

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

**CIV-2009-404-001060
[2013] NZHC 1848**

IN THE MATTER of the Insolvency Act 2006
AND IN THE MATTER of the bankruptcy of Roderick Nielsen
BETWEEN BRIDGECORP LIMITED (IN
RECEIVERSHIP AND IN
LIQUIDATION)
Judgment Creditor
AND RODERICK WILLIAM GUTHRIE
NIELSEN
Judgment Debtor

Hearing: 11 July 2013

Appearances: K Kuang for Official Assignee
A M Swan for Judgment Debtor

Judgment: 24 July 2013

JUDGMENT OF VENNING J

This judgment was delivered by me on 24 July 2013 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Meredith Connell, Auckland
Ross & Whitney, Auckland
Copy to: A M Swan, Auckland

Introduction

[1] Roderick William Guthrie Nielsen was adjudicated bankrupt on 23 September 2009. Mr Nielsen filed his statement of affairs with the Official Assignee on 23 November 2009. He was therefore due to be automatically discharged on 23 November 2012.¹ However, on 19 November 2012 the Assignee filed a notice of objection to Mr Nielsen's discharge from bankruptcy.² As a result Mr Nielsen was summonsed for public examination concerning his discharge.³ The examination took place on 11 July 2013. Mr Nielsen lives in Las Vegas, Nevada, USA. He attended the examination by video link at his request. He was represented by counsel at the examination, Mr Swan.

Statutory framework/principles

[2] After considering the objection and the matters raised in the course of the examination, the Court may, having regard to all the circumstances of the case:⁴

- (a) immediately discharge Mr Nielsen; or
- (b) discharge Mr Nielsen on conditions; or
- (c) discharge Mr Nielsen but suspend the order for a period; or
- (d) discharge Mr Nielsen with or without conditions at a future date; or
- (e) refuse an order of discharge, in which case the Court may specify the earliest date when Mr Nielsen could apply again for discharge.

[3] Although an application for early discharge by the bankrupt, *ASB Bank v Hogg* is accepted as a leading authority on the discretion available to the Court:⁵

¹ Insolvency Act 2006, s 290.

² Section 292.

³ Section 295.

⁴ Section 298.

⁵ *ASB Bank v Hogg* [1993] 3 NZLR 156 (CA) at 157.

... 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.

[4] The circumstances of the case include matters that are required to be contained in the Official Assignee's report, namely:

- (a) Mr Nielsen's affairs generally;
- (b) the causes of his bankruptcy;
- (c) Mr Nielsen's performance of his duties;
- (d) the manner in which Mr Nielsen has obeyed orders of the Court;
- (e) Mr Nielsen's conduct before and after adjudication; and
- (f) any other relevant circumstances.

[5] In addition to the factors referred to above, the Court should also consider the legitimate interests of Mr Nielsen, his creditors and wider public concerns, but is neither required nor entitled to impose threshold requirements in the exercise of the discretion so as to derogate from the breadth of the powers conferred on it.⁶

[6] The approach in *ASB v Hogg* was recently cited with approval by the Court of Appeal in *Armitage v Established Investments Ltd (in liq)*,⁷ an appeal from a decision of the High Court from conditions imposed on an extension of bankruptcy.

[7] From the above cases and statutory provisions, the following principles can be extracted:

- (a) The onus is on the applicant, in this case the Official Assignee, to satisfy the Court that it is in the public interest Mr Nielsen's bankruptcy should be continued.

⁶ At 158.

⁷ *Armitage v Established Investments Ltd (in liq)* [2012] NZCA 439.

- (b) In the absence of good reasons, a bankrupt such as Mr Nielsen should normally obtain a discharge three years after filing his statement of affairs.
- (c) The Court has a broad discretion which it must exercise after considering the legitimate interests of Mr Nielsen, his creditors, wider public concerns, Mr Nielsen's performance of his duties under the Act and, relevantly in this case, Mr Nielsen's conduct before and after adjudication, which impact on his commercial morality.

