PARTIES:	ROBERT WILLIAM SOMERVILLE v THE LAW SOCIETY OF THE NORTHERN TERRITORY
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ORIGINAL
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CATCHWORDS:

LEGAL PRACTITIONERS - application to review Law Society's decision to suspend practising certificate - nature of Full Court jurisdiction

Legal Practitioners Act (NT), s29(2) and (5)

Rogerson v Law Society of the Northern Territory (1992) 110 FLR 363, followed

LEGAL PRACTITIONERS - suspension of practising certificate of person convicted of offence - whether the applicant is a "fit and proper person" - relevant considerations - fact of conviction not decisive

Legal Practitioners Act (NT), s29(2) and (5)
Ziems v Prothonotary of Supreme Court of New South Wales (1957) 97 CLR 279, applied
Rogerson v Law Society of the Northern Territory (1992) 110 FLR 363, followed

In re Weare [1893] 2 QB 439, referred to
Re a Solicitor (1889) 61 L.T. Rep. (N.S.) 842, referred to
Re a Practitioner (1984) 36 SASR 590, referred to

WORDS AND PHRASES - whether "crime" in Territory Act encompasses Commonwealth offence - to be given its primary and ordinary meaning

Legal Practitioners Act (NT), s27(1)(b)
Bankruptcy Act 1966 (C'th), S269(1)(a)

Ettridge v Minister for Immigration and Ethnic Affairs (1979) 37 FLR 119, referred to

REPRESENTATION

Counsel:

Applicant:	S. R. Southwood
Respondent:	J. Reeves

Solicitors:

Applicant:	De Silva Hebron
Respondent:	Law Society of the Northern Territory

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IN THE FULL COURT OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP17 of 1995

BETWEEN:

ROBERT WILLIAM SOMERVILLE
Applicant

AND:

THE LAW SOCIETY OF THE NORTHERN TERRITORY
Respondent

CORAM: KEARNEY, THOMAS AND GRAY JJ

REASONS FOR DECISION

(Delivered 14 February 1995)

KEARNEY J:

This is an application for an order under s29(5) of the Legal Practitioners Act (herein "the Act") to revoke the suspension for 3 months of the applicant's practising certificate. Sections 29(2) and (5) of the Act provide, as far as material:-

> "(2) A person whose practising certificate has been - - - suspended by the Law Society may apply to the Court for an order under subsection (5).

(5) Where, on an application under subsection (2) the Court is satisfied that the circumstances are such that the - - - suspension of the applicant's practising certificate ought to be revoked, the Court may, subject to terms and conditions (if any) as it thinks fit, by order revoke the - - - suspension of the applicant's practising certificate."

Adapting what was said in *Rogerson v Law Society (NT)* (1992) 110 FLR 363 at p370, it appears that on such an application the Court is required -

> "- - - to take into account all relevant circumstances including those giving rise to the [suspension] of the practising certificate, any which have arisen since, and of the fitness of the person concerned to hold the certificate sought, - - - The words of [subsection (5)] are very wide, requiring only that the Court be satisfied that circumstances are such that the [suspension] of the practising certificate ought to be revoked. Bearing in mind the very serious consequences which a [suspension] of such a certificate, - - - may have upon the former holder of it, it could not have been the intention of the legislature that the exercise of that jurisdiction should be constrained. The words are wide enough to encompass a review of the circumstances surrounding the [suspension] of the certificate together with any additional circumstances which the Court considers relevant. It would be open to the Court for example, to revoke the [suspension] upon the grounds that the applicant had been denied natural justice, the [Society] had proceeded without jurisdiction or fresh circumstances had arisen justifying the order sought."

I have had the advantage of reading the opinion of Gray J. His Honour has set out the facts and circumstances relevant to this application, and discussed the issues. I

need not do so again; I agree generally with his Honour's opinion and confine myself to three aspects.

