IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2002-425-000015

THE OFFICIAL ASSIGNEE
Plaintiff

v

DAVID STANLEY HEENAN
Defendant

Hearing: 2 December 2009
(Heard at Christchurch)

Appearances: J G French for Plaintiff
Defendant in Person

Judgment: 2 December 2009

JUDGMENT OF FOGARTY J

---

[1] Yesterday I delivered an oral judgment finding an issue estoppel existed between Mr Heenan and the Official Assignee that the 1960 trust did not exist. That ruling was based on a finding that the Official Assignee was a privy to the judgment of Associate Judge Gendall in *Heenan Family Trust 1960 and Ors v Gore and Ors* HC DUN CIV 2006-412-1023 8 October 2007.

[2] This morning I occasioned to read a judgment of this Court delivered by Heath J in proceedings: *Heenan v Official Assignee* HC CHCH CIV 2005-425-76 12 May 2009. This judgment was not cited to me by Mr French yesterday. This judgment dealt with an application by Mr Heenan to review Associate Judge

Doogue's decision to refuse an annulment of the bankruptcy and to join some 57 parties to the bankruptcy proceeding.

[3] The hearing took place over four days in March and April of this and a lengthy judgment of 174 paragraphs was given. Paragraph [3] of that judgment is important:

> [3] Without opposition from Mr French (for the Official Assignee), I took a very liberal approach to evidential requirements. I did so because it was clear that Mr Heenan had a number of grievances that he wished to air fully. Also, it was necessary for me to understand the entire history of the proceeding in order to rule on specific issues that Mr Heenan raised, for example in relation to his application to join parties to the bankruptcy proceeding.

[4] The principle of issue estoppel is a principle which prevents a party from re-litigating matters which have been resolved finally. It is a principle essentially which prevents a party from calling evidence to reopen such disputes.

[5] It is plain in these proceedings that without opposition from the Official Assignee the Court accepted significant evidence which went to the question as to whether or not there had been a Heenan Family Trust in place before the bankruptcy. Heath J having referred to the fact that there was a finding by John Hansen J that the 1960 trust deed was a forgery in paragraph [68] of the judgment, recorded production of documents by Mr Heenan in paragraph [70] indicating bank statements provided by the Invercargill Branch of the Westpac Banking Corporation covering the period from 1 October 1999, a date prior to the bankruptcy, the statements being headed "Heenan Family Trust". The statements became styled later "The 1960 Trust" in the same Westpac account.

[6] In paragraph [144] of his judgment the Judge said:

> [144] On the basis of the additional evidence I have received, I do not make a finding that the 1960 Trust did not exist. Nor do I find that Mr Heenan forged documents to evidence the existence of a trust that had never been formed. The most likely explanation is that documents were drawn up after the event in an endeavour to record what Mr Heenan believed to have been done.

[7] This paragraph is in marked contrast to the judgment of Associate Judge Gendall which was relied upon by Mr French. There in paragraph [88], a paragraph particularly relied upon by Mr French, and paragraph [89] the Associate Judge said:

> [88] As I have noted, there have already been several findings of fact in a range of past proceedings involving Mr Heenan that the documents he claims as foundation documents for the Heenan Family Trust 1960 and also for the Amended Heenan Family Trust 1960 and the Amended Heenan Family Trust Number Two (the plaintiffs in this proceeding) are sham documents fraudulently created by Mr Heenan. There is nothing before the Court to establish that any of these three trusts exist. The only reasonable conclusion which can be reached is that the naming of those trusts as plaintiffs by Mr Heenan has occurred simply as a device in the attempt he has made as an undischarged bankrupt to avoid his incapacity to sue in his own name.
>
> [89] I also conclude therefore that the Heenan Family Trust 1960, the Amended Heenan Family Trust 1960 and the Amended Heenan Family Trust Number Two as the named plaintiffs do not exist and further that Mr Heenan as an undischarged bankrupt without the authority of the Official Assignee lacks capacity to bring these proceedings.

[8] I read paragraph [144] of Heath J's judgment as a contrary statement to that appearing in paragraph [88] of Associate Judge Gendall.

[9] As Mr French has pointed out, there is no discussion of res judicata and issue estoppel in the judgment of Heath J. As I have pointed out by citing from paragraph [3] of Heath J's judgment, there was no opposition from the Official Assignee for these matters being opened up. Once these matters have been opened up a very real question arises as to whether or not the proposition of issue estoppel can continue to be raised by the Official Assignee in these proceedings. One thing is clear, I am quite satisfied that the decision of Heath J should have been drawn to my attention.

[10] Rule 11.9 of the High Court Rules provides:

> **11.9 Recalling judgment**
>
> A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

Since delivering my issue estoppel judgment yesterday orally it has been typed up and I edited to render it more grammatical but it has not been signed. It was in that state when I obtained the judgment of Heath J, actually for other reasons, mainly to

get an overall background of the case and on a matter which I will come to in another ruling I will make after this one. Having read that judgment of Heath J though, it seems to me that the classic principle contained in Chief Justice Wild's judgment in *Horowhenua County v Nash* (*No. 2)* [1968] NZLR 632 at 633 applies. He there identified three categories of cases where a judgment not perfected may be recalled and I quote the second:

> ... [S]econdly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[11] Now for these reasons that ruling is recalled (recalled ruling attached to this judgment) and as a result I have not found that there is an issue estoppel. That is the end of this judgment of recall.

