

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2000-404-434**

IN THE MATTER OF     the Insolvency Act 1987  
  
BETWEEN               MICHAEL HELSBY KNIGHT  
                              Applicant  
  
AND                     THE OFFICIAL ASSIGNEE  
                              Respondent

Hearing:           23 June 2009

Appearances: Applicant in person  
                  N H Malarao for respondent

Judgment:       29 June 2009

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**JUDGMENT OF ALLAN J**

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*In accordance with r 11.5 I direct that the Registrar endorse this judgment  
with the delivery time of 1 pm on Monday 29 June 2009*

*Solicitors/party:*

*M H Knight, Auckland michaelhknight@hotmail.com*

*Meredith Connell, Auckland, nick.malarao@meredithconnell.co*

[1] Mr Knight has been bankrupt for eight years. In February 2009 he applied to the Official Assignee for consent to establish a business involving the sale of certain New Zealand statutes, both in book and CD form. The Official Assignee declined to approve the proposal. Being aggrieved by that decision, Mr Knight applied to the Court pursuant to s 86 of the Insolvency Act 1967 (the Act) in accordance with the transitional provisions set out in s 444 of the Insolvency Act 2006, for an order reversing the Official Assignee's decision. The Official Assignee now applies for security for costs pursuant to r 5.45 of the High Court Rules.

### **Background**

[2] Mr Knight was adjudicated bankrupt in New Zealand on 14 February 2001. He has also been adjudicated bankrupt on two occasions in Australia, and is subject to a lifetime ban from being involved in the management or control of a company in New South Wales. He has a long and unfortunate history of criminal offending in this country. Prior to his adjudication here, he had convictions for using a document for pecuniary advantage, false pretences, and managing a company while prohibited. Since adjudication there have been further difficulties.

[3] In May 2004, he was sentenced to 200 hours community work in this Court, on a charge of acting in the management of a company while disqualified by virtue of his bankruptcy.

[4] In August 2004, Mr Knight was convicted and fined substantial sums for breaches of the Fair Trading Act 1986, involving false representations in respect of his claimed ability to place television and radio advertisements, and in respect of vouchers for international travel.

[5] In March 2005, he was sentenced to 18 months imprisonment in the North Shore District Court, having pleaded guilty to offences involving dishonesty. Broadly, the charges related to an employment scam, under which Mr Knight

obtained fees for placing Asian applicants in non-existent jobs which were claimed by Mr Knight to have been arranged with an international accounting firm.

[6] Further charges have recently been laid against Mr Knight. They are scheduled to be heard at a five day trial in October 2009. He is charged with one count of managing a business whilst bankrupt, one count of failing to disclose property to the Official Assignee and one count of taking part in the management of a business while prohibited by reason of his previous convictions for dishonesty offences.

[7] Mr Knight has previously made two applications for discharge from bankruptcy. The more recent was heard by Doogue AJ on 19 October 2007. In his judgment of 9 November 2007, the Judge concluded that it was not in the public interest, or in the interests of commercial morality, that an order discharging Mr Knight be made. In the course of that judgment, Doogue AJ said:

It is necessary to note, I regret to say, that Mr Knight's "track record" is poor. It is symptomatic of a person who is indifferent to his obligations to behave honestly. It fits the picture of someone who will use unscrupulous means to get what he wants. All of this, in my view, emerges from his record of criminal offending, his conviction for taking part in the management of a company while bankrupt and the various banning orders that have been imposed upon him. His is the profile of a person who has been persistently dishonest and who has no regard at all for the constraints of the insolvency laws or indeed for commercial morality. His record shows that he has been a threat to the public generally and the commercial community, in particular.

I accept that Mr Knight says that he is a changed character. I hope he is right. The Court would not want to discourage him to make changes in his life. However it is the experience of Courts, whether in their commercial or criminal jurisdiction, that often the process of rehabilitation is not straightforward. It is not common for persons entrenched in anti-social ways to make a sudden, clean and irreversible break with their past. It is not usual for the path to rehabilitation to be followed unswervingly. Reliance on assurances that are intended to persuade the Court that the person before the Court has had a change of heart can lead to disappointment. It would not be fair to Mr Knight to categorically dismiss his claims to be a reformed character. But it is fair to say that it will be by his actions in the long-term that he will be judged. The Court cannot blind itself to his history, which has extended over some 20 years, on no other ground than that he now told the Court that in the last two years he has had a change of heart.

