Neutral Citation Number: [2024] EWHC 1001 (Ch)

Case No: BR-2017-000595

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 01/05/2024

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

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Between:

BORIS FRANZ BECKER (A BANKRUPT)	**Applicant**
- and -	
(1) MARK CHRISTOPHER FORD	**Respondents**
(2) FINBARR THOMAS O'CONNELL	
(as Joint Trustees of the Bankruptcy Estate of Boris Franz Becker (a Bankrupt))	
(3) THE OFFICIAL RECEIVER	

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LOUIS DOYLE KC (instructed by **LUPTON FAWCETT SOLICITORS**) for the **Applicant**
KATIE LONGSTAFF (instructed by **STEPHENSON HARWOOD LLP**) for the **First and Second Respondents**

Hearing dates: 24 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 1 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. On 15 February 2024 the Applicant, a well-known professional tennis player, made an application to discharge an order made on 3 December 2018 (the "2018 Order"), pursuant to section 279(3) of the Insolvency Act 1986.

2. The Applicant was adjudged bankrupt by court order on 21 June 2017. By Section 279 of the 1986 Act, a bankrupt in England and Wales will be discharged automatically at the end of the period of one year beginning with the date on which the bankruptcy started.

3. The first and second Respondents were appointed joint trustees in bankruptcy of the Applicant on 21 August 2017.

4. Section 279(3) of the 1986 Act permits applications to be made by the official receiver or trustee-in-bankruptcy to suspend the running of time, to prevent automatic discharge at the end of the period of one year.

5. On 31 May 2018 the joint trustees made an application to suspend time from running pursuant to section 279(3) of the 1986 Act. An interim order was made on 18 June 2018 followed in December by the 2018 Order.

6. The effect of the 2018 Order was that Mr Becker would remain subject to the disabilities imposed as a consequence of the bankruptcy order until the suspension on the running of time lifted, and the expiry of the remainder of the one-year period of bankruptcy.

The Application

7. By the application dated 15 February 2024 (the "Application") Mr Becker seeks:

> "An order (compliant with r.10.143(11) of the 2016 Rules) discharging the order made under s.279(3) of the 1986 Act on 3 December 2018 that time ceased to run from that date for the purposes of s.279(1) of the 1986 Act."

8. He further seeks a second order:

> "… under r.12.39(9) of the 2016 Rules that the Settlement Deed dated 15 November 2023 entered into between the Applicant, the First and Second Respondents and another ... must not be made available for inspection without the permission of the court."

9. The joint trustees accede to the second order sought and positively ask for the same relief.

10. The 2018 Order made by Deputy Insolvency and Companies Court Judge Schaffer recites that an order for suspension was sought "on the grounds that he has failed and is failing to comply with his obligations under" the 1986 Act. The operative order states that:

> "The relevant period for the purposes of section 279 of the Insolvency Act 1986 shall cease to run such that the Bankrupt shall not be discharged from bankruptcy:
>
> (a) until the Applicants [the Trustees] certify to the Court that the Bankrupt has complied with his obligations under Part IX of the Insolvency Act 1986; or
>
> (b) until the Court orders otherwise upon the application of either the Applicants or the Bankrupt."

11. Since the making of the 2018 Order Mr Becker has been prosecuted for offences specified in the 1986 Act. The indictment contained 25 charges. He was found guilty of 4 and sentenced to serve 18 months in prison in April 2022. He served a truncated term and was deported from the UK on 15 December 2022 following his release.

12. In November 2023 Mr Becker entered into a settlement agreement with the joint trustees. The parties are contractually bound to keep the terms of the settlement agreement confidential. In open court the joint trustees and Mr Becker explained that the settlement agreement was in respect of post-bankruptcy debts only.

13. At the hearing of the Application made on 15 February 2024, I ordered the suspension of discharge 2018 Order be lifted. The effect of my order is to discharge the bankruptcy of Mr Becker from 27 April 2024.

14. As the hearing was sandwiched between the winding up and the partnership lists, I informed the parties that I would provide my reasons in writing.

Supporting evidence

15. Mr Becker contends that he has complied with his obligations as far as he has been able and has acknowledged his mistakes for which he has paid a heavy price when he was sentenced to prison.

