SUSPENSION OF DISCHARGE FROM BANKRUPTCY – A WELCOME CLARIFICATION?

Richard Ascroft, Guildhall Chambers, 11th May 2017

Introduction

1. On 9 February 2016 District Judge Payne (sitting in the County Court at Oxford) made an order suspending Mrs Hilsdon's otherwise automatic discharge from bankruptcy. The order was expressed thus:

> The relevant period for the purposes of s 279 of the Insolvency Act 1986 and Schedule 19 to the Enterprise Act 2002 shall cease to run until such time as the Trustee in Bankruptcy confirms to the court by filing a report that the bankrupt has complied with [her] duties and obligations or until the court orders otherwise.

2. Orders in this form (or similar variants) have been routinely made in courts up and down the country.

3. On 4 May 2017 Nugee J allowed an appeal by the bankrupt and substituted a fixed period of suspension of 6 months, to run from the date when Mrs Hilsdon would otherwise have had her automatic discharge (20 February 2016).

4. The basis upon which the appeal was allowed was a failure by the court below to consider the range of orders that could have been made under s 279(3) of the 1986 Act ("the Act") in response to Mrs Hilsdon's acknowledged failure to comply with her statutory obligations.

The Statutory Scheme

5. The duration of an individual's bankruptcy is governed by section 279 of the Act which provides as follows:

> (1) A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences.
>
> (2) [repealed]
>
> (3) On the application of the official receiver or the trustee of a bankrupt's estate, the court may order that the period specified in subsection (1) shall cease to run until-
>
> (a) the end of a specified period, or
>
> (b) the fulfilment of a specified condition.
>
> (4) The court may make an order under subsection (3) only if satisfied that the bankrupt has failed or is failing to comply with an obligation under this Part.

(5) In subsection (3)(b) "condition" includes a condition requiring that the court be satisfied of something.

(6) In the case of an individual who is made bankrupt on a petition under section 264(1)(d)[1]-

(a) subsections (1) to (5) do not apply, and

(b) the bankrupt is discharged from bankruptcy by an order of the court under section 280.

(7) This section is without prejudice to any powers of the court to annul a bankruptcy order.

6. For the purposes of subsection (1), a bankruptcy commences when the relevant bankruptcy order is made: s 278(a) the Act.

7. The effect of discharge from bankruptcy is summarised in s 281(1) of the Act as follows:

(1) Subject as follows, where a bankrupt is discharged the discharge releases him from all the bankruptcy debts, but has no effect-

(a) on the functions (so far as they remain to be carried out) of the trustee of his estate, or

(b) on the operation, for the purposes of the carrying out of those functions, of the provisions of this Part;

and in particular, discharge does not affect the right of any creditor of the bankrupt to prove in the bankruptcy for any debt from which the bankrupt is released.

8. Rule 10.142 of the Insolvency Rules 2016 ("the Rules") sets out the procedure applicable to suspension applications under s 279(3). The appeal in *Weir v Hilsdon* fell to be considered under the Insolvency Rules 1986.

9. Rule 10.143 of the Rules makes provision for a bankrupt whose discharge has been suspended under s 279(3) of the Act to apply to the court for the suspension order to be discharged.

10. The principal obligations on a bankrupt under Part IX of the Act are:

(1) to give the official receiver such inventory of his estate and such other information, and to attend on the official receiver at such times, as the official receiver may reasonably require (s 291(4));

[1] A petition presented, following the making of a criminal bankruptcy order, by the Official Petitioner or by any person specified in the order in pursuance of section 39(3)(b) of the Powers of Criminal Courts Act 1973.

(2) to assist the trustee to take possession of all books, papers and other records which relate to the bankrupt's estate or affairs and which belong to him or are in his possession or under his control (s 311(1));

(3) to deliver up to the trustee possession of any property, books, papers or other records of which he has possession or control and of which the trustee is required to take possession (s 312(1)).

11. More generally, the bankrupt is also subject to the obligations imposed by s 333(1), which are to:

(a) give to the trustee such information as to his affairs,

(b) attend on the trustee at such times, and

(c) do all such things

as the trustee may for the purpose of carrying out his functions under any of this Group of Parts reasonably require.

