IN THE DISTRICT COURT
AT AUCKLAND

CRN: 14004501795
CRN: 14004501796
CRN: 14004501798
CRN: 14004501804
[2015] NZDC 2396

THE MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT

v

JAMES MATHEW PETERS

Hearing:	9 and 19 February 2015
Appearances:	Mr S T Symon and Ms J Harley for the Prosecutor/Respondent Mr D J Chisholm QC and Mr R Butler for the Applicant/Defendant
Judgment:	24 March 2015

RESERVED DECISION OF JUDGE P A CUNNINGHAM

Introduction

[1] On 14 November 2014 Mr Peters filed a number of pre-trial applications.

[2] The first was to dismiss the charges against him under the Insolvency Act on the basis that continuation of the prosecution is an abuse of the Court's process and will result in an unfair hearing for the defendant.

[3] The second relates to time limitation issues.

[4] The third relates to the admissibility of evidence. The third application did not proceed before me.

[5] In terms of the issue relating to whether or not certain charging documents were statute barred, that has largely been resolved. The prosecutor has withdrawn the charging document that ends with 801. Mr Peters accepts that 795, 796, 798, 802 and 803 are not timed barred. The only remaining one in dispute is charging document 804 which I will address.

[6] The prosecutor opposes the application to dismiss the charges on the basis that they are abuse of process and to dismiss charging document ending 804.

Background

[7] Mr Peters was adjudicated bankrupt on 6 October 2009. Mr Peters was due to be discharged from his bankruptcy on 19 October 2012. On 9 October 2012 the Official Assignee applied to the High Court for an extension of Mr Peters' bankruptcy including an order that he not apply for a discharge before 19 October 2015.

[8] Mr Peters brought an application for an order that he be discharged on 27 May 2013. The reason for that it was said was to enable Mr Peters to bring his own witnesses to support his position that he should be discharged.

[9] In relation to the Official Assignee's application (hereinafter referred to as the "Assignee"), a report was filed with the High Court dated 1 March 2013. That document ran to 31 pages. A supplementary report dated 7 June 2013 was also filed. This was a much shorter document although it attached numerous exhibits.

[10] Prior to his bankruptcy, Mr Peters had worked as a property developer and financier for 20 years. He bought and sold an estimated 1500 properties having a substantial value estimated by Mr Peters to be around $1b in aggregate. He conducted his business through a number of entities loosely referred to as the Starline Group.

[11] The judgment that led to the bankruptcy was brought by Marac Finance Limited. Marac obtained summary judgment against Mr Peters for just over $3m in relation to a personal guarantee he had given in relation to a loan of $2.5m made to a company Regal Flyer Holdings Limited. Following his being adjudicated bankrupt, nine creditors made claims against Mr Peters' estate totalling approximately $14.5m. Most of them were in respect of personal guarantees given by Mr Peters.

[12] The corporate entities through which Mr Peters conducted his businesses were said by the Assignee to have debts in excess $125m.

Proceedings in the High Court in 2013

[13] Section 292 of the Insolvency Act 2006 provides that the Assignee or a creditor may object to the bankrupt's automatic discharge. This involves the bankrupt being publicly examined in the Court. The Assignee is required to prepare a report for the Court on matters set out in s 296 of the Insolvency Act. Thus the process results in the bankrupt answering questions put to him.

[14] Because Mr Peters brought his own application that he be discharged he was able to bring his own evidence including evidence given by witnesses in addition to himself.

[15] The two applications referred to above came before the High Court on 10 June 2013. There were four days hearing before 10 and 14 June and a further six days hearing between 15 and 25 July 2013.

[16] On 23 December 2013 Associate Judge Abbott delivered a decision. The result was that Mr Peters was discharged from his bankruptcy and the Court found there were insufficient grounds for the extension of the bankruptcy. Associate Judge Abbott said that he would provide detailed reasons if that was required by either party.

[17] The Official Assignee requested detailed reasons and those were provided in a 128 paragraph decision of the Associate Judge on 25 July 2014.

Charges before the District Court

[18] On 28 March 2014 charges were filed in the Auckland District Court. Because the CRN ending 801 has been withdrawn I will omit that. The others alleged the following:

Information ending 804

[19] That Mr Peters being a bankrupt entered into, carried on or took part in the management or control of a business namely First Choice Collections (NZ) Limited without the consent of the Official Assignee between the dates of 6 October 2009 and 9 December 2011.

Charging document ending 803

[20] That James Mathew Paters produced a statement of financial position for St Laurence Limited a creditor that was not a true and fair statement of its affairs on 21 November 2006.

Charging document ending 802

[21] That James Mathew Peters contracted a debt namely a personal guarantee without expecting to be able to pay it when it fell due for payment between the dates of 22 September 2006 and 6 October 2009.