16. In his evidence in support of the Application Mr Becker explains that he had no experience of managing his finances or business affairs as from an early age he had advisors and representatives. He says he relied heavily on advisers and had no reason to believe that he had done anything wrong. He says:

> "The effect of my being made bankrupt was to turn my world upside down. I had no idea as to how I was in the position in which I found myself and I had no idea about the bankruptcy process itself. Again, I was completely reliant on those advising me and I followed what I was told, or at least what I understood I was being told, believing such steps to be in my best interests. With hindsight, I can see, and as has now been explained to me, that some of the advice I was receiving was not only wrong, but wildly so, and provided by individuals who clearly did not have my best interests at heart. This is not to seek to cast blame elsewhere; it is simply a statement of the facts based on my experience… I will say now in evidence that I genuinely did

> not believe at any time that anything I had done was wrong or could lead to me being in breach of the criminal law. If I had been so aware, then I would never have conducted myself so. I must, however, as I repeat below, accept the findings of the English courts against me and the consequences that have followed."

17. He explains that he has lost his assets and reputation, that he was unable to collate all the information asked for by the joint trustees and had no funds for legal representation. He provides a frank account stating that he should have worked with the joint trustees rather than oppose them. With the guidance of different advisors he understands his obligations and has entered into the settlement agreement. He explains:

> "In the course of my incarceration, and subsequently, my new solicitors continued to work with the Trustees and their solicitors in seeking to resolve all matters that remained outstanding in my bankruptcy… The purpose of the Settlement Deed was to resolve, so far as was perceived as possible, all outstanding matters that remained live or potentially live in my bankruptcy"

18. His sworn evidence is that:

> "I am simply incapable of doing more than I have done in terms of accounting for and delivering up assets, in particular the Trophies."

19. I have been given no reason why I should reject his statement.

20. Mr Ford provides a witness statement on behalf of the joint trustees. He explains that Mr Becker had entered an income payments agreement on 27 April 2018 which was to expire on 25 March 2021. Not all the payments were made. The arrears as at 30 June 2023 were considerable. Failed and misguided applications that were made by Mr Becker in June and July 2018 led to a climb down and an adverse costs order.

21. The joint trustees were successful in realising a number of assets that vested in the estate including 81 items of memorabilia. The recoveries were insufficient to pay the creditors in full. This is particularly the case since one individual creditor has claimed a significant sum in the bankruptcy. Mr Becker describes this creditor as:

> "a Swiss based entrepreneur with whom I was involved commercially over a period of ten years."

22. The joint trustees are "neutral" on the Application. However, Mr Ford says in his witness evidence:

> "Whilst the Trustees are not aware of any specific outstanding issues in terms of his statutory obligations to the Trustees, particularly given Mr Becker's past conduct as a bankrupt culminating in his imprisonment…they do not feel able to positively confirm that he has complied with his obligations

> under Part IX of the Insolvency Act 1986, either to the best of his abilities or otherwise."

23. I commented at the hearing that I found this statement curious. The joint trustees should know if there are specific outstanding issues. The reason relied on for not being able to confirm Mr Becker's compliance, rests on his "past conduct culminating in his imprisonment". The position taken by the joint trustees does not sit well with the statement that they are unaware of a failure to comply with any obligation. The fact that his past conduct led to a term in prison is not a relevant factor to take into account when deciding if Mr Becker has complied with his obligations.

24. The joint trustees would have done better if they had asked themselves whether there was sufficient evidence to succeed on an application to suspend discharge, by reference to section 333 of the 1986 Act namely, (i) has the bankrupt failed to provide information to the joint trustees that has been reasonably required; (ii) has the bankrupt failed attend on the trustee at any time when reasonably asked to do so; (iii) has the bankrupt failed to do 'all such other things' as the joint trustees may for the purposes of carrying out their functions under Part IX of the 1986 require. This may have enabled them to objectively view the current state of affairs. The answer to the question would clearly be answered in the negative.

25. There is no doubt that Mr Becker made poor choices in the past, but Mr Becker's past conduct should not be held against him indefinitely.

26. There has been no evidence filed and served by or on behalf of the official receiver.

27. There is one unresolved matter, namely the location of certain trophies that are missing but this is provided for within the settlement deed. Mr Becker has confirmed that he has no further information relating to their location. He has also confirmed that he would have no objection to the trophies being minted, turned into, attached to or monetised as non-fungible tokens. As the joint trustees are concerned to realise and distribute assets this offer provides a commercial outcome.

Legal framework

28. Section 279 in Part IX of the 1986 Act concerns the duration of a bankruptcy:

> "(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) If before the end of that period the official receiver files with the court a notice stating that investigation of the conduct and affairs of the bankrupt under section 289 is unnecessary or concluded, the bankrupt is discharged when the notice is filed.
>
> (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."