[8] This is the applicant's fourth recent application under s 86 of the Act. The first such application was the subject of a judgment of 25 February 2009 by Rodney

Hansen J. There, His Honour upheld the Official Assignee's decision to refuse consent in respect of a proposal that Mr Knight accept re-appointment to a position with Graduate House, an entity with which Mr Knight had formerly been associated.

[9] On 21 May 2009, Priestley J, having heard argument, adjourned two further applications under s 86. The first of those proposals was that Mr Knight should embark on the business of secondhand book selling at various markets in the Auckland region, set up by a grant of \$500 from his wife. The second proposal was that he should be employed by his wife as a sales representative for a translation business which she runs. In a minute, Priestley J expressed concern that either or both of those businesses might provide an opportunity for Mr Knight to revert to past practices and offending, and adjourned the matter part heard to enable the parties to provide further affidavit evidence and, in particular, evidence from Mr Knight and his wife. In the course of his minute Priestley J said:

My strong hope and expectation, however, is that a resumed hearing will not be necessary. The applicant for his part has to be fully alert to the scepticism of the Official Assignee which clearly has a sound basis. The reality is that on the basis of past conduct there must be a prima facie future risk should the applicant be permitted to embark on business activities. It is my expectation that the applicant and his wife will have to fine tune a comprehensible and extensive plan so that the Official Assignee can assess exactly what is involved and weigh the risks, on the one hand, against the clear desirability that at some stage the applicant must resume some form of employment.

[10] In my view it is a proper inference that, as the case stood, the Judge was not satisfied that it would be proper to grant Mr Knight's application. By adjourning it, Priestley J left open the possibility that significantly more detailed information from Mr Knight and his wife might open the door to reconsideration of the application.

### **The application for security**

[11] The Court's jurisdiction to order security for costs is conferred by r 5.45, which provides:

5.45 Order for security of costs

(1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—

- (a) that a plaintiff—
    - (i) is resident out of New Zealand; or
    - (ii) is a corporation incorporated outside New Zealand; or
    - (iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or
  - (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
- (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
- (3) An order under subclause (2)—
- (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
    - (i) by paying that sum into court; or
    - (ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and
  - (b) may stay the proceeding until the sum is paid or the security given.
- (4) A Judge may treat a plaintiff as being resident out of New Zealand even though the plaintiff is temporarily resident in New Zealand.
- (5) A Judge may make an order under subclause (2) even if the defendant has taken a step in the proceeding before applying for security.
- (6) References in this rule to a **plaintiff** and **defendant** are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[12] The exercise of the jurisdiction was extensively discussed in the context of the former r 60(1)(b) by the Court of Appeal in *A S McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747. There, the Court said:

[13] Rule 60(1)(b) High Court Rules provides that where the Court is satisfied, on the application of a defendant, that there is reason to believe that the plaintiff will be unable to pay costs if unsuccessful, “the Court may, if it thinks fit in all the circumstances, order the giving of security for costs”. Whether or not to order security and, if so, the quantum are discretionary. They are matters for the Judge if he or she thinks fit in all the circumstances.

The discretion is not to be fettered by constructing “principles” from the facts of previous cases.

[14] While collections of authorities such as that in the judgment of Master Williams in *Nikau Holdings Ltd v BNZ* (1992) 5 PRNZ 430, can be of assistance, they cannot substitute for a careful assessment of the circumstances of the particular case. It is not a matter of going through a checklist of so-called principles. That creates a risk that a factor accorded weight in a particular case will be given disproportionate weight, or even treated as a requirement for the making or refusing of an order, in quite different circumstances.

[13] The factors ordinarily taken into account by the Court are collated and considered in *McGechan on Procedure* (at HR5.45.03).

[14] Where an order for security for costs may have the effect of bringing a plaintiff’s claim to an end, special care is required. In *McLachlan* the Court of Appeal said:

[15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.

## **Discussion**

[15] It is common ground that the Court has jurisdiction to make an order in the present case. Mr Knight freely accepts that by virtue of his bankrupt status he has no assets, and he cannot raise the sum of \$3000 sought by the respondent for security. It is likely therefore, that the making of an order will inhibit, or indeed preclude, Mr Knight from bringing his application.

[16] It is accordingly necessary to consider whether Mr Knight’s s 86 application appears sufficiently meritorious to permit the application to proceed without requiring him to provide security for the respondent’s costs.

