**[2021 Gib LR 141]**

# IN THE MATTER OF THE BANKRUPTCY OF KING

# HYDE and LAVARELLO (as joint trustees of KING) v. KING

SUPREME COURT (Ramagge Prescott, J.): April 29th, 2021

2021/GSC/07

*Bankruptcy and Insolvency—discharge—non-discharge application—court only to order cross-examination of bankrupt if necessary for fair disposal of application by trustees in bankruptcy that bankrupt not entitled to automatic discharge—cross-examination not permitted where documentary evidence sufficient*

Trustees in bankruptcy applied to cross-examine a bankrupt.

The applicants were the trustees in bankruptcy of the estate of the respondent. In June 2020, they applied for an order pursuant to s.409(2)(c) of the Insolvency Act 2011 that the respondent was not entitled to an automatic discharge of the bankruptcy order and, in the alternative, pursuant to s.409(2)(a), that the bankruptcy order be subject to a three-year extension ("the non-discharge application"). On the return date, the court approved a consent order issuing directions. There was no provision in that order for the cross-examination of the respondent nor was such an application then before the court.

Following service of the respondent's statement of assets and liabilities, the trustees in bankruptcy served the respondent with a lengthy questionnaire. The respondent subsequently filed an affidavit to explain why he refused to answer the questions in the questionnaire. The trustees in bankruptcy filed an application seeking permission to cross-examine the respondent for the purposes of their application for an extension of the bankruptcy.

The applicants submitted that the court had jurisdiction to direct cross-examination in the course of bankruptcy proceedings but the respondent submitted that such a discretion should be sparingly exercised and that it was not appropriate in the present case.

**Held,** dismissing the application:

The court would only depart from the usual procedure and order cross-examination if satisfied that it was necessary for the fair disposal of the non-discharge application. If the trustees in bankruptcy were able to

evidence the alleged failures of the respondent upon the documentary evidence before the court, cross-examination could not be justified. It was difficult to understand precisely what aspect of the respondent's behaviour prompted the cross-examination application. The non-discharge application appeared to be premised on the respondent failing to comply with his obligations under the Insolvency Rules and failing to disclose particulars of his assets, liabilities and income. It therefore potentially related to the whole of the respondent's conduct during the bankruptcy. Whilst in principle such extensive cross-examination was permissible, before sanctioning it the court must be persuaded that the paper trail alone would not show the respondent's failures and that cross-examination was therefore necessary. The grounds upon which cross-examination was claimed to be necessary had not been identified and evidence in support of the request to cross-examine had not been forthcoming. In the circumstances, the court could not be satisfied that cross-examination was necessary for a fair disposal of the case and the application would therefore be dismissed (paras. 15–21).

**Cases cited:**
(1) *Highberry Ltd.* v. *Colt Telecom Group plc*, [2002] EWHC 2503 (Ch); [2003] 1 BCLC 290, considered.
(2) *Phillips* v. *Symes*, [2003] EWCA Civ 1769, referred to.

*C. Salter* and *A. Cardona* (instructed by Phillips Barristers and Solicitors) for the applicants;
*S. Davies*, *Q.C.* with *S. Catania* (instructed by Attias & Levy) for the respondent.

1 **RAMAGGE PRESCOTT, J.:** This is an application by the trustees in bankruptcy ("the joint trustees") of the estate of the respondent for an order that they be permitted to cross-examine the respondent for the purposes of their application that the respondent is not entitled to an automatic discharge of the bankruptcy order made against him.

**Background**

2 By way of summary I adopt the brief history as set out by Mr. Lavarello in his preliminary report of January 8th, 2018 which reads:

> "On 27 January 2014, Adrian Hyde was appointed the Special Administrator of Advalorem Value Asset Fund Limited ('Advalorem') by the Supreme Court of Gibraltar. The appointment followed a Financial Services Commission investigation which found that Advalorem had misappropriated more than £7,000,000 of investments from UK pension schemes.
>
> Investigations into Advalorem revealed that the Bankrupt had benefited from these misappropriated funds. Accordingly, Advalorem commenced

proceedings against the Bankrupt for dishonest assistance, knowing receipt and unlawful means conspiracy. A freezing injunction was also obtained against the Bankrupt (which to date the Bankrupt has failed to comply with).

On 7 April 2016, Advalorem obtained default judgment against the Bankrupt in the sum of £6,129,988 plus interest and costs.

On 7 February 2017, Advalorem served a statutory demand on the Bankrupt and an application for a bankruptcy order was issued on 5 June 2017 in the Supreme Court of Gibraltar.

On 31st July 2017, a bankruptcy order was made against the Bankrupt and we were appointed Joint Bankruptcy Trustees [reported at 2017 Gib LR 206]."