Charging document ending 800

[22] That James Mathew Peters misled the Official Assignee in that he failed to disclose funds in ANZ Bank account numbers 01-02970336970-00 and 01-02970336970-46 for April 2012 during a creditors' meeting.

Charging document ending 799

[23] That James Mathew Peters misled the Official Assignee in a statement made to him in the course of administration of his affairs by providing false information relating to his income details on 4 April 2012 at a creditors' meeting.

Charging document ending 798

[24] That James Mathew Peters concealed a part of his property namely an 18ct diamond ring priced at $18,000.00 between 3 November 2013 and 13 June 2013.

Charging document ending 796

[25] That James Mathew Peters concealed a part of his property namely a 2006 Chrysler motor vehicle valued at $38,000.00 between 11 November 2009 and November 2010.

Charging document ending 795

[26] That James Mathew Peters wilfully concealed a part of his property namely funds held with the ANZ Bank account numbers 01-02970336970-00 and 01-02970336970-46 between 27 October 2009 and 13 June 2013.

The case for Mr Peters

The abuse of process argument

[27] In a schedule set out at paragraph 14 of Mr Peters' affidavit sworn in support of the applications he made to this Court on 14 November 2014 he set out how the charges now before the Court overlap with issues canvassed in the High Court hearing making specific reference to paragraph numbers in the closing submissions of the Official Assignee which were exhibited to the same affidavit.

[28] Mr Chisholm QC broke this down into two main components:

(i) Firstly that the same allegations had already been the subject of public examination of Mr Peters in the High Court.

(ii) The delay in bringing the charges.

Delay

[29] For Mr Peters it was argued that the Assignee should have been aware of the factual circumstances upon which the charges are based sometime in 2012. One possible date is 4 April 2012 when Mr Peters was examined on oath at a creditors' meeting.

[30] Further no explanation has been given by the Assignee as to why there has been a delay in the bringing of the charges. Apart from submissions made by counsel at the hearing before me, there has been no other indication about why there was a delay of around two years from the date of the creditors' meeting until the filing of the charges in the Auckland District Court on 28 March 2014. That the reason for delay of almost two years should have been set out in an affidavit filed on behalf of the Assignee.

Prejudice

[31] There are a number of ways in which the conduct of the **High Court proceedings have prejudiced** Mr Peters in terms of his ability to defend the charges before this Court.

[32] Firstly, some criticism was made of the report of the Official Assignee including:

(a) That the Assignee's approach was partisan. This was reflected in the cross-examination of Mr Graham who stated that he thought it was fairly normal for the Assignee to put an additional material to further the thesis of the case but not provide or disclose information if it did

not assist. Mr Chisholm QC described this as a failure to be fair and impartial both as an officer of the Court and the person undertaking a statutory function.

(b) Mr Graham also stated that the Assignee was trying to gather information to bolster his position in relation to the objection to discharge and the gathering of the information was to backup the allegations that the Assignee was making.

(c) There were errors in the report some of which were acknowledged by the Assignee's counsel in his closing address.

(d) What was described as a mindset against Mr Peters was demonstrated by the Assignee not seeking to examine Mr Scholum, a professional who had taken over some of the roles that Mr Peters previously had following his bankruptcy.

(e) There was then a reference made to what was described as unfounded assertion and speculation about Mr Peters' involvement in business affairs post his adjudication and statements for which there was no evidential basis. This included statements such as Mr Peters' had had the benefit of having a few associates who appear to have knowingly assisted him in his attempt to conduct business and conceal assets.

[33] Failure by the Assignee to disclose transcripts of interviews with other witnesses to counsel for Mr Peters was another criticism made by counsel for Mr Peters. Likewise the failure to examine other individuals who could have provided some explanations for the conduct of the affairs of companies previously linked with Mr Peters post his bankruptcy.

[34] Prior to the hearing in the High Court counsel for Peters asked to have Mr Viljoen, the apparent author of the Assignee's report available for cross-examination which request was declined. Counsel had also asked for a Ms Dixon

and Ms Thompson who have been interviewed by the Assignee to be made available at the hearing but the Official Assignee did not arrange this.

[35] In addition to criticism of the report the following prejudice had occurred. The Official Assignee now had the benefit of the examination of Mr Peters and hearing and seeing witnesses he brought before the High Court on the issues that are now sought to be the subject of criminal charges. Mr Chisholm QC pointed to the fact that in disclosure in relation to the current charges before the Court, the Official Assignee seeks to rely on two affidavits presented by witnesses for Mr Peters in the High Court proceedings.

