of the three year period. Nevertheless the reference to the broad discretion is relevant as well in the case of opposition to a discharge after the expiration of three years.

[26] Penlington J referred to the background to the legislation introducing the three year automatic discharge provision. It seems that in the absence of automatic discharge few bankrupts ever applied. This was considered to be against the public interest. The Honourable JR Hannan, Minister of Justice, when moving that the Insolvency Bill be read a second time, described undischarged bankrupts as a menace to the trading community. Penlington J referred to a discussion paper of the Australian Law Reform Commission considering the same issue which described a discharge as a means of distinguishing bankrupts who are dishonest or have engaged in undesirable commercial behaviour. That report observed that discharge might be prevented altogether where the continuing conduct of a bankrupt suggested a continued risk to the community. At page 19 of *Anderson* Penlington J said:

> The overall scheme of the Act leads me to conclude that by introducing the automatic discharge provision the 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. …
>
> 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 a 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, then it is for the Assignee and/or the opposing creditor or creditors to justify their opposition.

[27] Penlington J referred to the decision of *Re Reilly ex parte Debtor* [1979] 36 FLR 268 at 278, 23 ALR 357 at 365-66 where Lockhart J said:

> In considering whether a bankrupt should receive a discharge it has been laid down repeatedly that the court must have regard not only to the interests of the bankrupt and his creditors but also to the interests of the public and of commercial morality. In the exercise of its discretion the court must also consider the conduct of the bankrupt relevant to his bankruptcy. See *Re Prince ex parte the Bankrupt* (1961) 19 ABC 39, *Re Grey* (1960) 19 ABC 29, *Re Mallan* [1975] 6 ALR, 161, 25 FLR 20.

He noted that in that passage Lockhart J pointed to five relevant considerations:

1. The interests of the bankrupt.

2. The interests of the creditors.

3. The public interest.

4. Commercial morality.

5. The conduct of the bankrupt relevant to this bankruptcy.

[28] I adopt these observations of Penlington J as relevant to the present case.

[29] Clearly the Court's discretion is unfettered. Each case will depend upon its own facts. The Master considered that at least while he remained in prison the applicant should not be discharged. He accepted, as do I, the need to bear in mind the rehabilitative aspects. Like him, I agree that Mr Edwards has shown little indication so far, that he is interested in mending his ways.

[30] In this Court Mr Hucker submitted that the conditions that should be imposed on a discharge are those set out in s111 of the Act. He was also prepared to accept a condition that an accountant be appointed to supervise any business operation of Mr Edwards.

[31] I accept that it may be possible to overcome some of the difficulties which the Master identified in the way of formulating and monitoring appropriate conditions. Certainly, more information was given to me on this aspect of the matter than was before Master Lang. However, like Master Lang, I have concluded that it is not appropriate at this stage to grant the application. The applicant is after all serving a sentence of imprisonment for serious offences relating to the very bankruptcy from which he seeks a discharge. It would, in my view, be entirely inappropriate for him to conduct any form of business whilst he is in prison. I accept that monitoring of conditions could present difficulties of a logistical nature. But most importantly in my view, this applicant's approach to matters of commercial morality is so deficient as to justify a considerably longer period of time as an undischarged bankrupt than would generally be the case. He is obviously a person from whom the public needs to be protected in a commercial sense. His conduct during this bankruptcy is highly relevant. Public interest overrides the interests of the applicant.

[32] The Master was right to refuse to grant the application for discharge. The application for review is dismissed.

Delivered at 2.45 ~~a.m.~~/p.m. on 13/5/ 2003