

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA399/2011  
[2012] NZCA 439**

BETWEEN                      ALLAN CLIFF ARMITAGE  
    Appellant

AND                                      ESTABLISHED INVESTMENTS  
    LIMITED (IN LIQUIDATION)  
    Respondent

Hearing:            18 September 2012

Court:                Randerson, Stevens and Miller JJ

Counsel:            Appellant in person  
                            E C Gellert for Official Assignee

Judgment:        27 September 2012 at 3.00 pm

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**JUDGMENT OF THE COURT**

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- A        The appeal is dismissed.**
- B        The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**
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**REASONS OF THE COURT**

(Given by Stevens J)

**Introduction**

[1]        The appellant, Mr Armitage, is an undischarged bankrupt. He has been adjudicated bankrupt three times over a period of some twenty years. The Official Assignee objected to an automatic discharge at the end of the statutory three year period for his third bankruptcy. In the High Court Associate Judge Doogue extended

the period of bankruptcy for a further three years and imposed conditions that the appellant was not to engage in business for a further three years following discharge at the end of the extended period.<sup>1</sup> The Associate Judge took into account the appellant's conduct during the two earlier bankruptcies and considered that protection of the commercial community prevailed over the appellant's personal interests. The appellant appeals against the Associate Judge's decision.

[2] Before this Court, the appellant accepted that the extension to the bankruptcy for three years was appropriate but challenged the imposition of conditions for a further three years. He argued that the additional penalty of the conditions was excessive. Counsel for the Official Assignee, however, contended that the Associate Judge properly exercised his discretion both to extend the bankruptcy and impose conditions following discharge. The decision was supported by ample evidence showing the appellant's continued misconduct throughout the third bankruptcy.

### **Some further background**

[3] The appellant was adjudicated bankrupt for the first time on 6 June 1990, as a result of a failed property development. He was discharged on 6 September 1993.

[4] The appellant was adjudicated bankrupt for a second time on 6 July 1999. He owed approximately \$1.5 million to creditors due to further failed property developments. He was automatically discharged on 6 July 2002.

[5] In 2007 the appellant was adjudicated bankrupt for the third time on the petition of the respondent, Established Investments Ltd (EIL), a company engaged in property investments. EIL was incorporated during the appellant's second bankruptcy and was liquidated on 10 July 2003. The liquidators, following initial investigation and interviews, formed the view that the appellant appeared to be the deemed director of the company. In particular, between July 2001 and April 2003, the appellant had cashed cheques totalling \$818,000 drawn from the account of EIL. None of the funds were located.

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<sup>1</sup> *Of the Bankruptcy of Allan Cliff Armitage (Bankrupt) v Established Investments Ltd (in liq)* HC Auckland CIV-2007-404-4280, 8 April 2011 [High Court judgment].

[6] The liquidators made demand on the appellant for the sum of \$818,000 and issued proceedings when the demand was not satisfied. The proceeding was determined when the liquidators successfully applied to strike out the appellant's defence on the basis of repeated failures to comply with discovery orders.<sup>2</sup> In July 2007, EIL served the appellant with a bankruptcy notice in respect of the judgment debt. Although the appellant opposed the resulting bankruptcy application, he was adjudicated bankrupt on 17 October 2007. He owed creditors in excess of \$1.7 million.

[7] The Official Assignee filed an objection to the appellant's automatic discharge from the third bankruptcy.<sup>3</sup> The concerns outlined in the Official Assignee report included:

... [the appellant's] involvement in setting up company and trust structures while insolvent for the purpose of carrying on commercial activities, his history of fraudulent dealings to obtain finance, avoidance of obligations to his creditors, outstanding concerns as to his activities while bankrupt, and breach of undertakings to the [Official Assignee] during bankruptcy.

### **High Court judgment**

[8] In considering the Official Assignee's objection, the Associate Judge took into account the appellant's conduct pre-dating the third bankruptcy. This included the appellant's involvement in the loss of large sums of money from companies with which he was involved. The Judge gave two examples of such conduct, the first being the loss of \$350,000 that had been withdrawn by the appellant from Lifestyle Orewa Ltd (in liquidation). The money has never been recovered. The second was the loss of \$818,000 from the cheques withdrawn from the account of EIL. The Associate Judge considered that these examples were directly relevant to two of the factors to be considered, namely, commercial morality and protection of the community. The Judge concluded:<sup>4</sup>

On either view of Mr Armitage's actions ... the two possibilities being recklessness or misappropriation, any common understanding of requirements of commercial morality must have been contravened. Further,

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<sup>2</sup> *Established Investments Ltd (in liq) v Armitage* HC Auckland CIV-2004-404-4084, 2 April 2007.

