

ROYAL COURT
(Samedi Division) 109.

10th June, 1996

Before: The Bailiff, and
Jurats Vibert and Herbert

In the matter of Jonathan Christopher
Hamish Hay and Article 43 of the
Bankruptcy (Désastre) (Jersey) Law 1990.

Representation of the Attorney General.

S.C.K. Pallot, Esq., Crown Advocate.
Advocate D.M.C. Sowden for J.C.H. Hay.

JUDGMENT

5 THE BAILIFF: This is an application by the Attorney General for an
Order pursuant to Article 43 of the Bankruptcy (Désastre) (Jersey)
Law, 1990, disqualifying Jonathan Christopher Hamish Hay from
acting as a director or being in any way concerned in the
management of a company.

10 The Court has power to make such an Order where it is
*"satisfied that his conduct in relation to the company makes him
unfit to be concerned in the management of a company"*.

15 The brief history of the matter is that Mr. Hay was declared
en désastre on 14th May, 1993, and his company, John Hay Financial
Management Limited, of which he was a director, was declared *en
désastre* on the same day.

20 Following a police investigation Mr. Hay was indicted before
the Royal Court on thirteen counts of fraudulent conversion and
eleven counts of fraud. He pleaded guilty to all counts and on
10th July, 1995, was sentenced to 5½ years' imprisonment.

5 The conduct by Mr. Hay of his business had involved the fraudulent conversion over a period of six years of some £839,000 of money belonging to his clients. He adopted an affluent life-style using the funds of his clients in an illegitimate way. His company leased expensive vehicles, such as Porsches, BMW's and a Land Rover for Mr. Hay and members of his family and at one point leasing costs were running at over £2,000 per month. During the period under consideration some £27,000 was spent by Mr. Hay's company in connection with the use of a horse owned by Mr. Hay's wife. His living expenses included considerable sums spent on wine, jewellery and holidays taken in exotic places.

10 Mr. Pallot for the Attorney General asks the Court to impose a five year disqualification with effect from 10th July, 1995, that is to say the date upon which Mr. Hay was sentenced to 5½ years' imprisonment.

15 Mr. Pallot bases his conclusions upon the case In re Christopher Anthony Delaney, Deltrust (CI) Ltd and Sentinel Management Ltd (9th November, 1995) Jersey Unreported, where the Court imposed a 5 year disqualification with effect from the date upon which Delaney had been sentenced.

20 We do not think, however, that the Court intended in Re Delaney to lay down any principle of general application. Commissioner Le Cras in giving the judgment of the Court stated:

25 *"In our view, given the particular circumstances of the case, the proper time to bring this application was at, or more or less contemporaneous with, the sentence on Mr. Delaney".*

30 It was the particular circumstances of that case, it appears to us, which led the Court to make the Order in that form. We interpose to mention at this stage that the maximum period of disqualification laid down by Article 43 of the Bankruptcy Law is a period of five years.

35 Miss Sowden for Mr. Hay accepts the justification for a disqualification order but urges the Court to make an order back-dated either to the date of the *declaration en désastre* or to the sentencing date so that it would have expired by the anticipated release date of Mr. Hay in 1999. We find it difficult to accept that submission. If the Court is to make an order at all it must have some effect.

40 What, then, is the purpose of a disqualification order? Article 43 (1) empowers the Attorney General to make an application where it appears to him *"expedient in the public interest that a person should not be a director of a company"*. It is a prerequisite to the making of a disqualification order that the court should be satisfied that the conduct in relation to the

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bankrupt company renders the person unfit to be concerned in the management of a company. The underlying purpose of the disqualification provision appears to us, however, to be the protection of the public.

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On that premise it seems difficult to sustain an argument that the period of disqualification should take effect from the date upon which the company was declared en *désastre*. Criminal investigations in cases of serious fraud can unavoidably take years to bring to a conclusion. In this case, as we have said, Mr. Hay's company was declared en *désastre* on 14th May, 1993. On 10th July, 1995, he was sentenced to 5½ years' imprisonment. If the operative date were taken to be the 14th May, 1993, Mr. Hay might well still be serving his sentence at the time of the expiry of the disqualification order, even if the maximum period were imposed. The underlying purpose of the statutory provision would then be frustrated. Even if one adopts the argument of counsel for the Attorney General that the period of disqualification should generally take effect from the date upon which a person is sentenced to a term of imprisonment it is not difficult to envisage a serious case where at least five years would have passed before release from custody. In such a case, too, the Court would be powerless to protect the public.

In our judgment the proper commencement date for a disqualification order under Article 43 of the Bankruptcy Law is the date upon which the order is made. The Attorney General is obliged to make his application during the currency of the administration of the *désastre*. It may be that he will usually find it convenient to defer making an application until the administration is near conclusion so as to ensure that he is in possession of as complete a picture of the delinquent director's conduct as is possible. We see no force in the argument that this might operate unjustly for the director. The Court will have the opportunity of taking all material factors into consideration, including the period of any delay in making the application, when it exercises its discretion whether or not to make an order under Article 43 of the Law.

Miss Sowden told us that Mr. Hay had been undertaking and intended to continue to undertake a business studies courses whilst serving his sentence. He hopes to obtain a diploma and ultimately an MBA before his release. Miss Sowden urged that he would find it difficult to obtain employment and that he therefore wished to be in a position to form a company and to start his own business immediately after his release from prison. She also emphasised Mr. Hay's remorse for his criminal misconduct.

Mr. Hay is entitled to credit for these efforts to improve himself and to obtain these qualifications and we have taken all that carefully into consideration. Our duty, however, is to consider whether and if so to what extent the public needs

protection. We have no doubt that Mr. Hay's conduct of his company was such as to demonstrate that he needs to gain considerable experience before launching himself into business on his own account again. We doubt that the five year maximum period of disqualification is adequate to give the public the necessary protection in this case and we note with approval the comment of counsel for the Attorney General that the maximum period is under consideration by the responsible States' Committee.

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Having given careful consideration to all the relevant circumstances, we order that Mr. Hay be disqualified, pursuant to Article 43 of the Bankruptcy Law for a period of five years with effect from the date of this Order. There will be no order for costs.

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Authorities

Bankruptcy (Désastre) (Jersey) Law, 1990: Articles 40, 43.

In re Christopher Anthony Delaney, Deltrust (CI) Ltd and Sentinel Management Ltd (9th November, 1995) Jersey Unreported.

A.G. -v- Hay (10th July, 1995) Jersey Unreported.

Mithani & Wheeler: "The Disqualification of Company Directors" (Butterworths): p.40: para. 2.31.

A.G. -v- Delaney (13th May, 1993) Jersey Unreported.