[36] In a notice given pursuant to s 130 of the Evidence Act 2006 by the prosecutor on 3 December 2014 the Crown advised that it intended to offer documents as evidence without calling a witness pursuant to s 130 of the Evidence Act 2006. Document listed as number four was an affidavit of John Scholum sworn on 21 May 2013 and document five was an affidavit of Matthew Carson sworn on 31 May 2013. Both deponents were professional advisors to Mr Peters' business enterprises prior to adjudication and were called as witnesses in the High Court proceedings in 2013.

[37] A letter dated 16 June 2014 from the prosecutor to Mr Peters' solicitors said in part:

> The remainder of the file held by the prosecution is the material relied upon in the High Court proceedings. Therefore, as this material is already in Mr Peters' possession, we are not required to disclose again. ...

[38] If there is a hearing, Mr Peters **will have lost important protections** normally afforded to a person in a criminal trial for example (a) the right to refrain from making any statement (s 23(4) New Zealand Bill of Rights Act 1990) and (b) the right not to be compelled to be a witness (s 25(d) NZBOR Act 1990).

[39] This is because the examination proceeded first which meant that Mr Peters had to give evidence and be subject to cross-examination in relation to matters that are now the subject of charges.

[40] During his examination and cross-examination in the High Court Mr Peters had no ability to not answer questions on the basis that he could not claim privilege against self incrimination. He was not advised that he could refuse to answer questions because at that stage no charges had been brought. Accordingly it would be unfair and contrary to natural justice to enable the Assignee to re-litigate the same allegations as criminal charges.

[41] In terms of the legal principles the leading case Mr Chisholm QC relied on was *Z v Dental Complaint Assessment Committee* [2009] 1 NZLR at page 1 where the Supreme Court agreed with a statement made in the House of Lords. *Johnson v Gore Wood & Co* (A Firm) [2012] 2 AC 1 at page 31 where Lord Bingham said in deciding whether further proceedings were an abuse of process that the Court makes:

> ...a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the factors of the case, focussing attention on crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court.

[42] Applying the principles in *Z* Mr Chisholm submitted that the present proceedings amount to an abuse of process for the following reasons:

(i) by proceeding with the examination first, the Assignee has denied Mr Peters the protections that would have been afforded to him by the criminal trial process and the New Zealand Bill of Rights Act.

(ii) the scope of the enquiry will replicate the exercise in the High Court that the High Court has undertaken with its attendant and significant costs.

(iii) the process will simply be a reserve means of punishing Mr Peters after the examination was unsuccessful.

(iv) the criminal proceedings have been unduly delayed by the Assignee essentially having a dry run first through the examination process.

[43] Attention was drawn to the fact that generally where there is both a civil and a criminal process happening in tandem, then the criminal proceeding goes first. That is not what happened in this case.

Submissions on behalf of the prosecutor

Abuse of process

[44] It was not accepted by the Crown that the Assignee's application to extend the bankruptcy of Mr Peters was a means of punishing him and that when the High Court refused to do so the Assignee belatedly resolved to file criminal proceedings as a second attempt. Reference was made to the case of *Darby v The Official Assignee* [2013] NZHC 22 where the Court adopted the following approach to assess a defendant's bankruptcy to include:

(i) administration of the bankruptcy;

(ii) making the bankrupt accountable for his insolvency;

(iii) punishing the bankrupt for his insolvency;

(iv) protecting the community;

(v) allowing the bankrupt to take up commercial activity again freed from his liabilities.

[45] The distinction was made that unlike a criminal proceeding, the public examination was an inquisitorial process and information gathering procedure which provides the Assignee and the Court with information concerning the affairs of the bankrupt. The purpose of the examination was to get the bankrupt person to answer all relevant questions put to him or her.

[46] To stay a proceeding for an abuse of process is not a matter to be taken lightly. The Court has a broad discretion under s 147 of the Criminal Procedure Act to dismiss the charges but only if the grounds set out in s 147(4) are made out.

Mr Symon referred to the decision of *Fox v Attorney-General* [2002] 3 NZLR 62 at paragraph [36] where Justice McGrath said:

> [36] I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct.

The final sentence in paragraph [37] of the same judgment said:

> [37] ... Finally, to stay a prosecution, and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.

[47] Mr Symon pointed to a distinction between the process in the High Court and the current charges before the Court. The examination was to determine whether Mr Peters should be discharged from his bankruptcy. Evidence was not heard for the purpose of determining his criminal responsibility.

[48] In the criminal proceedings, the Assignee is not able to rely on evidence during the examination in response to a question because that is inadmissible in criminal proceedings (s 185 of the Insolvency Act). That extended to any answer Mr Peters gave during the examination to a question put to him by either counsel or the Judge.

[49] In the decision of Associate Judge Abbott the reasons for judgment dated 24 July 2014 reference had been made in relation to one aspect that it was still open to the Assignee to prosecute Mr Peters for any breaches if that is what the Assignee decided to do.

