[2023 Gib LR 1]

IN THE MATTER OF KING (a discharged bankrupt)

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

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

COURT OF APPEAL (Kay, P., Davis and Rimer, JJ.A.): January 11th, 2023

2023/GCA/001

Bankruptcy and Insolvency—discharge—non-discharge application—joint trustees' application for non-discharge of bankrupt granted—bankrupt had failed to cooperate in any way with joint trustees or to comply with statutory obligations

Trustees in bankruptcy applied for an extension of the three-year bankruptcy period.

The respondent, Mr. King, was made bankrupt in July 2017 by an order of the Supreme Court. Admitted proofs of debt exceeded £100m. The appellants were the trustees in bankruptcy. The respondent had conducted his business dealings and owned assets through limited liability companies. The joint trustees had identified around 100 companies, incorporated in various jurisdictions, said to be connected with the respondent. It was alleged that he procured investment in or loans to companies which he controlled, which he then caused to be misapplied and/or paid out to other companies he controlled, thereafter to disappear. One company with which the respondent was connected ("Advalorem") was incorporated in Gibraltar under the experienced investor scheme. It had received moneys for investing in development land in Scotland. The land was subsequently identified as being relatively worthless. In 2013, Advalorem obtained a freezing order against the respondent in the Supreme Court, and the judge ruled there was a good arguable case of fraud against the respondent. Default judgments were obtained in 2016. Advalorem served a statutory demand on the respondent out of the jurisdiction in February 2017 and in June 2017 an application for a bankruptcy order was served. The bankruptcy order was made in July 2017.

The respondent denied wrongdoing.

The joint trustees claimed that the respondent failed to complete a statement of assets and liabilities ("SOAL") as required by the insolvency legislation and did not cooperate with the joint trustees. He was said to have been deliberately evasive and elusive. Letters enclosing a copy of the bankruptcy order and informing the respondent of his obligation to complete a SOAL were sent to the addresses in Scotland where he had been observed to be present, including his parents' home. The letters were returned to sender and no SOAL was provided. The respondent claimed not to have received any of the letters. The joint trustees formed the opinion that there was no prospect of securing voluntary cooperation from the respondent. In 2017, search and seize orders were made in respect of three Scottish addresses with which the respondent had been connected. The respondent was present at one of the addresses during a search. An iPhone was found for which the respondent claimed not to know the passcode. IT specialists were unable to obtain access to the content of devices found at the address. The possibility of the joint trustees seeking a private examination of the respondent was raised, but it was not pursued by the joint trustees.

The Insolvency Act 2011 provided in s.409(1) for the automatic discharge of a bankrupt after three years. In June 2020, the joint trustees applied to the Supreme Court for an order under s.409(2)(c) of the Act that the respondent was not entitled to an automatic discharge of the bankruptcy order and, in the alternative, pursuant to s.409(2) for an extension of the three-year bankruptcy period ("the non-discharge application"). The grounds on which the court might refuse to grant a bankrupt his discharge were set out in s.412(4) of the Act. The grounds relied on by the joint trustees included s.412(4)(a), that "the bankrupt has failed or is failing to comply with his obligations under this Act or the Rules . . ." and s.412(4)(h) "that the bankrupt, either before or after the bankruptcy order, has committed any fraud or breach of trust." The joint trustees asserted that the respondent had actively sought to evade and mislead them, had not provided a SOAL nor any financial records. It was said that he had clearly committed bankruptcy offences but had not been convicted of such.

The respondent claimed that he had not been made aware at the time that bankruptcy proceedings had been raised against him, nor that he was made bankrupt, although he did say that he had been told of this in August 2017. He disputed his connection with Gibraltar at the relevant time. He denied attempting to evade service and asserted non-receipt of various documents. He denied any lack of cooperation, claiming the joint trustees deliberately failed to seek such cooperation. He claimed that he only received a request to provide a SOAL in November 2017 on the execution of the search and seize order. He claimed that he completed the form and posted it to the joint trustees. If the form was not received, he did not understand why he or his solicitor were not contacted. No request had been made for him to be examined voluntarily or to attend for any private examination before the court.

The respondent completed a SOAL during the course of the proceedings, dated August 7th, 2020 in which he provided very little information.

The joint trustees applied to cross-examine the respondent on his affidavit. This was opposed by the respondent, who submitted *inter alia* that it was exceptionally rare to order cross-examination in insolvency applications such as this. The judge, Ramagge Prescott, J., rejected the application to cross-examine which she considered was not necessary for a fair disposal and would delay the proceedings. She criticized the generality of aspects of the joint trustees' evidence and lack of defined scope of the proposed cross-examination.

Ramagge Prescott, J. rejected the joint trustees' non-discharge application. The respondent's lawyer submitted that because the respondent was not to be cross-examined on his affidavits, his evidence had to be accepted in its entirety unless manifestly incredible (reliance was placed on the principle articulated in decisions such as *Long* v. *Farrer & Co*., [2004] EWHC 1774 (Ch)). That was strongly opposed by the joint trustees. After the conclusion of the oral hearing, the joint trustees applied to adduce further evidence, namely information from an individual in the US who had contacted the joint trustees indicating a prospective settlement of a claim by an American company ("Senticare") of which the respondent had been a shareholder. The joint trustees asserted that the respondent had withheld this information. The joint trustees also sought to adduce fresh evidence from a further analysis of the iPhone, conducted in July 2021, which indicated that there had been a full reset to factory settings, wiping all data; that the iPhone had been set up to perform a full reset on 10 failed passcode attempts; and that the iPhone had been updated to the latest operating system within 7 days of the search in 2017 which could only have been done with the input of the passcode.

The judge was very critical of the joint trustees. She found that there had been a violation for the purposes of s.412(4)(a) of the 2011 Act in that the respondent had attempted to avoid service of the bankruptcy order, but she found that in all other respects the joint trustees had failed to establish any other grounds. She accepted the respondent's evidence that he had not received letters and that he had posted a SOAL to the joint trustees in 2017. She found against the joint trustees' suggestion that he had failed to disclose assets. The judge admitted the fresh evidence concerning Senticare but refused evidence as to the iPhone on the basis that no sufficient explanation had been given for failing to analyse the phone much earlier. The non-discharge application was dismissed and the joint trustees were ordered to pay costs on a standard basis.

The joint trustees raised six grounds of appeal: (1) the judge erred in adopting the approach that the respondent's evidence should not be disbelieved unless manifestly incredible: such approach was in the circumstances of the case unjustified and unfair to the joint trustees; (2) the judge erred, having adopted this (wrong) approach, in not likewise applying it to the evidence of the joint trustees; (3) the judge erred in law, when engaging in the fact finding process, in considering that the joint

trustees should have (but did not) file evidence in reply to the respondent's affidavits; (4) the judge erred in law in declining to take account, in assessing the case against the respondent, the respondent's own evidence; (5) the judge erred in refusing to admit the fresh evidence in the form of the analysis in 2021 of the data on the iPhone; and (6) the judge erred, at the second stage, in her assessment of where the public interest lay, given the interests of creditors, the very large sums involved, the highly suspicious nature of the respondent's conduct and the restrictions on future investigation that discharge would entail.

The judge granted a stay of her order pending determination of the appeal.

The respondent sought permission to appeal against the order granting the stay and against the judge's refusal to award indemnity costs against the joint trustees.

Held, allowing the appeal; refusing the cross-appeal:

(1) The following general principles were stated (which were not intended to be exhaustive) for non-discharge applications: (i) a bankrupt was ordinarily to be entitled to automatic discharge after the expiry of the specified statutory period; (ii) the discharge of a person from bankruptcy was of great importance and value to that person, of which he was not lightly to be deprived; deprivation being in effect penal in nature; (iii) correspondingly, the power of a trustee to object to discharge was of great importance and not lightly to be exercised; (iv) an application for non-discharge carried with it an important public interest; (v) underlying purposes of the power to postpone discharge could (where non-compliance was alleged) be that the continuance of bankruptcy should, in the public interest, be maintained until proper compliance had been achieved, coupled with the incentive provided for a bankrupt to give proper compliance; (vi) an application for non-discharge must be based on evidence and the grounds relied on must not be founded on mere suspicion or speculation; and (vii) the evidence in support of an application for non-discharge must sufficiently identify and particularize the grounds on which non-discharge was said to be justified. In addition, and importantly, it was plain from both the structure and the wording of s.412 of the 2011 Act that a two-stage process was involved. First, one or more of the matters set out in s.412(4) must, as a condition precedent, be satisfied. Secondly, if such a matter (or matters) was satisfied, the court had a discretion, to be exercised judicially by reference to all the circumstances of the case, as to whether or not to refuse to grant the bankrupt a discharge (paras. 44–46).

(2) The judge wrongly accepted that the *Long* v. *Ferrar* principles required her to accept the respondent's written evidence at face value. The principle enunciated in *Browne* v. *Dunn* and applied in modern contexts such as *Long* v. *Farrer & Co.* was important. The underpinning rationale was fairness. Generally speaking it was not fair for a person to be disbelieved on his affidavit or witness statement if he had been afforded no chance to explain himself in cross-examination. However, that was not this

case. The respondent had not only been able to put in his own evidence setting out his case but also, when he knew that it was being challenged, had been offered a chance to explain himself by oral examination. He had however declined that opportunity when he opposed the joint trustees' application for cross-examination on his affidavits. It would be very odd if an individual could say that his evidence must be believed (unless manifestly incredible) in the absence of cross-examination when he himself had successfully opposed cross-examination. The joint trustees had assumed, after the cross-examination ruling by the judge, that the case would be evidentially determined on the papers. It was a reasonable inference. The court was in no doubt that if the case on failure to comply with statutory obligations should have been, and should be, decided on the papers, on the standard of balance of probabilities and with the burden being on the joint trustees, it should have been, and should be, in the circumstances of this case, decided in favour of the joint trustees (paras. 111–122).

(3) The respondent's assertion that he had posted a SOAL to the joint trustees in 2017 was incredible. The only sure conclusion on the evidence was that no completed SOAL was posted. The judge could and should, given the circumstances of the case, have so concluded. This conclusion wholly undermined the judge's conclusion that the only respect in which the respondent had failed to comply with his statutory obligations was in attempting to avoid being served with the bankruptcy order. In fact, the respondent had not complied in any respect with his statutory obligations throughout the bankruptcy order. The judge's exercise of discretion as to whether to order non-discharge was therefore undertaken on a flawed basis and the court was entitled to intervene (paras. 130–136).

(4) The joint trustees' appeal would be allowed. The judge's order would be set aside and the court would direct an extension of the bankruptcy for one year. This was essentially because of the sheer scale and persistence of the respondent's non-cooperation and failure to comply with his statutory obligations throughout the bankruptcy. He had done nothing voluntarily to assist the joint trustees, on the contrary he had sought to evade service of bankruptcy documentation; had failed to provide details of where he could be contacted; and had wholly implausibly professed ignorance of the Advalorem proceedings and the freezing order. He had voluntarily produced no document relating to his assets or dealings, nor had he provided any passcode to access any of his electronic devices. All this had been compounded by his giving incredible evidence as to service of the bankruptcy order and as to the posting of the SOAL. The SOAL which he produced under compulsion in 2020 was demonstrably deficient and almost entirely uninformative. The court did not accept that the respondent had cooperated or would cooperate if discharged. It was unfortunate that the joint trustees had not further attempted to contact the respondent's solicitor and that they had failed to apply for the private examination of the respondent, and it was regrettable that they put in no evidence to seek to explain their failure to take these steps. Nevertheless, these (to an extent

valid) criticisms of the joint trustees did not mask the underlying reality. The respondent had, irrespective of any demands by the joint trustees, his own positive duties of cooperation and assistance: and he plainly did not comply with those so as to fulfil his statutory obligations. It must not be overlooked that this was an extremely complex bankruptcy. The task of the joint trustees was monumental and they had no assistance from the respondent in identifying assets. The public interest required that the respondent not be discharged from bankruptcy (paras. 136–144).