Preliminary procedural matters

[8] The Official Assignee filed and served an initial report on 30 April 2013. However, the Assignee also filed and served a supplementary report on 5 July. Mr Nielsen complained that the supplementary report was only filed three clear working days before the hearing. Mr Swan took objection to it on his behalf. I allowed Mr Nielsen to be cross-examined about the issues in the supplementary report on a *de bene esse* basis. I indicated that I would rule on whether that report could be considered in the course of this decision. It became apparent during the course of the examination of Mr Nielsen on the issues raised in the supplementary report that he was aware of them and was well able to respond to Ms Kuang's questions. To the extent that counsel raised questions arising from the supplementary report with Mr Nielsen, I propose to take those issues into account. Mr Nielsen cannot be said to have been disadvantaged by receiving the report late as he was able to deal with the questions. However, to the extent the matters in the supplementary report were not put to him, I do not propose to consider them further.

[9] One other preliminary matter was raised: the vast volume of documents put before this Court by the Official Assignee. The report was accompanied by nine volumes of documents. Obviously it was not possible to put all of the documents to Mr Nielsen. A substantial number of them are matters of public record such as liquidators' reports, and land transfer records. There are also Court documents. All the documents had been sent to Mr Nielsen. Both he and his counsel had access to them well in advance of the hearing. As noted, the initial report was filed on 30

April, and the original hearing scheduled for 6 May was adjourned at Mr Nielsen's request.

[10] Mr Swan did not suggest that the numerous documents in the bound volumes that were not put to Mr Nielsen were not admissible, but did submit it was unnecessary for the Court and Mr Nielsen to be faced with such an overwhelming volume of documents. I am sympathetic to the point Mr Swan made as a general proposition. If the Official Assignee is confident of his or her position in opposing a discharge, then in most cases it should be possible to focus the opposition. Of course some cases will be more complicated than others and will require more documentation. It is fair to say that Mr Nielsen's commercial dealings prior to bankruptcy (and his dealings subsequently) have been complicated. In this case, it has been necessary for the Assignee to put an extensive number of documents before the Court. To the extent that Mr Nielsen has not been examined directly on matters relating to some of the documents, I propose to deal with that as a matter of weight to be accorded to the particular documents but, as noted, a number of the documents are either public records or will be well known to Mr Nielsen in any event, as they are email or text exchanges he has been a party to.

Nr Nielsen's position/affairs

[11] Mr Nielsen has made his position clear. He has been bankrupt now for over three years and wants to be discharged, as he says he is entitled to be.

[12] The first consideration is the state of Mr Nielsen's current affairs, in particular his income and living arrangements. In his statement of affairs, Mr Nielsen simply answered "N/A" to the request to provide details of his income. He also failed to supply any information about his spouse, Ms Sirene Miller's income. In the course of the examination, Mr Nielsen said that, during the entire period of his bankruptcy he has received no income whatsoever. He says all his daily expenses are met by his wife. She has paid all the bills. I find it difficult to accept that Mr Nielsen has not received any income at all over the last three years. Further, where, as here, he says he is reliant on his wife's income, details of that income should have been provided.

[13] Mr Nielsen has been living in the United States, on his evidence, since 2005/2006. Mr Nielsen and his wife currently live in a property at 35 Innisbrook Avenue, Las Vegas, Nevada. The property is owned by 35 Innisbrook LLC, apparently a corporate trustee for the 35 LLC Nielsen Nevada Trust. The property was purchased for \$2.6 million in March 2006. A mortgage of \$1.9 million was taken out to complete the purchase. Mr Nielsen explained the balance of the purchase price was paid by his wife who had sold property she owned in Queenstown. Mr Nielsen said the value of the property has fallen to \$1.1 million and there is approximately \$2.7 to \$2.8 million owing under the mortgage. Mortgage payments have not been made for a number of years.