12. Section 333(2) of the Act is also relevant in this context:

Where at any time after the commencement of the bankruptcy any property is acquired by, or devolves upon, the bankrupt or there is an increase in the bankrupt's income, the bankrupt shall, within the prescribed period, give the trustee notice of the property or, as the case may be, of the increase.

13. The prescribed period for the purposes of s 333(2) is within 21 days of the bankrupt becoming aware of the relevant facts: see r 10.125 of the Rules.

14. The duties in s 333(1) and (2) survive discharge. There are, however, no criminal sanctions for non-compliance post-discharge: see s 350(3) the Act and *Shierson v Rastogi (a bankrupt)* [2007] BPIR 891 at [7].

15. Whether the bankrupt "is failing" to comply etc (s 279(3)) falls to be judged at the date of the hearing of the application: *Hellard v Kapoor* [2013] BPIR 745 at ¶ 11. A bankrupt will not "fail to comply" if he or she has done all that could reasonably be done to fulfil those obligations: *Keely v Bell* [2016] EWHC 308 (Ch); [2016] BPIR 653 at [10 b]. As to whether the official receiver (or trustee as the case may be) should be confined to the grounds set out in the evidence filed with the application, see *Bowles and anr v Trefilov* (unrep, 29.04.16., Ch Reg Baister) at [35]) and now *Weir v Hilsdon* (supra) at [56] to [60].

16. A failure (past or continuing) by the bankrupt to comply with his or her obligations under Part IX of the Act – s 279(4)), is the jurisdictional threshold for suspension; once that is met, the court must then consider how to exercise its discretion (*Bowles v Trefilov* (supra) at [33]) whether to make a suspension order and, if so, in what form.

Orders for suspension - fixed period

17. Examples of the imposition of orders for suspension from discharge for a fixed period include *Shierson v Rastogi* (supra) (1 year from conclusion of pending criminal trial for conspiracy to defraud – a course proposed by the bankrupt's joint trustees[2]), *Hellard v Kapoor* [2013] BPIR 745 (1 year from date of otherwise automatic discharge), and *Keely v Bell* [2016] EWHC 308 (Ch); [2016] BPIR 653 (1 year from date of otherwise automatic discharge).

18. In neither *Rastogi* nor *Kapoor* was there any apparent consideration by the court of a different form of order. In *Keely* Norris J. (dealing with an appeal from an order for suspension made by a district judge) said this (at [41]):

> The District Judge then considered that a fixed-term and not a conditional suspension was required. I would reach the same view as the District Judge. A conditional order is appropriate where there are one or two specific shortcomings the significance of which can be appreciated and the outcome of which (if remedied) can be predicted. Where the proven breaches of statutory obligation are more in the nature of examples of thoroughgoing non-cooperation (as here) then a suspension for a period is appropriate. Mr Keely's case plainly falls into the latter category.

19. Where discharge from bankruptcy is suspended for a specified period, the trustee (or official receiver) is not precluded from making a further application for suspension (assuming the relevant bankrupt remains undischarged and the later application is based on continuing or further non-compliance): *Harris v Official Receiver* [2016] EWHC 3433 (Ch).

20. It is respectfully submitted that the same approach should apply where the period of suspension is fixed by reference to fulfilment of specified conditions (s 279(3)(b) of the Act). Put shortly, for so long as the relevant bankrupt remains undischarged, he or she is (or ought to be) at risk of further suspension in consequence of any additional non-compliance with his or her statutory obligations.

21. Neither the Act nor the Rules specifies a minimum or maximum period of suspension for the purposes of s 279(3)(a). Although the court's power to suspend discharge is penal in character (see *Bramston v Haut* [2012] ref at [51] per Kitchen LJ), it is submitted that the one year period for bankruptcy referred to in s 279(1) is likely to act as a de facto outer limit (subject to the power to re-apply in the face of continued non-compliance). This approach is echoed in the cases

[2] See judgment at [63]. For the relief originally sought, see [26].

involving wholesale non-cooperation (e.g. *Keely*). Moreover, the imposition of a significantly longer period runs the risk of usurping the role of the Bankruptcy Restrictions Order regime[3].

