

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

**CIV 2009-404-004231  
[2013] NZHC 3568**

IN THE MATTER	of the Insolvency Act 2006
IN THE MATTER	of the bankruptcy of James Mathew Peters
BETWEEN	MARAC FINANCE LIMITED Creditor
AND	JAMES MATHEW PETERS Bankrupt

Hearing: 10, 11, 12, and 14 June 2013 and 15, 16, 17, 18, 19 and 25 July 2013

Appearances: G A D Neil/K H Kuang for official assignee  
D J Chrisholm QC/JD Ryan for bankrupt

Judgment: 23 December 2013

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**JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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This judgment was delivered by me on 23 December 2013 at 3.30pm,  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:  
Meredith Connell, Auckland  
Claymore Partners Ltd, Auckland

Counsel:  
D J Chisholm QC, Auckland

[1] James Mathew Peters was adjudicated bankrupt in October 2009. Prior to his bankruptcy he had been a property developer, and had carried out several very substantial developments over a 20 year period. His debts at the time of his adjudication were substantial, many as a result of personal guarantees. He conducted his business activities through a large number of corporate entities, many of which have gone into receivership or liquidation, reporting even more substantial debts.

[2] Mr Peters was due for automatic discharge on 19 October 2012. The Official Assignee objected to an automatic discharge. The Assignee seeks an extension of Mr Peters' bankruptcy, and an order that Mr Peters not apply for discharge before 19 October 2015, being three years from the date he would have been discharged automatically but for the Assignee's objection.

[3] Mr Peters has responded to the Assignee's objection with an application for discharge. The Assignee has opposed that application. None of Mr Peters' creditors has opposed the application.

[4] I have reached my decision and have decided to release it immediately, without detailed reasoning in support, given both that I am not extending the bankruptcy further, and the start of the Court vacation period.

### **The essential arguments**

[5] The public examination of Mr Peters took place first, followed by the hearing of Mr Peters' application. The Assignee provided a substantial report ahead of the examination. Mr Peters was examined at length by counsel for the Assignee and for a creditor (L Peters). A number of witnesses were cross-examined on affidavits provided both in support of and in opposition to Mr Peters' application.

[6] The Court has a wide discretion<sup>1</sup> as to the orders it can make under s 298 of the Insolvency Act 2006, either as a consequence of the public examination or on the

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<sup>1</sup> To be exercised in accordance with principles stated by the Court of Appeal in *ASB Bank v Hogg* [1993] 3 NZLR 156 (CA) particularly at 157 – 158, and affirmed recently in *Armitage v Established Investments Ltd (in Liq)* [2012] NZCA 439.

application for discharge. They range from an immediate discharge, a discharge on conditions, a discharge suspended for a time or a discharge at a specific date in the future, to the refusal of an order of discharge and stipulation of the earliest date when the bankrupt can apply again for discharge.

[7] The essence of the Assignee's objection and opposition to Mr Peters' discharge is his conduct both before and after adjudication:

- (a) The Assignee has formed the view that by his pre-adjudication conduct (including giving false information to creditors and giving personal guarantees without having assets in his own name to back them) Mr Peters has displayed a lack of concern for the financial interests of others, and that since his adjudication Mr Peters has continued to conduct business through a number of entities under the nominal control of others but under his ultimate control and in doing so has exposed innocent parties to risk and liability, and has concealed assets in which he appears to have a beneficial interest. The Assignee also considers that Mr Peters has failed to cooperate fully with the Assignee (thus hindering the Assignee's investigations).
- (b) The Assignee has decided not to continue investigating Mr Peters' historical transactions (although the Assignee is still seeking to identify assets held by new trading entities that could be recovered for creditors) but considers that the pattern of Mr Peters' behaviour warrants further condemnation and is such that he poses a risk to the business community if he were to be discharged from bankruptcy and allowed to recommence trading without supervision.