(1) Gray J has pointed out the degree of confusion in the sentencing proceedings as to the precise circumstances in which the applicant committed his offence. The learned sentencing Judge accepted that the applicant believed that he could have arranged the purchase through NAALAS, and had a basis for that belief, even though he had not approached NAALAS about it. Gray J has set out a critical passage in his Honour's sentencing remarks, at p15; I consider that the last sentence is the vital sentence. I do not consider that his Honour there treated the applicant as having engaged in a criminal deception; in sentencing, his Honour said at pp71-72:-

> "As to the obtaining of credit, there was some disagreement between counsel for the Crown and your counsel as to your state of mind in that regard, as can be demonstrated by the surrounding facts and circumstances, but it was agreed that for my purposes I could accept, firstly, that your employer would not have paid for the motor vehicle but that you had a belief that you could come to an arrangement with it whereby finance could be made available to enable the price to be paid. I accept that you had such a belief although it was rather speculative. It was based upon your knowledge that the organisation had previously purchased a secondhand motor vehicle and that there was a current need for an additional vehicle to be acquired.
>
> You had an arrangement with your employer in relation to fringe benefits to the value of $1100 a fortnight, which had till then been applied towards rent on your behalf. You had it in mind that, by negotiation with your employer, that allowance could be made available, one way or another, so as to have the debt on the vehicle paid. It is not necessary to examine the reality or otherwise of that expectation on your behalf or how it may have been worked out.

> It is sufficient for these purposes that it was a belief which you held and, in particular, [it] militates very much against any suggestion that you were engaged upon some fraudulent enterprise when negotiating to acquire the motor vehicle. One of your referees suspects that your rather chaotic, casual and even naive approach to financial matters may be at the root of this matter and I am inclined to the view that that is so." (emphasis mine)

His Honour appears to have treated the applicant as falling within s30(2) of the Criminal Code, in this regard.

(2) As to the meaning of "crime" and "simple offence involving dishonesty on his part" in s27(1)(b)(i) of the Act, I note that this terminology is strongly reminiscent of the classification of offences in s3 of the Criminal Code which came into force some 4 years before this provision was inserted in the Act. There are 2 sources of criminal law in the Territory: Territory legislation and Commonwealth legislation. The Territory legislature could not have intended to exclude all offences created by Commonwealth legislation from the ambit of "crime" in s27(1)(b)(i) of the Act; that would lead to absurd results, which could not have been intended. The offence under s269(1)(a) of the Bankruptcy Act 1966 (C'th) is an "indictable offence", for the purpose of s4G of the Crimes Act 1914 (C'th), since it is capable of being dealt with on indictment; see *Ettridge v Minister for Immigration and Ethnic Affairs* (1979) 37 FLR 119. I consider that "crime" in s27(1)(b)(i) of the Act embraces an offence which is an "indictable offence" under Commonwealth legislation, as well as an offence which is a "crime" under Territory legislation. Accordingly, it encompasses the offence under s269(1)(a) of the Bankruptcy Act.

(3) In its reasons for suspending the applicant's practising certificate, the respondent considered that the passage from his Honour's sentencing remarks set out by Gray J at p15:-

> "- - - does illustrate that the course of conduct engaged in by the practitioner was not completely blameless. Given the standard of conduct expected of practitioners, even in their private dealings, it is the Society's view that a sanction of a professional nature is warranted."

It rightly took account of the considerations stated by Kitto J in *Ziems v Prothonotary of Supreme Court of New South Wales* (1957) 97 CLR 279 at pp297-8, when directing its attention to the question whether the applicant's conduct had been such as to show that he was unfit, at least for some time, to practise as a member of his profession; see *In re Weare* [1893] 2 QB 439 at p445, and *Re a Solicitor* (1889) 61 L.T. Rep. (N.S.) 842 at pp843-4. It had earlier stated that -

> "- - - the community is entitled to expect a higher standard [than that of ordinary persons] from members of the legal profession."

I agree. I concur in Gray J's observations and conclusions in this regard, at pp20-21. However, I consider that this case was one for suspension as opposed to cancellation, in accordance with the principles indicated in *Re a Practitioner* (1984) 36 SASR 590 at p593. Accordingly, I would refuse the application to revoke the suspension. As a result of earlier orders made, the 3-months suspension should commence today.

