IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2018-419-169
[2018] NZHC 1944

UNDER	the Insolvency Act 1967
IN THE MATTER	of an appeal from the decisions of the Official Assignee
BETWEEN	MIKE LAFFERTY also known as MICHAEL HELSBY KNIGHT Appellant
AND	OFFICIAL ASSIGNEE IN BANKRUPTCY OF THE PROPERTY OF MICHAEL HELSBY KNIGHT Respondent

Hearing: 27 July 2018

Appearances: Appellant in person
G S Caro for the Respondent

Judgment: 1 August 2018

JUDGMENT OF GORDON J

This judgment was delivered by me
on 1 August 2018 at 4 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Ministry of Business, Innovation and Employment, Auckland
Copy To: Appellant

Introduction

[1] The appellant, Mr Lafferty, appeals under s 86 of the Insolvency Act 1967 (the Act) against two decisions of the Official Assignee refusing two separate applications by Mr Lafferty to enter or carry on business under s 62(1)(a) of the Act.[1]

[2] Mr Lafferty, who was formerly known as Michael Knight or Michael Helsby-Knight, appeared on his own behalf. He says he has changed his name by deed poll.

[3] For the purposes of this judgment, I shall refer to the appellant as Mr Lafferty. However, he is the same person as the Michael Knight or Michael Helsby-Knight named in judgments to which I shall shortly refer.

[4] The Official Assignee opposes the appeal.

Background

[5] On 14 February 2001, Mr Lafferty was adjudicated bankrupt. He has remained bankrupt ever since.

[6] On 9 November 2007, Associate Judge Doogue dismissed Mr Lafferty's application for an order discharging him from bankruptcy.[2] The Judge concluded that it was not in the public interest or the interests of commercial morality to grant the order.[3] He also stated that Mr Lafferty's conduct in the course of bankruptcy did not justify the grant of the order.[4] Many of the Judge's comments were prescient. I set out in some detail a number of paragraphs of his judgment. They include a history of Mr Lafferty's offending to that point:

> [9] … Mr Malarao made extensive reference to the report that had been filed by the Official Assignee. The main issues that he brought out were that Mr Knight has an extensive criminal history of offending. He noted that Mr Knight had been convicted as long ago as May 1985 of fraudulently using a document to obtain a pecuniary advantage. Mr Knight has spent a considerable amount of his time in Australia. He has been bankrupted there twice. In 1990

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1 As Mr Lafferty was adjudicated bankrupt on 14 February 2001, the Insolvency Act 1967 governs his applications, rather than the Insolvency Act 2006. See Insolvency Act 2006, s 444(2).
2 *Knight v Independent New Auckland Ltd* HC Auckland B1256-IM00, 9 November 2007.
3 At [30].
4 At [30].

he was convicted of managing a company when prohibited. He has been banned indefinitely in New South Wales from being involved in any business. Since his bankruptcy in New Zealand on 14 February 2001, he has been bankrupted in Australia on a second occasion. He has continued offending since he was adjudicated bankrupt in New Zealand in 2001. In 2002 and 2004 Mr Knight was sentenced for offences against the Fair Trading Act. Even since he filed his application for a discharge in 2005, he has offended yet again. In 2005 he was sentenced in the North Shore District Court on four charges of fraudulently using a document to obtain a pecuniary advantage. On that occasion he was sentenced to 18 months imprisonment. Then in 2005 he was prosecuted for managing a company while bankrupt and pleaded guilty.

…

[15] One particularly troubling aspect of this case is that Mr Knight committed fraud offences through carrying on a business even during the time when he has been bankrupt. As well, there is the troubling feature of the case, which I raised during discussion with counsel, that Mr Knight seems intent on returning to the types of business where he has got into trouble in the past and which have resulted in loss being incurred by members of the public. Broadly speaking, those two types of business are sales promotions connected with travel and timeshares and immigrant employment type businesses. If Mr Knight had developed an employment history in a position where the Court was able to discount any risk to the public and was assured that Mr Knight intended to stay in that position, then the position might be different. But that is not the case and the risk remains. The fact that Mr Knight seems unable to understand the Court's concerns in this area also discloses a troubling lack of insight.