<sup>3</sup> Under s 107(3) of the Insolvency Act 1967 [the 1967 Act].

<sup>4</sup> High Court judgment at [22].

that a person in Mr Armitage's position would involve himself in such schemes which ultimately caused loss to creditors of the company demonstrates that he poses a significant hazard to other people who are in business.

[9] A further factor was that the appellant has misused the structure of various companies and trusts in order to carry on business as a property developer while he was bankrupt.<sup>5</sup> Particular examples included two companies incorporated during the second bankruptcy whereby the appellant arranged for others to become the director or sole shareholder of the company yet maintained control over the company's affairs.<sup>6</sup> The Associate Judge concluded:<sup>7</sup>

It follows ... that Mr Armitage was acting in a way that ignored the disability that he was under as an undischarged bankrupt. He was deliberately contravening the Insolvency Act.

[10] The Associate Judge also took into account that the appellant had pleaded guilty to 21 charges of using a document with intent to defraud. Many of the fraudulent transactions, relating to applications for loans, occurred during the course of the appellant's second bankruptcy. He was sentenced to two years and six months' imprisonment.<sup>8</sup>

[11] The Associate Judge then considered the appellant's conduct during the third bankruptcy. He rejected counsel's submission that the appellant was a "model citizen". There was evidence of dealings with a company called Sanctuary Propvest Ltd demonstrating that the appellant had engaged in a pattern of conduct, established in the first and second bankruptcies, which continued through into the third bankruptcy. It involved the appellant deliberately finding ways to carry on the business of property development and investment without regard to the restrictions arising from his bankruptcy.

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<sup>5</sup> Section 62 of the 1967 Act sets out a prohibition of the bankrupt entering into business.

<sup>6</sup> At [25]–[31].

<sup>7</sup> At [32].

<sup>8</sup> *Serious Fraud Office v Armitage* DC Auckland 04090500767/NORS, 1 December 2005.

[12] The Associate Judge then considered the personal interests of the appellant, including his age (mid-60s), health issues and poor employment prospects. But he also accepted that there was a need to protect the community.<sup>9</sup>

[13] The Associate Judge also concluded:

[51] Had there been a significant change in Mr Armitage's outlook and attitude which showed that he now understood how reprehensible his conduct was, that would put his actions, which are admittedly of some years ago, in a less unfavourable light. But I was unable to discern any such shift in Mr Armitage's understanding and attitude to the responsibilities that persons in control of companies, as he was, have.

[14] Accordingly the Associate Judge upheld the Official Assignee's objection. He extended the bankruptcy by three years, to 17 October 2013. The Associate Judge also made orders, pursuant to s 111 of the Insolvency Act 1967 (the 1967 Act), preventing the appellant from engaging in business. These were to have effect for three years following the date of discharge, that is, until 17 October 2016.

### **Submissions of the parties**

[15] Before us the appellant repeated his submission that, since his release from prison, he had been a model citizen. He took no issue with the order of the Associate Judge extending the period of the third bankruptcy by three years. Rather, the thrust of his argument was that there was no warrant for the further penalty of the order imposing conditions under s 111 of the 1967 Act for a further period of three years following his discharge from bankruptcy on 17 October 2013.

[16] The appellant submitted that he had cooperated fully with the Official Assignee in relation to the resolution of litigation for property owned by Sanctuary Propvest Ltd. The appellant also contended that he would continue to cooperate with the Official Assignee in the same manner as he had done in June 2012 when he had disclosed his intention to work for an employer in Tauranga on a commission basis sourcing properties and finding buyers for those properties that he might purchase

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<sup>9</sup> At [43].

and then on-sell. The arrangement, whereby all real estate transactions would be carried out by the employer, had been approved by the Official Assignee.