THOMAS J:

I have read the reasons for decision of Gray J. I agree with his reasons and with his conclusion. I have nothing to add.

GRAY J:

The Court has before it an originating motion and summons in which William Robert Somerville is the applicant and the Law Society of the Northern Territory is the respondent. Mr Southwood of counsel appeared for the applicant. Mr Reeves of counsel appeared for the respondent.

On 18 January 1995, the respondent resolved to suspend the practising certificate of the applicant, who is in legal practice in the Northern Territory. The suspension was to take effect from 25 January 1995 and to extend for three months. As a result of certain agreed extensions and an order of this Court, the suspension has not yet taken effect.

The motion seeks an order that the respondent's decision of 18 January 1995 be revoked. The application is based upon section 29 of the *Legal Practitioners Act* ("the Act"). Upon such an application, the Court is exercising original jurisdiction. *Rogerson v Law Society of the NT* (1992) 110 FLR 363.

The foundation of the respondent's decision is a finding that the applicant is not a fit and proper person to practise as a legal practitioner. This finding was based upon a conviction suffered by the applicant on 24 October 1994 and the circumstances surrounding such conviction. Before reaching its decision, the respondent conducted a substantial

inquiry. The applicant was represented by counsel who advanced argument and was accorded a full hearing.

The applicant's conviction to which I have referred was for obtaining credit in excess of $500 without disclosing that he was an undischarged bankrupt. This offence is created by section 269(1)(a) of the *Bankruptcy Act* 1966, which is an Act of the Commonwealth. The applicant pleaded guilty to this charge on 24 October 1994 and was sentenced by Martin CJ on 31 October 1994 to nine months imprisonment. His Honour directed that such sentence be wholly suspended upon the applicant entering into a recognisance in the sum of $2000 to be of good behaviour for two years.

As to the identification of the precise circumstances in which the crime was committed, there has been some confusion. This has stemmed largely from the procedure adopted when submissions as to sentence were made to the Chief Justice on 25 October 1994. There being no written agreed version of the facts, His Honour was provided by the prosecutor with statutory declarations of a number of prosecution witnesses. No objection was taken by counsel for the applicant.

Counsel for the prosecution (Mr Rice) then proceeded to outline the facts as alleged by the Crown. The transcript records the following passages at pages 6-10:

> "MR RICE: Essentially sir, Mr Crean says that about a week prior to 19 March 1992, Mr Somerville telephoned him at Bridge Auto and made inquiries about purchasing a Toyota Landcruiser utility. Mr Crean advised Mr Somerville that Bridge Autos did in fact have a car available which he could recommend as being suitable for Mr Somerville's needs, and that was just what one might call an

initial inquiry by Mr Somerville of Mr Crean, and they did have a friendship that had been in existence for at least some months, so that Mr Somerville was able to approach Mr Crean and make a relatively informal and easy inquiry.

HIS HONOUR: Sorry to interrupt you, Mr Rice, but when was the bankruptcy order made?

MR RICE: 7 September 1990, Your Honour. As at the date of these events, he was about 18 months into the minimum period of three years.

HIS HONOUR: Thank you.

MR RICE: Following upon that initial inquiry by Mr Somerville, there was a further conversation on the prosecution case on or about 19 March '92. Mr Somerville, in addition to another phone inquiry, attended, inspected a car that Mr Crean showed him, and said that certainly that was a car that he liked but that he was still in the process of working out his finances.

Then we come to the important day, 26 March 1992. Mr Somerville again telephoned Mr Crean and asked if the motor vehicle he'd previously inspected was still available as, on Mr Crean's account, Mr Somerville said that his finance was in place. Mr Crean told Mr Somerville that the vehicle had been sold, however, there were other vehicles in stock that he could recommend that would be appropriate for Mr Somerville's purposes.

Mr Somerville inquired if he was able to select a vehicle from that available stock, and would he be able to take possession of the vehicle straightaway, as he had an urgent errand to do, and for Bridge Autos to furnish him, Mr Somerville, with an invoice, so that Mr Somerville could deliver to his employer, the North Australian Aboriginal Legal Aid. Mr Somerville advised that he would then collect - what he proposed to do would be that he would collect a cheque from his employer and convey that cheque to Bridge Autos later in that day.