[14] Mr Nielsen is personally liable for the loan. It seems he originally purchased the property and took out the loan himself. The property was then subsequently transferred into a trust, the Nielsen Nevada Trust, and then to 35 Innisbrook LLC, but the loan remains in his name.

[15] Mr Nielsen is not sure whether he is a beneficiary of the trust that currently owns the property. Mr Nielsen was unable to recall the transaction that transferred the property from his name to the trust. Mr Nielsen assumed the current trustee was a corporate trustee and that the transfers were done for tax purposes.

[16] Mr Nielsen's evidence of his current circumstances was unsatisfactory. If the position is as he has outlined, namely that he has no income and is living in a home owned by a trust (which he does not know the details of) and the property has a negative equity of over USD\$1.5 million – his current situation is a matter of real concern.

The causes of the bankruptcy

[17] Prior to bankruptcy, Mr Nielsen operated as a property developer through various trusts and corporate entities. Bridgecorp Ltd (in receivership and liquidation) obtained a judgment against him for in excess of \$14 million. Mr Nielsen's indebtedness to Bridgecorp arose out of a guarantee he gave to support the borrowing by a company of which he was a shareholder and director. Under Mr Nielsen's direction, that company had borrowed significant sums from Bridgecorp to

undertake a property development in Queenstown. Despite the judgment, Mr Nielsen opposed Bridgecorp's petition. Bridgecorp was supported at the time by Mr Nielsen's brother, who had a judgment debt in excess of \$1.8 million in his favour against Mr Nielsen.

[18] Subsequent to Mr Nielsen's adjudication a number of other creditors came forward, including a number of other finance companies. Mr Nielsen owed Dominion Finance Group Ltd in excess of \$4 million; Capital + Merchant Finance Ltd, in excess of \$8.5 million, and Walter Peak Corporate Trustee Ltd in excess of \$4.6 million. All arose out of personal guarantees. In addition, Mr Nielsen owed the Inland Revenue Department over \$200,000. The total claims in his bankrupt estate are in excess of \$20.4 million. There is no prospect of any recovery at all. There is a substantial loss to Mr Nielsen's creditors, and through the finance companies, investors.

[19] The causes of Mr Nielsen's bankruptcy were the personal guarantees he gave to support the speculative property developments he was involved in through trusts and corporate structures. As Heath J observed in dismissing Mr Nielsen's opposition to the petition and adjudicating Mr Nielsen bankrupt:⁸

[61] Mr Nielsen operated a speculative business in good financial times and, I infer, did not make adequate provision to deal with any adverse financial conditions that might arise. Property developers cannot do business on the basis that the market will always be buoyant. Mr Nielsen must take responsibility for being (at best) imprudent or (at worst) commercially irresponsible.

[20] The extent of loss to creditors and the apparent lack of any substance to back up the guarantees Mr Nielsen provided are of concern.

[21] It is apparent from Mr Swan's submissions on behalf of Mr Nielsen that Mr Nielsen blames the global financial crisis for the failure of his business. He says he was one of its "casualties". However, that reflects a failure to accept the point made by Heath J when adjudicating Mr Nielsen bankrupt that he was involved in speculative business ventures. Mr Nielsen remains unwilling or unable to accept that.

⁸ *Re Bridgecorp Ltd (in rec and in liq) ex parte Nielsen* [2010] 1 NZLR 820 (HC) at [61].

Mr Nielsen's performance of his duties under the Insolvency Act

[22] Mr Nielsen said he had complied fully with the Official Assignee's requirements and had met with the Official Assignee whenever requested. He said he had always sought the Official Assignee's permission to travel overseas to the United States except on two instances. Mr Nielsen apologised for his failure to obtain approval on those occasions. He said that in relation to the first, he had simply overlooked the matter, and the second breach occurred after he had been in New Zealand to attend his mother's funeral. He said he had just not thought about it. Although it may be unusual for a bankrupt to travel as much as Mr Nielsen has, given that Mr Nielsen had made a home for himself in the United States before his bankruptcy, it is understandable why the Official Assignee would have consented to his travel out of New Zealand.