[16] 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.

[17] 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 there 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.

> [18] I am of course required to give weight to the penalising effect of a continuation of what has already been a bankruptcy of considerable length. So far as restrictions on going into business are concerned, I think that the concerns there can be mitigated by Mr Knight seeking the consent of the Official Assignee to taking part in some business, if the Official Assignee sees fit: s 62 Insolvency Act 1967. In making that judgment, no doubt the question of risk to the public will be one of the matters that the Official Assignee will place in the balance.
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> …
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> [32] The Court is not without sympathy for Mr Knight. He is to be commended on the efforts that he has made to address what seems to have been a serious drug addiction. Of course, the longer he manages to stay out of trouble, the more confidence the Court can have in his long-term prognosis. In my view, though, it is too early at this point to grant him a discharge. It cannot be said with confidence that he is no longer a threat to the public or the commercial community. The application is dismissed. I also order pursuant to s 110(1)(d) of the Act that Mr Knight is not to bring another application for discharge for twelve months.

[7] In January 2008, the Official Assignee approved Mr Lafferty's application for employment as an assistant branch manager at Wealand International NZ Limited. When that job concluded, the Official Assignee refused consent for Mr Lafferty to be an assistant manager at Kiwi Professionals Limited. Mr Lafferty then proposed returning to his previous position at Wealand International NZ Limited. The Official Assignee declined that application. Mr Lafferty then applied under s 86 of the Act to reverse that decision. He submitted that the Official Assignee had previously agreed to him working for the same firm in the same job, and there had been no material change of circumstances.

[8] On 25 February 2009, Rodney Hansen J dismissed the appeal.[5] The Judge rejected the submission made on behalf of Mr Lafferty that the Official Assignee had to show a change of circumstances in order to justify his change of position.[6] In any event, alongside other developments, the National Enforcement Unit had laid charges against Mr Lafferty in the meantime.[7] In that respect, the Official Assignee's decision to refuse consent "was the only one reasonably open to him".[8]

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5 *Knight v Official Assignee* [2009] NZAR 235 (HC).
6 At [27].
7 At [28].
8 At [32].

[9] In 2009, the Official Assignee again refused consent for Mr Lafferty to establish a business selling certain New Zealand statutes, both in book and CD form. Mr Lafferty applied under s 86 of the Act to reverse that decision. The Official Assignee sought security for costs of $3,000, and Allan J determined that application.

[10] Allan J first acknowledged that "the making of an order will inhibit, or indeed preclude, Mr [Lafferty] from bringing his application".[9] It was necessary, therefore, to consider whether Mr Lafferty's application appeared "sufficiently meritorious to permit the application to proceed without requiring him to provide security for the respondent's costs".[10]

[11] Allan J noted that the application faced "significant obstacles".[11] The Judge noted Mr Lafferty's past history, making the Court hearing the application likely to share the concern that Mr Lafferty was "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".[12]

[12] At the time of the hearing before Allan J, further charges had recently been laid against Mr Lafferty. He faced one charge of managing a business while bankrupt, one charge of failing to disclose property to the Official Assignee and one charge of taking part in the management of a business while prohibited, by reason of his previous convictions for dishonesty offences. I was told that Mr Lafferty entered a guilty plea at the hearing in October 2009 to at least one of the charges. He received a suspended sentence.

[13] Returning to the judgment of Allan J, the Judge also noted the "limited scale of material" supplied by Mr Lafferty in support of his application for the Official Assignee's consent.[13]

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9 *Knight v Official Assignee* HC Auckland CIV-2000-404-434, 29 June 2009 at [15].
10 At [16].
11 At [24].
12 At [25].
13 At [27].