So following from that conversation, at about 1 pm on that day, Mr Somerville attended at Bridge Autos and was shown a particular Toyota Landcruiser utility. He agreed for there to be a purchase of that vehicle. The value of the vehicle as reduced through negotiation was $22,990. He then requested

that a Toyota Extra-Care Used Vehicle Warranty and a radio cassette be fitted to the vehicle. There was a re-calculation of the all-up price, including stamp duty, and it came to just less than $25,000, and to be precise, the amount in the information itself.

The defendant, Mr Somerville, accepted that price. Mr Lloyd who was also involved in this part of the procedure, completed a Bridge Auto Car Division Offer to Purchase form and an extra-care warranty form. Mr Somerville signed both of those forms and also signed a registration certificate that, in part, purported to record him as being the new owner, although it is the case that the full completion of that transfer of registration was left blank because it was uncertain as to whether or not the vehicle would be registered in Mr Somerville's name or in the name of Aboriginal Legal Aid, or NAALAS.

Mr Lloyd, whose statement is on file, furnished Mr Somerville with an invoice, and Mr Somerville took possession of the vehicle, advising the staff at Bridge Auto that he would return with payment later that afternoon.

HIS HONOUR: To whom was the invoice paid, Mr Rice?

MR RICE: I'll just double-check that. I feel confident it was made in Somerville's name, but I'll just double-check that. Yes, the invoice was in his name at his home address on the Esplanade. The offer to purchase was also filled out with the customer's name being Mr Somerville's name. The used Toyota vehicle extended warranty contract was also in his name. The transfer of registration was the only document, as it were, about which there was some doubt, although he signed, as I've said, I think, in partial assertion that he was the new owner, the name of the buyer was left blank because he said that it was uncertain whether or not he would be the new purchaser or whether indeed it might be NAALAS who would be the actual purchaser.

So sir, on the prosecution statements, Mr Somerville said, and undertook to return with a cheque in payment later that same day. He did not return later that day or on subsequent days, despite efforts to secure payment from him, and there was no disclosure of course on 26 March or, indeed, during the course of any of the negotiations the preceding

week or even the week before that, about his status as an undischarged bankrupt.

As I've said, he did not return to Bridge Auto that afternoon. Mr Crean contacted the North Australian Aboriginal Legal Aid Service and inquired - that is, on 27 March - where Mr Somerville was, and was advised that he was on recreation leave. On Monday, 30 March, Mr Lloyd from Bridge Autos contacted Mr Somerville by telephone and was advised that he would make payment that afternoon, and again he failed to attend Bridge Autos to make payment on that Monday.

On the Tuesday, that is, 31 March '92, there was a phone call made by Mr Somerville to the Northern Territory Police to advise that the motor vehicle had been stolen from the garaged area of Mr Somerville's residence at unit 1, 80 The Esplanade. There is a statement on file, sir, from an officer of the Northern Territory Police, a Mr Darrell Kerr, who says that when he spoke with Mr Somerville at about 6.30 am on that Tuesday morning, Mr Somerville advised him that at about 2 am that morning he noticed that his motor vehicle, that is, the Landcruiser, had been stolen from the garage.

The phone call to the police notifying them of the stealing of the vehicle was not made, on the prosecution case, until 6 am, and that the police were delayed in attending and first spoke with Mr Somerville at about 6.30 am. In any event, the vehicle was indeed stolen and has never been recovered, nor has any part of it, so far as we are aware, been recovered.

At about 8.30 am on that same morning, Tuesday, 31 March, Mr Somerville spoke with Mr Crean at Bridge Auto and advised him that the vehicle had been stolen from his garage during the course of the night. Mr Crean asked if Mr Somerville's insurance was in place, and the defendant - or Mr Somerville stated that he would check to see if it was indeed in place. On the following day, that's Wednesday, 1 April, Mr Somerville again telephoned Mr Crean and advised that his insurance was not in place, and that Bridge Autos should endeavour to claim the vehicle on their insurance.