(5) There was no valid basis for the court to interfere with the judge's discretion to refuse the application to admit as fresh evidence the evidence relating to the analysis of the iPhone. That phone had been seized in November 2017. It was not analysed until mid-2021. The judge was entitled to reject the explanation for the delay and to rule that the evidence had been obtained and presented unacceptably late. The fifth ground of appeal therefore failed (para. 101).

(6) There was a great deal of force in the judge's criticism of the presentation of the joint trustees' case on the ground of fraud or breach of trust, by reference to s.412(4)(h) of the 2011 Act. Cogent and properly particularized and evidenced allegations were required. The joint trustees' allegations rested primarily on the obtaining of the judgment in default in 2016 (against the background of the obtaining of the freezing order) and on the judgment making the bankruptcy order. However a judgment in default had a rather special and limited status in evidential terms. Unquestionably the dealings involving Advalorem, and other transactions, were highly suspicious but suspicion alone was not sufficient to establish a ground for non-discharge. The judge's rejection of this ground was properly open to her (para. 102).

(7) The respondent would be refused leave to cross-appeal. The challenge to the judge's decision to grant a stay pending determination of the appeal was, in the circumstances, an essentially academic exercise. In any event, there was no proper basis for interfering with the judge's exercise of discretion in this respect. It was a strong thing to deprive a successful litigant of the fruits of success pending appeal: the more so in this case when continuance of the bankruptcy was effectively penal in nature. However, the judge had a balancing exercise to perform which included consideration of the potential prejudice in the interim to the respondent in the event that the appeal ultimately failed but a stay was ordered, and the potential prejudice to the joint trustees (and creditors) in the event that the appeal ultimately succeeded but a stay was not ordered. There was no arguable basis for impeaching the judge's conclusions. As to the challenge to the judge's failure to award indemnity costs, this issue had become academic in the light of this court's conclusion that the appeal of the joint trustees had succeeded. In any event, here too there was no arguable basis for interfering with the judge's exercise of discretion. It was true that the joint trustees had unsuccessfully pursued, as one ground, an allegation that the respondent had committed a fraud or breach of trust: in

circumstances, moreover, where the judge had generally been critical of the lack of focus and particularization of the allegations being made. However the judge was alive to the applicable principles. She appreciated that an order for indemnity costs was an exceptional step, connoting conduct which was unreasonable to a high degree, going beyond the ordinary and reasonable conduct of proceedings. There was no valid basis for challenging the judge's exercise of discretion not to award indemnity costs (paras. 146–149).

Cases cited:

(1) *Browne* v. *Dunn* (1893), 6 R. 67, considered.
(2) *Chen* v. *Ng*, [2017] UKPC 27, referred to.
(3) *Coyne* v. *DRC Distrib. Ltd*., [2008] EWCA Civ 488; [2008] BCC 612, referred to.
(4) *Finelist Ltd.*, *In re*, [2003] EWHC 1780 (Ch), considered.
(5) *Highberry Ltd.* v. *Colt Telecom Group plc*, [2002] EWHC 2503 (Ch), considered.
(6) *Hollington* v. *F. Hewthorn & Co. Ltd*., [1943] K.B. 587; [1943] 2 All E.R. 35; (1943), 169 L.T. 21; 59 T.L.R. 321; 112 L.J.K.B. 463, referred to.
(7) *Kireeva* v. *Bedzhamov*, [2022] EWCA Civ 35; [2023] Ch. 45; [2022] 3 W.L.R. 1253; [2022] 4 All E.R. 192; [2022] BCC 603; [2022] BPIR 753, referred to.
(8) *Ladd* v. *Marshall*, [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, referred to.
(9) *Long* v. *Farrer & Co.*, [2004] EWHC 1774 (Ch); [2004] BPIR 1218, considered.
(10) *Royal Bank of Scotland Intl. Ltd.* v. *Magner*, 2018 Gib LR 54, referred to.
(11) *Vogon Intl. Ltd.* v. *Serious Fraud Office*, [2004] EWCA Civ 104, considered.
(12) *Williams* v. *Solicitors' Regulation Auth.*, [2017] EWHC 1478 (Admin), considered.

Legislation construed:

Insolvency Act 2011, s.344(1): The relevant terms of this subsection are set out at para. 42.
s.409: The relevant terms of this section are set out at para. 39.
s.412(4): The relevant terms of this subsection are set out at para. 40.

D. Feetham, *K.C.*, *A. Cardona* and *C. Smith* (instructed by Phillips LLP) for the joint trustees in bankruptcy;
S. Davies, *K.C.*, *S. Chandiramani* and *I. Lawson-Cruttenden* (instructed by Attias & Levy) for Mr. King.

1 **DAVIS, J.A.:**

Introduction

Gregory Hugh Colin King, the respondent to this appeal ("Mr. King"), was made bankrupt on July 31st, 2017 by an order of the Supreme Court of Gibraltar. Admitted proofs of debt exceed £100m. in value (we were told that the bankruptcy is one of the largest personal insolvencies, if not the largest personal insolvency, in Gibraltar's history). Edgar Lavarello of PricewaterhouseCoopers Ltd. of Gibraltar and Adrian Hyde of CVR Global LLP of London ("the joint trustees") were appointed joint bankruptcy trustees on that date. They are the appellants on this appeal.

2 The provisions of the relevant insolvency legislation applicable in Gibraltar are such that a bankrupt stands automatically to be discharged after the lapse of three years from the date of the bankruptcy order. There is also provision, however, enabling bankruptcy trustees in specified circumstances to apply to the court for an extension of the three-year period or for an order that the bankrupt is not entitled to automatic discharge. In the present case the joint trustees so applied on June 1st, 2020 ("the non-discharge application"). The non-discharge application eventually came on for substantive hearing in the Supreme Court before Ramagge Prescott, J. on July 12th and 13th, 2021. Judgment was reserved. Before judgment had been handed down the joint trustees applied to adduce fresh evidence: the judge dealt with that application as part of her judgment on the non-discharge application. That judgment was handed down on March 10th, 2022. By it, the judge rejected the application of the joint trustees. She refused to extend the period of bankruptcy or to direct that Mr. King was not entitled to automatic discharge. An order to that effect was drawn up accordingly.

3 It is from that order that the joint trustees now appeal. Following her decision, the judge on June 21st, 2022 acceded to a further application by the joint trustees and granted a stay of her order pending determination of the appeal. That, as is common ground, had the effect that the bankruptcy continues until determination of the appeal. Mr. King seeks permission to appeal against that order granting the stay. He also seeks permission to appeal against the judge's refusal on June 21st, 2022 to award indemnity costs (as opposed to standard costs) against the joint trustees.

4 The principal question arising before this court therefore is whether the judge was wrong to refuse the application to extend the period of bankruptcy or to make an order that Mr. King was not entitled to automatic discharge. Put in a nutshell, the central argument on behalf of the joint trustees was to the effect that the judge's approach to the evaluation of the evidence placed before her was legally flawed and that her decision cannot be sustained. The central argument on behalf of the respondent, on the other hand, was to the effect that the judge's approach to the evaluation of the

evidence was entirely proper and that there is no valid basis for an appellate court interfering with the exercise of her discretion in refusing the non-discharge application.

5 I would like to record at the outset that the arguments, both written and oral, were very skilfully and carefully presented on both sides.

Factual background

6 The background to this case, leading up to the bankruptcy order of July 31st, 2017, is complex. I will try and summarize it, for present purposes, relatively briefly.

7 Mr. King was brought up in Glasgow. He qualified as a solicitor in Scotland in 1997 but ceased to practise from 1999 when he decided to pursue other interests, principally in the field of international financial investment. On his evidence, he ceased to live in Scotland in 2004 and relocated to Monaco. He also acquired a property in Gibraltar. In addition, as he has put it, he was "spending a lot of time" in Spain where (as the joint trustees were later to allege but he has disputed) he beneficially owned two properties near Marbella. On his evidence, he moved to Switzerland in 2010 for tax purposes, returning to live in Scotland at the end of 2017.

8 It was not really in dispute that Mr. King's *modus operandi* was to operate almost entirely, whether by way of business dealings or by way of ownership of assets, through the medium of limited liability companies whose shares he ultimately owned or controlled. The joint trustees were in due course to identify around one hundred companies said to be connected with Mr. King. Such companies were incorporated in a variety of jurisdictions including, among others, Gibraltar, Isle of Man, Scotland, British Virgin Islands and so on. One of the many allegations made against Mr. King was that (put shortly) he would procure from third parties substantial investment in, or loans to, corporate vehicles controlled by himself which he would then cause to be misapplied and/or to be paid out, often under the guise of loan agreements said to be shams, to other corporate vehicles controlled by himself, thereafter to disappear. Mr. King has always denied such allegations of wrongdoing.

9 One company with which Mr. King was connected was a company called Advalorem Value Asset Fund Ltd. ("Advalorem"). Advalorem was incorporated in Gibraltar, being established under the experienced investor scheme. Amongst other receipts, it received sums in excess of £7m. from four pension schemes based in the United Kingdom, primarily for the purposes of investing in development land in Scotland.

10 What thereafter happened (as was subsequently to be stated in reports filed by the joint trustees in the ensuing bankruptcy of Mr. King and as had been recorded in a subsequent judgment of Jack, J. in the Supreme Court)

was this. Land near Kirkintilloch in Scotland was in 2013 purchased by Advalorem via subsidiary companies for £6m. That land was ultimately owned, via subsidiaries, by a company called Thistle Holdings Ltd. ("Thistle"), itself said to be beneficially owned by Mr. King. The land had been acquired in 2008 for £305,000 by another connected company. The purchase price of £6m. payable by Advalorem was said to be justified by a report from a local firm of valuers, which had purportedly based itself on three assumptions in terms of development potential. Those assumptions were said to be demonstrably incapable of fulfilment: and if that were so the land, as subsequently valued by other, and highly reputable, valuers, was worth less than £200,000. At all events, the sale and purchase transaction at a price of £6m. was concluded. Thereafter, as was alleged, most of the moneys received by Thistle were paid out directly or indirectly to corporate entities controlled by Mr. King, ostensibly on terms of purported loan agreements.

11 In 2013, investigations into Advalorem by the Financial Services Commission were started. The value of the so-called development site was re-appraised and identified as being relatively worthless; other matters of concern as to possible misappropriation of moneys were also identified. On January 27th, 2014, Mr. Hyde (who, as I have indicated above, was in due course to become one of the joint bankruptcy trustees of Mr. King) was appointed special administrator of Advalorem by the Supreme Court.

12 On September 4th, 2015 Advalorem obtained in the Supreme Court, on an *ex parte* basis, a freezing injunction against Mr. King (and others). The proceedings and freezing order were, it is said, served on Mr. King in September 2015. Subsequently, default judgments were during the course of 2016 obtained against Thistle and Mr. King respectively, for sums in excess of £6m.

