[2019 Gib LR 36]

IN THE MATTER OF VISICK (a bankrupt)

BENADY (as trustee in bankruptcy of VISICK) v. VISICK

SUPREME COURT (Dudley, C.J.): March 29th, 2019

Bankruptcy and Insolvency—bankruptcy trustee—control by court—on challenge under Insolvency Act 2011, s.365(1) to trustee's decision to admit or reject proof of debt, court resolves issue on evidence before it on balance of probabilities—same test applies on challenge under s.370(2) to claim admitted by trustee—court's reluctance to interfere with trustee's business judgment, e.g. on realization of assets, provided rational is not test applied under s.365(1) or s.370(2)

A trustee in bankruptcy applied for directions.

The applicant, as trustee in bankruptcy of the respondent, sought directions in relation to the respondent's bankruptcy pursuant to s.365(2) of the Insolvency Act 2011. The directions sought related to the acceptance or otherwise of proofs of debt from the respondent's brother, mother and former partner. The trustee also sought an extension of the bankruptcy order which would otherwise be automatically discharged pursuant to s.409(1) of the Act on the following day, being the end of the three-year period since the making of the order. In a second application, the trustee also sought permission to serve the earlier application on the creditors in the bankruptcy who had provided a proof of debt.

The respondent's financial affairs were complex and the trustee was not satisfied that the respondent had provided him with all relevant documentation. The trustee alleged that he was being asked to consider claims "against the backdrop of unaudited accounts and . . . accusations that [the respondent] has no compunction in backdating, hiding and falsifying documents in order to ensure that the largest creditors are [the respondent's] family, thereby putting them in a position of absolute control." The trustee had various concerns regarding the purported family creditors.

The respondent submitted that (a) there had been unconscionable delay by the trustee in making the application, it having been filed on the last day of the three-year period when, but for the application, the respondent would have been automatically discharged from bankruptcy; (b) the trustee had not identified the documents or class of documents which he alleged the respondent had failed to disclose; (c) the trustee's suspicions had not been substantiated despite his having three years to reach a

conclusion; and (d) the respondent had not been charged with a bankruptcy offence.

The trustee wished the court to direct him as to accepting or rejecting the claims in a process which would allow the creditors and the respondent to put evidence before the court. The trustee's reason for the application was said to be to ensure fairness to the parties because, if he were to make the determinations, any challenge by a person aggrieved would be by way of a narrow review. That submission was premised on the trustee's interpretation of s.365(1) and s.370(2) of the Act.

> "365.(1) A person aggrieved by an act, omission or decision of a trustee may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the trustee."
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> "370. . . .
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> (2) The Court, on the application of the trustee or, where the trustee declines to make application under this subsection, a creditor, may expunge or amend an admitted claim if it is satisfied that the claim should not have been admitted or should be reduced."

Held, dismissing the application:

Although the court would be very slow to interfere with commercial decisions by a trustee in bankruptcy exercising administrative decisions such as the realization of assets, that was not the test to be applied when reviewing a decision involving competing claims between creditors. When the court had to determine an application under s.365(1) of the Act in respect of a challenge to an admitted or rejected proof of debt, it would not defer to the trustee's business judgment provided only that it was rational. Instead, the court would resolve the issue on the evidence before it on the balance of probabilities. The same test would be applied to a challenge under s.370(2) to a claim which was admitted by the trustee. It would be incongruous to have two distinct tests on what was fundamentally the same issue, namely whether a trustee should accept or reject a claim. There was nothing in the language "if [the court] is satisfied that the claim should not have been admitted" that precluded the court from making such an adjudication on the evidence before it on the balance of probabilities. The trustee's application for directions would therefore be dismissed. It would fall to the trustee to determine the various claims. As the trustee did not pursue the applications for service on the creditors or for an order extending the period of bankruptcy, those applications were dismissed. By virtue of s.490(1) of the Act, the respondent was discharged from bankruptcy (paras. 23–27).

Cases cited:

(1) *Bramston* v. *Haut*, [2012] EWCA Civ 1637; [2013] 1 W.L.R. 1720; [2013] BPIR 25, considered.