[14] Allan J eventually granted the order for security for costs.[14] The Judge commented that Mr Lafferty's application enjoyed "little prospect of success".[15]

[15] From July 2011 to June 2012, Mr Lafferty engaged in three further fraudulent schemes which resulted in a total loss to all the participants of $156,790. Those schemes are described in the judgment of the Court of Appeal in *Helsby-Knight v R.*[16] Briefly, they were as follows:

(a) Mr Lafferty adopted a fictitious name and purchased a database that contained over 3,800 business names in the Auckland region. He then targeted those businesses by email identifying himself as the New Zealand and Australian agent for a trade fair to be held in China. He said he was putting together a trade delegation to attend the trade fair. He made various other false representations as to what he would provide to delegates. He was not authorised by, or affiliated to, that trade fair. A total of 45 individuals paid approximately $125 each as a registration fee. In return, they received a package containing false airline and accommodation vouchers, as well as false documentation relating to the trade fair. The total sum defrauded by this scheme was some $5,620.

(b) Mr Lafferty represented that he acted for a fictitious Hong Kong registered company that imported low cost iPads, iPhones and other electrical goods. A brochure was produced. Fifty per cent deposits were sought for the sale of such goods. Sixty-four members of the public paid a total of $129,027.

(c) Mr Lafferty changed his name by deed poll to Foxconn Group plc. He obtained a passport in that name and opened a bank account in the same name. He produced a brochure for low cost electrical goods available

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14 At [36].
15 At [28].
16 *Helsby-Knight v R* [2015] NZCA 315 at [15]-[32].

for delivery in the Auckland area. Payments of $22,142 were obtained by Mr Lafferty. The goods were never delivered.

[16] Mr Lafferty initially faced 117 charges under the Crimes Act 1961 for these schemes. Eventually, he accepted a sentence indication given in the Manukau District Court on 1 May 2015.[17] There were a number of procedural difficulties from that point, which it is unnecessary to traverse. Eventually, the Court of Appeal allowed Mr Lafferty's appeal against sentence in 2015, imposing a sentence of three years and one month's imprisonment.[18]

[17] Mr Lafferty was released from prison in November 2015. He has no offending history from that date.

The decisions

[18] As noted, this appeal relates to two decisions of the Official Assignee refusing consent for Mr Lafferty to enter or carry on business under s 62(1)(a) of the Act.

[19] Section 60(g) of the Act requires Mr Lafferty to notify the Official Assignee of any change in his employment. He is not required to obtain the Official Assignee's consent unless the job involves participation in the management or control of a business. Section 62 of the Act then provides:

> **62 Prohibition of bankrupt entering business**
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> (1) An undischarged bankrupt must not, without the consent of the Assignee or the Court either directly or indirectly,—
>
> (a) enter into, carry on, or take part in the management or control of, any business:
>
> (b) be employed by a relative of the bankrupt or by any company, trust, trustee, or incorporated society, that is managed or controlled by a relative of the bankrupt.
>
> (2) Nothing in this section restricts section 151 of the Companies Act 1993.

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17 *R v Helsby-Knight* DC Manukau CRI-2012-004-13672, 1 May 2015.
18 *Helsby-Knight v R*, above n 16, at [59].

[20] On 17 April 2018, Mr Lafferty applied to establish a business which consisted of knocking on doors asking if people wanted to sell their houses, and then selling those leads to real estate agents (the first application). He also said in the first application that he wanted to knock on doors for lawnmowing quotes to sell to lawn mowing firms.

[21] By letter dated 24 May 2018 (the first decision), the Official Assignee declined the application saying:

> The Official Assignee needs to keep the commercial public in mind when deciding on applications and in this case the risk is too great due to your history of offending.

[22] Anthony Pullan, a deputy Assignee, and Hayley Whitford, a senior insolvency officer, both swore affidavits in these proceedings. Ms Whitford is the insolvency officer tasked with the administration of Mr Lafferty's bankruptcy. She reports to the Official Assignee and Mr Pullan who is her immediate manager. Annexed to Ms Whitford's affidavit is a detailed internal memorandum from her to Mr Pullan in which she considered Mr Lafferty's application. In that memorandum, Ms Whitford accepted that Mr Lafferty had the skills and knowledge to carry out the role, and that he required an income to meet his living expenses. But she noted that there were concerns for creditors and the public. Specifically, that the nature of the proposed business was similar to roles that he had previously been involved in which resulted in numerous fraud complaints. She also noted that his name change did not allow a reasonable person to associate his new name with his old name, and thereby make an informed decision.