13 In the papers before us, as before the judge, there was included a transcript of the judgment of Jack, J. dated September 4th, 2015, given on the *ex parte* application for a freezing injunction. It is a lengthy judgment. In the course of it, Jack, J. ruled, on the basis of the evidence before him, that there was a good arguable case in fraud against Mr. King. As I have said, Mr. King denies that there has been any fraud or wrongdoing on his part.

14 Following the obtaining of the default judgment, Advalorem obtained permission to serve a statutory demand on Mr. King out of the jurisdiction. That was served, it is said, on February 7th, 2017. On June 14th, 2017, an application for a bankruptcy order was served pursuant to an order to serve out of the jurisdiction, and on July 31st, 2017 the bankruptcy order was made. The judge granting the order was again Jack, J. He gave a detailed judgment, running to 37 paragraphs (reported at 2017 Gib LR 206).

15 That judgment started uncompromisingly (*ibid.*, at para. 1) with the sentence: "Gregory Hugh Colin King is a fraudster." Thereafter, however, it is fair to say the judge moved into the more conventional language of what was being "alleged." In the course of his judgment the judge observed that Mr. King had not complied with the disclosure obligations contained in the prior freezing order. He also found that there had been good service of the application for a bankruptcy order (at the Marbella property) and (*ibid.*, at para. 7) "it is quite clear that Mr. King was attempting to evade service." The judge went on to consider the evidence relating to Mr. King's centre of main interests. He concluded that Gibraltar was that centre.

16 I would here interpose that in subsequent evidence in these proceedings Mr. King has stated that he had "no direct knowledge" of the service of the statutory demand. As to the bankruptcy application, he has stated "I did not receive that either." As to the prior freezing order obtained by Advalorem, and the disclosure obligations contained in it, he states: "I did not receive service of any documents ordering me to provide any information." He has also asserted that his centre of main interests had been at the relevant times Switzerland, not Gibraltar. But he has never sought to set aside any of the orders made on any of these bases, or on any other basis.

17 One other matter can be mentioned at this stage. Featuring in the evidence before Jack, J., and as alluded to in his judgment, is a reference to an Isle of Man incorporated company called Heather Capital Ltd. ("Heather"). That was another company said to be controlled by Mr. King. It was described as being operated as a "hedge fund." It has been placed in liquidation. It has been alleged that here too Mr. King had been party, under the guise of other corporate entities, to the misappropriation from Heather of very large sums of money. A proof of debt in Mr. King's bankruptcy was in fact lodged by the liquidator of Heather and has been admitted by the joint trustees in the sum of £93,083,947.

Events following the bankruptcy order

18 The joint trustees have periodically filed, as required, reports (which I gather are publicly accessible) as to the progress of the bankruptcy. Those reports summarize the background to the matter and also, among other things, outline any progress in realising or tracing assets and the steps being taken in that regard.

19 Every one of such reports states that Mr. King had not completed a statement of assets and liabilities ("SOAL") as required by the insolvency legislation and had not co-operated with the joint trustees. It is also reiterated in each report that Mr. King had supplied no assistance or documentation relating to his affairs or business dealings.

20 It is not, I think, necessary for me to give any great detail as to the steps thus far taken by the joint trustees to realise assets. The very fact that

Mr. King chose to conduct his affairs through the medium of limited liability companies, incorporated in various jurisdictions, has given rise to great complexity: especially when coupled with the (as the joint trustees would say) total lack of co-operation on the part of Mr. King. Thus, protracted proceedings have been undertaken in Spain with regard to the two properties in Marbella, in which various companies and members of Mr. King's family were involved. For example, in the case of one of those properties the father of Mr. King has claimed to be beneficial owner, saying that he had purchased that property with £6m. provided by Mr. King as a gift—as to which the joint trustees responded that such purported gift in truth derived from moneys misappropriated by Mr. King. Further, pursuant to letters of request directed to the courts of England and Wales and of Scotland, various forms of injunctive relief have been obtained. Proceedings were also instituted seeking possession of a valuable residential property in Glasgow legally owned through a company which has been said (but which is disputed by the joint trustees) to be beneficially owned by the wife of Mr. King. Those proceedings also have become protracted. The claims pursued by the joint trustees in Scotland further extend to restoring to the register of companies three companies to which very large "loans" had been made by another company ultimately owned by Mr. King: which sums the joint trustees were seeking to recover for the benefit of creditors.

21 One striking feature of the whole bankruptcy process is the service of the bankruptcy order itself.

22 The joint trustees had been very concerned about what they viewed as the deliberate evasiveness and elusiveness of Mr. King. They suspected that by now he was in fact not in Spain or Switzerland but in Scotland, in Glasgow where his wife and children and parents lived. On August 7th, 2017 they instructed enquiry agents, who speedily confirmed that Mr. King was indeed in Glasgow at that time. On August 29th, 2017, Mr. Hyde wrote a letter from his London office, sent by recorded delivery and addressed to Mr. King, enclosing a copy of the bankruptcy order for his attention. The letter was directed to an address in Newton Mearns, Glasgow, a large detached mansion in the name of Mr. King's parents, where his parents resided and where Mr. King had been observed often to be present. Surveillance showed him to be there on August 29th and 30th, 2017.

23 By manuscript letter dated August 30th, 2017, a response to Mr. Hyde's letter was sent by Mr. King's mother. In it, she said that she had returned home that day to find that her cleaner had signed for the letter addressed to her son. The letter went on:

> "My son has not lived in Scotland for a long time. I have returned your letter which I opened by accident. You should write to Gregory at his address in Switzerland where he has lived since 2010 or his other home in Dubai."

24 Mr. King necessarily had to accept that he was in Glasgow at that time. He says in a subsequent affidavit that he was visiting his family, staying with his sister at another address in Glasgow. He accepts that he "may very well" have been at that time at his parents' house. He goes on:

> "My parents' house is a very large house. If any mail had been delivered for me that day I would very easily have not been aware of that fact. I confirm that I was not aware of that letter and I certainly didn't receive it."

25 On September 14th, 2017, Mr. Hyde sent letters to the addresses in Glasgow with which Mr. King had been associated. Those letters enclosed a copy of Mr. Hyde's certificate of appointment as joint trustee; informed Mr. King of his legal obligation to complete a SOAL (a form of which was enclosed); and asked for a response within seven days. Mr. King was also reminded that failure to comply with the obligation would amount to the commission of a bankruptcy offence. A letter to like effect was also sent on that date to Mr. King's mother at the Newton Mearns address. It was there also stated that the SOAL was a very important document and should be brought to Mr. King's attention without delay. The letter also requested the mother to provide by return Mr. King's addresses in Switzerland and Dubai. She was also asked to provide to Mr. Hyde the email address and telephone number of Mr. King.

26 Mr. King has since stated that he did not receive any of these letters. In fact, all these letters (including that to the mother) were returned to sender. No SOAL was provided.

27 The joint trustees had taken the view that there was in truth no prospect whatsoever of securing any voluntary co-operation on the part of Mr. King. A letter of request had in fact been issued by the Supreme Court on August 15th, 2017 directed to the Court of Session in Edinburgh. That sought permission (among other things) for the joint trustees to engage in search of premises and seizure of documents and for the examination of Mr. King and any other person with knowledge of his affairs. A petition was presented accordingly on behalf of the joint trustees on October 9th, 2017. Thereafter various orders were made by the Court of Session.

28 Search and seize orders (formerly commonly known as "*Anton Piller* orders") were made by the Court of Session in respect of three addresses in Glasgow with which Mr. King had been connected. Those were executed. In particular, for present purposes, such an order was executed on November 16th, 2017 at the address in Glasgow of a flat held in the name of a sister of Mr. King. Mr. Hyde has said in a subsequent witness statement that important documentation was collected at each of the addresses as result of the searches.

29 A transcript of the "dawn raid" of November 16th, 2017 was made and was put in evidence. It shows a number of persons present on behalf of the joint trustees, including Mr. Hyde himself, solicitors and IT specialists from Grant Thornton. The independent commissioner attending, as appointed by the Court of Session, was Alan Dewar, Q.C. Mr. King was present at the flat throughout.

30 As the transcript records, Mr. King was at the outset insistent that the whole process should have been in Switzerland. He went on to state that his Apple MacBook and other devices had very recently been stolen in Spain; and all that he now had was a new iPhone. In due course, Mr. King (as fully entitled to do) contacted his solicitor, Mr. James Lloyd of Harper MacLeod LLP, and asked him to attend—as in due course he did.

31 When asked to give password access to the devices found in the flat, Mr. King did not do so, saying that he could not remember them. In the detailed exchanges that ensued (as recorded in the transcript) Mr. Hyde was moved to say to Mr. King that it was difficult to believe anything that he said, and Mr. King was moved to respond to like effect to Mr. Hyde. At a later stage during that morning Mr. King said that, following the recent theft of his laptop in Spain, a friend of his in Switzerland had set up a new iPhone for him. He (Mr. King) had in the interim since then been using his finger-print to access it—in effect, connoting that it was coincidence that the iPhone could not be accessed on the day of this dawn raid. Mr. King did suggest some possible passwords. These were tried, unsuccessfully, during that morning by the representatives of Grant Thornton. At all events, the IT experts from Grant Thornton were unable to obtain any access to the content of the devices found in the flat.

32 At a later stage during the search a phone had been found, together with a passport of Mr. King, on top of a safe. The phone was switched on and had 66% charge. When asked about this, as recorded in the transcript, Mr. King said that it belonged to a friend called Graham Bruce who had been in the flat the previous day, although how or why Mr. Bruce should leave his phone behind, switched on and still having a charge the next day of 66% could scarcely readily be explained. In addition, when examined that phone had on the face of its screen a photograph of a child who Mr. King accepted was his (Mr. King's) son. When asked why that should be on Mr. Bruce's phone Mr. King's answer was that he was "a god-father and close family friend." He said further that Mr. Bruce would hold a spare passport for him in case he lost one. This whole passage might, on one view, be reckoned to be highly revealing as to the true attitude of Mr. King.

33 Towards the very end of the transcript there was this exchange (to be much relied on in argument before us, as before the judge, on behalf of Mr. King). In the presence of Mr. Hyde, the commissioner informed Mr. King that one order that might ultimately be sought would be for Mr. King to be

examined before a judge of the Court of Session. The commissioner then said:

> ". . . [Mr. Hyde] is interested in seeing whether you are agreeable to being examined on a voluntary basis?"
>
> MR. KING: If I am advised to do that by my lawyers, that's exactly what I'll do.
>
> THE COMMISSIONER: Yes, because I think, [Mr. Hyde], your position is that, if it is not agreed to, you probably will seek an order from the court?
>
> MR. KING: Yes."

34 This last exchange has, as Mr. Davies, K.C. on behalf of Mr. King was entitled to emphasize, to be put in some further context.

35 Mr. Lloyd, latterly a partner in Harper Macleod LLP, had in the past acted for Mr. King. By letter dated August 3rd, 2017 from English solicitors acting for the joint trustees, his firm had been requested to retain all files relating to Mr. King. Some correspondence ensued. On September 1st, 2017, Scottish solicitors acting for the joint trustees wrote further to Mr. Lloyd. They indicated, amongst other things, that it would be open to the joint trustees, further to the letter of request, to seek an order for the private examination of Mr. King. On September 8th, 2017, Mr. Lloyd replied, stating that it was first necessary for the Scottish court to recognize the Gibraltar bankruptcy proceedings. If that were done, "are we [*sic*] happy to cooperate with your client."