(2) *Edennote Ltd.*, *Re*, *Tottenham Hotspur* v. *Ryman*, [1996] 2 BCLC 389; [1996] BCC 718; [1996] T.L.R. 348, considered.

(3) *Mitchell* v. *Buckingham Intl. plc*, [1998] 2 BCLC 369; [1998] BCC 943, followed.

Legislation construed:

Insolvency Act 2011, s.365(1): The relevant terms of this sub-section are set out at para. 21.

s.365(2): "A trustee may apply to the Court for directions in relation to any particular matter arising under the bankruptcy."

s.370: The relevant terms of this section are set out at para. 21.

s.409(1): "[A] bankrupt is discharged from bankruptcy at the end of the period of 3 years commencing on the date of the bankruptcy order . . ."

Insolvency Act 1986 (c.45), s.168(5): The relevant terms of this sub-section are set out at para. 22.

s.303: The relevant terms of this section are set out at para. 21.

s.322(1): The relevant terms of this sub-section are set out at para. 21.

Insolvency (England and Wales) Rules 2016 (S.I. 2016/1024), r.14.8: The relevant terms of this rule are set out at para. 21.

M. Levy and *A. Cleverly* for the applicant;
C. MacEvilly and *N. Gomez* for the respondent.

1 **DUDLEY, C.J.:** By its application notice issued on May 17th, 2018, the applicant ("the trustee") seeks certain directions in relation to the bankruptcy of the respondent bankrupt ("RV") pursuant to s.365(2) of the Insolvency Act ("the Act"). These relate to the acceptance or otherwise of proofs of debt from Jason Visick ("JV"), who is RV's brother; Parvin Tania Visick ("PTV") who is RV's mother; and Emma Visick/White ("EW"), RV's former partner with whom he has three children. The purpose behind the trustee's application is set out in para. 7 of the skeleton argument filed on his behalf:

> "The trustee's intention in seeking directions was to put the evidence that he currently has before the Court, and to allow the various interested parties (most particularly [EW, PTV, JV] and the bankrupt himself) to put any further evidence they have on these issues, before the Court. The Court could then adjudicate on the evidence as best it could, and provide the trustee with guidance and directions as to how he should proceed . . ."

2 Conditional upon the court accepting to adjudicate upon those proofs of debt, the trustee seeks an extension of the bankruptcy order which, but for that application, would by virtue of s.409(1) of the Act have been automatically discharged on May 18th, 2018, being the end of the period of three years from the making of the order.

3 On June 28th, 2018, the trustee issued a second application notice, which his solicitors asked be dealt with without a hearing, in which he sought permission to serve the earlier application on the creditors in the bankruptcy who had provided a proof of debt. That application was not dealt with without a hearing but rather listed for hearing, together with the substantive application.

4 The substantive application was set down for hearing on July 24th, 2018, but on July 11th, 2018 the court entered an order by consent for the hearing to be vacated and relisted for a date not before September 24th, 2018 with the recital to the order reflecting that the trustee had agreed "to a request by the Bankrupt to adjourn the hearing in order to attempt to resolve the issues . . ."

5 Thereafter the matter was set down for hearing on November 2nd, 2018 before Ramagge Prescott, J. However, shortly before the hearing she realized that RV was the son of PTV who had hosted a dinner party which she (and Butler, J.) had attended. In those circumstances she properly requested that the matter be relisted before another judge.

6 For completeness it should be noted that the first skeleton filed on behalf of RV reflects that Adrian Jack, who was formerly a judge of this court and who was the judge that made RV bankrupt on May 18th, 2015 on an unopposed application (through Prudhoe Caribbean, which I understand to be a Turks & Caicos Islands law firm), assisted RV's solicitors when the matter first came before me on November 2nd, 2018. On that occasion, time constraints only allowed me to deal with what in effect was a preliminary point raised on behalf of RV in which reliance was placed upon the doctrine of *lex specialis.* For the extempore reasons given at the time, that submission was misconceived.