[8] Mr Peters acknowledged in the examination that he engaged in some inappropriate conduct in a relationship property dispute, but says that his behaviour both prior to and after his bankruptcy does not warrant further condemnation, and that he does not pose a risk to the business community. He says that prior to bankruptcy he acted in accordance with usual property industry practice and that the evidence does not support the Assignee's

contentions that he is in control of the entities that are causing the Assignee concern or that he has a beneficial interest in assets held by others. He acknowledges that there have been breaches of obligations as a bankrupt but says that any breaches were minor, and that he can still be prosecuted for them. He notes that the Assignee alleges a risk to the business community rather than the public at large, and says that his circumstances are well known to the business community and will not pose a risk to it.

[9] Mr Peters contends that the Assignee is motivated primarily by a wish to punish him and that there is no basis for maintaining the bankruptcy.

[10] The evidence has been explored in considerable depth. The Assignee has filed a lengthy report supported by a substantial number of documents, as well as a supplementary report. However, Mr Peters has taken issue with much of the content of the Assignee's reports, contending that they are inaccurate and largely based on hearsay and assumption, so that although they can be taken into account they must give way to direct evidence. He says that the evidence of the witnesses whom he has called displaces any assumptions that the Court might otherwise draw from the indirect material in the report, and that the Court may be satisfied that there is no conduct that warrants further extension of the period of bankruptcy.

[11] Mr Peters says that it is significant that the Assignee has not prosecuted him for any breaches of his obligations nor examined any of the persons whom the Assignee contends are parties to the hiding of assets, and that in any event the Assignee has power to pursue matters of continuing in the future without the need to prolong the bankruptcy.

### **Factors in decision**

[12] Mr Peters' estate was large and complex. It is clear that the Assignee has had considerable difficulty getting to the heart of several transactions due to the volume of documents involved (said to fill a shipping container). The Assignee had reason to question the various matters that have been advanced in the reports as grounds for opposing discharge. However, the evidence on which the Assignee relies is largely

circumstantial, calling for inferences to be drawn to allow findings on conduct which would warrant further extension of the bankruptcy, or lacking in detail when examined closely. Most of those inferences are inconsistent with the direct evidence of Mr Peters' witnesses, tested in cross-examination. Notwithstanding that the demeanour of some of the witnesses allows doubt on some details, the evidence of those witnesses taken as a whole supports the arguments advanced for Mr Peters: there was a consistent theme to the evidence in relation to the control of current entities and the beneficial interest in assets that needs more than assertion of circumstance and coincidence to find conduct of sufficient degree to warrant further extension of the bankruptcy.

[13] Ultimately the Court must decide whether to defer discharge having regard to the evidence available to it. On the evidence before the Court I am not persuaded that there is sufficient reason to impose any further sanction, nor that discharge now will create an unmanageable risk to the business community:

- (a) The Assignee has been unable to establish the primary matters on which he relies as conduct warranting further extension (control of business entities without approval and retention of beneficial interest in assets), and his contentions about those matters cannot displace the direct evidence of Mr Peters' witnesses to the contrary;
- (b) To the extent that the matters advanced by the Assignee have not been answered sufficiently by Mr Peters' witnesses, Mr Peters has already been sanctioned for his conduct by an extension approaching fifteen months;
- (c) If there are breaches of obligations that warrant some further sanction it remains open to the Assignee (or perhaps the Registrar of Companies) to take action in that respect;
- (d) The business community will be aware of Mr Peters' bankruptcy, and is able to protect itself against debts.

[14] I also take into account that to date the Assignee has not been able to identify any specific recovery action, nor any matters on which he is likely to get further information from Mr Peters during an extension to the bankruptcy. The Assignee is able to continue his investigations into Mr Peters' affairs after bankruptcy, but is unlikely to get any different answers from Mr Peters in a period of extended bankruptcy than he has to date or will after discharge.

### **Decision**

[15] Having weighed the circumstances of the case I make an order discharging Mr Peters with immediate effect.

[16] Although I have found, on the basis of all the evidence before the Court, that there are insufficient grounds for extension of the bankruptcy, I consider that the Assignee was justified in opposing automatic extension and opposing Mr Peters' application for discharge. In doing so the Assignee was exercising a public function. In the circumstances I make no order as to costs.

[17] I will provide detailed reasoning if required by either party by memorandum to be filed by 21 January 2014.

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**Associate Judge Abbott**