[17] The current proposal was the subject of communications between Mr Knight and the Official Assignee in November 2008. During the course of correspondence

between them, the Official Assignee, Mr Harte, wrote to Mr Knight by e-mail as follows:

Dear Mr Knight

To assist you further the consent forms and requirements are on our website [www.insolvency.govt.nz](http://www.insolvency.govt.nz).

A copy of the material is attached below for your reference. I look forward to receiving proper applications for consent to both suggested employment options in order for the Official Assignee to carry out the required assessment.

[18] Below that e-mail the Official Assignee conveyed the following information to Mr Knight:

**How do I apply for consent to be in business or employed by a relative?**

All applications for consent must be made in writing to the Official Assignee and supported by an affidavit, which is a written statement of the relevant facts sworn on oath or affirmed (usually before a solicitor).

[Download a sample affidavit](#)

You must submit your application before you begin employment.

Your application must include details (where applicable) of:

- Reasons for application
- Current employment details
- Name and type of business
- Whether new or existing
- Details of expected income
- Name(s) and relationship to the business owner(s)
- Details of capital if a new business
- Who the capital is being paid by
- Full description of your duties and responsibilities
- List of any expenses incurred by you, including any initial outlay
- Schedule of the plant and equipment required
- Provisions made to pay income tax, PAYE, GST, etc
- Any other information the Official Assignee may need in order to make an informed decision.

You must also tell the Official Assignee what benefits (if any) your employment or business has to your creditors.

The onus is on you to show why consent should be granted.

The Official Assignee will take into account your best interests and those of your creditors and the business community and will consider:

- Cause of bankruptcy
- Conduct before and during bankruptcy
- Previous involvement with failed or family owned businesses or companies
- Viability of the proposed venture
- Potential benefits and risks to creditors and the community.

The Official Assignee will consider every application on a case by case basis.

[19] Mr Knight made his application in February 2009. It reads in its entirety:

I, Michael Helsby Knight of Unit 1B/12 Fisher Point Drive, St Mary's Bay Auckland Bankrupt, swear:

1. That I was adjudicated bankrupt on February 2001 in the High Court at Auckland.
2. I seek consent of the Official Assignee for leave to enter business on my own account.
3. My present status is I am working for China Business and Trading Co Limited as an International Sales Representative.
4. I wish to be able to resell the Companies Act book, the insolvency act book and various other legislations (sic) in book and CD form.
5. I have a large business network that can utilise the service and are (sic) confident I will achieve many sales.
6. I have spoken to Securicopy the publisher in Wellington and can purchase the books on demand with a 20% discount.
7. If the information is published on CD the price would be considerably cheaper than the book and more profitable.
8. With my research very few Company directors actually have the book on hand and have said it would be useful.
9. I have spoken to many bankrupts whose information I gathered from the New Zealand Gazette and none have a copy of the Insolvency Act and have said it would be useful.
10. If consent is given I will employ the services of an accountant to pay the appropriate taxes.

[20] On 11 March 2009, the Official Assignee wrote to Mr Knight declining his application. The Official Assignee's letter reads:

I refer to your application for self employment in regard to the sale of various books and CDs.

The Official Assignee has now fully assessed this application and has declined to grant you the requested consent. The Official Assignee has based this decision on the significant potential risks that you pose to the commercial community if consent was granted to allow you to take up this role. As advised previously you have breached your obligations as a bankrupt under the Insolvency Act 1967, these serious breaches are a significant concern to the Official Assignee, and the Official Assignee believes that these breaches indicate that you may treat the commercial



obligations of this role in a similar manner. You also have a significant history of commercial offending that has been taken into account as part of this decision.

The Official Assignee also believes that this decision does not cause you any significant hardship in attempting to prove to the Court that you have rehabilitated. You have the opportunity to do this in an employment role that does not pose a potential risk to the commercial community (and therefore does not require the Official Assignee's consent).

This decision is final. If you wish to review this decision then please do so as your right under s 86 of the Insolvency Act 1967.

[21] By his s 86 application Mr Knight asks the Court to reverse the Official Assignee's decision.

[22] At the hearing of the s 86 application, the Court would approach the matter on a de novo basis. In *Rao v Official Assignee* HC WN CIV 2006-485-004 17 October 2007, Clifford J said at [24]:

[24] My view, having reviewed the authorities, is that I am required to consider the merits of the application on a de novo basis and determine, in my own assessment, what decision is reasonable under the circumstances, based on the material presented to me at the hearing. In doing so, however, I must pay due regard to the decision of the Assignee and take into account the Assignee's functions in administering the estate and giving effect to the policy of the Act. The Act provides for the Assignee to exercise his or her discretion in administering the bankrupt's estate and if the Court interferes too readily that statutory policy will be frustrated.