Fulfilment of specified condition

22. A suspension order framed by reference to fulfilment of a condition or conditions can take an infinite number of forms. The specified condition may be the provision of particular outstanding documents or pieces of information. Not infrequently, however, the relevant condition will be expressed in more open ended terms, typically involving the bankrupt's trustee reporting to the court that he or she is satisfied with the bankrupt's co-operation.

23. Thus, in *Mawer v Bland* [2013] EWHC 3122 (Ch); [2015] BPIR 55, the suspension order made at first instance was in these terms:

    1. The period for the discharge of the respondent from bankruptcy shall continue to be suspended and shall not run again until [the trustees] have or either of them has confirmed to the Court in writing that the respondent has properly and fully co-operated with the [trustees] in all respects required of him.

    2. The trustees are to file and serve a report confirming such co-operation within 14 days of being satisfied thereof, and shall specify therein the date from which the discharge period has run again and the consequential date of the respondent's discharge.

24. On appeal Rose J ultimately upheld the form of order (which was acknowledged by the bankrupt's counsel to be in common usage), having been persuaded that in the event of dispute about the extent of co-operation, it was open to the bankrupt to apply to the court (under a liberty to apply provision in the order or under what is now 10.143 of the Rules. As Rose J recorded in her judgment (at [21]), however, she was initially attracted by the bankrupt's counsel's proposal that the suspension order should have been fixed for a specific period or the condition to be fulfilled to be much more specific.

25. In *Wilson v Williams* [2015] EWHC 1841 (Ch); [2015] BPIR 1319 the bankrupt appealed against an order made under s 279(3) suspending his otherwise automatic discharge until:

    such time [the trustee] prepares a report and files it with the Court confirming [the bankrupt] has complied with his duties and obligations to [the trustee's] satisfaction or the Court orders otherwise

26. Counsel for the bankrupt submitted on appeal, among other things, that the order lacked specificity and left the bankrupt at the mercy of his trustee with the prospect that he might be left

[3] A failure to co-operate with the official receiver or trustee which the court is specifically directed to take into account for the purposes of a BRO application: see paragraph 2(2)(m) of Sch 4A to the Act. The minimum duration of a BRO (which gives rise to some of the same disabilities applicable to undischarged bankrupts) is 2 years and the maximum 15 years: para 4(2) of Sch 4A.

an undischarged bankrupt for an indeterminate time, contrary, it was said, to the policy of the Act. The judge (HHJ Behrens) was, like Rose J in *Mawer*, initially attracted to such submissions but again, like Rose J, upheld the form of order. His reasons were:

(1) the absence of any evidence of oppressive conduct by the trustee;

(2) the bankrupt's breach of the statutory duty to co-operate was both significant and serious;

(3) it was impossible to say that the exercise of discretion by the judge below was wrong;

(4) the bankrupt was protected by the ability to apply to the court under the express provisions of the order or under rule 10.143.

Hilsdon v Weir

27. Mrs Hilsdon appealed the suspension order made against her on 8 distinct grounds. The only one on which she succeeded before Nugee J was in respect of the form of order used to effect her suspension (as to which, see paragraph 1 above).

28. The basis upon which the appeal was allowed was the failure of the district judge below to:

(1) take into account the range of orders that could be made under the provision and;

(2) consider whether the Mrs Hilsdon's failings really justified an order in the form made.

29. Those failures meant that the district judge's exercise of discretion was flawed, permitting the appeal court to interfere and exercise the discretion afresh.

30. It is important to understand that Nugee J did not say that the form of order used in the court below was necessarily always wrong in principle (see [91]) and therefore one that ought never to be used.

31. As he explained:

(1) as a matter of language, the order was within the literal terms of s 279(3) (see [92]);

(2) the terms of s 279(5) supported the use of such a form (assuming it was otherwise appropriate on the facts) ([93]);

(3) in a case where the bankrupt is being unco-operative, obstructive, misleading or downright dishonest, there is a real difficulty in framing an order suspending discharge until the bankrupt has answered a specific list of questions, as the trustee may well not know quite what it is that he does not know (the "unknown unknowns") ([96]);

(4) two decisions of the High Court (*Mawer v Bland* and *Wilson v Williams*) had upheld the form of order.