36 There was further correspondence. In it, Mr. Lloyd, on instructions, among other things raised the point advanced by Mr. King that his centre of main interests was Switzerland. He also asked by letter of October 31st, 2017 that issues requiring contact with Mr. King be referred to Mr. Lloyd. In response, the solicitors for the joint trustees by email of October 31st, 2017 asked for clarification of the basis for asserting that the centre of main interests was Switzerland. They also asked Mr. Lloyd to let them know "(a) whether Mr. King is willing to meet with his trustees to discuss his financial affairs; and (b) his availability to do so?" There was no response by Mr. Lloyd to this email.

37 Thereafter, and following the execution of the order on November 16th, 2017, no application was pursued by the joint trustees before the Court of Session seeking a private examination of Mr. King. The evidence would rather suggest that the joint trustees were focusing their attention on recovery of such assets as had been identified and on pursuit of the litigation attending recovery of such assets.

The applicable legislation

38 The applicable statutory provisions (which broadly, but by no means precisely, correspond to those that apply under English insolvency legislation) are contained in the Insolvency Act 2011 ("the 2011 Act"). For the purposes of the present appeal against the judge's refusal to accede to the non-discharge application, express reference need be made only to relatively few of such provision.

39 The position as to automatic discharge is set out in s.409 of the 2011 Act. That provides as follows:

"**Automatic discharge**.

409.(1) Subject to subsection (2), a bankrupt is discharged from bankruptcy at the end of the period of 3 years commencing on the date of the bankruptcy order unless—

(a) he is ineligible for automatic discharge by virtue of section 408; or

(b) he has previously been discharged under section 412(1)(b) or (c).

(2) On the application of a person specified in subsection (3), the Court may, on the grounds specified in subsection (4)—

(a) extend the period referred to in subsection (1);

(b) order that the period will cease to run until the fulfilment of such conditions as it may specify; or

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

(3) An application under subsection (2) may be made on the application of the Official Receiver or the trustee of the bankrupt.

(4) The Court may—

(a) make an order under subsection (2)(a) or (b) if it is satisfied that the bankrupt has failed or is failing to comply with any of his obligations under this Act or the Rules; or

(b) make an order under subsection (2)(c) on any of the grounds upon which it could refuse to discharge the bankrupt under section 412.

(5) An application under subsection (2)—

(a) shall be made before the bankrupt has been discharged under subsection (1); and

(b) when made, operates to suspend the period referred to in subsection (1) until after the determination of the application by the Court.

(6) The Court may not, by an order made under section 493(1), permit an application to be made under subsection (2) after the discharge of a bankrupt under subsection (1)."

40 The grounds on which the court may refuse to grant a bankrupt his discharge are set out in s.412(4) of the 2011 Act. That subsection provides as follows:

"(4) Subject to subsection (3), the Court may refuse to grant a bankrupt his discharge if—

(a) the bankrupt has failed or is failing to comply with his obligations under this Act or the Rules;

(b) the bankrupt has, after the date of the bankruptcy order, engaged in a prohibited activity;

(c) the bankrupt has been convicted of a bankruptcy offence;

(d) the bankrupt has failed, whether intentionally or not, to disclose to his trustee particulars of—

(i) any of his assets;

(ii) any liability existing at the date of the bankruptcy order; or

(iii) any income or expected income;

(e) where the bankrupt has been engaged in any business for any of the period of 3 years prior to the date of the bankruptcy order, he has—

(i) failed to keep such books and accounts as would sufficiently disclose his business transactions and financial position whilst engaged in his business; or

(ii) having kept the books and accounts referred to in subparagraph (i), he has failed to preserve them;

(f) the bankrupt continued to trade after knowing, or having reason to believe himself to be unable to pay his debts as they fell due;

(g) the bankrupt contracted any liability that is claimable in his bankruptcy without having at the time of contracting it any reasonable expectation that he would be able to discharge it;

(h) that the bankrupt, either before or after the bankruptcy order, has committed any fraud or breach of trust;

(i) that the bankrupt has entered into a voidable transaction within the meaning of section 433; or

(j) for any other reason it considers it appropriate to do so."

41 It is also provided, it may be noted, that discharge has no effect on the functions of the bankruptcy trustee so far as they may remain to be carried out or on the operation of the provisions of the 2011 Act for the purposes of carrying out those functions (s.413(1)). Further, a discharged bankrupt is required, even though discharged, to give such assistance as the trustee reasonably requires in the realisation and distribution of assets vested in the trustee (s.414(1)). I would, however, note that while s.402 of the 2011 Act empowers a trustee to apply for the private examination of a bankrupt before discharge, there is no such power available after discharge.

42 So far as the statutory duties of the bankrupt in relation to his assets and affairs are concerned, these are set out in s.344 and following of the 2011 Act. These include, among others, an obligation "to make discovery of and deliver" all assets in his estate that are in his possession or control (s.344(1)). He is also obliged to give to his trustee such information concerning his assets and affairs, to attend on the trustee at such times and to do all such other things as, in each case, the trustee may reasonably require (s.344(3)). This last obligation is stipulated also to apply after discharge (s.344(5)).

43 The 2011 Act also sets out the duties of a bankruptcy trustee. By s.357(3) it is provided that, subject to the 2011 Act and applicable Rules, a trustee shall use his own discretion in undertaking his duties.

44 By reference to these provisions and to the authorities under the law of England and Wales in relation to broadly comparable provisions under the insolvency legislation in that jurisdiction, the following general applicable principles can, I think, be stated (they are not intended to be exhaustive) for non-discharge applications:

(i) A bankrupt is ordinarily to be entitled to automatic discharge after the expiry of the specified statutory period;

(ii) The discharge of a person from bankruptcy is of great importance and value to that person, of which he is not lightly to be deprived; deprivation being in effect penal in nature;

(iii) Correspondingly, the power of a trustee to object to discharge is of great importance and not lightly to be exercised;

(iv) An application for non-discharge carries with it an important public interest;

(v) Underlying purposes of the power to postpone discharge can (where non-compliance is alleged) be that the continuance of bankruptcy should, in the public interest, be maintained until proper compliance has been achieved, coupled with the incentive provided for a bankrupt to give proper compliance;

(vi) An application for non-discharge must be based on evidence and the grounds relied on must not be founded on mere suspicion or speculation;

(vii) The evidence in support of an application for non-discharge must sufficiently identify and particularize the grounds on which non-discharge is said to be justified.

45 A number of authorities were helpfully cited to us in these respects. However, I do not think that specific citation by me in this judgment is needed, where there was no real dispute before us as to these broad principles.

46 In addition, and importantly, it is plain from both the structure and the wording of s.412 of the 2011 Act that a two-stage process is involved. First, one or more of the matters set out in s.412(4) must, as a condition precedent, be satisfied. Second, if, but only if, such a matter (or matters) is satisfied, the court then has a discretion, to be exercised judicially by reference to all the circumstances of the case, as to whether or not to refuse to grant the bankrupt a discharge.

The non-discharge application

(a) ***The evidence of the joint trustees***

47 The non-discharge application was filed on or around June 1st, 2020, a few weeks before Mr. King would otherwise have stood automatically to be discharged.

48 The application was supported by an affidavit sworn by Mr. Lavarello on May 28th, 2020. The affidavit also included as an exhibit a witness statement of Mr. Hyde (with annexes) previously made on April 11th, 2019 in the bankruptcy proceedings. It is by reference to that affidavit and exhibit that the case was made against Mr. King in support of the application for his non-discharge from bankruptcy.

49 The grounds relied upon in this respect were identified in para. 13 of the affidavit of Mr. Lavarello as those set out in s.412(4)(a), (c), (h) and (j) of the 2011 Act. The ground referred to in s.412(4)(c) can be rejected *in limine*, as was accepted below. The statutory reference is to conviction, not committal, of a bankruptcy offence; and Mr. King has never been convicted of any such offence. No real reliance was placed on the ground referred to in s.412(4)(j) either. No express reliance, I note, was placed on s.412(4)(d).

50 Mr. Lavarello states in his affidavit, among other things: "To say that Mr. King has failed to cooperate with the Trustees is an understatement." He asserts that Mr. King had, with others, "actively sought to evade and mislead the Trustees." He goes on to deal with the history of service of the bankruptcy order, the letter from the mother dated August 30th, 2017 and the letters of September 14th, 2017 (as summarized above). The affidavit records that Mr. King had not prepared any SOAL and had not supplied any financial records. It summarizes the alleged *modus operandi* of Mr. King in putting assets in the name of companies and in making disposals of assets by way of purported gifts to family members. It says that the joint trustees are unable to establish whether he has moved assets. It was also observed that Mr. King had failed to make any disclosure pursuant to the Advalorem freezing order of September 4th, 2015. Reference is made to "his involvement in the Advalorem fraud and the Heather fraud," and to the judgment of Jack, J. of July 31st, 2017. The overall submission (in para. 25 of the affidavit) was that the court had "sufficient evidence to conclude that Mr. King has failed to comply with his obligations under the Act and that he has committed fraud." It was also said that he had clearly committed bankruptcy offences but had not been convicted of such.

51 The exhibited statement of Mr. Hyde (itself with an exhibited bundle of documents) primarily concerns itself with the history of the bankruptcy process. It among other things refers to the position of Advalorem and Heather. It says that Mr. King "remains non-compliant and has failed to produce a statement of affairs, deliver any financial records or submit himself for interview." It goes on to detail the attempts at recovery (and associated litigation) with regard to the two properties in Spain; the proceedings in Scotland; proceedings in Gibraltar relating to a property in Glasgow involving the wife of Mr. King; and the proceedings concerning restoring to the register three Scottish companies with a view to recovering "loans" purportedly made by them. It is also said, in the course of Mr. Hyde's statement, that "a recurring theme of the Trustees' investigations . . . is that there appears to be nothing in the name of the bankrupt himself . . ."

(b) ***The evidence on behalf of Mr. King***

52 Mr. King made an affidavit in answer dated September 2nd, 2020.

53 He complains that the affidavit of Mr. Lavarello is "neither balanced nor fair" in its presentation of the evidence. He goes on to state that he was not made aware at the time that bankruptcy proceedings had been raised against him nor that he was made bankrupt, although he does say that in around August 2017 he had been told by a firm of solicitors, as a result of an enquiry made to that firm by a journalist, that he had been made bankrupt in Gibraltar. He describes his background and the history of his place of residence. He disputes connection with Gibraltar at the relevant

time. He denies attempting to evade service and objects to the conclusions of Jack, J. He asserts non-receipt of various of the documents, as recorded above.

54 He goes on to deny any lack of cooperation, saying about the joint trustees: "To be clear, I believe that they have actively and deliberately failed to seek any sort of cooperation from me." He subsequently states (as also set out earlier in this judgment) that he did not receive any of the correspondence referred to by Mr. Lavarello, including the letter of August 29th, 2017.

55 Mr. King further states that the only request he had received from the joint trustees to provide a SOAL was on November 16th, 2017, on the execution of the search and seizure order. According to him, during that episode Mr. Hyde provided him with a form to complete setting out his assets and liabilities (I interpolate that this does not appear anywhere on the actual transcript relating to that search). He says that he had not heard from Mr. Hyde again. As to that form he says this (at para. 28):

> "At the time of the search and seizure, Mr. Hyde provided me with a form to complete setting out my assets and liabilities. I confirm that I completed that form and posted it to him a few days later. I was unable to give him full information as most of my financial affairs had been dealt with by my professional advisers. I provided him with details of all these advisers on a separate paper."