7 At the adjourned hearing, Mr. MacEvilly appeared with Mr. Gomez and the submissions on behalf of RV were amplified.

Background

8 Undoubtedly RV's financial affairs are somewhat complex. According to the trustee, he identified that in the five years prior to his bankruptcy, RV, either directly or indirectly, held an interest in 27 companies. He also identified that he had 102 bank accounts either in his name or through companies of which he was the ultimate beneficial owner. In his first affirmation, the trustee asserts that he cannot be satisfied that RV has provided him with all relevant documentation. Those concerns are exacerbated by witness statements made by a former PA and a former employee of RV filed in the English matrimonial proceedings between EW and RV. Moreover, according to the trustee, in a conversation he held on May 5th, 2016 with a director of a company in which RV had an interest, he was told:

> "The way that Richard dressed it up to me was that this bankruptcy was a ploy to sort his divorce out . . . [and to] come out the other end smelling of roses."

As the trustee puts it at para. 52 of his first affirmation, he is being asked to consider claims:

> ". . . against the backdrop of unaudited accounts and . . . accusations that [RV] has no compunction in backdating, hiding and falsifying documents in order to ensure that the largest creditors are Richard's family, thereby putting them in a position of absolute control."

The trustee's specific concerns regarding RV

9 St. Bernard's House—Eris Enterprises Ltd. ("Eris") owns a property in Gibraltar known as St. Bernard's House which is valued at £1.55m. According to the trustee, RV claims that it belongs to PTV, but says that he paid the deposit and serviced the mortgage in lieu of interest repayments on loans she had given to RV and RV's companies. This assertion is made against the backdrop of RV having previously been the sole shareholder in Eris and share transfer forms in favour of PTV dated December 1st, 2013 being filed with Companies House on January 15th, 2015, a week after EW's lawyers had raised the issue.

10 Rock Cottage—according to the trustee, RV owned that property which is located in Europa Road. The net proceeds of £2,002,360 were paid to family and friends, including a payment of £871,490 to PTV. The trustee opines that given the timing of the payments some could constitute a bankruptcy offence.

11 East Timor oil rights—the trustee understands that RV was involved with East Timor oil rights through Minza Ltd., a Jersey company. The trustee has been informed that the company was placed into a creditor's liquidation but has not been provided with any liquidator's report.

12 Inheritance—RV and JV are beneficiaries of the estate of a late uncle. It is unclear from the trustee's affirmation whether the value of the estate was US$240,000 or whether that was the amount which RV was to inherit. In any event, a deed of assignment of September 18th, 2014 and an earlier trust deed of June 6th, 2013 purportedly show that RV assigned his interest in that estate to JV for £62,500.

13 Trust assets—according to the trustee, on March 20th, 2017 he was contacted by Ms. Collins who is a trustee of the South Atlantic One Settlement which is a trust settled by RV's late father. It is the trustee's evidence that Ms. Collins informed him that she had been unsuccessfully trying to be removed as trustee, not least because some time in August 2012 she discovered that HSBC held a badly forged signature for her in their files and that the forgery had come to light after Ms. Collins had

purportedly signed a cheque for £41,500 payable to RV and her real signature did not match the bank's records. RV provided the trustee with a copy of the trust deed which does not show RV to be a beneficiary, although the trustee suspects that he may have been added to the class of beneficiaries. The trustee has sought copies of the trust accounts and supplementary deeds from RV who, it seems, has been unable to obtain them.

The trustee's concerns regarding the purported creditors

JV

14 RV first met Mark Benady, who in due course became the trustee, in April 2015. In their first two meetings, RV provided him with certain details of assets and liabilities but failed to mention any liabilities to JV or PTV. According to the trustee, as regards JV, the only mention was in the debtor's verified list of assets and liabilities, which included the following reference: "Jason Visick: Monies advanced to the debtor over a number of years by way of loans. Total figures to be confirmed." In due course, on June 24th, 2015, the trustee received a claim from JV in the sum of £2,268,106.94.