There were, after that, sir, a number of negotiations whereby there was a certain amount of

to-ing and fro-ing as to who was actually the owner of this particular vehicle, and whom it would be appropriate to claim upon their insurance for its loss.

HIS HONOUR: That's as between Mr Somerville and Bridge Autos?

MR RICE: And Bridge Autos, yes. As events transpired, Bridge Autos were indeed able to claim upon their insurance, although at first blush when one looks at the documentation, it appears that the vehicle had indeed been purchased by Mr Somerville on 26 March and that property had passed to him and therefore the risk that is not without its complications or doubt, because the contract signed by Mr Somerville recorded that property was not to pass until payment of the full purchase price had been made.

Now, I'm not too sure precisely why Bridge Autos insurers paid out, but it may well be because of that clause.

HIS HONOUR: In any event, they did.

MR RICE: In any event, they did. They paid out, sir, the book value of the vehicle, and I'll just double-check that amount, sir. $19,386.32 was the amount that they paid out. I might also add, sir, although it does not emerge from the documents, that there was - I'm sorry, may emerge from the documents - there was a $500 policy excess which had to be borne by Bridge Autos, and although it does not emerge from the documents, in the following year, Bridge Autos insurance premiums increased by $5000 because of this particular payout.

So in one sense they were paid out, but in another sense they paid, by virtue of an increase in their premium.

HIS HONOUR: And lost their no-claim bonus, or howsowever called.

MR RICE: Yes. Probably doesn't go precisely under that name, but certainly, I would think, to that effect.

In any event, I think there's probably little need for me to take Your Honour through the history; after about the 4th and the 10th of April there were

negotiations, they were the 'to-ing' and 'fro-ings' that I mentioned, and there was, as part and parcel of that, those discussions; suggestions by Mr Somerville that he might purchase another vehicle from them and have that in effect paid for by his fringe benefit arrangements with his employer. In any event, those discussions came to naught and in the end result there was no further purchase by him of a vehicle, and as I've said, Bridge Autos claimed upon their policy of insurance.

On the 26th of June the following year, sir, in 1993, Mr Somerville attended at the offices of the Australian Federal Police in Darwin and participated in a tape-recorded interview. He said a number of things, Your Honour, and I would like, if I might, to make some further submissions about that after Mr McDonald has made his submissions. But what I do say at this stage about that interview, is that it can hardly be said that he co-operated with the police during that interview. When interviewed his answers were contradictory, they were evasive and in my submission they lacked candour.

He asserted at one stage, I think, that the vehicle was on loan from Bridge Autos and that he could give it back to them if NAALAS was not prepared to, in some way, finance its purchase. And on the prosecution case the vehicle was never in a position to be able to be returned by him to Bridge Autos if NAALAS did not agree to finance its purchase. It was never agreed by Bridge Autos that the vehicle be, in any way, loaned to him. On the prosecution case, such a suggestion is in reality nonsense, and indeed, contradicts the documents that he signed.

Sir, they are a broad outline of the facts. I would, as I said, like to respond to some matters I think that are to be raised by Mr McDonald, but after his submissions. We have had negotiations, he has told me the matters about which he is to make submissions. There are some differences in matters about which we take issue, but perhaps it may be, if Your Honour wishes, best to identify those either during or after my friend's submissions. But I'm in Your Honour's hands in that regard."

Mr McDonald, counsel for the applicant, told His Honour that there was not a great deal of difference in

relation to the facts, "save that I will be differing with my friend to say that Mr Somerville lacked candour in his responses to the police questions" (p 11). His Honour asked if that was a matter he would have to decide upon the basis of the transcript. Mr McDonald agreed.