[23] On their own, the two instances of travel without first obtaining the Official Assignee's consent are relatively minor matters, but they add to the picture that emerged during the examination which was that Mr Nielsen took a cavalier attitude to his responsibilities under his bankruptcy.

[24] Mr Nielsen's subjective view of his performance of his obligations under the Act is not supported by the documentation. The statement of affairs he filed is woefully inadequate. He said in it he had answered every question and attached proof of income. Yet several pages of the statement were left blank. There was no income statement. As noted he did not provide details of his wife's income, or the household budget. As a further example, while stating his business had a landlord he said he was not sure of their details. He referred the Official Assignee to his advisers for information about his business activities. However, when the Official Assignee inquired about the Hunter Sterling agreement (referred to below), Mr Nielsen's solicitor advised:

The writer has acted for Mr Nielsen and his entities for nearly 20 years during which time a large number of transactions were carried out. Over this period Mr Nielsen would call me regularly as he preferred to give instructions or seek information and advice by phone. My practice was to make a note of what he wanted done and then dispose of the note when the work was completed unless it was other than routine in nature. ...

The manner in which Mr Nielsen has obeyed orders of the Court

[25] There are no relevant issues arising under this head.

Mr Nielsen's conduct before and after adjudication

[26] It is apparent from the borrowing that Mr Nielsen arranged from Bridgecorp and also guaranteed that he took, in Heath J's words, an imprudent (at best) or commercial irresponsible (at worst) approach to his commercial activities prior to adjudication. That is borne out by the additional claims in his bankruptcy by the several other finance companies and Walter Peak Corporate. The Capital + Merchant Finance debt arose pursuant to a guarantee Mr Nielsen provided for a loan advance to Charteris Bay Land Company Ltd. Mr Nielsen was a sole director of Charteris Bay Land Company Ltd. The claim by Walter Peak Corporate Trustee arose out of a guarantee Mr Nielsen granted for a loan advance to Aviation Properties NZ Ltd. Again, Mr Nielsen was the sole director of that company. The claim by Dominion Finance Group arose out of a personal guarantee granted by Mr Nielsen in respect of a loan to Ayr Street Townhouses Ltd and GC Housing Ltd. At material times, Mr Nielsen had been a director of those two companies.

[27] It appears from Mr Nielsen's statement of affairs that at the time he guaranteed the borrowing, he had no assets and no ability to back up his guarantee. I note for example that the personal guarantee to Walter Peak Corporate Trustee Ltd was provided on or about 17 June 2008. However, just over six months earlier than that, in November 2007, Mr Nielsen had signed a declaration for another creditor regarding his personal financial position and the financial position of related entities in which he acknowledged the financial situation was "a complete disaster".

[28] Further, Mr Nielsen's answers to Ms Kuang when questioned about his personal debt situation in 2007 disclosed a commercially irresponsible approach. The following exchange discloses his attitude to the obligations he assumed as a guarantor:

- Q. Did you have enough assets, personal assets in your personal name to meet debts that you owed personally?
- A. Under personal guarantees?

Q. Well, it's a personal – if it's a personal liability, it's included in the question. Did you have personal assets sufficient to meet your personal debts as at November 2007?

A. No, I don't think anyone does.

[29] Quite apart from the borrowing be guaranteed in New Zealand, Mr Nielsen also accepted in the course of the examination, that two substantive judgments had been entered against him in Clark County Courts, United States. On 16 October 2008, a default judgment for the sum of USD\$9,227,187 was entered against Mr Nielsen by Vestin Realty Mortgage I Inc. On 24 July 2009, less than three months before his adjudication in New Zealand, a further confession of judgment was entered in relation to Vestin Realty Mortgage II Inc in the sum of USD\$17,567,612.