[17] But the appellant noted that the terms of the approved arrangement were restrictive and did not enable him to earn a satisfactory living. Hence the appellant sought to challenge the imposition of conditions under s 111 of the 1967 Act. His hope was that, after October 2013, he might re-enter the real estate business because employment in other areas at his age and in his present circumstances was problematic, if not impossible. The appellant would welcome the freedom to embark on the buying and selling of real estate through a business which would employ up to three staff and produce greater income. Unlike the current arrangement, the appellant advanced no concrete proposal. In particular there was no affidavit evidence from prospective parties as to the true nature and details of any such arrangement.

[18] Finally, the appellant submitted that the combined effect of the extension to the third bankruptcy and the decision to impose conditions for a further three years was excessive and inconsistent with previous cases. The appellant relied in particular on *Edwards v The Official Assignee*,<sup>10</sup> *Re Caigou*<sup>11</sup> and *Wenzel v The Official Assignee*.<sup>12</sup>

[19] In response counsel for the Official Assignee submitted that the extended bankruptcy and imposition of post bankruptcy conditions were, viewed as a whole, entirely appropriate. Even considering the impositions separately, the restrictions imposed post discharge were appropriate. The Associate Judge had exercised his discretion available under the applicable statutory framework and had applied correct legal principles and relevant authorities. The appellant had not shown that the Associate Judge took into account irrelevant factors. Rather the Associate Judge had taken into account all relevant factors and had not been shown to be plainly wrong.

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<sup>10</sup> *Edwards v The Official Assignee* CA236/03, 1 April 2004.

<sup>11</sup> *Re Caigou* HC Christchurch M513/92, 30 October 1996.

<sup>12</sup> *Wenzel v The Official Assignee* HC Auckland CIV-2005-404-6852, 15 April 2008.

## Discussion

[20] The issue that we have to determine is whether the Associate Judge erred in exercising his discretion under ss 110 and 111 of the 1967 Act to extend the bankruptcy and impose conditions. Given that the statute confers a broad discretion, there is a higher threshold for appellate intervention.<sup>13</sup> In considering an appeal of this kind the appellant must show that the Judge acted on a wrong principle, failed to take into account some relevant matter or took into account some irrelevant matter, or was plainly wrong.<sup>14</sup>

[21] The principles to be applied in relation to s 110 of the 1967 Act have been determined by this Court in *ASB Bank v Hogg*.<sup>15</sup> There, the Court stated:<sup>16</sup>

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. ... The Court is to consider the assignee's report as to the affairs of the bankrupt, the causes of the bankruptcy, the manner in which the bankrupt has performed the duties imposed on him or her under the Act and his or her conduct both before and after the bankruptcy, and also as to any other fact, matter or circumstance that would assist the Court in making its decision. Clearly the Court apprised of the matter will consider the legitimate interests of the bankrupt, the creditors and wider public concerns, but it 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 under s 110.

[22] In the present case, therefore, it was relevant that the Associate Judge should consider all of these factors including the conduct of the appellant in his prior bankruptcies, the continuation of similar conduct into the third bankruptcy, as well as the appellant's convictions for dishonesty offences.

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<sup>13</sup> *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 (CA) at [13].

<sup>14</sup> *May v May* (1982) 1 NZFLR 165 (CA) at 170.

<sup>15</sup> *ASB Bank v Hogg* [1993] 3 NZLR 156 (CA).

<sup>16</sup> At 157–158.

[23] The Official Assignee in the High Court had sought an extension of the bankruptcy for five years and the imposition of conditions for a further five years after that. The decision of the Associate Judge under ss 110 and 111 of the 1967 Act to extend the bankruptcy for three years and impose conditions for a further three years at the end of the bankruptcy demonstrates that the Associate Judge exercised his broad discretion. We are satisfied from all of the circumstances that the Associate Judge might equally have concluded that a longer period of bankruptcy, perhaps close to five years, would have been appropriate.

[24] We are also satisfied that the imposition by the Associate Judge of conditions under s 111 of the 1967 Act was not unreasonable or inappropriate in the circumstances. Section 111 relevantly provides:

(1) Without restricting the provisions of section 110 of this Act, the Court, when granting the order of discharge or at any earlier time, may make an order prohibiting the bankrupt after his discharge from doing all or any of the following things without the leave of the Court:

(a) Entering into or carrying on any business or class of business either alone or in partnership with any person:

(b) Being engaged in the management or control of any business carried on by or on behalf of, or being in the employ of, any of the following persons, namely, the bankrupt's wife or husband, a lineal ancestor or descendant of the bankrupt, the wife or husband of such an ancestor or descendant, a brother of the bankrupt, the wife of such a brother, a sister of the bankrupt, and the husband of such a sister:

(c) Acting as a director or taking part directly or indirectly in the management of any company or class of company.