[23] Mr Pullan recorded his comments at the end of the memorandum as follows:

> It is very important to the Official Assignee to keep the commercial public in mind when deciding on applications. In this case, the risk is too great due to the bankrupt's extreme history of offending. Also another name change does not allow a reasonable person to associate Mike Lafferty with Michael Knight and therefore make an informed decision.
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> The bankrupt has also not demonstrated that he is unable to work in paid employment for an employer due to his health. The fact that the bankrupt is applying to work self-employed suggests that he has some capacity to work for an employer.

[24] On 25 May 2018, Mr Lafferty applied to establish a business which consisted of buying bric-a-brac and assorted goods from garage sales and charity shops, and then selling them on Trade Me (the second application).

[25] By letter dated 6 June 2018 (the second decision), the Official Assignee declined the second application for the same reasons. The letter stated:

> The Official Assignee needs to keep the commercial public in mind when deciding on applications and in this case the risk is too great due to your history of offending.

[26] In another internal memorandum, Mr Pullan and Ms Whitford expressed the same concerns as outlined above at [22]-[23]. Ms Whitford also noted that Mr Lafferty had been trading whilst bankrupt without consent despite being aware of his employment restrictions and that an application would need to be made to the court for his discharge.

[27] For completeness, I add that Mr Lafferty made a third application dated 11 June 2018 to be an Uber driver. That application was approved by the Official Assignee subject to conditions.

[28] Mr Lafferty has filed an affidavit stating that he has an issue with one of the conditions imposed by the Official Assignee.

[29] However, that decision was not the subject of this appeal. At the hearing, Mr Lafferty agreed that the hearing before me related to the first and second decisions.

Approach on appeal

[30] In *Glynbrook 2001 Ltd v Official Assignee*, the Court of Appeal set out the approach of the appellate Court under the Act:[19]

> [84] When considering the question of the standard of review under s 86 of the Act, it is necessary to distinguish between the discretionary powers of the High Court under s 86 to confirm, reverse, or modify the Official Assignee's act or decision and to make such order as it thinks fit and the nature of the statutory provisions under which the Official Assignee acted or decided. This distinction is important because the standard of review by the High Court

[19] *Glynbrook 2001 Ltd v Official Assignee* [2012] NZCA 289.

> will depend on whether or not the Official Assignee was making a decision that is subject to a general right of appeal or exercising a discretionary statutory power, which is subject to a more limited right of appeal.
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> (Citations omitted)

[31] The issue in each case under this approach is, therefore, whether the Official Assignee was exercising a discretionary statutory power or one which is subject to a general right of appeal.

[32] Subsequent decisions of this Court have adopted that approach in relation to s 226 of the Insolvency Act 2006 (the successor to s 86 of the Act).[20]

[33] Other decisions have, however, followed the approach adopted prior to the Court of Appeal decision in *Glynbrook 2001 Ltd*.[21] That approach involves hearing all the material de novo, but being careful not to interfere with the Official Assignee's discretion too easily.

[34] In this case, the Official Assignee exercised the power under reg 34 of the Insolvency Regulations 1970:

> **34 Assignee's discretion to grant or refuse leave**
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> The Assignee, having regard to the interests of the bankrupt, the creditors, and the community, may in his discretion refuse leave or grant leave either unconditionally or upon such conditions as he thinks fit.

[35] Under this regulation, the Official Assignee had a discretionary power to allow Mr Lafferty's application or decline it. The exercise of the power is expressly stated to be within the Official Assignee's "discretion".

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[20] *Henderson v Official Assignee* [2015] NZHC 1341 at [59]; *Gollan v Official Assignee* [2012] NZHC 1869 at [15]; *Erwood v Official Assignee* [2015] NZHC 390 at [19].

[21] *Haines House Removals Ltd v Jamieson* [2013] NZHC 653 at [39]. See also *Miah v Official Assignee* [2013] NZHC 2726 at [68] and *Murray v Official Assignee* [2014] NZHC 1710 at [28]-[29].