He goes on to say that if that form was never received (and the judge in due course found that it was not): "I do not understand why [Mr. Hyde] did not contact me or my solicitor James Lloyd." He says that, had Mr. Hyde done so, he would have completed the form again.

56 Overall, Mr. King makes strong complaint about what he says was a sustained failure on the part of the joint trustees to contact him or Mr. Lloyd. He draws attention, among other things, to the closing remarks as recorded on the transcript of November 16th, 2017 (set out above) and says that no request thereafter was made, whether to him or via Mr. Lloyd, for him to attend to be examined voluntarily or, indeed, to attend for any private examination before the court.

57 He also denies the assertion that he was a fraudster.

58 He concludes his affidavit by noting that he was aware that discharge did not bring his bankruptcy to an end and that he was obliged to cooperate with the trustees.

59 In addition, Mr. Lloyd made an affidavit of September 2nd, 2020. He refers to the correspondence with his firm in the second half of 2017. He says of his failure to respond to the email of October 31st, 2017:

> "I did not respond to that as I was still to consider the COMI [centre of main interests] point and subsequently Mr. King met with Mr. Hyde on November 16th, 2017 as I now discuss."

He goes on to say that thereafter he received no further communication from the joint trustees or their solicitors.

60 As to Mr. King's assertion in his affidavit that he complied with Mr. Hyde's provision to him of a SOAL form on November 16th, 2017 for completion (and Mr. Lloyd does not say that he himself witnessed any such provision) by posting it, Mr. Lloyd says:

> "The Respondent tells me that he complied with this request and posted the form . . . I cannot confirm whether the Respondent did so or not."

61 The joint trustees did not see fit to put in any evidence in reply to the evidence of Mr. King or Mr. Lloyd.

(c) ***The statement of assets and liabilities***

62 Mr. King did at all events complete a form of SOAL during the course of the proceedings. This was dated August 7th, 2020. It was made as required by a consent order of the Supreme Court dated July 29th, 2020. The SOAL would appear to have been sworn by Mr. King before Mr. Lloyd as notary public or commissioner for oaths. That SOAL was before the judge at the hearing, as it was before us.

63 In it, the various required statements as to assets and liabilities are marked with the answer "see paper apart." Mr. King does not say in evidence that this document was in the same form as that said to have been posted shortly after November 16th, 2017. The annexed paper apart is a two-page, typed document. In it, reference is made to bank accounts previously held by Mr. King prior to his bankruptcy. No records or account details were given. He goes on to refer to his being ultimate owner of a number of corporate special purpose vehicles: "There were a large number of these and I do not remember them all." He names none of them. He refers to various professional advisers in Gibraltar, Spain, UK and Switzerland. He says that he holds no further documents relating to his financial affairs aside from what the joint trustees had recovered in their search and seize processes in Scotland or Spain. He says nothing about the properties in Scotland or Spain. He in fact identifies no property or residence as an asset of his at the time of the bankruptcy order, whether in Spain or Switzerland or Dubai or anywhere else. In short, he identifies no assets and no debts (aside from those due to Advalorem and Heather, which he disputes) save for an unspecified outstanding tax bill in Switzerland (although what the tax relates to is not identified) and some possible fees owed to professional advisers.

64 Following receipt of that SOAL, the joint trustees on September 3rd, 2020 served a detailed questionnaire. I will come on to that in due course.

(d) ***The preliminary hearing concerning cross-examination***

65 In view of what Mr. King had asserted in his affidavit of September 2nd, 2020 the view was taken by the joint trustees that it was appropriate to seek to cross-examine Mr. King on his affidavit. They applied accordingly. The application was opposed by Mr. King.

66 The application for cross-examination eventually came on for hearing before Ramagge Prescott, J. in March 2021. Written submissions were provided in advance of the hearing. In the written submissions on behalf of the joint trustees it was acknowledged that the cross-examination should be limited to the subject-matter of the non-discharge application and not be used for a general investigation of Mr. King's affairs. It was said that the non-discharge application was based on, among other things, the assertion that Mr. King had failed to comply with his obligations as a bankrupt and continued to do so:

> "perhaps the simplest example relied on by the Trustees is the Bankrupt's failure to comply with his statutory obligation to serve a statement of assets or liabilities or to produce financial records."

It was noted that there was a factual dispute as to Mr. King's assertion that he wrote to the joint trustees sending a SOAL. Mr. King was accused of being evasive; and it was stated that he had "refused to provide any assistance to the Trustees, despite having promised to do so." In the detailed written submissions on behalf of Mr. King, it was among other things stated that it was envisaged that the non-discharge application:

> "would be determined in accordance with the settled practice of the court exercising its insolvency jurisdiction, namely to hear and determine insolvency applications 'on paper' and without a 'trial' (properly so called), i.e. without disclosure or cross-examination."

It was said that, although there was jurisdiction to order cross-examination, it was "exceptionally rare" to make such a direction in insolvency applications of an administrative nature such as this and that the respondent's lawyers were not aware of any authority in which a direction to cross-examine had been made on a non-discharge application. Further, criticism was made of the joint trustees' failure to put in a reply to Mr. King's affidavit or to identify disputed facts; of the submission by the joint trustees of the questionnaire; and of the potentially roving and unfocused nature of the lines of potential cross-examination (it being noted that an initial consent order of July 29th, 2020 had not envisaged any cross-examination).

67 Following oral argument, the judge reserved her decision on the application for cross-examination. Her judgment was handed down on April 29th, 2021. She rejected the application to cross-examine. She considered that cross-examination would delay the proceedings, which "would be converted into a sort of mini-trial." She considered that departure from the usual procedure could only be justified if cross-examination was necessary for the fair disposal of the non-discharge application (para. 15). She went on to make some criticism of the generality of aspects of the joint trustees' evidence and lack of definition of the scope of the proposed cross-examination (paras. 20 and 21). However, she also said that the affidavit of Mr. Lavarello "makes for compelling reading," and "[1] 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" (para. 19). Her ultimate conclusion was that "I cannot be satisfied that cross-examination is necessary for a fair disposal of the case." The cross-examination application was accordingly dismissed. There was no appeal by the joint trustees against that ruling.

(e) ***The hearing of the non-discharge application***

68 The hearing of the non-discharge application then took place on July 12th and 13rd, 2021. Mr. King had in the meantime made a second affidavit on September 4th, 2020, among other things stating that he declined to answer the questionnaire served on September 3rd, 2020 until after final determination of the joint trustees' non-discharge application. He complained that such questionnaire had been served unwarrantedly late (more than three years after the bankruptcy order) and was designed to try and generate late evidence to bolster the non-discharge application.

69 Shortly before the hearing, there were served on behalf of the joint trustees three bundles of documents culled, it was said, from the bankruptcy process. It was proposed that reference be made to some of them at the hearing. The judge refused to allow such bundles to be put in evidence at the hearing, on grounds both of lateness and of want of particularization as to the use to which such documents might be put. Although these bundles were provided as non-agreed bundles to this court prior to the appeal hearing (the court not reading them in advance of the hearing), in the event Mr. Feetham, K.C., for the joint trustees, did not seek at the appeal hearing to rely on them. They thus can and should be ignored for the purposes of this appeal.

70 It is clear from the written submissions lodged in advance of the hearing before the judge that counsel then appearing for the joint trustees were assuming that the judge would be making her evidential appraisal on disputed issues (on the balance of probabilities and the burden being on the joint trustees) by reference to the papers. It is a fair inference that the judge herself, judging by some of her observations in her earlier ruling on the

cross-examination application, had also been assuming that to be the case. But there was a development. For Mr. Davies, appearing then, as he had on the previous cross-examination application, for Mr. King, submitted that because there was to be no cross-examination on his affidavits the evidence of Mr. King had to be accepted in its entirety unless manifestly incredible. Reliance was placed on the principle articulated in decisions such as *Long* v. *Farrer & Co.* (9) (to which I will come). That approach was strongly opposed on behalf of the joint trustees. That issue was left to be decided as part of the judge's substantive decision on the non-discharge application. The hearing thus continued.

71 After the oral hearing had concluded the judge reserved her decision. There was then yet a further development, for the joint trustees on August 12th, 2021 applied for permission to adduce further evidence (which, judgment not having yet been handed down, the judge would have had jurisdiction to permit, as a matter of discretion).

72 The proposed fresh evidence had two distinct aspects, which were detailed in a full affidavit of Mr. Hyde sworn on August 12th, 2021.

73 The first aspect related to information received after the hearing from an individual in the United States of America called Mr. Staw. He had contacted the Gibraltar lawyers for the joint trustees indicating a prospective settlement of a claim by an American company called Senticare Inc. ("Senticare") of which Mr. King had been a shareholder. In due course, it was to be stated by Mr. Staw that Mr. King had invested $655,000 in Senticare on or about July 11th, 2011, and that around $2.5m. was now potentially due to him on a deferred sale of Senticare to another American corporation. Mr. Hyde exhibited documentation thereafter obtained which essentially confirmed that position. The submission of Mr. Hyde was that the joint trustees would never have known of this asset or potential return but for the unexpected contact by Mr. Staw. It was accordingly asserted that Mr. King had sought to withhold mention of this asset in his SOAL and otherwise, and had sought to deceive the joint trustees, and this further confirmed that Mr. King was not (contrary to his protestations) acting in accordance with his obligations as a bankrupt.

74 The second aspect concerned alleged obstruction on the part of Mr. King. As stated above, an iPhone had been recovered on the search of November 16th, 2017 but Mr. King had been either unable or unwilling to provide the password, and in spite of several unsuccessful attempts the IT team of Grant Thornton were not able to access the content (which had been evaluated, moreover, as heavily encrypted). However, the question of analysis of the iPhone was then raised by the creditors' committee of Heather (the largest creditor of Mr. King) in November 2020. Use of funds for further analysis was sanctioned. Further analysis then conducted by Grant Thornton in July 2021 indicated that there had been a full reset to

factory settings on the iPhone, which had had the effect of wiping all data from the iPhone. The conclusion was that the iPhone had been set up to perform a full reset upon ten failed password attempts. Further, the report of Grant Thornton was that the iPhone had been updated to the latest operating system within seven days prior to the November 16th, 2017, and that could only have been done with input of the password. Mr. Hyde states the belief, based on this, that Mr. King indeed knew the password and knew that ten unsuccessful attempts would have had the effect of wiping the data on it.

75 Mr. King, in response to these latest allegations, put in a further affidavit sworn on September 10th, 2021. In it, he denied any deliberate withholding of any information about an asset and denied any deliberate obstruction. He complained that this was another example of Mr. Hyde "shooting first and asking questions later." As to Senticare, Mr. King accepts that he made an investment of $655,000. That company, to his knowledge, traded poorly and by 2011 he viewed it, as he said, as a "dead duck" and he had no further contact with it after 2011. He says that he was sanguine about losing his money as at the time he was dealing with and investing very large sums, normally involving deals worth between $2m. and $40m., and by comparison this investment was inconsequential and hardly registered with him. He had forgotten all about it, in short. An affidavit of Mr. Lloyd sworn on September 30th, 2021, with exhibits, was also put in to support this account.

76 As to the password on the iPhone, Mr. King maintains that he did not know the password, the reason being that "I am not very good with electronic devices." He says that, as he had said on November 16th, 2017, his previous devices had been stolen in Spain and he had acquired the new iPhone only a few days before November 16th, 2017. A friend in Switzerland had at that time set up the new iPhone for him, including the password, and he (Mr. King) could not remember it as it was a long one. He also protested at the delay (over three years) of the joint trustees in having the iPhone analysed.