...

(3) The Court may at any time cancel or vary any such order.

[25] The Associate Judge imposed conditions under each of s 111(1)(a) to (c). The purpose of this, in light of the public interest, was to ensure that the appellant would not become involved in business. The conditions imposed do not prevent the appellant from working as an employee, for example as a commission salesman, employed in the real estate field on arrangements similar to that which apply under his present (approved) arrangement.



[26] It is significant that s 111 expressly preserves the ability of the appellant to seek leave of the Court in respect of any specific proposed arrangement. No doubt in the first instance the appellant would refer the matter to the Official Assignee. The obligation on the Official Assignee would be to act fairly and reasonably in considering the nature of any such proposal. We have no reason to doubt that the Official Assignee would so act, as was the case in relation to the approval of the arrangement in June 2012 referred to at [16] above.

[27] With respect to the appellant's submission that he has in recent times been a "model citizen" we are satisfied that the Associate Judge was correct in rejecting this submission. The evidence and the reasons given by the Associate Judge, as summarised at [8]–[14] above, amply demonstrate that the conclusion was justified.

[28] Moreover, the observations of the High Court on the Official Assignee's application that caveats registered against the title of property owned by Sanctuary Propvest Ltd not lapse are apposite.<sup>17</sup> Relevantly, Asher J concluded that:

[61] ... It is seriously arguable that [Sanctuary Propvest Ltd] and [Sanctuary Trust, the underlying trust owning the company of which the appellant was a beneficiary] were vehicles of deception or even fraud, designed by Mr Armitage to enable him to do something unlawful and against the interests of his creditors, namely to enable him to own property while bankrupt. It is arguable that to achieve this result he set up structures which were never intended to operate according to their legal tenor. The company was not intended to operate as a company at all, but rather as an entity where an ignorant Mr Dunn [the initial director] would do or sign whatever he was asked to enable his friend Mr Armitage to have the benefits of property ownership. The trust, it will be argued, was set up for the same purpose.

[29] In the High Court the Associate Judge relied on these findings. We are satisfied that it was entirely proper to do so.

[30] The final point is whether the extension of the bankruptcy for three years and the imposition of conditions for a further three years was inconsistent with the cases relied upon by the appellant. We think not. In cases arising under s 110 of the 1967 Act the outcome will usually be dependent on the particular facts and

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<sup>17</sup> *The Official Assignee as assignee of the bankrupt estate of Alan Cliff Armitage v Sanctuary Propvest Ltd* HC Auckland CIV-2009-404-852, 11 June 2009.

circumstances of each case. With cases of bankruptcy or successive bankruptcies, the commercial dealings involved are likely to differ, often markedly. Care needs to be taken in seeking to draw comparisons with other cases.

[31] Similarly the concept of a “tariff approach” is not appropriate in this context. Applications under s 110 of the 1967 Act generally include consideration of the interests of the bankrupt, the interests of the creditors, the public interest, commercial morality and the conduct of the bankrupt. While some guidance may be drawn from previous cases, we would expect that precise comparisons are unlikely to be useful or appropriate.

[32] We are satisfied that, in ordering the three year extension to the bankruptcy and the imposition of conditions for a further three years, the Associate Judge achieved the correct balance. Plainly the serious lapses of commercial morality exhibited in this case require the protection of the community. The orders made by the Associate Judge both individually and in totality were appropriate.

[33] As a fallback, the appellant argued that if conditions under s 111 of the 1967 Act were to be imposed, a period of 18 months after October 2013 would be sufficient. We disagree. We see no reason to interfere with the imposition of conditions for a three year period from October 2013, especially bearing in mind that, if the circumstances warranted it, the appellant could seek leave of the Court to enable the conditions to be cancelled or varied.

## **Result**

[34] For the reasons outlined above, the appeal is dismissed.

[35] The respondent is entitled to costs. There will be an order that the appellant pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:  
Simpson Grierson, Auckland for Official Assignee