Solicitors:
French Burt and Partners, Invercargill, for Plaintiff

cc: Mr D S Heenan

IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2002-425-000015

	BETWEEN	THE OFFICIAL ASSIGNEE Plaintiff
	AND	DAVID STANLEY HEENAN Defendant

Hearing: 1 December 2009
(Heard at Christchurch)

Appearances: J G French for Plaintiff
Defendant in Person

Judgment: 1 December 2009

RULING OF FOGARTY J

---

[1] In this judgment I make rulings as to the scope of the hearing today. On 14 August last I set aside a judgment of this Court given on 20 December 2006 for the reason that Mr Heenan was not given notice of the hearing which led to the judgment by Panckhurst J, in favour of the Official Assignee, granting a declaration that the bankrupt estate of Mr Heenan is the true owner of a 1939 Buick Convertible, and other related declarations.

[2] In that judgment I said at paragraph [7] I would hear argument as to how we would proceed in the next hearing as to going into the scope of the matters and I have heard argument on this this morning after hearing the opening address of Mr French for the Official Assignee.

[3] In these proceedings the Official Assignee is seeking declarations that a 1939 Buick Convertible car and another dismantled Buick fall into the estate of Mr David Heenan who was bankrupted on 11 December 2000.

[4] Mr French's case falls into four parts. He is calling some witnesses and I will return later to the scope of that witness evidence. Second, he is arguing that the Official Assignee is entitled to judgment because Mr Heenan's defence was struck out by a judgment of this Court on 31 October by Chisholm J. Thirdly, he is arguing that by issue estoppel there is no 1960 Heenan Family Trust and therefore it is not open, for a second reason, in addition to defence being struck out, for Mr Heenan to argue that the true owners of these chattels are the trustees of that trust. Fourthly, he is saying it is an abuse of process for Mr Heenan to argue this.

[5] In reply, Mr Heenan submits that fraud is an exception to the principle of finality and he argues that his bankruptcy was based on a fraud of a cheque; that this Court should hear his argument that the bankruptcy was derived by fraud and thus collapse what he describes as "the deck of cards" upon which the Official Assignee is standing when proceeding today to try to obtain declarations in respect of these two sets of chattels.

[6] I agree that fraud is an exception to the principle of finality. Mr Heenan has correctly identified the leading Court of Appeal case of *Shannon v Shannon* (2005) 17 PRNZ 587 and also the judgment in the Supreme Court of *Lai v Chamberlains* [2007] 2 NZLR 7. However, it is another question as to whether or not Mr Heenan can be heard on his notice of motion, which he is seeking for me to hear today, to set aside the bankruptcy and including setting aside the recent judgment of the full Court of this Court on 19 August declaring him a vexatious litigant. I focus really on the application to set aside the bankruptcy, on the grounds that it was fraudulently obtained. It is not possible to hear this application today. Before an application of this order could be obtained Mr Heenan first needs to obtain the leave of the Court, because of his status as a vexatious litigant. Second, under the Rules of the High Court a fair hearing process has to be set up which would mean that the persons alleging to be fraudulent would need to be given an opportunity to be heard. The Court always takes extremely seriously allegations of fraud and makes sure that the

rules of procedure are strictly followed as to pleading of particulars and opportunity to prepare an answer and as to a hearing. It is simply not possible to entertain this argument today.

[7] Furthermore, this Court takes note that Mr Heenan has applied unsuccessfully in the past to raise this fraud argument: *Gore v Heenan* DC ALEX NP125/99 3 August 2000, Saunders DCJ; *Heenan v Gore* HC INV CP6/00 1 December 2000, Young J; *Heenan v Gore* HC INV B55/00 11 December 2000, Master Venning; *Heenan v Gore* HC INV B55/00 29 January 2001, Master Venning (see particularly paragraph [19]); and *Heenan v Gore* HC INV M18/01 12 June 2001, John Hansen J. But, there have been a number of attempts to raise this argument, without success. The matter has also been canvassed in the recent judgment of the full Court: *Attorney-General v Heenan* HC CHCH CIV 2007-412-001061 19 August 2009, Randerson and Hugh Williams JJ. In that judgment the Court considered that the allegations of fraud and forgery in respect of the cheque were misguided and did not affect his liability which underpinned his bankruptcy.

[8] As to the argument that the 1939 Buick Convertible and the dismantled Buick are owned by the Heenan Family Trust 1960 that is a positive argument in response to the Official Assignee's claim. That argument was raised in the statement of defence, which has been struck out. I am satisfied that there are two bases why that argument cannot be pursued today. The first is by way of issue estoppel. There was a judgment by Associate Judge Gendall in the *Heenan Family Trust 1960 and Ors v Gore and Ors* HC DUN CIV 2006-412-1023 8 October 2007. This judgment falls into two parts for these purposes, part of it recognises earlier judgments whereby both the District Court and the High Court have found that the Heenan Family Trust 1960 was not valid but secondly, Associate Judge Gendall analysed the subject in this own judgment from paragraphs [83] – [89] and concluded that the trust did not exist.