(f) ***The decision of the judge***

77 The judge handed down her reserved judgment on the non-discharge application on March 10th, 2022. The judgment was 90 paragraphs in length. It is evident that the judge, most commendably, had spent a good deal of care in preparing it.

78 The judge summarized the circumstances of the making of the bankruptcy order. She among other things referred to the service of the SOAL in August 2020 and the provision of the questionnaire of September 3rd, 2020 by the joint trustees. She was very critical of the joint trustees' failure to serve evidence in reply and of the failure (in her view) properly

to identify the evidence upon which the joint trustees proposed to rely in support of the non-discharge application.

79 In evaluating the evidence, the judge accepted the submission of Mr. Davies based on cases such as *Long* v. *Farrer & Co.* (9). She referred to her prior ruling on the cross-examination application. She held that the joint trustees "have filed no evidence challenging the assertions made by the Bankrupt" (para. 21). She went on:

> "The approach I adopt when considering the evidence is that the evidence of the Bankrupt should not be disbelieved unless it is manifestly incredible and that must particularly be so where the trustees have filed no evidence challenging, disputing or displacing any of the assertions the bankrupt makes."

80 Adopting this approach, the judge nevertheless concluded, with regard to service of the bankruptcy order in Scotland by Mr. Hyde's letter of August 29th, 2017 and to the mother's letter of August 30th, 2017, that "the irresistible inference" was that Mr. King was avoiding service of the order and that his mother was helping him in that. As to the alleged non-receipt of the letters of September 14th, 2017, however, she found that "the bankrupt must be believed." She also accepted Mr. King's evidence that Mr. Hyde handed him a form of SOAL during the dawn raid of November 16th, 2017. As to whether it had been completed and posted back, the judge said that "if I were approaching the subject from the perspective of whose account I prefer I would in all probability conclude that he did not post the SOAL to the Trustees"—not least because she thought it highly unlikely that he would not have consulted and/or informed Mr. Lloyd if he had. She accepted the SOAL had not been received by the joint trustees. She went on, nevertheless, to say:

> "However, reminding myself of *Long* v. *Farrer* I guard against reaching a conclusion on the basis of preferring one statement over another, and therefore I accept the Bankrupt's evidence that he did post the SOAL to the trustees as he states . . ."

She in due course went on to hold that it thus had not been proved that Mr. King had failed to provide a SOAL during the course of the bankruptcy, and:

> "it follows that the suggestion by the Trustees that the Bankrupt has failed to disclose assets must also fail and consequently so must the suggestion that the Bankrupt has been dealing with any such assets."

81 As to the ground alleging that Mr. King had committed a fraud or breach of trust, the judge took the view that the findings of Jack, J. in his judgment of July 31st, 2017 were inadmissible and in any event were insufficient to justify a conclusion of fraud, and there was no other evidence adduced sufficient to justify such a conclusion.

82 Turning to the proposed fresh evidence, the judge took account of the criteria set out in the well-known case of *Ladd* v. *Marshall* (8) and other such cases. The judge decided to admit the evidence relating to Senticare. She, among other things, said that she "shared some of the incredulity" of the joint trustees as to the credibility of Mr. King's account. Nevertheless, applying *Long* v. *Farrer*, she decided that the explanation of Mr. King could not be rejected in the absence of cross-examination.

83 As to the issue of the data on the iPhone, the judge refused to admit the proposed fresh evidence. She held that no sufficient explanation was given for failing to analyse the iPhone much earlier; and that reasonable diligence had not been shown. In any event, Mr. King's explanation could not be rejected as incredible.

84 The judge went on to hold that the joint trustees could not adopt the unchallenged evidence of Mr. King as further grounds for supporting their application, if those grounds were not made in the application. She also declined to take into account the completed SOAL provided in August 2020.

85 Overall, therefore, the judge found (at para. 73 of her judgment) that there had been a violation for the purposes of s.412(4)(a) of the 2011 Act in Mr. King's attempting to avoid service of the bankruptcy order and in failing to engage with the joint trustees so as to facilitate service. The judge found that in all other respects the joint trustees had failed to establish any other grounds.

86 Having (in this one respect) concluded that Mr. King had breached a statutory obligation, the judge went on to consider the exercise of discretion.

87 For this purpose, she balanced the conduct of Mr. King with the conduct of the joint trustees. In this regard, the judge (rightly) recognized that Mr. King had a positive duty to cooperate and comply with his statutory obligations irrespective of any promptings, or lack of promptings, by the joint trustees. That said, the judge was very critical of the conduct of the joint trustees. She accepted that their task in this bankruptcy may have been "monumental." But she concluded that they had erred in assuming evasion and dishonesty to be self-evident; in failing sufficiently to evidence or particularize their allegations or to justify the application to cross-examine; in failing to serve the questionnaire during the period of the bankruptcy; in failing to seek the private examination of Mr. King; and in failing to correspond further with Mr. Lloyd after October 31st, 2017. The judge also noted that the non-discharge application itself had been filed relatively late in the day. The judge expressed her ultimate conclusion in these terms, at paras. 89 and 90 of the judgment:

> "89. There is no doubt that the onus is on the Bankrupt to engage with the Trustees and provide the relevant information, but where trustees do not engage with a bankrupt, it will be difficult for them to justify an extension to the bankruptcy in circumstances where they appear to have failed to take advantage of the opportunities afforded to them during the statutory bankruptcy period, more so where the breach by the bankrupt of his statutory duty is not of the most serious.
>
> 90. I bear in mind the public interest, which I balance against the penal nature of the application. I balance the seriousness and significance of the single proven breach against the Bankrupt's right to be discharged after three years. For the reasons I have given, I exercise my discretion against the postponement of the automatic discharge as sought by the Trustees."

88 Accordingly the non-discharge application was dismissed. As I have said, the judge subsequently granted a stay, pending disposal of this appeal. She ordered the joint trustees to pay costs, on a standard basis.

89 I should note two other points at this stage. First, Mr. King did subsequently, after the hearing, lodge a signed response to the questionnaire. This is exhibited to a witness statement of Mr. Hyde of June 6th, 2022 made in support of the application for a stay (Mr. Hyde also explains in that statement that it is not appropriate, or usual practice, for bankruptcy trustees to send a questionnaire until a completed SOAL is received). Second, following the grant of the stay Mr. King obtained on an *ex parte* basis from Ramagge Prescott, J. on July 15th, 2022 a direction that the joint trustees be prohibited, pending disposal of the appeal, from examining or interviewing Mr. King. The restriction on examination, given Mr. King's success on the non-discharge application, is understandable. The prohibition even on interviewing is less easy to understand, given the provisions of s.343(3) and (5), and s.414(1) of the 2011 Act.

Grounds of appeal

90 There are six grounds of appeal:

(1) The judge erred in adopting the approach that Mr. King's evidence should not be disbelieved unless manifestly incredible: such approach was in the circumstances of this case unjustified and unfair to the joint trustees.

(2) The judge erred, having adopted this (wrong) approach, in not likewise applying it to the evidence of the joint trustees.

(3) The judge erred in law, when engaging in the fact finding process, in considering that the joint trustees should have (but did not) file evidence in reply to the affidavits of Mr. King.

(4) The judge erred in law in declining to take account, in assessing the case against Mr. King, Mr. King's own evidence.

(5) The judge erred in refusing to admit the fresh evidence in the form of the analysis in 2021 of the data on the iPhone.

(6) The judge erred, at the second stage, in her assessment of where the public interest lay, given the interests of creditors, the very large sums involved, the highly suspicious nature of the conduct of Mr. King and the restrictions on future investigation that discharge would entail.

91 The grounds (the first five grounds in particular) all relate, in one form or another, to an attack on the judge's approach to the overall evidential evaluation. Although they are, in one sense, distinct, I propose to take them all together in assessing what conclusion to reach on this appeal. In doing so, I have endeavoured to take into account all the very detailed arguments presented by counsel to us, although I will not specifically address every point or nuance raised.

Long* v. *Farrer & Co.

92 It is appropriate at this stage to address some of the authorities which caused the judge to adopt the stance that Mr. King's evidence should not be rejected unless manifestly incredible.

93 A starting point can be taken to be the decision of the House of Lords in *Browne* v. *Dunn* (1). Lord Herschell, L.C. there stated, among other things, in the course of a lengthy passage of importance (6 R. at 70):

> "My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

More generally, all advocates—even those who have never heard of *Browne* v. *Dunn*—know of the importance of "putting one's case" at trial to a relevant witness.

94 Lord Herschell, L.C. was speaking nearly 130 years ago, when civil procedure rules were very different and when there was no routine exchange of affidavits or statements prior to trial. He also self-evidently was talking in the context of trials of what may be called witness actions and where the relevant witness was giving oral evidence. Moreover, he himself went on to acknowledge that there might be exceptions and that there is no absolute requirement in every case that every possible basis for disbelieving a witness must be put in cross-examination: see also for

example, the Privy Council case of *Chen* v. *Ng* (2) (British Virgin Islands) ([2017] UKPC 27, at para. 52).

95 The broad principle enunciated in *Browne* v. *Dunn* was applied in an altogether more modern context in *Long* v. *Farrer & Co.* (9). In that case, in a disputed application as to production of documents in an insolvency context, an issue arose as to whether a Mr. Belcher had indeed been a client of the solicitors Farrer & Co. On this issue there were directly conflicting witness statements. Rimer, J. (as he then was) observed that the Registrar had been dealing with an application which finally decided the rights of the parties: "it was, therefore, akin to a trial, albeit one of modest dimensions" ([2004] EWHC 1774 (Ch), at para. 57). He went on:

> "It is, I believe, by now familiar law that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness."

He stated that the principle applied equally to witness statements and statements made under oath or affirmation. He also went on, after citation of various authorities, to say that the basic principle could nevertheless be disregarded where the paper evidence was manifestly incredible. One particular point of importance in that decision, as I see it, is that it confirms that the principle can indeed apply as much to final decisions on applications as it does to the full trials of witness actions.

96 There was cited to us a number of authorities where, in cases not involving the trial of a witness action as such, that general principle was invoked. These cases extended, among other things, to directors' disqualification cases; a dispute, in an insolvency context, as to where the debtor's centre of main interests really was; and a dispute as to whether a foreign bankruptcy order should be recognized by the English courts. This last case (*Kireeva* v. *Bedzhamov* (7)) was particularly striking, being a case where the first instance judge had rejected assertions of fraud and forgery raised on paper evidence, in particular in a witness statement only provided towards the very end of the hearing. It was held in the Court of Appeal that the issue should not have been decided on paper evidence alone and the paper evidence of the relevant witness could not be discounted without cross-examination. The matter was, in that case, remitted to enable cross-examination to take place.

97 It might also be noted, on the other hand, that it has been stated that in proceedings for an administration order "only very exceptional circumstances" will justify an order for cross-examination: *Highberry Ltd.* v. *Colt Telecom Group plc* (5) ([2002] EWHC 2503 (Ch), at para. 35, *per* Lawrence Collins, J.) (an authority, I observe, cited to and relied upon by counsel for Mr. King before Ramagge Prescott, J. at the cross-examination application hearing). And judges of the Administrative Court in England

and Wales are well used in judicial review and administrative law cases to evaluation of factual evidence, including disputed factual evidence, on the papers: cross-examination being only exceptionally permitted in that court.