[30] Further, as noted, prior to his bankruptcy Mr Nielsen operated through a number of trusts and corporate entities. He was a director of 27 companies which have subsequently been placed into liquidation. The Official Assignee confirms in his report that the combined loss to unsecured creditors of those companies is estimated to be approximately in excess of \$82 million. Mr Nielsen accepted that he had been a director of those companies and that he accepted what was stated in the liquidators' reports.

[31] A common theme of the reports is the difficulty the liquidators experienced in contacting the former directors, particularly Mr Nielsen, for any explanation. In relation to one company for example, the Lodge Trust Company Ltd (in liquidation), the liquidators' report states:

The directors of the Company are Gregory Nielsen and Roderick Nielsen. The directors have been uncooperative and are currently not responding to any of the requests made by the liquidators. These people are the directors or former directors of a number of other companies currently in liquidation. To date the liquidators have had limited contact with one director and no contact with the director who is believed to reside in Las Vegas, Nevada, USA. ...

[32] That is inconsistent with the submission for Mr Nielsen that his accountants and lawyers were instructed to provide the information requested. It is a further common theme of the liquidators' reports that the companies had a series of limited

intercompany loans between related entities controlled by Mr Nielsen, which made recovery difficult or impossible.

Any other general matters

[33] The Official Assignee has raised a concern in the report that Mr Nielsen has been carrying on business during his bankruptcy. The Official Assignee refers to Mr Nielsen's email address which includes "Nielsen Capital" in it. There is also a LinkedIn profile recording Mr Nielsen as President of Nielsen Capital. However, in the course of the examination, Mr Nielsen denied he had any association with LinkedIn and explained that that was an unauthorised entry. He said he used Nielsen Capital because "it sounded good" and that he had never undertaken any sort of investment banking.

[34] The Official Assignee also refers to a reference in some documents to Rod Nielsen as Chief Executive of Citation Property Group in Las Vegas. Mr Nielsen confirmed that Citation was the name of the project management arm for World Capital Partners, an entity based in London. He said he worked for Citation but said it ceased trading in 2008.

[35] While the Court has certain reservations about the need for Mr Nielsen to have an email address with "Nielsen Capital" in it because it simply sounded good, for present purposes I am prepared to give Mr Nielsen the benefit of the doubt on that particular issue. I also accept that his involvement with Citation ceased in 2008.

[36] Of more concern is Mr Nielsen's further involvement and dealings with property in New Zealand. The Official Assignee refers to a complaint regarding Mr Nielsen's management of Little Rock Management Ltd and Brick Street Properties Ltd (Brick Street). (It appears the reference to Little Rock Management Ltd is intended to refer to Little Rock Management Company Ltd "Little Rock".) Mr Nielsen was a director of that company until shortly before his bankruptcy. From October 2009, his wife took his place as director, and from 27 April 2010, she has been the sole director of Little Rock.

[37] Mr Nielsen initially held the shares in Little Rock as trustee. Little Rock and Brick Street were involved in the development that Bridgecorp had provided lending for through Mondrian Property Holdings Ltd (Mondrian) which ultimately led to Mr Nielsen's bankruptcy.

[38] Mondrian had developed a unit title complex in Queenstown known as the Heritage Villas. The land appears to have been originally owned by Little Rock. Little Rock took a lease back of the villas once completed. Little Rock then contracted Heritage Hotel Queenstown Ltd to manage the villas.

[39] In December 2009, shortly after Mr Nielsen's bankruptcy, Little Rock purported to sell the management rights over the villas. At about the same time, Brick Street sought to sell the land behind the heritage villas. Mr Nielsen accepted in cross-examination that Brick Street was owned by a good friend of his, Alistair Brown. The Official Assignee referred to an email of 2 February 2010 in which Mr Nielsen signed off as consultant to Brick Street, and other emails in June 2010 where Mr Nielsen signed off as either consultant to Little Rock or on behalf of Little Rock as evidence of Mr Nielsen carrying on business without approval.