[36] The appeal therefore proceeds as an appeal against a decision made in the exercise of discretion. I will approach this appeal adopting the approach in *Glynbrook 2001 Ltd.* As the Court explained in that case:[22]

> [87] … This meant that, as the Supreme Court explained in *Kacem v Bashir*, the criteria for a successful appeal were stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision was plainly wrong.

Submissions

[37] In his written submissions, Mr Lafferty says that the Official Assignee's decision to decline the applications was unfair and unreasonable. He claims that the Official Assignee is not acting in good faith for either the public or him as a bankrupt.

[38] At the hearing, Mr Lafferty supplemented his written submissions with oral submissions applying the criteria in *Glynbrook 2001 Ltd* to both the first and second decisions.

[39] Mr Lafferty submits there was an error of law as the Official Assignee had breached s 27 of the New Zealand Bill of Rights Act 1990 by failing to observe the principles of natural justice, in that the Official Assignee had not given him an opportunity to be heard on his applications. Phone messages he had left had not been answered.

[40] Mr Lafferty also submits effectively that the Official Assignee had pre-determined the first and second applications. The Official Assignee was biased and prejudiced against him from the outset. This was demonstrated, Mr Lafferty says, by the statement in Mr Pullan's affidavit that Mr Pullan did not consider that it was appropriate for Mr Lafferty to be self-employed in any business.

[41] Mr Lafferty next submitted that the Official Assignee had failed to take into account relevant considerations, namely that he had served almost three years in prison to pay for his past offending, and that he had been clean from drugs for seven years and was an active member of a Narcotics Anonymous programme.

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[22] *Glynbrook 2001 Ltd v Official Assignee*, above n 19; citing *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

[42] In his submissions and his affidavit, Mr Lafferty says that he had previously been a long-standing drug addict. He attributes his offending to this addiction. But he still takes responsibility for his crimes. He says being in prison was a huge learning curve for him, and he has not been in any trouble since his offending in 2012.

[43] As to the first decision, Mr Lafferty says it was plainly wrong. His proposed business was different from the businesses for which he had got into trouble.

[44] Mr Lafferty submits that there is no risk to the public as he would not be providing the service. He would simply knock on a person's door and ask if they were considering selling their house in the next year. If so, he would tell them he could he recommend a local agent. If the owner declined, he would ask if they wanted a quote for lawn mowing, pool cleaning, or moss/mould removal. Mr Lafferty says that the Official Assignee misunderstood his proposed business. He would not be taking money from the homeowner. He would be paid by the real estate agent or, for example, a lawnmowing service upon providing them with the lead resulting from a homeowner's indication that they wished to sell or wished to have their lawns mown.

[45] As to the second application, Mr Lafferty again submits there is no risk to the public as he would only be purchasing clothes at garage sales and then selling them at other markets or online with a mark-up. He says that the second decision was unreasonable and failed to take into account a relevant consideration. Mr Lafferty says he could sell items on Trade Me as a hobby. He says he has set up a Trade Me account and done some trading and his rating is "first class" (he annexed Trade Me feedback to his affidavit).

[46] The Official Assignee, in short, submits that Mr Lafferty cannot satisfy the standard required on appeal. He reiterates his prior concerns about Mr Lafferty's offending history, and submits there is too much risk in allowing Mr Lafferty to carry on the proposed businesses.

[47] In relation to the first decision, Mr Caro, appearing for the Official Assignee, submits that the risks associated with this proposal by Mr Lafferty are readily apparent, particularly for elderly homeowners. Mr Caro submits there is a risk that the

homeowner could be convinced to embark on a course of action that is not in the homeowner's best interests. Mr Caro refers to the 2011-2012 offending where Mr Lafferty fraudulently took deposits and did not provide the goods or service. He says that despite Mr Lafferty's assertion that he will not be taking money from homeowners, there is a real risk that Mr Lafferty could sign up home owners for a direct debit or deposit for a service which would not be provided.