On June 1st, 2020, the joint trustees filed an application ("the non-discharge application") for an order pursuant to s.409(2)(c) of the Insolvency Act 2011 that the respondent is not entitled to an automatic discharge of the bankruptcy order, and in the alternative pursuant to s.409(2)(a) that the bankruptcy order be subject to a three-year extension.

3 On July 21st, 2020, the joint trustees became aware that the respondent had instructed solicitors in Gibraltar. The return date of the non-discharge application was set for July 29th, 2020. On that date, by consent, the substantive hearing did not proceed and instead the court approved a consent order issuing directions. There was no provision in that order for cross-examination of the respondent nor indeed was there such an application before the court.

4 Pursuant to the order for directions issued on July 29th, 2020, the respondent filed and served the following:

(i) A statement of assets and liabilities (which, although dated August 7th, 2020, was, as I have understood it, served on September 3rd, 2020).

(ii) The respondent's grounds of opposition to the non-discharge application dated September 3rd, 2020.

(iii) An affidavit sworn by the respondent, dated September 2nd, 2020.

(iv) An affidavit sworn by Mr. James Lloyd, dated September 2nd, 2020.

5 On September 3rd, 2020, following service of the respondent's statement of assets and liabilities, the joint trustees served the respondent with a lengthy questionnaire ("the questionnaire"). By second affidavit,

dated September 4th, 2020, the respondent explained why he was refusing to answer the questions contained in the questionnaire.

6 On December 17th, 2020, at a case management hearing, the joint trustees asked the court for a direction that they be granted permission to cross-examine the respondent at the non-discharge application. The respondent indicated he was opposed to this and the court ordered that, in the event that the joint trustees should want to pursue their request to cross-examine the respondent, they should file a corresponding application.

7 On December 21st, 2020, the joint trustees filed an application seeking permission to cross-examine the respondent ("the cross-examination application").

**The law and the facts**

8 Not in dispute that, by operation of s.409 of the Insolvency Act 2011 ("the Act"), a bankrupt will (subject to certain conditions which do not apply in this case) be discharged from bankruptcy automatically at the end of a period of three years commencing on the day on which he was made bankrupt.

9 Upon the filing of a non-discharge application, the three-year period will not end until the court has determined the application.

10 Upon application by the bankruptcy trustees the court may:

(i) extend the three-year period;

(ii) order that the three-year period cease to run;

(iii) order that the bankrupt is not entitled to an automatic discharge.

11 Such an application would (in the absence of an application that it should be otherwise) proceed to a final hearing without the calling of *viva voce* evidence. It seems to me that this was the initial position accepted by both parties given the consent order of July 29th, 2020, given that the cross-examination application was not made at the time of the filing of the non-discharge application, and given that the time estimate for the non-discharge application was set at three hours.

12 The application for cross-examination is:

> "For an Order that the Applicant be permitted to cross examine the Respondent for the purposes of their application for an extension of the bankruptcy which is due to be heard on the 21 to 23 April 2021."

13 Mr. Salter relies on r.12.28(3) of the Insolvency (England & Wales) Rules 2016 and CPR 32.7 for the proposition that the court has jurisdiction to direct cross-examination in the course of bankruptcy proceedings. The existence of that discretion is not challenged.

14 Mr. Davies submits however that such a discretion should be sparingly exercised, he relies on *Highberry Ltd.* v. *Colt Telecom Group plc* (1) in support. Whilst it is true that *Highberry* involved an application for an administration order, in my view the principles formulated therein are nevertheless broadly applicable in all insolvency proceedings of which bankruptcy proceedings are a part. Referring to the 1986 Insolvency Rules, Collins, J. said ([2003] 1 BCLC 290, at para. 26):

> "The hearing of insolvency proceedings (including administration petitions) will normally be on the basis of written evidence, but the court does have the power to order disclosure of documents and information and to order cross-examination under rr. 7.7 and 7.60."

The learned judge went on to say (*ibid.*, at para. 35):

> "It seems to be plain that the nature and purposes of an application for an administration order, the nature of the enquiry by the court, and the usual urgency of the application, make it inevitable that only very exceptional circumstances will justify an order for disclosure or cross-examination in proceedings for an administration order."