15 As I understand it, the alleged debt arises as follows:

(i) A loan from JV to RV in 2010 in the sum of £680,000 carrying simple interest at 9.5%. This it is said was paid in part by RV assigning to JV the benefit of the debt owed to him by Eris in the sum of £533,000 leaving an outstanding balance of £147,000. As mortgage payments continued to be paid by RV, the debt owed to JV by Eris also increased. The calculations as to what may be outstanding pursuant to this purported arrangement are somewhat confusing and the trustee also has concerns that there may be an element of double counting by JV. I have not explored the accounting or explored the transaction beyond the trustee's explanation but to my mind there may be an issue as to whether the assignment by RV to JV of Eris' debt was in part satisfaction or by way of security and there is a need to reconcile it with PTV's alleged beneficial ownership of the shares in Eris.

(ii) A further loan in the sum of £1,749,000 (£1,111,022.50 plus interest). This is said to consist of three distinct loans dated February 17th, 2010, May 21st, 2010 and June 28th, 2012. The trustee's affirmation shows that he was provided with advice of debit forms in respect of the first two. The third is said to be a novation of a director's loan from Eris.

16 The trustee's concerns are said to come about as a consequence of what he describes as "the fungible nature of the family's affairs" and what he accepts are unsubstantiated allegations that RV has no qualms falsifying and backdating documents. Notwithstanding, he is of the view that on

the face of it there is a plausible explanation for the debt to JV and in the absence of concrete evidence, other than the lack of evidence as to whether or not payments were made (which to my mind is a significant consideration) his present position is that he has nothing concrete to justify an immediate refusal to admit the claim.

PTV

17 PTV's claim is somewhat simpler. Her claim is for £123,989.94 which is said to be the outstanding balance of a loan arising from a personal guarantee given by RV in respect of a loan between Legal & Commercial Ltd. and Strachan Visick Ltd. which Legal & Commercial Ltd. assigned to PTV and which, according to PTV, has been called in. The trustee made a request for supporting documentation and information to substantiate the claim but received material which he describes as minimal. In the trustee's view, the information and documentation he has is inadequate to allow the claim to be admitted.

EW

18 EW's claim arises from orders made in Family Court proceedings in Manchester. RV challenges her entitlement to claim these sums through the bankruptcy, although according to the trustee the legal advice he has received is to the effect that it is a valid claim. However, there are also potential set-offs arising from certain allegations in relation to EW's involvement in a property known as Braydon Green Farm which, subject to a mortgage, belonged to RV. The allegations made against EW are that she:

(i) sub-let two properties within the farm and retained the rental income;

(ii) refused to give vacant possession of the farm which resulted in a reduced sale price; and

(iii) removed equipment from an equestrian facility at the farm.

The case for RV on the trustee's concerns

19 The submissions advanced on behalf of RV in relation to the trustee's concerns can be summarized shortly. That there has been unconscionable delay by the trustee in making the application, it having been filed on the very last day of the three-year period when, but for it, RV would have been automatically discharged from bankruptcy. That the trustee admits that he merely has "concerns" in relation to lack of disclosure and suspect proofs of debt but that he has failed to identify the documents or class of documents which he alleges RV has failed to disclose. That some of the concerns relate to the actions of creditors and not those of RV. That the

trustee's suspicions have not been substantiated despite his having had three years to reach a conclusion. Significantly, that RV has not been charged, still less convicted, of any bankruptcy offence, notwithstanding that the Royal Gibraltar Police investigated a complaint by EW.

The basis for the application

20 Rather than deal with the claims as provided for by s.369 of the Act, the trustee seeks directions that would lead to the court accepting or rejecting the claims in a process which would allow the various purported creditors and RV to advance their case in adversarial proceedings. The reason underpinning the application is said to be ensuring fairness to the parties because it is said that if the trustee makes a determination, any challenge by a person aggrieved would be by way of a narrow review. That on appeal the test to be applied would be whether the trustee had acted in a perverse, absurd or wholly unreasonable way as opposed to what Mr. Levy describes as a "*de novo* appeal."