[48] In terms of the second decision, Mr Caro submits that the way the proposed business is described is so open-ended that it comes down to an application for consent to sell any goods via the internet. Mr Caro submits the risk is too high that Mr Lafferty would either not deliver the goods after receiving payment or make false representations as to the quality and authenticity of the goods. The fraudulent scheme he operated in 2011 involved this type of activity.

[49] As to Mr Lafferty's submissions/evidence regarding his Trade Me feedback, when one refers to the feedback form annexed to Mr Lafferty's affidavit, there are in fact only three trades where Mr Lafferty was the seller, on 16, 17 and 24 May 2018. Further, in response to Mr Lafferty's submission/evidence that he would be closed down by Trade Me if he traded in a way that was deceptive or dishonest, Mr Caro submits it would be a simple matter for Mr Lafferty to start up again using another email address.

[50] Mr Caro says that the Official Assignee does recognise Mr Lafferty's interests as part of the balancing exercise in considering applications such as these. On the one hand, there is need to ensure the bankrupt can earn income to support himself and his family, and on the other, there is the need to protect the public where the bankrupt presents a commercial risk.

[51] Finally, Mr Caro advises the Court that Mr Lafferty has separately applied for an order discharging him from bankruptcy. He says that the Official Assignee will oppose an unconditional discharge and is currently formulating the conditions that would be acceptable in order for Mr Lafferty to be discharged.

Discussion

[52] Mr Lafferty rightly points out that the purpose of orders under the Act is not to punish the bankrupt, but the protection of the community.[23]

[53] I do not consider it can be said that the Official Assignee has made an error of law or principle, took into account irrelevant considerations, failed to take into account relevant considerations, or made a decision that was plainly wrong.

[54] I do not accept that the Official Assignee breached Mr Lafferty's right to natural justice by not giving him an opportunity to be heard on the first and second applications. The Insolvency Regulations 1970 contain the following regulation for applications for leave to enter business:

> **33 Applications for leave**
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> Every application to the Assignee by a bankrupt under section 62 of the Act for leave to enter or carry on or take part in the management of a business shall be made in writing by the bankrupt or his solicitor and shall be verified by affidavit, and shall set out the reasons for the application, whether the business is a new business, what capital (if any) it is intended that the bankrupt or any other person will put into the business, and such other particulars as the Assignee may require.

[55] The Official Assignee then considers the application in accordance with reg 34 which is set out in [34] above.

[56] A standard pre-prepared form is available for any applicant to complete. Mr Lafferty completed one of those forms for each of the first and second applications. An applicant completing the form is asked to answer 25 questions. The last question is open-ended and gives the applicant the opportunity to provide whatever information he or she considers relevant. That question reads:

> 25. The following information is also supplied in support of this application (if applicable):

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[23] *Bryers v Official Assignee* [2015] NZHC 384 at [70]; *Re Kelly ex parte Structured Finance Ltd* [2009] 2 NZLR 785 (HC) at [63].

[57] Assuming s 27 of the New Zealand Bill of Rights Act 1990 applies,[24] there has been no breach. The Official Assignee, having received the application, considered the information supplied by Mr Lafferty. The Official Assignee was not required to give Mr Lafferty the opportunity to be heard further on his application.

[58] In my view, this is not a case where, to use the words of Byles J in *Cooper v Wandsworth Board of Works*:[25]

> … although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

[59] The question is whether the statutory arrangements which are in place to govern the procedure are a code which has been carefully and deliberately drafted so as to prescribe a procedure which is fair and appropriate.[26]

[60] In *Wiseman v Borneman*, Lord Reid said:[27]

> … For a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose. But before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation.

[61] In my view, it cannot be said that the statutory procedure is insufficient to achieve justice. The legislation enables an applicant to place whatever information he or she considers relevant before the Official Assignee. To require additional steps by way of a hearing should not be read into the procedure.

[62] I also do not accept Mr Lafferty's submission that the Official Assignee had pre-determined Mr Lafferty's two applications. The answer to that submission can be seen in the fact that the Official Assignee granted Mr Lafferty's third application.

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24 Bill of Rights Act 1990, s 3.

25 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 194, 143 ER 414 (Comm Pleas) at 420.