[40] Mr Nielsen's explanation for this is that he was acting as a consultant for Little Rock, but only to help the villa owners. He said one of the owners had contacted him and told him of a problem with the hot water supply to the villas, because the boiler was on Brick Street's property rather than on the villa site and there was no easement in place. He said he felt bad about that and agreed he would approach the owners of the Brick Street property to negotiate on behalf of the villa owners to sort out an easement.

[41] The correspondence authored by Mr Nielsen on behalf of Little Rock does refer to the easement for hot water system but it goes somewhat further than that. It also refers to the management rights and the operation of the lease. For example, in an email on 20 December 2009, Mr Nielsen wrote to a Mr Richardson at Linwood Law stating, inter alia:

A discussed, the Trusts that owned the LittleRock Management contract with the Heritage are entering into a contract to sell this. The purchaser,

previously unknown to the Trusts, is a solid long term holder of various assets in Queenstown ...

As per our sales agreement for the management rights, the villa owners would be required to sign off on the transfer of the management rights. I believe the contract states this and that permission cannot unreasonably be withheld. Hence, I would like you to begin this process in the near future. Prior to this I will let you know who the local company is that is purchasing them ...

As yet the ink has not dried on the agreement but it will shortly. As a sign of good faith from my end, in the event the deal does not go through, even though all the villa owners have given their consent, I will ensure that the required easement is pushed through to access the Hot Water Boiler. ...

[42] The tone of the correspondence does not suggest Mr Nielsen is merely a “consultant” helping out with the hot water easement. Rather it is written as though he was in control and directing the affairs of Little Rock. He talks of “our sales agreement” and “good faith from my end”.

[43] That theme continues through the correspondence. In a later email of 4 June 2010, Mr Nielsen wrote (using the email address rod@citationproperty.com) withdrawing the offer made to resolve issues and stated, inter alia:

We are been upfront with all our dealing with the management rights since Dec 2009 and feel that this level of co operation is no longer there due to misinformation the some villas Owners are placing into the public arena. ...

Again, while Mr Nielsen signed that off as consultant to Little Rock Management Ltd, it is apparent he was making major decisions for the company. Then there is a further email of the same date, attaching a letter dealing with the issue of Little Rock Management Ltd’s obligation to provide audited accounts, stating:

Please see the attached letter from the Heritage Hotel to Mr Duncan Brown. It clearly shows that all times the Heritage and Little Rock have always made the audit process available and Mr Brown clearly declined the offer to receive Audited Accounts. ...

[44] On the basis of his own correspondence, it is apparent Mr Nielsen’s attendance on behalf of Little Rock went beyond his personal commitment to assist the villa owners in relation to the hot water easement. Mr Nielsen was on the face of it the controlling force making business decisions on behalf of Little Rock. He withdrew an offer of resolution. I reject his explanation of his limited involvement.

He was acting to control and direct the affairs of Little Rock without obtaining the Official Assignee's consent.

[45] Mr Swan submitted that this and the Hunter Sterling issue were referred to the National Enforcement Unit, but no further action was taken as the Official Assignee withdrew the complaints. However, in response, Ms Kuang pointed out the reason the matters were not taken further was because Mr Nielsen was living out of the jurisdiction.

[46] The next issue relates to the Hunter Sterling business venture. On 18 October 2010, Mr Nielsen entered an agreement with three others, Messrs Bublitz, Chiven and Cook to undertake business ventures in Singapore and throughout the rest of the world. The agreement recorded that Mr Nielsen held a 25 per cent share of the business and all entities established for the purposes of conducting and carrying on the business. It also provided that the shares of ownership could be held by a trust or trusts established by or on behalf of each party.

[47] On 22 October 2010, Mr Nielsen entered a deed of assignment of contract with Rosebud Corporate Trustee Ltd, assigning his interest in the Hunter Sterling agreement to Rosebud Corporate Trustee Ltd. Mr Nielsen's explanation for his entering the agreement in his own name was that the agreement was signed in the United States, but that he entered into the agreement for Rosebud Corporate Trustee Ltd as trustee of the Rosebud Trust. However, it appears Mr Nielsen signed the agreement in Kuala Lumpur, Malaysia, as that was where the witness to his signature lived.