21 That submission is premised upon the interpretation which the trustee gives to s.365(1) and s.370(2) of the Act. These sections provide:

> "365.(1) A person aggrieved by an act, omission or decision of a trustee may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the trustee.
>
> (2) A trustee may apply to the Court for directions in relation to any particular matter arising under the bankruptcy."
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> "370.(1) A claim made under section 369 [a claim by an unsecured creditor] may—
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> (a) be amended or withdrawn by the creditor at any time before the trustee has admitted it; and
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> (b) be amended or withdrawn by agreement between the creditor and the trustee at any time after the trustee has admitted it.
>
> (2) The Court, on the application of the trustee or, where the trustee declines to make application under this subsection, a creditor, may expunge or amend an admitted claim if it is satisfied that the claim should not have been admitted or should be reduced."

For its part, the English Insolvency Act 1986 ("the English Act") has a provision equivalent to our s.365 albeit one couched in slightly different language, it provides:

> "**303 General control of trustee by the court.**
>
> (1) If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an

application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit.

(2) The trustee of a bankrupt's estate may apply to the court for directions in relation to any particular matter arising under the bankruptcy."

Mr. Levy submits that the English Act applies a very different regime in relation to challenging the admission or rejection of a proof of debt in that s.322(1) of that Act provides:

"Subject to this section and the next, the proof of any bankruptcy debt by a secured or unsecured creditor of the bankrupt and the admission or rejection of any proof shall take place in accordance with the rules."

In turn the English Insolvency (England and Wales) Rules 2016 at r.14.8 provides:

"14.8.—(1) If a creditor is dissatisfied with the office-holder's decision under rule 14.7 in relation to the creditor's own proof (including a decision whether the debt is preferential), the creditor may apply to the court for the decision to be reversed or varied.

(2) The application must be made within 21 days of the creditor receiving the statement delivered under rule 14.7(2).

(3) A member, a contributory, any other creditor or, in a bankruptcy, the bankrupt, if dissatisfied with the office-holder's decision admitting, or rejecting the whole or any part of, a proof or agreeing to revalue a creditor's security under rule 14.15, may make such an application within 21 days of becoming aware of the office-holder's decision.

(4) The court must fix a venue for the application to be heard."

Mr. Levy submits that we do not have an avenue to challenge decisions of a trustee admitting or rejecting proofs of debt equivalent to the English s.322, whilst our s.365(1) has to be afforded the same interpretation as s.303(1) of the English Act. As regards the latter, he relies upon English authorities which support the proposition that the courts will generally not intervene unless the decision under review is unreasonable. In *Bramston* v. *Haut* (1), Kitchin, L.J. (with Arden, L.J. and Rix, L.J. agreeing) said ([2012] EWCA Civ 1637, at para. 68):

"The court is properly reluctant to interfere with the day to day administration by a trustee of the bankruptcy estate because, as Harman J explained in *Re a debtor; ex parte the debtor v Dodwell*

> *(the trustee)* [1949] Ch 236 at 241, administration would be impossible if the trustee had to answer at every step to the bankrupt for the exercise of his powers and discretions in the management of and realisation of the property. So also in *Re Edennote Ltd* [1996] 2 BCLC 389 this court explained (at 394) that, fraud and bad faith apart, the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it."

And later (at para. 69):

> ". . . I believe the test which must in general be satisfied was correctly described by Registrar Baister in these terms in *Osborne v Cole* [1999] BPIR 251 at 255:
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> > 'It follows that it can only be right for the court to interfere with the decision the official receiver has taken if it can be shown he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way.'"

22 However, the authorities show that that approach is not one of universal application to all decisions by a liquidator or trustee in bankruptcy. Since the conclusion of the hearing, in a wholly unrelated matter, I was referred to *Mitchell* v. *Buckingham Intl. plc* (3). And when an embargoed draft of this judgment was made available to counsel, they were given the opportunity to provide short written submissions on its applicability in the present case. In *Mitchell*, the English Court of Appeal considered s.168(5) of the English Insolvency Act 1986 which is in very similar terms to s.303(1) of the same Act and our s.365(1). Section 168(5) provides:

> "(5) If any person is aggrieved by an act or decision of the liquidator, that person may apply to the court; and the court may confirm, reverse or modify the act or decision complained of, and make such order in the case as it thinks just."