[50] *Davidson v Registrar of Companies* [2011] 1 NZLR 542, was an appeal against a decision of the Registrar to prohibit Mr Davidson from being a director, promoter or manager of any company for a period of 2 ½ years. At the time there were separate criminal proceedings against Mr Davidson and other directors of Bridgecorp following the collapse of a group of companies known as "Bridgecorp". The High Court noted that the two proceedings served two different purposes, but that no abuse of process arose.

[51] Reference was also made to cases where bankrupts have been subject to both examinations and criminal proceedings, for example, *Edwards v The Official Assignee* CA236/03 1 April 2004 (CA), *The Official Assignee v Wenzel* High Court Auckland CIV-2005-404-6852 10 July 2008 Associate Judge Robinson, and *Wenzel v The Official Assignee* High Court Auckland, CIV-2005-404-6852 15 April 2008, Robinson AJ.

[52] Mr Symon conceded that there would be some prejudice to Mr Peters because of the material disclosed in the High Court proceeding. He acknowledged that any affidavit sworn in support of the application for discharge did not have the same privilege as s 185. He pointed to the fact that Mr Graham the fact finder for the Assignee said at the examination that the Assignee had referred some matters to the National Enforcement Unit for further investigation into alleged breaches under Insolvency Act by Mr Peters. Therefore Mr Peters was aware at the time of the High Court hearing that prosecution was a possibility.

[53] It was contended by the prosecutor that Mr Peters has not lost the protections afforded to him in a criminal trial. That it was for Mr Peters to decide whether or not to give evidence in any criminal proceeding. However the prosecution case relies on witness' statements and documents rather than what Mr Peters has said in evidence.

[54] In *Nations Finance v Doolan* HC Auckland CIV-2010-404-2360 the Court considered whether civil proceedings against Mr Doolan and other former directors ought to be adjourned pending the completion of a criminal trial arising out of the collapse of Nathans Finance.

[55] The Court considered a number of factors including:

(a) overlapping issues between the two cases.

(b) that there would be evidence in the criminal proceeding that would be relevant to the civil proceeding.

(c) the defendants should not have to disclose their defence.

(d) The privilege against self incrimination.

[56] The Court declined to order a stay on the basis that there would not be injustice to the defendants if a stay was not ordered.

Delay

[57] In terms of s 25(b) NZBOR Act, that related only to delay since the charges were laid.

[58] Pre-charge delay (s 25(a) NZBOR Act) is relevant only to the extent it impacts on whether-

(i) the defendant can have a fair trial; and

(ii) the circumstances are such that it would offend the Court's sense of justice and propriety to allow the prosecution to proceed.

[59] Delay of itself will not result in the dismissal of charges. The delay must be such that it causes such prejudice to the accused that he can no longer receive a fair trial (*R v O* [1999] 1 NZLR 347 (CA) at 35 per Blanchard J). That could either be-

(i) specific prejudice that would not have arisen but for the inordinate delay; or

(ii) general prejudice which can be inferred from long delay in the absence of proof of specific prejudice.

[60] While some of the conduct goes back as far as 2006, the Official Assignee could not detect this prior to the creditors' meeting in April 2012. Mr Symon conceded that following the creditors' meeting there was a basis for suspecting offending and to commence an investigation. However when the charges were laid on 28 March 2014 all but "801" were laid within the time limitation period.

[61] Delay was explained by the prosecutor in this way. It was appropriate to await the decision of the High Court on the examination proceeding to determine if a prosecution was in the public interest. Further it could not have been anticipated that the hearing and decision in the High Court would take 14 months (and a further 7 months for the reasons decision).

[62] Crown legal advice had been sought before charges were laid, this was received on 25 March 2014.

[63] No prejudice has occurred to Mr Peters from the decision to prosecute after the examination. Any prejudice cannot amount to specific prejudice as a consequence of any delay.

The Reasons for Judgment decision of Associate Judge Abbott 25 July 2014

[64] This decision sets out the Assignee's concerns as at October 2012 about-

(i) Pre-adjudication conduct that disclosed business practices that demonstrated a lack of concern for the financial interests of others.

(ii) Post-adjudication conduct which included concealment of assets, failure to disclose employment and expose others to risk and liability.

The Assignee was asking the Court to extend the bankruptcy both to sanction Mr Peters for his conduct and to protect the business community from his activities.

[65] At para [8] Associate Judge Abbott said the following:

> I accepted that the matters identified in the Assignee's report, and explored extensively, first in the public examination of Mr Peters and then in cross-examination of the various deponents in Mr Peters' application for discharge, were proper matters of concern and justified the Assignee's objection and opposition. However, I also found that the evidence was largely circumstantial, and lacked sufficient detail (when examined) to support a finding of conduct that warranted extension to the period of bankruptcy, or to satisfy me that Mr Peters was likely to be a risk to the business community if he was discharged without the Court imposing conditions on his discharge.