[48] One of the business ventures undertaken pursuant to the Hunter Sterling agreement was a property development in Albany, Auckland conducted through Hunter Gills Road Ltd. On the information before the Court, it appears Mr Nielsen has had a controlling hand in relation to that development through the Rosebud Trust. The joint venturers have fallen out. Their relationship broke down to the extent that they made an agreement on 10 May 2012 in which Rosebud Corporate Trustee Ltd agreed to sell its interests in the Hunter Sterling agreement. One of Mr Nielsen's former partners under the original Hunter Sterling agreement says that Mr

Nielsen received money under it which he has not disclosed to the Official Assignee. Mr Nielsen denies that and says the monies were received by Rosebud Trust, not him.

[49] Mr Swan has written to the Official Assignee to explain Mr Nielsen's involvement in the above. Mr Swan explained that the Gills Road, Albany property was held in trust for the parties to the Hunter Sterling agreement (Mr Nielsen's interest had by this time been assigned to Rosebud as intended). The long-term plan was to develop approximately 120 townhouses on the property. Following the breakdown in the relationship (which involved Mr Nielsen), Mr Bublitz agreed to purchase Rosebud's interest in the Hunter Sterling agreement and the other businesses that Rosebud owned, including intellectual property rights Rosebud had to the development funding model in New Zealand.

[50] Rosebud is now seeking to recover payments of \$400,000 it says are due to it. Mr Swan argues that if the Official Assignee takes the stance Mr Nielsen acquired the property under the Hunter Sterling agreement and that property vested in the Official Assignee, then Rosebud had no standing to enter into the 10 May 2012 agreement which is the basis for the present claim for \$400,000. He invited the Official Assignee to disclaim any rights under the agreement or to determine that Mr Nielsen acquired those rights as trustee for Rosebud.

[51] It is neither necessary nor appropriate for the Court, on this application, to attempt to determine that particular issue.

[52] Ms Kuang referred to Mr Ken Whitney, Mr Nielsen's lawyers' letter of 10 May 2013 to the Official Assignee's office where Mr Whitney confirmed:

We set up the Rosebud Trust with a corporate trustee called Rosebud Trustee Ltd of which our partners were the initial directors. We were subsequently advised by Mr Nielsen verbally that this entity was to hold an interest in the Hunter Sterling agreement which he had entered into on behalf of the trust. As it appeared that commercial activity was to be undertaken by the Rosebud Trust we advised Mr Nielsen that we did not wish to be directors of the trustee company if this was the case. We then resigned and Mr Robert Foster of BDO Accountants was appointed in our stead.

[53] Ms Kuang submitted that Mr Whitney was effectively saying that he was only advised of the fact of the Hunter Sterling agreement after Mr Nielsen had already entered it. That is one interpretation that can be taken from the letter.

[54] Interestingly, the timing of the establishment of the Hunter Sterling joint venture on 18 October 2010 coincides with an email from Mr Nielsen to the Official Assignee on 21 October 2010, asking the Assignee whether he could become involved in real estate consultancy in New Zealand.

[55] Although Mr Nielsen subsequently did not pursue that matter when the Official Assignee advised further particulars would be required, the Hunter Sterling partners then proceeded with the Albany project.

[56] It seems from the documentation disclosed that Mr Nielsen has had an involvement in its business of property development in New Zealand even if he has used the vehicle of the Rosebud trust to do so. Mr Nielsen's accountant (who resigned as a director of Rosebud Corporate Trustee) says that he had regular contact with Rod Nielsen:

all the way through the negotiation process and gave my approval to the final deal ...

(relating to the May 2012 agreement)

It suggests that Mr Nielsen effectively negotiated the deal, which Mr Foster ultimately agreed with.