15 Although arguably bankruptcy proceedings may not have the same urgency as the administration proceedings under dissuasion in *Highberry*, nevertheless a bankruptcy order will impact upon the bankrupt's ability to earn a living and provide for himself and his family. The starting point is that he is entitled to a statutory discharge after three years. If objection is to be taken to that discharge by the trustees, it is easy to see why at that point the issue of discharge should become urgent to the bankrupt. Cross-examination of the respondent (and possibly the joint trustees) will invariably delay proceedings which will be converted into a sort of mini-trial. Consequent delay of itself is not a valid reason for not permitting cross-examination but, in my view, in order for the court to deviate from the usual procedure and order such cross-examination it must be satisfied, as Mr. Salter points out, that such cross-examination is necessary for a fair disposal of the application of the joint trustees (*Phillips* v. *Symes* (2)).

16 It appears that the non-discharge application was not the catalyst behind the cross-examination application. It was not until six months after the non-discharge application, and after the respondent filed his affidavit and statement of assets, and refused to fill in the questionnaire, that the cross-examination application was filed. The irresistible presumption must therefore be that it was not the conduct of the respondent during the bankruptcy that required further exploration through cross-examination, but his conduct after the order of July 29th, 2020. Strictly speaking, that conduct forms part of the bankruptcy proceedings but, given the timing of the cross-examination application, it would appear that the conduct of the respondent prior to the non-discharge application was so clearly established

on the documentary evidence as to not require further investigation by way of cross-examination.

17 Mr. Davies points out that, there are no grounds identified in the cross-examination application, that, despite para. 5 of the order of July 29th, 2020, allowing the joint trustees to file evidence in reply if so advised, no supporting evidence has been filed by the joint trustees, and that the enabling provision under which the cross-examination application is made is not identified. That latter complaint is not fatal, but the first two require closer consideration.

18 The fundamental difficulty facing the joint trustees is that it is difficult to understand precisely what aspect of the respondent's behaviour prompted the cross-examination application. Should it be presumed that it was the respondent's behaviour post order of July 29th, 2020? If so, it is difficult to identify with any degree of certainty, or indeed at all, what part of that behaviour prompted the application. Was it the content of the statement of assets? Was it the content of the respondent's affidavit? Was it the respondent's refusal to complete the questionnaire? Or indeed, was it nothing to do with the respondent's behaviour post July 29th, 2020 but with his behaviour prior to the non-discharge application? The respondent's difficulty in opposing the cross-examination application in these circumstances is appreciable.

19 In his reply, Mr. Davies has gone into some detail with regard to the merits of the non-discharge application. I do not propose to deal with the merits of the non-discharge application other than to the limited extent necessary in order to be able to consider the issue before me. I do not ignore that the non-discharge application is supported by evidence and that the affidavit of Mr. Lavarello of May 28th, 2020 points to the respondent's failure to comply with his obligations as a bankrupt and to his failure to make required disclosure as reasons for the application. The affidavit makes for compelling reading and sets out the basics for the non-discharge application. Whilst it is right that bankruptcy is an exercise in accountability so that assets can be identified and traced, the rules envisage that the paper trail will demonstrate the extent of the bankrupt's cooperation or otherwise. If the joint trustees are able to evidence the alleged failures of the respondent upon the documentary evidence before the court, then cross-examination of the respondent cannot be justified.

20 The joint trustees acknowledge that the cross-examination "should be limited to the subject matter of the non-discharge application." I confess to having some difficulty in identifying the limitation. It seems to me that the non-discharge application is premised upon the respondent failing to comply with his obligations under the Insolvency Rules and failing to disclose particulars of his assets, liabilities and income, the non-discharge application therefore potentially relates to the whole of the respondent's

conduct during the bankruptcy. Whilst in principle such extensive cross-examination is permissible, before sanctioning it, the court must be persuaded that the paper trail alone will not show the respondent's failures and that therefore cross-examination is necessary. The joint trustees rely upon *Phillips* v. *Symes* (2) for the proposition that cross-examination is permissible so long as it is not too wide in scope. The proposition is sound, the difficulty faced by the joint trustees is that not having detailed the particular reasons for the request to cross-examine, it is impossible for the court to define the scope of the [proposed] cross-examination.

21 Mr. Salter submits for the purposes of this application, that the statement of assets is defective, evasive, non-cooperative and uninformative, but there is no particularization. He submits that the respondent has failed to provide any assistance to the joint trustees, that the respondent's evidence is incapable of belief, and that he is a fraudster who should not be discharged in the public interest. That may or may not be the case, but the point is that disputes of fact have not been identified, the grounds upon which cross-examination is claimed to be necessary have not been identified, and evidence in support of the request to cross-examine has not been forthcoming. Instead there are generalizations of the sort that "the facts speak for themselves." In my view that will not suffice, without particulars not only is it impossible for the respondent to answer the application but also for the court to conduct a proper exercise of its discretion.

22 In the circumstances I cannot be satisfied that cross-examination is necessary for a fair disposal of the case and the application is dismissed.

*Order accordingly.*