[66] After discussing the criticisms made by Peters' counsel of the Assignee's report, the Court found that it was admissible however what weight was to be attached to it given that some of the report was based on hearsay, assumptions and opinions that ran counter to direct evidence. At para [87] Associate Judge Abbott said:

> ....matters of hearsay and conjecture must give way to direct and credible evidence of facts to the contrary, and the weight to be given to the assumptions and opinion must also be reviewed where the underlining (*viz* underlying) facts are disputed by cogent and credible evidence.

[67] The High Court judgment reveals that had the evidence not gone beyond the facts in the Assignee's reports and emerging from the examination of Mr Peters, there would have been a case for the inferences of serious misconduct by Mr Peters both before and after adjudication.

[68] However the direct evidence given by witnesses for Mr Peters, particularly Mr Schollum supported Mr Peter' case as did the evidence of Mr McKay, both men were professionals associated with Mr Peters.

[69] The High Court found that the Assignee was not able to counter this direct evidence (see paras [103] to [108] of the reasons decision).

[70] The allegations of concealment of beneficial interests in assets were considered to be the most serious allegations being made by the Assignee. The Court found that the timing of the establishment of entities and various transactions and flow of funds could have supported an inference of deception and a continuing beneficial interest. But such an inference was not available given the direct evidence by three witnesses in support of Mr Peters as to the independence of the entities from Mr Peters.

[71] Among the allegations in the High Court were that Mr Peters had continued to have a direct role in the management and control of his businesses after his bankruptcy. The Court accepted that those running the entities after Mr Peters' bankruptcy would have sought advice from him from time to time. Further there was a concern that Mr Peters was more involved that he had acknowledged. However that was not a sufficient basis for extending the bankruptcy noting that it was still open to the Assignee to prosecute Mr Peters under s 149 if that was considered warranted.

[72] Similarly the Court found that there was some basis for criticism of Mr Peters in terms of notifying the Assignee about employment, income and change of address, but these matters did not warrant further extension of the bankruptcy.

Discussion – abuse of process

[73] Mr Peters relies on s 147 Criminal Procedure Act 2011, ss 25 (a), (b), (d) and s 23 (4) of the New Zealand Bill of Rights Act 1990 and *Z v Dental Complaints Assessment Commitment* [2008] NZSC 55 to support his application.

[74] Section 147 CPA gives the Court the power to dismiss charges pre-trial. The section does not specifically include as a ground an abuse of the Court's process but it does not limit the grounds either.

[75] Section 25(a) NZBOR Act guarantees everyone changed with an offence to the right to a fair hearing. Section 25(b) relates to the right to be tried without undue delay. Section 25(d) provides that every defendant not to be compelled as a witness or to confess guilt. Section 23(4) is the right to refrain from making any statement and to be informed of that right.

[76] *Z v Dental Complaints Assessment* is a Supreme Court decision relating to abuse of process. The factual issue was different to this case. *Z* a dentist had been acquitted of three counts of indecent assault in relation to patients of *Z*. The Complaints Committee of the Dental Council decided to lay charges before the Dentists Disciplinary Tribunal as a result of complaints by the three complainants at trial plus another patient who had not.

[77] Z is applicable to this case because the Supreme Court approved a statement of Lord Bingham in *Johnson v Gore Wood & Co* at para [63] of the decision in *Z*. What amounts to an abuse turns on a-

> ...broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court.

Delay

[78] There have been two periods of delay in this case. From 4 April 2012 to the bringing of charges on 28 March 2014 (pre-charge delay) and delay since 28 March 2014. I did not understand Mr Peters to be complaining about post-charge delay and I approach delay on the basis of pre-charge delay.

[79] In this case there was a delay of almost twenty four months between the examination of Mr Peters at a creditors' meeting on 4 April 2012 and the laying of charges on 28 March 2014. It was revealed by a witness for the Assignee in the High

Court proceeding that certain matters were under investigation with a view to bringing charges in June 2013. The laying of charges followed quickly upon the receiving of advice from Crown Law.

[80] Mr Peters' business affairs and his estate were complex and extensive. It is apparent from the decisions of Associate Judge Abbott of 23 December 2013 and 25 July 2014 that obtaining relevant material from Mr Peters took the Assignee literally years due to the size and complexity of his estate and business matters.

[81] It appears however that by 4 April 2012 the Assignee had some basis for deciding that breaches of the Insolvency Act by Mr Peters may have occurred. Certainly by 9 October 2012 there was a sufficient basis to apply to extend his bankruptcy and at an unknown date the investigation unit of the Official Assignee's office was asked to advise whether charges should be laid.