32. It did not, however, follow that the form used below was an appropriate one to make in all cases ([99]).

33. Mr Justice Nugee accepted (at [100]) that it was not only in the interests of bankrupts but also in accordance with the policy of the reforms introduced by the Enterprise Act 2002, that a bankrupt should be able to tell with some precision when his or her discharge will take place, so that he or she can move on and rebuild their financial lives. He went on:

> If the case merits a suspension under s 279(3), a suspension for a fixed period, or until some specifically identified condition has been fulfilled, satisfies that desirable aim. A suspension in the *Mawer v Bland* form does not: for the reasons put forward by [counsel for Mrs Hilsdon][4], I accept that it does have significant adverse consequences for the bankrupt, and puts the bankrupt at the mercy of the trustee, and I accept that under this form of order there is no real incentive on the trustee, after obtaining the order, to pursue enquiries with great diligence, and that leaves the bankrupt suspended for an indefinite period. It is true that the bankrupt always has the option, if the trustee is dragging his or her feet, of applying to the Court, but bankrupts are often obliged to act in person, and that, and the time and costs involved in initiating an application of this sort, means that it is a far from perfect solution.

34. The judge also accepted (at [101]) that routine use of an order in the *Mawer v Bland* form of suspension order acted as a disincentive on the trustee to make progress during the year before automatic discharge takes place.

35. Ultimately, when framing any order for suspension, the court was, said Nugee J, required to strike a balance between the competing considerations of a bankrupt knowing exactly what was required of him or her to obtain discharge and the desirability of preventing bankrupts who were unco-operative, obstructive or downright dishonest from frustrating the legitimate enquiries of trustees seeking to fulfil their functions. Where that balance is to be struck in any given case must depend on the facts ([102]).

36. Without intending to lay down any general principles, Nugee J was of the view that the Court should be hesitant about reaching for the *Mawer v Bland* type order as a routine or standard form ([102]). Where on the spectrum of co-operation any particular bankrupt lies is, according to the judge, of the first importance in deciding what form of order, if any, under s 279(3) is appropriate.

[4] Which drew, in large part, on an article by Philip Patterson, *Indefinite Suspension of discharge from bankruptcy – a worrying trend?* (Insolv. Int. 2016, 29(2), 21-3).

In his judgment, therefore, the Court should always consider whether an order in *Mawer v Bland* form is really justified on the facts of the case, rather than treating it as the default option on an application under s 279(3).

Applications in the future

37. For the future, it is reasonable to assume that *Mawer v Bland* type orders are likely to be reserved for those cases where:

    (1) the relevant bankrupts are guilty of significant non-co-operation, obstruction or dishonesty; and

    (2) the official receiver or trustee (as the case may be) is unable, because of the bankrupt's conduct, to state with any confidence at the hearing of the application what specific information is required to constitute full compliance.

38. Even then, such cases are now more likely to be met by suspension for a fixed period which, if it turns out to be inadequate, can be the subject of extension on any renewed application. Those acting for trustees or the official receiver may consider it prudent to seek in such an order express liberty to apply (prior to expiration of the relevant period) for further suspension respect of any continuing non-compliance.

39. In every case it will be necessary for the Court to form some assessment of the seriousness of any non-compliance by the bankrupt with his or her statutory obligations in order for it to:

    (1) decide whether suspension is properly warranted;

    (2) consider how any suspension order should be framed (see especially r 10.142(9)(f) of the Rules[5]).

40. Even if the bankrupt acknowledges non-compliance in general terms (as Mrs Hilsdon had before the district judge), identification of the extent of non-cooperation should be undertaken in order to comply with the requirements of r 10.142(9)(f) of the Rules.

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[5] This requires any order for suspension to include a statement of the respects in which the bankrupt has failed to comply with his or her obligations under the Act.