Mr McDonald then proceeded to make statements from the Bar Table about the applicant's relationship with NAALAS. He conceded that the applicant, as at 26 March 1992, had made no arrangements with NAALAS to finance the purchase by the applicant of this or any other vehicle. However, Mr McDonald stated that the applicant entertained a genuine belief that NAALAS would finance the purchase out of the applicant's fringe benefits allowance. He stated that the applicant had not intended to deceive anybody. Mr McDonald made a number of other assertions as to the facts, particularly as to the close social relationship between the Mr Crean's and Mr Somerville's families and as to the applicant's belief that the fact of his bankruptcy was known to Mr Crean.

Mr McDonald then dealt at length with the applicant's personal history and referred to a number of testimonials from other members of the profession.

When Mr McDonald concluded, Mr Rice re-asserted that the Crown's position was that the applicant had no foundation for a belief that NAALAS would finance the transactions. Mr Rice said that, in relation to the events of 26 March, the Crown's position was that the applicant had stated that finance was in place and that a cheque would be proffered later that day. Mr Rice said that this statement of the applicant was a deliberate sham. He stated that if that position was not accepted it would be necessary to call evidence on the point. This provoked an intervention by

Mr McDonald who asserted that the matter was not relevant because it was not an essential element of the offence.

Thereafter, matters fell into some confusion, there being much discussion concerning the basis, or lack of basis, for the belief attributed to the applicant by Mr McDonald that NAALAS would pay.

Then at page 50, the following exchange is recorded in the transcript:

> "MR RICE: It would have to be through NAALAS that the purchase was going to be made. I maintain our position, that at the time, on the 26th, both over the phone and face to face, it was asserted that finance was in place and that he would be returning later that day with a cheque. That, obviously, could not, on anybody's construction of the events and facts, possibly be true because there's no way known that NAALAS during the course of that afternoon or, indeed, the following day or the following week - - -
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> HIS HONOUR: There's nothing to support that, no.
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> MR RICE: - - - could or would pay that.
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> HIS HONOUR: Yes, I see your point.
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> MR RICE: So that is the position, sir. It was very much - and I suppose I can adopt Your Honour's word - even speculation on Mr Somerville's part or high hopes certainly, that everything would fall into place, but there was not the slightest guarantee that NAALAS would be prepared to do that or, indeed, perhaps whether any of the other alternatives could eventually be put into place. I hope I have made our position clear, sir."
>
> His Honour then took up the matter with Mr McDonald.

The transcript, at pp 51-2, records the following passage:

> "HIS HONOUR: Mr McDonald, does it accord with your instructions for me to deal with the matter on the basis I've just discussed with you and Mr Rice?
>
> That is, as you put it to me, there was a basis for his belief and you told me three things: that he believed, either through his arrangements with NAALAS, either they'd buy it or through his arrangements with them he'd be able to come to some deal whereby the creditor, Bridge Autos, would not lose out on that money; and that there was some prospect of his wife being able to assist, also which he had in mind, and that is demonstrated by the fact that in fact later she did in fact purchase a vehicle; that there was a sum of $1100 available a fortnight which could've been used as the source for whatever arrangements it may've been lawful and proper to come to, to assist with the acquisition of the vehicle; and that he told Mr Crean on the 26th that finance was in place and he would be back with the cheque.
>
> MR McDONALD: Your Honour, the words 'finance is in place', I'm instructed are not the words that - - -
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> HIS HONOUR: I probably need to take it from Mr Crean's statement. Would somebody direct me to where it is, please?
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> MR RICE: It's page 2, second paragraph, sir.
>
> MR McDONALD: Your Honour, my instructions are that Mr Somerville said words to the effect that finance would be available, wasn't a problem. He just says he doesn't say finance is in - that's just not a term of expression that - he says it's a used-car salesman's type of expression, not the sort of language - but he gave Mr Crean to expect that finance would be available, yes, Your Honour, and it wasn't a problem and that he'd be back with a cheque. Mr Somerville says he was on holidays; it'd be a week later.
>
> HIS HONOUR: Whichever way one views it, it was an assurance given by your client to Bridge Autos that, 'You'll be right.'
>
> MR McDONALD: Would be set right.

HIS HONOUR: You'll be right.

MR McDONALD: Yes, Your Honour.

HIS HONOUR: Thank you, gentlemen, for that. Mr Rice, I interrupted you while you were taking issue with some matters raised by Mr McDonald. We've now resolved those.