[82] I agree with the submission made by Mr Chisholm QC that the Assignee should have filed an affidavit explaining the delay since 4 April 2012. In addition to explain the delay from mid June 2013 when Mr Graham gave evidence that matters had been referred for investigation as to prosecution until late March 2014 when charges were actually filed.

[83] The reasons for judgment decision of Associate Judge Abbott dated 25 July 2014 makes it clear that the direct evidence given by the witnesses called by Mr Peters in the High Court hearing were decisive in determining allegations made against Mr Peters in favour of Mr Peters. In my view it follows that the delay between 4 April 2012 and mid June 2013 did not cause the type of prejudice that detrimentally affected the ability of Mr Peters to counter matters in the Assignee's report. That same evidence is going to form the basis of Mr Peters' defence to the charges now before the Court. Therefore it cannot be said that delay of itself has caused Mr Peters fair trial rights to be prejudiced. As Blanchard J said in *R v O* [1999] 1 NZLR 347 at 350:

> ...Whatever the length and cause of delay, the central question is whether a fair trial can still take place.

[84] Delay since the June/July 2013 hearing in the High Court has not been explained by way of evidence. In submissions Mr Symon stated that waiting for the Associate Judge's decision was the reason including because if the bankruptcy of Mr Peters had been extended, a decision to prosecute may not have necessarily been made.

[85] Delay since mid 2013 to 28 March 2014 has not in my view made any difference to Mr Peters' fair trial rights apart from the usual consequence of the elapse of time in dimming memories for example.

Prejudice

[86] Two important observations need to be stated here. Firstly to repeat that it was the evidence that Mr Peters brought through ten witnesses that was pivotal in resulting in adverse inferences that the Assignee sought to make against Mr Peters, not being made by the court (see para [67] to [70] inclusive herein). It follows that had Mr Peters not brought evidence, the result in the High Court would have been different.

[87] Secondly that it was not until the hearing when Mr Graham was giving evidence that Peters knew there was an investigation into whether or not to prosecute him. Affidavit evidence on behalf of Mr Peters had been filed. It was too late for him to elect to remain silent had he wished to, in anticipation that charges could be brought against him.

[88] It is the case for Mr Peters that the matters that are the subject of charges before this Court as set out in paragraphs [19] to [26] herein have already been traversed in the High Court proceeding. Mr Symon did not disagree.

[89] It is known that the Crown will rely on evidence disclosed by Mr Peters in the criminal proceedings. These are the two affidavits in s 130 notice (see para [36] herein) and the fact that all the evidence in the High Court proceeding will be available to the Prosecutor and has been referred to as disclosure in the criminal

charges. Although Mr Peters has some statutory protection afforded by s 185, other witnesses do not.

[90] It follows from the foregoing that the Prosecutor is better informed in terms of the charges by virtue of the material disclosed by Mr Peters and his witnesses in the High Court proceeding. It goes without saying that the Prosecutor will also be better prepared having seen and heard the witnesses. That is a most unusual situation.

[91] Mr Symon referred to the *Davidson* case. This was an appeal from the decision of the Registrar of Companies to prohibit Mr Davidson from being a director prior to the criminal charges being heard. The Court noted that the two proceedings served different purposes. In my view that is not the reason the case was decided. The main issue was whether Mr Davidson could show prejudice. At para [150] the Court said:

> ...The question, however, is whether Mr Davidson faces any real risk of injustice in the criminal proceeding from the disclosure made to date. I cannot see that he does.

[92] The *Nathans Finance* case was also relied on by the Crown as being helpful. This was an application to stay civil proceedings on the basis that if the defendants had to disclose their defence it could prejudice their defence in an upcoming criminal trial that was five months away.

[93] It is clear from the case that the civil proceeding was at an early stage. There was no risk it would get to trial prior to the criminal proceeding. Section 63 of the Evidence Act protected the defendants from any information disclosed in the civil proceeding being used against them in the criminal proceedings. Therefore no prejudice could arise.

[94] I note that the plaintiffs in the civil proceeding were investors in *Nathans Finance*. That can be contrasted with this case where the Official Assignee was the applicant in the High Court proceeding and is the Prosecutor in the criminal charges. Further the investors had lost millions of dollars with the collapse of the company

and their rights to pursue the directors to try and recover their losses without delay was a consideration taken into account by the Court.

[95] Mention was made by both counsel where cases have been adjourned to enable the criminal proceedings against a bankrupt to proceed first. Similarly how different proceedings serve different purposes. While I have considered both, I do not find either concept to be of much help in this case.

[96] In my view this case turns on whether the prejudice to Mr Peters (which Mr Symon acknowledged) is such that it abuses the process of the Court.