[9] The parties to that judgment included the officers and former officers of the office of the Official Assignee as the 15th, 16th and 17th defendants and I am satisfied, for all practical purposes, the office of the Official Assignee was a privy to that judgment so an issue estoppel arises.

[10] Secondly, for the reasons deriving from the famous case of *Henderson v Henderson* 67 ER 313 and numerous other authorities following, including the Supreme Court in *Lai v Chamberlains*, the litigation has now reached the point where it is an abuse of process for Mr Heenan to pursue an argument that the Buick Convertible and the dismantled Buick are property of the Heenan Family Trust 1960 because of the findings that that trust does not exist.

[11] It is not open to me by law to even entertain an argument as to whether those judgments are wrong.

[12] Therefore the hearing will proceed on this basis: the Official Assignee has the normal onus on the balance of probabilities to prove to this Court that the 1939 Buick Convertible and the dismantled Buick were the personal property of Mr Heenan at the date of bankruptcy. Second, the Official Assignee does not have to reply to the contention that they were the beneficial property of the Heenan Family Trust 1960 as this Court cannot by reasons of issue estoppel and abuse of process hear that contention in the first place. Therefore there is no need to reply to it. Any attempts to reply to it will be irrelevant evidence pursuant to s 7 of the Evidence Act 2006.

[13] I have then given consideration to what Mr Heenan's position is. For the reasons which are expressed, if not fully developed, in the judgment setting aside the judgment of Panckhurst J on 14 August, Mr Heenan is entitled to be here in this Court. Secondly, it is material that although Chisholm J struck out the statement of defence on 31 October, he did not enter judgment.

[14] Mr Heenan is entitled to a conservative reading of that judgment. It follows that he cannot set up arguments that he was planning and had forecasted in that statement of defence. These are particularly just the Heenan Family Trust 1960 arguments. So I draw the conclusion that he is nonetheless entitled to cross-examine any witnesses that Mr French calls as to proof that the two vehicles were owned by himself but without advancing by way of cross-examination the submission that they were in fact owned by the 1960 trust. Second, Mr Heenan can also give evidence himself as to the history of the registration papers. In this regard I am referring to

the registration papers that the Official Assignee relies on in the bundle of documents, particularly pages 20 and 21. I think it is important as a matter of fairness that Mr Heenan be able to give evidence on this because I have read the judgment of Panckhurst J of 20 December 2006 in which he gave judgment to the Official Assignee. This is the judgment I have set aside. In the course of that judgment Panckhurst J, without the benefit of evidence from Mr Heenan, inferred that it was likely that the Transport Registry Centre records in respect of the 1939 Buick were altered around about the time of the auction on 23 April 2001.

[15] As I have had occasion to mention the auction took place in April 2001. Mr Heenan was adjudicated bankrupt in December of 2000. The certificate of registered ownership of the vehicle appearing on page 20 of the bundle says:

> … current details as at 23 April 2001

[16] I think it is appropriate that Mr Heenan have an opportunity to give evidence contrary to the inference that Panckhurst J drew at paragraph [17] of the judgment where he said:

> [17] I regard the date of the certificate as highly significant. It was issued on 23 April 2001, at about the very time of the intended auction to be conducted by Todds Car Auctions of Invercargill. In my view the only sensible inference is that the certificate was obtained in an endeavour to lend substance to the claim that a Trust, rather than Mr Heenan personally, owned both the vehicles which were about to be sold.

[17] That is the scope of the evidence that I will hear today and which I consider is the only relevant evidence by way of application of s 7 of the Evidence Act. I remind the parties that in my judgment of 14 August, setting aside the judgment given by Panckhurst J, I did point out to the parties in paragraph [5] of the judgment that I would be applying s 7 of the Evidence Act. In other words, insisting that only relevant evidence would be admissible.

[18] In that regard I now turn back to the opening address of Mr French where he in part scoped the evidence that he was going to call from four witnesses. I do not know in detail the evidence proposed to be called but applying s 7 and s 8 of the Evidence Act I rule inadmissible now the history of the litigation, as that is a matter of public record, and the history of non-compliance with the interim injunction

orders, as that is also a matter of public record. These public records are decisions of this Court. I do not consider that it is relevant or admissible, let alone in any way helpful, for me to be trawled through this history by a witness.

[19] Accordingly, I will only allow evidence from the Official Assignee which goes to proof on the probabilities that the two cars were owned by Mr Heenan at the time of the bankruptcy and so form part of his bankrupt estate.

[20] That completes my ruling. I will now call on Mr French to continue his case and call his evidence.

Solicitors:
French Burt and Partners, Invercargill, for Plaintiff
cc: Mr D S Heenan