98 Ultimately, the underpinning rationale clearly is that of fairness. Further, as stated by Carr, J. in the Divisional Court case of *Williams* v. *Solicitors' Regulation Auth.* (12) ([2017] EWHC 1478 (Admin), at paras. 73–74):

> "73. The rule [in *Browne* v. *Dunn*] is not an absolute or inflexible one: it is always a question of fact and degree in the circumstances of the case so as to achieve fairness between the parties . . .
>
> 74. What matters is the giving of notice to a witness of the allegation in question, and the proper opportunity for the witness to respond."

Discussion and disposal

99 I turn, then, to the conclusion to be reached on this appeal.

100 I would at the outset reject a number of points raised on behalf of the appellants.

101 First, I can see no valid basis for the appellate court interfering with the judge's discretion to refuse the application to admit as fresh evidence the evidence relating to analysis of the iPhone. That phone had been seized in November 2017. It was not analysed until mid-2021. The judge was entitled to reject the explanation, such as it was, for the delay and to rule that the evidence had been obtained and presented unacceptably late. The fifth ground of appeal therefore fails. For completeness, however, I would add that in my opinion the judge's discretionary decision to admit the fresh evidence relating to Senticare was itself a proper one, for the reasons she gave. I in fact did not understand that to be disputed.

102 Second, I consider that there was a great deal of force in the judge's criticism at least of the presentation of the joint trustees' case on the ground of fraud or breach of trust, by reference to s.412(4)(h) of the 2011 Act. Such a ground, to be established, required cogent and properly particularized and evidenced allegations. But as advanced in the evidence of the joint trustees there was a conspicuous lack of particularization: the complaints of Mr. Davies were, I think, justified in this respect. Ultimately, the allegations rested primarily on the fact of the obtaining of the judgment in default on April 7th, 2016 (against the background of the obtaining of the freezing order) and on the judgment of Jack, J. on July 31st, 2017 in making the bankruptcy order. But a judgment in default has a rather special, and limited, status in evidential terms; and while the judgment of Jack, J. of July 31st, 2017 was trenchant in its opening remark that Mr. King was a fraudster, Jack, J. necessarily thereafter had to qualify it by reference to what was alleged (Mr. King having put in no evidence). Nor, for whatever

reason, were the particulars of claim, doubtless backed by a statement of truth, in the Advalorem proceedings even adduced in evidence before the judge. Yet further, the so-called rule in *Hollington* v. *Hewthorn* (6) might pose some difficulties in this respect. Unquestionably the dealings involving Advalorem (and Heather), among other transactions, were suspicious, highly suspicious. But it is established that suspicion alone is not enough in this context to establish a ground for non-discharge, and given also that Mr. King has denied any fraud, I consider, overall, that the judge's rejection of this ground was properly open to her. I say this because in argument before us Mr. Feetham was reluctant to abandon the point. That said, it was clear that the main focus of his argument—as appears to have been the main focus in the court below—was as to the appraisal of the evidence relating to failure to comply with a bankrupt's obligations, by reference to s.412(4)(a) of the 2011 Act.

103 Third, I can see no real substance in the complaint that the judge applied a wrong approach, by reference to *Long* v. *Farrer & Co.* (9), to the joint trustees' own evidence. The joint trustees had very limited first-hand knowledge of the underlying facts—although it was clearly, on the face of what they were alleging, the explanations of Mr. King which in practice had to be a primary focus of attention, albeit the burden of proof of course throughout rested on the joint trustees.

104 All that said, and while I accept that in some respects criticism of the evidence of the joint trustees can be justified, in other respects I consider, with respect, that the judge was unjustifiably over-critical of the joint trustees' evidence.

105 Thus, she criticized the failure of the joint trustees to put in evidence in reply. I agree that was surprising, indeed ill-judged. But it is incorrect to say (as the judge did at para. 21) of her judgment that "the Trustees have filed no evidence challenging the assertions made by the Bankrupt." It is wholly obvious from their evidence, read as a whole, that they regarded Mr. King as an evasive and uncooperative fraudster and accepted none of his protestations by way of denial or exculpation. That no evidence in reply was put in, however surprising, at least clearly does not connote acceptance of his evidence. Indeed, on usual principles, there was a deemed joinder of issue.

106 What, nevertheless, can be accepted is that, having put in no evidence in reply, the joint trustees could rely on no further *positive* assertions to rebut Mr. King's evidence which were not already contained in the evidence heretofore filed. One obvious example is this. Mr. King specifically said in his first affidavit that during the dawn raid of November 16th, 2017 Mr. Hyde provided him with a form of SOAL for completion. I gather that at the hearing below counsel then appearing for the joint trustees, on instructions, denied this on behalf of Mr. Hyde. But Mr. Hyde

was there on November 16th, 2017. He had first-hand knowledge in this respect. Yet he made no positive case in any affidavit in reply disputing what Mr. King had said. That being so, in my view the affidavit of Mr. King in this particular regard should not be discounted on this application and appeal.

107 Another concern as to the judge's approach which I have is this. The judge (para. 66 of her judgment) had held that the joint trustees could not adopt unchallenged evidence of Mr. King as grounds upon which to found the non-discharge application and that it was not appropriate to rely on such matters to find that Mr. King was in breach of his statutory obligations. For that reason, she held, among other things, that the joint trustees could not rely on the SOAL provided by Mr. King on August 7th, 2020 (which was in evidence before the judge) as exemplifying non-cooperation.

108 I simply cannot accept this.

109 Mr. Davies cited to us (as he had to the judge) the case of *In re Finelist Ltd.* (4), a directors' disqualification case. In the course of his judgment, Laddie, J. ([2003] EWHC 1780 (Ch), at para. 18) said:

> "It should not be open to the applicant, by making general allegations of misconduct, to require the respondent to put forward his own account of events, and then to rely upon the respondent's own account to support the case for a disqualification order."

110 One may have reservations about the width of that statement. But in any event that is not this case. The joint trustees had unequivocally and specifically alleged the failure on the part of Mr. King to comply with his statutory obligations. They unquestionably were, on *prima facie* cogent grounds, alleging evasion and non-cooperation. Appraisal of Mr. King's own account in response was required. Further, he had, for example, actually consented to the order requiring him to produce a SOAL; and that SOAL was in evidence before the judge. In such circumstances, there was, in my opinion, no reason why it could not have been relied on by the joint trustees against Mr. King as further evidence of failure to comply with his statutory obligations. It would have been an empty procedural gesture to include such further criticisms of the SOAL in any affidavit in reply: indeed, the SOAL spoke for itself and could hardly meaningfully be the subject of evidence (as opposed to comment) on the part of the joint trustees. I consider, with respect, that the judge was wrong to exclude it entirely from her overall appraisal: and, more generally, was wrong in principle to exclude an assessment of Mr. King's own evidence in answer as even being capable of supporting the joint trustees' case.

111 This leads me on to what was really the principal complaint of Mr. Feetham, that the judge had been wrong to direct herself that the account of Mr. King had to be accepted, unless manifestly incredible. He submitted

that the judge, in the light of her prior cross-examination ruling, thereby "crippled" the case of the joint trustees and gave an unfair advantage to the case of Mr. King.

112 I consider that there is great force in this submission

113 The principle enunciated in *Browne* v. *Dunn* (1), and applied in modern contexts such as *Long* v. *Farrer & Co.* (9) and other such cases, is an important and salutary one. The underpinning rationale is fairness. And, generally speaking, it is not fair for a person to be disbelieved on his affidavit or witness statement if he has been afforded no chance to explain himself in cross-examination. But that, as I see it, simply is not this case. Mr. King had not only been able to put in his own evidence setting out his case but also, when he knew that it was being challenged, had been offered a chance to explain himself by oral examination. He had, however, declined that opportunity for he opposed the joint trustees' application for cross-examination on his affidavits. Mr. Davies did not demur when it was put to him by the court in argument that Mr. King thereby had indicated that he did not wish to be cross-examined.

114 None of the cases cited to us involved a situation where cross-examination had been applied for but had been positively opposed by the witness and the application for cross-examination had then, by reason of that opposition, been rejected by the court. That of itself renders the present case distinguishable. It seems, to me, very odd indeed that an individual can say that his evidence must be believed (unless manifestly incredible) in the absence of cross-examination when it is he himself who had successfully opposed cross-examination. If the underlying consideration is fairness—and it is—that kind of stance, in my opinion, makes no appeal to fairness.

115 It is evident that counsel for the joint trustees had assumed, after the cross-examination ruling by the judge, that the case would be evidentially determined on the papers. It is a reasonable inference, and I would myself infer, that the judge herself at that time had so thought: see for example her comments in para. 19 of her ruling (referred to above). Mr. Feetham in his written submission on this appeal had himself taken it that that also must at the time have been true of the legal team of Mr. King. He there submitted that it was "inconceivable" that Mr. King's lawyers, acting professionally and in good faith, would not have brought *Long* v. *Farrer & Co.* (9) to the judge's attention had they had it in mind subsequently to argue that if there was no cross-examination Mr. King's evidence (absent manifest incredibility) would have to be accepted as true.

116 It transpires, however, that this was not so. Mr. Davies was asked by this court during the course of argument whether he had it in mind at the time of his argument before the judge on the cross-examination application to invoke the *Long* v. *Farrer & Co.* principle on the substantive non-

discharge application. He said that he had. I found this answer as disconcerting as it was candid.

117 It is disconcerting because, on the cross-examination application, Mr. Davies had himself been submitting that cross-examination on a non-discharge application was wholly exceptional and contrary to settled practice. The impression surely given thereby was that the substantive non-discharge application was to be determined by an evidential evaluation (on the balance of probabilities) on the papers: as the judge, it can be inferred, at that time was assuming. Had the *Long* v. *Farrer & Co.* case been drawn to the attention of the judge, I consider that her ruling may well have been, indeed would (and, in my view, should) have been, different. I appreciate that the judge had concerns about the lack of focus and particularization of the joint trustees' evidence. But cross-examination could have been kept in concise bounds by case management and in any event the written arguments of counsel then appearing for the joint trustees had made clear the kind of points of dispute (for example, service of the bankruptcy order and posting of the SOAL after November 16th, 2017) that arose: that is to say, relatively concise areas.

118 Mr. Davies coolly submitted that if there was a misunderstanding that was attributable to the joint trustees (who, after all, had sought cross-examination) and to the judge. They should, he said, be expected and assumed to know the law, as re-stated in *Long* v. *Farrer & Co*. This is not, in my view, acceptable. Counsel for the joint trustees had evidently not appreciated the point. It was also not reasonable to expect that Ramagge Prescott, J. should have then been alive to the point either. Judges in Gibraltar have a very wide portfolio of cases to manage. They do not have, and cannot reasonably be expected to have, the knowledge of specialist judges of the Insolvency Courts or Chancery Division in England and Wales. In my view, against the submission of specialist counsel that it was not the practice to order cross-examination on non-discharge applications, it should have been made clear, if it was the case, that it was the intention thereafter to argue that that had the potential consequence that the bankrupt's evidence must be accepted, unless manifestly incredible. Had that been done, I apprehend the judge would have taken a different approach.

119 I appreciate that thereafter the judge, at the substantive hearing of the non-discharge application, did not, when then presented with the arguments based on *Long* v. *Farrer & Co.* (9), seek to revoke her earlier ruling (albeit potentially at the expense of an adjournment). Perhaps she thought she had no power to do so. But the upshot was, in my view, unduly favourable for Mr. King and unduly unfavourable for the joint trustees.