MR RICE: Yes, I think we've dealt with all of those, sir. I did also submit to Your Honour earlier some descriptions about Mr Somerville's answers and during the course of his questioning."

Mr Rice then made submissions regarding the applicant's interview with the police with a view to demonstrating a lack of candour on the applicant's part. Beyond that there was no further discussion regarding the facts relevant to sentence.

When the Chief Justice came to sentence the applicant on 31 October, His Honour, in his sentencing remarks, accepted that the applicant entertained a genuine, if speculative, belief that NAALAS would eventually finance the transaction. His Honour then said (Exhibit "K" p 5):

"Against all this information which, to some extent, ameliorates the seriousness of the particular offence, in that you expected the creditor would be paid. It must be set of [sic] the fact that you led Bridge Autos to believe, when you took possession of the vehicle, the finance was in place and that you would be back with a cheque. The fact is, that notwithstanding your expectation that your employer would come to arrangements whereby the debt might be met, you were at the time of the transaction on holidays but did nothing during the ensuing week with a view to coming to suitable arrangements with your employer."

This passage was relied upon by the respondent in reaching its conclusion that the applicant's practising

certificate be suspended. It was contended before this Court that the finding expressed in the above quoted paragraph was not open to His Honour. Furthermore, this contention is one of the grounds of an appeal against sentence which is due to be heard next April.

It was said on behalf of the applicant, that the exchanges between the Bench and Bar on 25 October 1994 had resulted in the resolution of a dispute as to what was said by the applicant to Mr Crean on 26 March 1992. It was contended that the agreed version was that the applicant had done no more than express a confident expectation that the money would be provided by NAALAS.

I have carefully read the 65 pages of transcript, which record the proceedings on 25 October 1994. I have set out the passages which appear to throw light on the question. It is quite apparent that Mr Rice repeatedly and vehemently stated the Crown's position upon this aspect of the case. Although Mr McDonald strove to achieve some qualification of the facts appearing in Mr Crean's statutory declaration, these attempts were stoutly repudiated by Mr Rice. It is indisputable that Mr Rice was not a party to any agreed watering down of Mr Crean's version and Mr Rice was a necessary party to any suggested resolution of the matter.

The position is that His Honour had before him, without objection, a statutory declaration by Mr Crean stating in clear terms that the assurance in question was given by the applicant. There was no other evidence on the point and no application was made to lead evidence from the applicant in contradiction.

In my opinion, the Chief Justice was abundantly justified in making the finding he did. The finding amounts

to the making by the applicant of a false statement, knowing it to be false. It is an inescapable inference that the vehicle would not have been released to the applicant in the absence of such an assurance. In my opinion, the knowingly false statement amounted to a fraudulent deception. It is true that the ingredients of the crime to which the applicant pleaded guilty do not include any element of fraud. But for the purposes of determining the applicant's fitness to practise law, the finding is, in my opinion, of major significance.

Upon an examination of the whole of the material, it seems to me that the applicant had the benefit of the very minimum of adverse findings by the Chief Justice. It would have been open to a tribunal to be far more critical. The transaction certainly has some curious features. The inference I would draw is that, for reasons never explained, the applicant developed an obsession to acquire a vehicle and became quite reckless in what he said and did. However that may be, I remain quite satisfied that the finding under discussion was not only open to His Honour but was, in truth, inescapable.

The question of the Chief Justice's finding is likely to be considered in the course of the criminal appeal in April. It may prove an opportunity for the Court to lay down procedural guide lines for the determination of facts relevant to sentence in cases where they are disputed facts.

I now return to the decision of the respondent which is sought to be revoked.

The decision was based upon section 27(1)(b) of the Act which empowers the respondent to cancel or suspend a practising certificate where the holder "has been convicted in

the Territory - - - of a crime, or of a simple offence involving dishonesty on his part".

Before the respondent and before this Court, it was argued by Mr Southwood that the applicant had not been convicted of either a crime or a simple offence involving dishonesty. Thus, it was contended that the respondent had no jurisdiction to suspend the applicant's certificate. The respondent concluded that the applicant had been convicted in the Territory of a crime. In my opinion, this conclusion was correct.