[97] Section 25(a) NZBORA enshrines in our statutory law the right to a fair trial for every person charges with an offence. This right is behind many other important protections, to give two examples, entitlement to disclosure of the case against a defendant and the exclusion of evidence where the prejudicial value outweighs its relevance (s 8 Evidence Act 2006). An important part of the role of a Judge in any criminal trial (whether it be trial by jury or Judge alone) is to ensure a defendant's fair trial rights are upheld. As such it is part of the Court's process to ensure that every defendant including Mr Peters has a fair trial.

Has Mr Peters' right to a fair trial already been breached?

[98] Section 23(4) NZBORA states that anyone arrested for an offence or suspected offence has the right to refrain from making any statement. This is often referred to as the right to silence.

[99] In my view Mr Peters has already "disclosed his hand" including from his evidence in chief and by answers he gave under cross-examination in his application to be discharged from his bankruptcy. In addition he has disclosed what evidence other witnesses might give on his behalf. This can be viewed as being equivalent to a breach of his right to silence. I say this because at the time he chose to present his evidence in chief and that of other witnesses was not only before charges were brought against him, but before he knew consideration was being given by the

Assignee to bringing charges against him. Accordingly any suggestion that his right to silence can be maintained pre-trial is illusory.

[100] I am less sure about the alleged breach of section 25(d), that a defendant cannot be compelled as a witness. This is because I am not in any position to decide if Mr Peters will or will not give evidence given what has gone before.

Will a criminal trial breach Mr Peters' fair trial rights?

[101] In terms of the privilege against self incrimination, I agree that this privilege has been lost by virtue of that fact that Mr Peters was unaware if charges would be brought against him and what those might be at the time of the High Court proceeding. He has answered questions in the High Court proceeding he may not have chosen to answer had he known about the charges.

[102] I am of the view that Mr Peters' fair trial rights have and will be compromised in any criminal proceeding (see paras [99] and 101] above).

[103] In terms of the public interest, I find it difficult to see how the public interest will be served by the criminal charges proceeding, particularly given the outcome in the High Court proceedings. There are two aspects to this. Firstly the resources including the cost of a trial when these very same issues have been traversed in the High Court. The High Court application occurred over ten days. Although the criminal proceedings might be more focussed, it is likely they could take a similar amount of time.

[104] Secondly the Assignee was unsuccessful in the High Court. That must cast some doubt on the likelihood of success on the criminal charges given the outcome in the High Court and that the criminal standard of proof will now apply in this Court.

[105] Given the role the Court has in preserving a defendant's fair trial rights, I am of the view that to proceed would abuse the Court's process. I am further of the view that the other circumstances including the public interest in a prosecution do

not warrant the charges proceeding. All charges are stayed and dismissed pursuant to s 147.

The limitation issue in relation to charging document end 804

[106] Charging document ending "804" alleges that James Mathew Peters failed to comply with s 149(1)(a) of the Insolvency Act 2006 in that he entered into, carried on or took part in the management or control of a business namely First Choice Collections (NZ) Limited without the consent of the Official Assignee or the High Court between the dates of 6 October 2009 and 9 December 2011. This is described as an offence pursuant to s 436(1)(b) and s 149(1)(a) of the Insolvency Act 2006. Section 149(1) says:

> (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:
>
> ...

[107] Section 436 says:

> (1) A bankrupt commits an offence if he or she:
>
> (a) Acts as a director of a company;
>
> (b) Fails without reasonable excuse to comply with s 149.
>
> (2) Despite anything that s 14 of the Summary Proceedings Act 1957 says, an information in respect of an offence under subs.(1) may be laid at any time within two years after the date of the offence.

[108] Section 437 says:

> **437 Penalties for offence in relation to management of companies**
>
> A person who commits an offence under section 436 is liable,
>
> (a) on conviction on indictment, to imprisonment for a term not exceeding 2 years:
>
> (b) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding $5,000 or both.

[109] The period of time when the offence was alleged to have occurred was prior to the Criminal Procedure Act coming into force. The sections referred to above were those in force at the relevant time.

Submissions on behalf of Official Assignee

[110] The Crown says that s 436(1)(b) is both an indictable and a summary offence. In support of that submission reference was made to a discussion document published by the Law Commission in October 2009 in relation to categories of offences and the middle band, such document being produced in anticipation of the Criminal Procedure Act 2011.

[111] This document set out six categories of offences that it stated existed prior to the Criminal Procedure Act which were:

(i) offences triable only in the High Court;

(ii) offences triable in either the High Court or the District Court (middle band offences);

(iii) offences triable only in the District Court (District Court only indictable);

(iv) offences listed in Schedule 1 of the Summary Proceedings Act which could be tried by a Judge alone in the District Court;

(v) charges proceeded with summarily that could be tried by a Judge alone or tried by a jury if the defendant elects trial by jury;

(vi) offences that are triable only by a Judge alone.

[112] The Law Commission document set out a list of District Court indictable offences and lists s 436 of the Insolvency Act as an offence triable only in the District Court.