[23] That reasoning was endorsed by Rodney Hansen J in his decision dismissing Mr Knight's first s 86 application: *Knight v Official Assignee* [2009] NZAR 235.

[24] It must be said that Mr Knight's present s 86 application appears to face significant obstacles. As the Official Assignee points out in his letter of 11 March 2009, Mr Knight's past history is against him. Much of his previous offending has been against members of the commercial community. There is, in my view, merit in Mr Malarao's submission that it is difficult to conceive of a person who is more unsuitable for the business that Mr Knight wants to engage in, namely the marketing and selling of copies of legislation. His target market is company directors (for copies of the Companies Act), employers (for employment legislation), and bankrupts (for the Insolvency Act). Mr Knight has committed offences under both the Act and the Companies Act, and was sentenced to a substantial term of

imprisonment for what the sentencing Judge considered to have been an elaborate employment hoax.

[25] In my view, the Court hearing Mr Knight's s 86 application is likely to share the Official Assignee's concern that he is inherently unsuitable for the type of business proposed, in that it would bring him into contact with classes of person who were the victims of earlier offending.

[26] Mr Knight submits that company directors "are not dummies" but I do not believe that the Court's likely concern on this point will be so lightly brushed aside.

[27] The Court hearing the s 86 application will probably also be concerned about the limited scale of the material supplied by Mr Knight in support of his application for the Official Assignee's consent. He was advised by the Official Assignee, in writing, of the detail required in support of an application. No doubt he was already aware of those requirements, given this was by no means his first application for consent. The single page application fell well short of complying with the Official Assignee's requirements. During the course of the security for costs argument I elicited a little more detail from Mr Knight than appears in his somewhat sparse application to the Official Assignee. It appears that he proposes to purchase a stock of books and then to sell them door to door. By way of example, he believes he would be able to purchase one particular statute for about \$17 and resell it for \$30-40. No detail is provided in respect of the buying arrangements, nor of the source of the funds which would be required to acquire his initial stock. Beyond indicating that he would employ an accountant to deal with taxation issues, there is no indication of the extent to which he would have other professional advice.

[28] In my opinion, a Court dealing with the s 86 application would entertain a degree of concern about a proposal that Mr Knight engage in door to door selling, especially to his target markets. Mr Knight's s 86 application enjoys little prospect of success, in my opinion.

[29] Mr Knight submits that the Court would need to take into account his entitlement to demonstrate his ability to carry on business on his own account, in

order to show his fitness to be discharged from bankruptcy. There is however, considerable substance in the Official Assignee's view that in the first instance, Mr Knight ought to establish a track record in conventional employment.

[30] The Official Assignee has limited his application for security for costs to the sum of \$3,000, although the costs already incurred by the respondent in this application significantly exceed that sum. Mr Malarao says that the Official Assignee seeks a contribution only to his costs. He does not intend thereby to prevent Mr Knight from pursuing the s 86 application.

[31] The Court is told that applications by the Official Assignee for security against a bankrupt are rare, but not without precedent. Generally they are reserved for bankrupts who "...may be described as obstinate", to use Mr Malarao's words.

[32] Mr Knight submits that there ought to be more leeway for a bankrupt who is in dispute with the Official Assignee, given the inherently impecunious status of bankrupt persons. That is certainly a consideration, but it is not determinative: *Holdgate v Official Assignee* HC AK B1545-IM96 23 August 2000 where Wild J ordered security for costs against a bankrupt who was unable to satisfy the order for security from his own resources.

[33] It is necessary to balance Mr Knight's interests against those of the Official Assignee. In Mr Knight's favour is the principle that access ought not lightly to be denied to those who seek the determination of the Court, and his inability to meet, from his own resources, an order for security for costs.

[34] In favour of the Official Assignee is the likely failure of Mr Knight's substantive application, and the concern that it is undesirable that public funds be utilised in the defence of proceedings that have little prospect of success.

[35] I am satisfied that it is appropriate to grant the Official Assignee's application, Mr Knight having failed in my view to demonstrate that his substantive application has any significant merit.

## **Result**

[36] There will be an order directing that the applicant give security for the respondent's costs in the sum of \$3000. The proceeding is stayed until such sum is paid, or security is otherwise provided.

[37] Costs are reserved.

**C J Allan J**