29. In *Shierson and Birch v. Rastogi (A Bankrupt)* [2007] EWHC 1266 (Ch), [2007] BPIR 891, Morritt C explained the consequences of discharge [7]:

> "A discharge from bankruptcy has various consequences. It releases the bankrupt from the debts prescribed in section 281 of the Insolvency Act 1986 (IA 1986). It removes the disqualification imposed by section 11 of the Company Directors Disqualification Act 1986 from being concerned in the promotion, formation and management of a company without the leave of the court. Acts or omissions of the bankrupt occurring after discharge cannot constitute a bankruptcy offence under Chapter VI, see section 350(3) of the IA 1986. Accordingly a bankrupt may, after his discharge, obtain credit or engage in business, see section 360 of the IA 1986. But discharge from bankruptcy does not affect the continuing obligations of a bankrupt to assist the official receiver or the trustee in bankruptcy with the provision of information and the recovery of assets. Those are the obligations on which the trustees rely in this application."

30. The reference to a bankruptcy offence is a reference to offences prescribed by sections 353 to 356 of the 1986 Act which include a failure to deliver up possession property comprised in the bankrupt's estate as is in his possession or control. The Chancellor explained the purpose of the power to suspend discharge [65]:

> "It is clear from the terms of s 279 that postponement of discharge is linked to a failure to comply with the obligations imposed on a bankrupt by Part IX. But is the purpose of the power to postpone a discharge to provide an incentive to full compliance? Or is it that the disabilities arising from being an undischarged bankrupt should, in the public interest, continue until there has been full compliance? I doubt whether, on the facts of this case, it is necessary to reach a final conclusion on those questions. But in my view the purpose of the power is the latter, even though its effect may be to achieve the former. Were it otherwise I would have expected Parliament to have made discharge conditional on full compliance."

31. In my view the authorities demonstrate that the purpose of the power is primarily to achieve compliance, and compliance is in the public interest. It may be the case that an individual will be incentivised to cooperate because of the suspension. Suspension operates in two ways. First, suspension prolongs the availability of a penal power, where the threat of criminal proceedings hangs over the head of a miscreant bankrupt. For this reason a suspended order should be made sparingly and for the purpose of aiding the office holder to fulfil the statutory obligations of investigating, getting-in, realising and distributing assets for the benefit of the debtor's creditors in accordance with Chapter IV of the 1986 Act.

32. Secondly, there are other restrictions imposed by the 1986 Act that restricts the liberty of a bankrupt. These may or may not affect a debtor's life choices. I have in mind a restriction that prevents a bankrupt serving as a member of Parliament. The life-style restrictions may incentivise a debtor to cooperate and at the same time the availability of a criminal sanction provides the office holder with teeth to compel: *Bramston v. Haut* [2013] EWCA Civ 1637, [2013] BPIR 25 at [51].

33. *In Bramston v Haut* the Court of Appeal heard a challenge to an order made by Arnold J (as he was then) who had made a suspension of discharge order for a fixed period of six weeks to permit the debtor to put proposals to creditors for the purpose of agreeing a voluntary arrangement. The question for the Court was whether the reason for the suspension was one that was permitted by section 279(3) of the 1986 Act. Some useful observations that relate to this case are as follows [47]:

    33.1. "the purpose of a suspension under section 279(3) is plainly connected to a failure by a bankrupt to comply with his obligations under Part IX of the 1986 Act."; and

    33.2. "section 279(4) expressly provides the court may not make an order unless it is satisfied that the bankrupt has failed or is failing to comply with an obligation under Part IX".

34. In *Keely v Bell* [2016] EWHC 308, [2016] BPIR 653, an order of bankruptcy was made against Mr Keely for failing to pay a costs order arising from a family will dispute. The pattern of the bankrupt's actions are not unfamiliar to this court. Norris J said [4, 36]:

> "If a bankrupt had set about being deliberately obstructive it is difficult to see what greater obstacles he could have placed in the way of his trustee than those that apparently arose out of Mr Keely's circumstance.
>
> Mr Keely was in breach of his statutory obligations: on any objective view he had not done all that could reasonably be done to enable the trustee to ascertain the value of the principal asset in the bankruptcy estate. He had simply prioritised his own personal arrangements and self-evidently sought to exert control over the administration of his affairs. He completely overlooked that the property was in fact vested in the trustee for the benefit of the creditors in the bankruptcy estate. He seems to have regarded his bankruptcy as simply another front to his war with other members of his family."

35. The test of compliance deployed by Norris J was whether, objectively, the bankrupt had done all that might reasonably be done to provide the information.

36. I was taken to *Weir v Hilsdon* [2017] BPIR 1088 for the proposition that when making an order for suspension under section 279(2) of the 1986 Act a bankrupt should be able to understand what he or she has to do in order to obtain discharge.