[113] Schedule 1A of the District Court Act sets out middle band offences and High Court only in Part 11 and s 436 is not in either part of Schedule 1A.

[114] Mr Symon also referred to the definitions of summary offence and indictable offence. Importantly both refer to the right of election to trial by jury.

> Indictable offence means an offence for which the defendant may be proceeded against by indictment provided that an offence shall not be deemed to be an indictable offence solely because under s 66 the defendant could elect to be tried by a jury.
>
> Summary offence means any offence for which defendant may not accept pursuant to an election made under s 66 be proceeded against by indictment and where the enactment creating an offence expressly provides that it may be dealt with either summarily on indictment, includes such an offence that is dealt with summarily.

[115] Accordingly he submitted the definition of a summary offence contemplates the situation where an offence may be dealt with either summarily or on indictment.

[116] He further submitted that conviction on indictment in s 437 could not refer only to a situation where a person elected trial by jury including the fact that offences under s 433 and 435 of the Act set out summary offences by a bankrupt which has identical wording to the limitation period of two years and an identical maximum penalty on summary conviction of imprisonment for a term not exceeding twelve months or a fine not exceeding $5000 or both. A defendant would be able to elect jury trial on those offences under s 66 of the Summary Proceedings Act. But there is no equivalent provision for "conviction on indictment". Accordingly it cannot have been Parliament's intention to create a separate maximum penalty for offences under s 436 simply because the defendant elected jury trial or it would have taken the same approach for offences under s 433.

[117] Mr Symon sought to make a distinction between the phrases "convicted on indictment" and "indictable offence". Convicted on indictment is defined by s 3 of the Crimes Act which states for the purposes of this Act, a person should be deemed to be convicted on indictment if:

(a) he pleads guilty on indictment;

(b) or he found guilty on indictment;

...

(d) after having been committed for trial he pleads guilty in s 321.

(Subsection (c) relates to High Court trials)

[118] The point was made that there is nothing in s 3 that refers to elections of trial by jury made on summary offences.

[119] Therefore Mr Symon concluded that s 436 provides for two offences: an indictable offence and a summary offence.

[120] Mr Symon further submitted that the relevant limitation period for an offence laid indictably under s 436 of the Act is ten years pursuant to s 10B of the Crimes Act. This is because s 436(2) makes an exception from s 14 of the Summary Proceedings Act but not s 10B of the Crimes Act. Accordingly the relevant limitation period for an offence laid indictably is ten years and the charging document is not time barred.

Submission for Mr Peters

[121] Mr Chisholm QC submitted that the Crown cannot rely on the Law Commission discussion document for a number of reasons including that the authors are not identified and that it is what it says it is, namely a discussion paper.

[122] He further submitted that there is no such class of an offence; that is both indictable and summary. Reference was made to the case of *Panela Corporation v The District Court at Whangarei* M1885-SW99 High Court at Whangarei 6 June 2000 where the Salmon J said:

> where there is no statutory prescription as to the nature of the offence the "default" position is that it is a summary offence rather than an indictable one. I reach this conclusion because where it is intended that an offence be indictable that seems invariably to be made clear by the statutory provision.

[123] Mr Chisholm QC submitted that the penalty section (s 437) which differentiated between conviction on indictment and summary conviction referred to conviction on indictment being when a person elected trial by jury.

[124] In term to the s 10B Crimes Act point, he submitted that if Parliament had attended s 436 to have an indictable time limit it would not have specified a two year time limit but would have included the offence as an indictable offence under that subpart of the Insolvency Act (s 419 – 428).

Discussion

[125] This is not a straightforward issue. I appreciate the point made by Mr Symon that ss 433 and 435 of the Act set out "summary offences by bankrupt" which has identical wording worded "limitation period of two years" and an identical maximum penalty on summary conviction. Although the defendant was able to elect jury trial on those offences under s 66 that there is no equivalent provision for "conviction on indictment".

[126] This has to be contrasted to s 437 which provides the penalty for s 436. This supports the argument that there could be an indictable and summary offence created by the section.

[127] Balanced against that are two points made by counsel for Mr Peters. Firstly that this would create a new type of offence, namely indictable and summary as opposed to a summary offence that can be proceeded on by way of indictment according to the seriousness of the offending itself. The helpful case of *Panela* points in favour of s 436 being a summary offence.

[128] I decide this issue in favour of Mr Peters essentially because of the *Panela* case. I agree with the statement of Salmon J that indictable offences were previously made clear by the statutory provision itself.

Result

[129] (i) Charging document 804 is time barred and should be dismissed.

(ii) All charging documents referred to in paragraphs [19] to [26] inclusive herein are dismissed.

Dated at Auckland this 24th day of March 2015 at 8.30 am.

P A Cunningham
District Court Judge