Mr Southwood's argument, as I understand it, was that the offence created by s269 of the *Bankruptcy Act* is not a crime because it is not defined as a crime in that Act. Alternatively, it was said, the offence is regulatory only and does not fall within the ordinary conception of what amounts to a crime. It was further argued that s27(1)(b)(i) distinguishes between "a crime" and "a simple offence" which indicates that the word "crime" in s27(1)(b)(i) does not encompass all classes of offences.

The word "crime" appearing in s27(1)(b)(i) of the Act must take its meaning from the context. In my view, when one considers the purpose of s27(1)(b) there is no indication that the word should be given any other than its primary and ordinary meaning, namely, an act punishable by law. Many statutes such as Criminal Codes or Consolidations divide crimes into categories such as felonies, misdemeanours, indictable offences or those punishable summarily. In my opinion, they are all crimes within the meaning of s27(1)(b)(i). The NT Criminal Code distinguishes between crimes, simple offences and regulatory offences. This probably explains the alternative in s27(1)(b)(i) which was added shortly after the introduction of the NT Criminal Code. It was probably intended to meet an argument that a person

convicted of what the Code classifies as a simple offence had not been convicted of a crime. However that may be, I am satisfied that the offence under s269 of the *Bankruptcy Act* is a crime within the meaning of s27(1)(b)(i). It is not an offence under the NT Code which, accordingly, has no bearing on the question. It is an indictable offence carrying a maximum term of imprisonment of three years. It falls squarely within the ordinary definition of a crime. The applicant committed the offence within the Northern Territory and, in my opinion, all the jurisdictional requirements of s27 are satisfied.

That being so, I now turn to consider whether the respondent's decision to suspend the certificate should be revoked.

Mr Southwood placed particular reliance upon the fact that the offence to which the applicant pleaded guilty does not involve proof of any dishonest conduct. He pointed out, correctly, that the offence is complete merely upon proof of the obtaining of credit and the fact of non-disclosure of bankruptcy. Mr Southwood contended, again correctly, that in *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, the High Court held that the fact of a conviction and sentence is not decisive of the question of a practitioner's fitness to practise. Mr Southwood drew attention to what he described as the regulatory character of the offence and to the absence of any evidence of professional misconduct. He, of course, pressed the Court to conclude that the adverse finding of the Chief Justice was inconsistent with the facts as resolved between counsel.

The real difficulty faced by the applicant is the adverse finding to which I have earlier referred. The false statement found to have been made, and the circumstances in

which it was made, demonstrate, in my view, a want of the probity to be expected from a legal practitioner. I also share the view, expressed in the respondent's written reasons for its decision, that the misconduct in business dealings revealed in this case is more relevant to the question of fitness for practise than the manslaughter conviction considered in *Ziems*.

The respondent, in its written reasons, gave careful consideration to the matters personal to the applicant, which were largely reflected in the testimonials tendered. The respondent stated its opinion as to the high standard of probity required from members of the profession and cited passages from *Ziems* in support. It concluded that unfitness to practise had been shown and that a professional sanction was required. A period of three months suspension was decided upon as appropriate.

I have already said enough to reveal that I share the opinion reached by the respondent. My only difficulty is with the fixed period of suspension. The respondent's decision is based, as it must be, on a finding that the applicant is not a fit and proper person to practise law. *Rogerson v The Law Society NT* (supra) at p 369. In such a case it is , in my view, a better course to cancel the certificate and allow the person affected to re-apply at a subsequent time and offer positive evidence that his re-admission is warranted. See the remarks to this general effect by Dixon CJ in *Ziems* at p 286.

The difficulty about the course adopted here is that it appears to assume that after the expiration of three months the applicant's fitness for practise will have been restored. The foundation for such an assumption is not clear to me.

However, on the present application, the alternatives open to the Court are to revoke the respondent's decision or to refuse the application. For the reasons I have sought to express, I would refuse the application for revocation.