The analysis in the judgment of the court delivered by Robert Walker, L.J. can be discerned from the following passages ([1998] B.C.C. at 960 and 961):

> "Mr Hollington submitted that Harman J was wrong in applying the test in Leon v York-O-Matic Ltd and Re Edennote Ltd. Both those cases were concerned with decisions taken by liquidators as to the realization of assets of the company (in one case a chain of launderettes, in the other a right of action for damages for breach of contract) for the benefit of the general body of unsecured creditors.

They were therefore concerned with practical decisions (albeit important ones) as to valuation and disposal, not decisions involving the exercise of judgment as between different creditors' competing claims . . .

In our judgment Mr Hollington's submissions are right on this point. When liquidators are exercising their administrative powers to realise assets, the court will be very slow to substitute its judgment for the liquidators' on what is essentially a businessman's decision (see Re Edennote Ltd at p. 722). All the cases referred to by Nourse LJ on the point (from *Re Peters, ex parte Lloyd* (1882) 47 LT 64 to *Harold M Pitman & Co v Top Business Systems (Nottingham) Ltd* (1985) 1 B.C.C. 99,345) are concerned with decisions as to the disposal of assets. In this case, by contrast, when the provisional liquidators launched their s. 304 petition, they did so for the same purpose as they might (in times when there was a lower level of comity in cross-border insolvency) have sought an anti-suit (or anti-execution) injunction from the English court: see Re Vocalion (Foreign) Ltd [1932] 2 Ch 196 and the earlier cases there cited. That is eminently a matter for the Companies Court, or for liquidators acting under the control of the Companies Court. It is not a matter for the liquidators to decide at their own discretion in the way in which they might take decisions as to the disposal of their company's assets."

23 As I understand it, *Mitchell* is authority for the proposition that the *Edennote* test (*Re Edennote Ltd*., *Tottenham Hotspur* v. *Ryman* (2)) is applicable for justifying interference with commercial decisions by a liquidator or a trustee in bankruptcy exercising administrative decision such as the realization of assets. But it is not the test to be applied when reviewing a decision involving competing claims between creditors. In my judgment, it follows that in the event that the court were to determine an application under s.365(1) in respect of a challenge to an admitted or a rejected proof, it would not apply the *Edennote* approach and defer to the trustee's business judgment provided it is rational. Instead, the court would resolve that issue on the evidence before it on the balance of probabilities.

24 As regards s.370(2) for the trustee, it was said that there was no authority which assisted in its interpretation and it was submitted that on a proper construction it requires a creditor to show that the trustee was "wrong" to admit the debt in the sense that it was irrational and that this fell short of a right of appeal.

25 Section 370(2) provides a route through which to challenge a claim which is admitted by a trustee as opposed to one which is rejected. The only provision I have been referred to providing an avenue by which to challenge the latter is s.365(1). In my judgment it would be wholly

incongruous for there to be two distinct tests on what is fundamentally the same issue, namely, should a trustee admit or reject a claim. Moreover, there is nothing in the language "if [the court] is satisfied that the claim should not have been admitted" that precludes the court from making such an adjudication on the evidence before it on the balance of probabilities.

26 For these reasons I dismiss the application for directions and it will therefore fall upon the trustee to determine the various claims and either admit or reject them. As an aside, I would add that in my experience, when determining whether or not a transaction is genuine, its underlying commercial basis and establishing a money trail are essential considerations.

27 Counsel for the trustee indicated that should the application for directions be dismissed he was instructed not to pursue the applications for service on creditors who had provided a proof or for an order extending the period of bankruptcy, those applications are therefore also dismissed. It therefore follows that by virtue of s.409(1) of the Act, RV stands discharged from bankruptcy.

28 Orders accordingly and I shall hear the parties as to costs.

Order accordingly.