26 *Furnell v Whangarei High Schools Board* [1973] AC 660 at 679, [1973] 2 NZLR 705 (PC) at 717 per Lord Morris.

27 *Wiseman v Borneman* [1971] AC 297 (HL) at 308. See also the cases discussed in *Bryers v Official Assignee* [2014] NZHC 2920, [2015] 2 NZLR 273 at [27]-[38].

[63] Mr Lafferty's reference to a statement in Mr Pullan's affidavit (at [40] above) was incomplete. What Mr Pullan in fact said was:

> I do not currently consider that it is appropriate for the bankrupt to be self-employed in any business involving selling directly to the public when the bankrupt is able to make representations as to the quality and authenticity of the products or services on offer. I assess the risk to the public as being too high.

[64] As can be seen, Mr Pullan qualified the kind of business which he considered was unsuitable. It was not 'any business' as Mr Lafferty represented in his submissions.

[65] As to Mr Lafferty's submission that the Official Assignee had failed to take into account the fact that he had served almost three years in prison and had been clean from drugs for seven years, again I do not consider that Mr Lafferty has demonstrated an error in this regard. He was released from prison in November 2015. That is a period of only just over two and a half years. Although there is no evidence of Mr Lafferty having reoffended in that time, I consider the Official Assignee was entitled to take the view that this is too short a period for Mr Lafferty to demonstrate he is a changed man.

[66] One only needs to refer back to the circumstances before Associate Judge Doogue in October 2007. At that hearing, it was said on behalf of Mr Lafferty that:[28]

> [10] … [His] story was a "story of redemption". [Counsel] placed considerable emphasis on the fact that Mr Knight had changed his life. He said that Mr Knight was "reformed".

[67] Notwithstanding those assurances, Mr Lafferty went on to offend again. Of particular concern is the offending from mid-2011 to mid-2012. That was just over three and a half years after the assurances given to Associate Judge Doogue in October 2007. Against that background and taking into account Mr Lafferty's history of offending, it cannot be said that the Official Assignee was wrong in his assessment that two and a half years was too short a period for Mr Lafferty to have demonstrated that he had changed his ways.

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[28] *Knight v Independent New Auckland Ltd*, above n 2.

[68] I do not accept Mr Lafferty's submission that the nature of the businesses proposed in the two applications is sufficiently different from his earlier offending and that accordingly the Official Assignee's two decisions were plainly wrong.

[69] As to the first decision, despite Mr Lafferty's assurance that he would not be taking money from the homeowners, I consider it was open to the Official Assignee to consider, against the background of Mr Lafferty's prior offending, that there was a risk to the public, namely that he might take money and then not provide the service.

[70] As to the second decision, it cannot be said that the Official Assignee was wrong in considering the risk was too high, namely that Mr Lafferty would either not deliver the goods after receiving payment or make false representations as to the quality and authenticity of the goods. Despite Mr Lafferty's submission that this was different from his earlier fraudulent schemes, on being questioned by the Court he accepted that there was a common factor in that he was proposing to offer goods to consumers for payment to him.

[71] As noted above, Associate Judge Doogue said that Mr Lafferty's actions in the long term would be how his actions will be judged and the longer Mr Lafferty stayed out of trouble, the more confidence the Court could have in his long-term prognosis.[29]

[72] In my view, those comments are still applicable, especially given Mr Lafferty's reversion to his pattern of offending after giving the assurances that I have noted to Associate Judge Doogue. As things stand, Mr Lafferty has been out of prison for less than three years.

Conclusion

[73] The appeal is dismissed.

Costs

[74] My preliminary view is that the Official Assignee, as the successful party, is entitled to costs. I encourage the parties to agree costs and file a joint memorandum.

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[29] *Knight v Independent New Auckland Ltd*, above n 2, at [32].

My present view is that 2B is the appropriate categorisation. Any agreed memorandum is to be filed within 15 working days of the date of this judgment. In the event that there is no agreement, the Official Assignee may file a memorandum within 10 working days after the date for the agreed memorandum and Mr Lafferty 10 working days thereafter. Memoranda should not exceed five pages.

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Gordon J