[57] The text exchanges between Mr Nielsen and Mr Bublitz show Mr Nielsen's involvement in the project and the joint venture. It is sufficient to refer to the following passages from the texts attributed to Mr Nielsen:

Have sent u an email. We really don't like the proposed plan with the funders, understand why u doing it but we need our agreement re stage 1 honoured by all parties ...

... We have the right to caveat the title and ensure all payments under our agreement are paid up in accordance with it. ...

In terms of a response to the advice Mr Cook intended to report Mr Nielsen to the Ministry of Economic Development:

We don't care about MED. Tell him to keep his appointment. They will laugh at him and see right through his lies. ...

And later:

The Trust informs me they have placed a caveat on the Gills Rd Title. We off to Europe tonight for summer holidays. C u in 5 mths. Good luck.

Mr Nielsen accepted he had authored the text but said he had not gone to Europe.

[58] On the information before the Court, I infer that Mr Nielsen was effectively using the Rosebud trust as a vehicle. While Ms Sirene Miller was the current director of Rosebud Corporate Trustee Ltd, there is nothing to suggest she directed the trust. Mr Nielsen appears to have been the controlling force behind the trust. Through it he was involved in the property development at Albany.

[59] The Official Assignee raises other matters in the supplementary report relating to the Elam Street property formerly occupied by Mr Nielsen's mother. There would appear to be issues about the beneficial ownership of that property as well, which is now in the name of Elam Street Property Trustee Ltd. Again, Ms Sirene Miller is sole director and shareholder of the trustee company. Mr Nielsen's evidence about that property was vague. He accepted he originally held a beneficial interest in the property. When the property was transferred from the Parnell Residential Trust Ltd to the Elam Street Property Trust in 2010, Mr Nielsen was recorded as the sole director of the Parnell Residential Trust Ltd. Despite that, he said he was not sure why the property had been through several changes of ownership. Further, Mr Nielsen accepted he did not obtain the Official Assignee's approval to act as a director and execute the transfer.⁹

Summary

[60] The overriding intent of the Insolvency Act is to enable a person who has complied with the requirements of bankruptcy during the statutory term to be

⁹ Quite apart from the fact it appears the company was struck off in February 2010.

discharged and be free again to earn a livelihood and, in the words of the English Court of Appeal, to have the ordinary inducements to industry.¹⁰

[61] However, in this case, the Official Assignee satisfies the Court that it is not in the public interest to discharge Mr Nielsen. Mr Nielsen has failed to understand or appreciate the consequences of his actions that led to his bankruptcy in the first place, and has failed to meet his obligations as a bankrupt. I accept the submission made on behalf of the Assignee that Mr Nielsen has a clear predisposition to incur credit and take unacceptable risks with other people's money.

[62] On the information before the Court, I am satisfied that the cause of Mr Nielsen's bankruptcy was his commercial irresponsibility. It is apparent from his evidence and attitude during the course of the examination that Mr Nielsen still does not understand the responsibilities involved in operating a company or borrowing money. Further, he has not regarded himself bound to comply with the restraints applying to a bankrupt. His personal circumstances at present are hopeless. If Mr Nielsen was to be discharged from bankruptcy now, I consider it almost inevitable, despite his suggestion otherwise, that he would engage in further commercial property development in New Zealand, with further loss to banks, financial institutions, their investors and other creditors.

[63] I do not accept that the risks that Mr Nielsen poses to the commercial and investing public can appropriately be met by conditions upon discharge. The only means of protection for the public is to extend the period of Mr Nielsen's bankruptcy.

Result/orders

[64] I therefore make an order extending Mr Nielsen's bankruptcy until at least 23 November 2015. That date, 23 November 2015, is the earliest date that Mr Nielsen may apply to be discharged from bankruptcy. His attitude towards the obligations he

¹⁰ *Re Gaskell* [1904] 2 KB 478 (CA) at 482.

has as a bankrupt and his conduct between now and that date will determine whether he will be discharged at that time.

Venning J