37. I was also taken to *Brittain v Ferster* [2022] EWHC 1060 which concerned the making of an order under section 279(3) of the 1986 Act. The case was complex in that cross-examination had been ordered to determine whether the bankrupt had done all that might

reasonably be done to provide information. Expert evidence was heard on a mental health issue and the trustee in bankruptcy had sworn 10 witness statements. The reported case provides a useful summary of principle and an example of how the court approaches the making of an order under section 279(3) of the 1986 Act.

38. Taken together the authorities demonstrate the following practice:

    38.1. As the court is to be satisfied that there has been non-compliance by a bankrupt to suspend automatic discharge, so it is to be satisfied that the bankrupt has cooperated to merit a finding that there has been cooperation consistent with the obligations imposed by the 1986 Act.

    38.2. Ordinarily the court will give reasonable weight to a report of the official receiver or trustee. They are officers of the court, have knowledge of the bankruptcy and can inform the court of the bankrupt's conduct. As HHJ Halliwell remarked in *Brittain v Ferster* [55], the court can expect an office-holder to exercise her functions consistently with her duties to the court.

    38.3. The court may find that the bankrupt has not completely fulfilled his obligations. In these circumstances the court must understand the failure and the impact the failure(s) have on the ability of the officeholder to carry out his or her obligations. The courts recognise that there is a 'spectrum between bankrupts who are being as difficult as possible and doing everything to frustrate the trustee's inquiries, and those who are in the main cooperative and seeking to provide information to the trustee but have nevertheless failed to comply properly with their obligations': *Hilsdon v Weir* [102]. If the failure falls into the latter category it is axiomatic that the court will ask whether the failure is material and if the cost of remaining bankrupt is so disproportionate that the suspension should be lifted. This is because even after discharge, a bankrupt still must provide information to the trustee. The difference is that the restrictions are lifted and criminal sanctions for non-compliance are no longer applied.

    38.4. To the same end, it should be borne in mind that the legislation does not impose a requirement, at least not expressly, that discharge is conditional on full compliance: *Shierson and Birch v. Rastogi (A Bankrupt)* [65].

    38.5. It is sufficient, if the debtor can demonstrate that, objectively viewed, he or she has done all that he or she could reasonably do in the circumstances of the case in fulfilling any outstanding obligation previously identified: *Keely v. Bell* [10(b)], [20], [30] and [36].

39. I add that a useful exercise for an office holder to undertake when asked to support or resist an application such as the one before the court, is to ask themselves if there remains sufficient evidence to succeed on an application to suspend discharge.

40. Lastly, I have considered the role of discretion on an application to lift suspension. The starting point is that there is a discretion to be exercised when making an order to suspend time from running. This much is clear from the language used in section 279(3). In *Hildson v Weir* Nugee J said [18]:

> "… a Court considering an application has first to be satisfied that the bankrupt has failed or is failing to comply with a relevant obligation (the jurisdiction stage or threshold question), and then must consider how it is to exercise its discretion (the discretion stage)…"

41. There is no legislative discretion for lifting a suspension ordered by the court. I am not clear of the source of a discretion to exercise when determining an application to lift a suspension order. Nor am I certain that a discretion would serve a purpose. This is because the court is tasked to decide if an applicant has done all that he or she could reasonably do in the circumstances of the case in fulfilling any outstanding obligations. As the existence of a discretion in cases such as this is not an issue before the court, it is best dealt with if and when the issue arises in argument, on another day.

42. I turn to the decision.

Decision

43. The first arm of the 2018 Order allows the joint trustees to certify to the court that Mr Becker has complied with his obligations. As explained above the joint trustees have felt unable to certify compliance, "particularly given Mr Becker's past conduct as a bankrupt culminating in his imprisonment." Mr Becker relies on the second arm of the 2018 Order, asking the court to intervene and order time to start running and his discharge from bankruptcy be ordered.

44. On the spectrum of bankrupts who range from "difficult as possible and doing everything to frustrate the trustee's inquiries" to cooperative, providing information and delivering up assets, Mr Becker clearly falls on the right side of the line.

45. Mr Becker has signed a statement of truth, engaged solicitors to ensure compliance with his obligations and entered a settlement agreement that benefits the joint trustees. I accept his evidence and find that objectively he has done all that he could reasonably do to fulfil his obligations to the joint trustees.

46. If the exercise of discretion is required, I would exercise it in favour of Mr Becker and lift the suspension as it would be perverse to exercise it against Mr Becker given my decision that he has fulfilled his obligations.

47. I am grateful to counsel on both sides for their assistance.