120 In my view, given that Mr. King had objected (successfully) to being cross-examined, and moreover had done so saying that it was usual practice

not to have cross-examination but without alluding to intended reliance thereafter at the substantive application on the principle of *Long* v. *Farrer & Co*., the factual evaluation (including as to disputed facts) should indeed, as a matter of fairness, then have been undertaken at the substantive hearing on the papers on the balance of probabilities. Rule 71 of the Court of Appeal Rules, I might add, if it be relevant, provides that no interlocutory order from which there has been no separate appeal should operate to prevent the appellate court from making a just decision on appeal. Consequently, the failure to seek to appeal from the judge's ruling on the cross-examination application is no bar to a just outcome on this appeal.

121 That being so, I am in no doubt that if the case on failure to comply with statutory obligations should have been, and should be, decided on the papers, on the standard of balance of probability and with the burden being on the joint trustees, it should have been, and should be, in the circumstances of this case, decided in favour of the joint trustees. My view is that such an approach—that is, making an evidential assessment of disputed facts on the papers on the balance of probabilities—should at the time of the hearing of the non-discharge application, in the circumstances of the case as they had been thus far permitted to develop, have been taken by the judge; and in fact, on that approach, it is clear from her own statements what her own conclusion would have been.

122 In any event, however, that is also the view which I reach on the basis that evidence of Mr. King in his affidavit as to posting the SOAL is to be rejected as incredible. I accept Mr. Feetham's submission on this.

123 One needs to stand back here. On the undisputed evidence Mr. King had volunteered, throughout the entire bankruptcy, no information as to his assets or dealings at all (subject always, of course, to his claim to have posted a SOAL in 2017). Such assets as the joint trustees identified were identified through their own efforts and almost invariably involved contested litigation, Mr. King's family (even if not Mr. King himself directly) being involved in the opposition. Mr. King provided no information as to dispositions or gifts. Quite simply, on the face of it he never cooperated or complied with his statutory obligations.

124 Mr. King's protestations to the effect that it was all the fault of the joint trustees in never engaging with him or Mr. Lloyd do not pass muster. As the judge herself (rightly) pointed out, at para. 30(iv) of the judgment, the duty is on the bankrupt to provide assistance and, for example, a SOAL; it is no answer of itself for him to say that the joint trustees had not requested it.

125 In any event, the fact is that the joint trustees had in 2017 engaged in communications: and those had been, in effect, ultimately ignored. Mr. Davies pointed out that Mr. Lloyd had in his letter of October 31st, 2017 asked for communications concerning Mr. King to be sent to him: and the

joint trustees never thereafter did so. That, I think, is to some extent a valid point of criticism although it may be, given the history, that the joint trustees considered that any such contact would have been, as it were, the waste of a postage stamp, especially in the light of Mr. Lloyd's (in my view, conspicuous) failure to answer the email of the joint trustees' solicitors of October 31st, 2017—the explanation for that as given by him in his affidavit being palpably inadequate. More puzzling, I accept, is the joint trustees' failure to apply for the private examination of Mr. King, notwithstanding the fact that the letter of request from Gibraltar had been accepted by the Scottish courts, notwithstanding the recorded comments of Mr. Hyde on November 16th, 2017 and notwithstanding, for example, the fact that the joint trustees had in the meantime procured the private examination in London of a sister of Mr. King with regard to ownership of one of the Spanish properties. Overall, therefore, I accept that it is a valid criticism that the joint trustees seem to have taken no positive steps after 2017 to obtain relevant information from Mr. King: there was, in this regard a "void," in the word of Mr. Davies, and there was no evidence in reply to offer an explanation.

126 That said, it still remains the case that Mr. King himself had voluntarily done nothing (aside, and importantly, from the point concerning the claimed posting of the SOAL) to identify assets, transactions or liabilities in the bankruptcy. His protestations, moreover, as to ignorance of the Advalorem proceedings and injunction are clearly to be rejected. Either he deliberately evaded service of the formal documentation or, more likely, he received it but ignored it. The contrary is not credible.

127 The one point—and in the circumstances it is indeed potentially an important one—in which Mr. King advances a specific case of voluntary cooperation is in the claimed posting of the SOAL. He says, as I have recounted, that he posted a completed form of SOAL, provided to him by Mr. Hyde, to the joint trustees after the dawn raid of November 16th, 2017: albeit, as found, it was never received. The judge herself in terms held, in para. 30(iv) of her judgment, that "in all probability" she would have concluded that Mr. King did not post the SOAL to the joint trustees. But, applying *Long* v. *Farrer & Co.* (9), she had felt constrained to accept Mr. King's evidence that he had posted it.

128 It must not be forgotten that the judge had herself also found that Mr. King's evidence as to non-service of the bankruptcy order by the letter of August 29th, 2017 was to be rejected as not credible. The evidence of Mr. King (not even supported by an affidavit of the mother) was in that regard preposterous. He had been informally told in around August 2017 that he had been made bankrupt in Gibraltar. He was, as the surveillance showed, at the house in Glasgow at the time. It simply was not credible that the mother would not show him the letter but would return the letter on the ground that he was not there. It was plain that the mother was, in returning

the letter, acting at his behest. As the judge herself found, "the irresistible inference to draw is that the bankrupt was avoiding service of the order and that his mother was helping him to do that." I do not myself in fact see (albeit contrary to the judge) why the same "irresistible inference" was not to be drawn as to the various letters of September 14th, 2017, all returned to sender. This is all the more so given the palpable evasion or denial of service by Mr. King in the Advalorem proceedings—which evidence, in my view, also was admissible on this application, pace the apparent view of the judge.

129 My assessment that the assertion of Mr. King to the effect that he posted a completed SOAL to the joint trustees after November 16th, 2017 was not simply improbable but indeed incredible is for the following reasons, taken together:

(1) The SOAL was never received;

(2) Mr. King had a track record of evasion in and after the Advalorem proceedings.

(3) Mr. King had, as found by the judge herself, given in affidavit evidence an account as to non-service of the bankruptcy order which was not credible.

(4) As the judge herself also noted, it was highly implausible that Mr. King would complete and return a SOAL without informing Mr. Lloyd (whose own evidence was that he could neither confirm nor deny that a completed SOAL was returned).

(5) Mr. King would surely have made and have retained a copy, electronically or in hard form, of the SOAL as so completed, if it was. Yet Mr. King exhibited none.

(6) Return of the SOAL to Mr. Hyde would surely have been accompanied by a covering letter. Yet Mr. King exhibited none.

(7) A completed SOAL had to be signed before a notary public or commissioner of oaths. None is identified.

(8) It is remarkable that, if the SOAL had indeed been posted, Mr. King should, if genuinely trying to assist, never have contacted the joint trustees to check that it had been received, in the light of the lack of any acknowledgment or response of any kind by the joint trustees.

130 It may be that some of these points individually can be explained away but collectively they cannot be, in my view. There is only one sure conclusion on this evidence. No completed SOAL was posted. In my view, as I have said, the judge could and should, given the circumstances of this case, have so concluded on the balance of probabilities, evaluating the

matter on the papers. But further, and in any event, Mr. King's bald assertions to the contrary are to be discounted as manifestly incredible.

131 This conclusion that no SOAL was posted wholly undermines the judge's conclusion that the only respect in which Mr. King had failed to comply with his statutory obligations was in attempting to avoid being served with the bankruptcy order. The actuality is that in *no* respect had Mr. King complied with his statutory obligations throughout the bankruptcy. On the contrary, he had deliberately evaded doing so and, for the reasons which I have given, it is no real answer at all for Mr. King to try and turn matters round and seek to blame the joint trustees for failing to engage with him. To the contrary, it is plain that it was Mr. King who himself was failing to engage with the joint trustees. It was Mr. King who (knowingly) was failing to comply with his statutory obligations. The failure to submit any SOAL was but a specific, albeit very important, example of that non-cooperation. I cannot in this regard accept the submission of Mr. Davies in argument that the issue of whether the SOAL was or was not posted was merely a "side show."

132 If more were needed (I do not think it is) it can be found in the SOAL eventually completed by Mr. King, pursuant to court order, in August 2020. It demonstrably fails to engage properly with the obligations of Mr. King on bankruptcy and simply confirms an impression that he has no intention whatsoever of cooperating. It can, in my view, properly be taken into account, contrary to the very narrow view of the judge. The answers are almost insolently cursory. No assets are identified. No liabilities are identified. There is merely vague reference to certain professional advisers (who demonstrably Mr. King had made no attempt to contact). There is also, for example, no reference to any property in Switzerland or Dubai (*cf.* the letter of the mother of August 30th, 2017). There is no reference to any personal investments, whether in his own name, as in Senticare, or in any other corporate name: and this notwithstanding his explanations, in dealing with the evidence relating to the Senticare investment, that he would be personally involved in deals or investments worth up to $40m. The SOAL was clearly designed to yield no meaningful information at all and does not comply with Mr. King's statutory obligations.

133 The same can be said to the answers to the questionnaire. I appreciate that these postdate the hearing before the judge. But in my view they should be admitted in evidence on this appeal, under r.67(2) of the Court of Appeal Rules, given the evidently tactical decision on behalf of Mr. King not to submit them before the determination of the non-discharge application. The answers to the questionnaire are, in my assessment, to like effect as those set out in the SOAL provided in August 2020. Some of the answers are, it is fair to say, to some limited extent informative. But in other respects they are absurdly uninformative: for example, Mr. King briefly claims "no

memory" of, or gives no comment on, many of the companies with which his dealings were connected: including Advalorem, Heather and Thistle.

134 In my view, looking at the evidence overall, the conclusion to be drawn is clear. Mr. King has failed to comply with any of his obligations under s.344(1) of the 2011 Act. That failure goes well beyond the limited failure found by the judge (*viz*. failure to engage with the joint trustees so as to facilitate service of the bankruptcy order).

135 In such circumstances, the ground specified in s.412(4)(a) of the 2011 Act was amply made out and on a far more wide-ranging basis than that found by the judge. Her finding (at para. 89 of the judgment) that the breach of statutory duty by Mr. King "is not of the most serious" cannot be sustained.

136 That, then, leaves the question of discretion, at the second stage of the requisite approach. Given that I conclude that the defaults of Mr. King were to be assessed as far more extensive than the judge had accepted, I consider that the judge's exercise of discretion as to whether or not to order non-discharge was undertaken on a flawed basis. This court is therefore entitled to intervene.

137 Understandably, in the circumstances, no party before us asked that the matter be remitted to the judge. It was accepted, in the event that this court disagreed with the evidential appraisal of the judge (as, for myself, I do) such that it could not be maintained on appeal, that this court should exercise the discretion afresh.

138 Re-exercising the discretion, I am of the firm view that the non-discharge application of the joint trustees should succeed.

139 This is essentially because of the sheer scale and persistence of the non-cooperation and of the abject failure to comply with the statutory obligations on the part of Mr. King throughout the bankruptcy. I repeat that, if one stands back and reviews the position, one can see that Mr. King has done nothing whatsoever voluntarily to assist the joint trustees (if one discounts, as I do for the reasons given above, his claim to have posted the SOAL after November 16th, 2017). On the contrary, he had plainly deliberately sought to evade service of bankruptcy documentation (and has brought in members of his family to assist in that); has failed to provide details of where he can be contacted; and has wholly implausibly professed ignorance of the Advalorem proceedings and freezing order. Moreover, he has voluntarily produced no document relating to his assets or dealings (those which the joint trustees obtained were obtained as a result of execution of the search and seize orders which they had felt constrained to procure from the Scottish court); nor has he in point of fact provided any password giving access to any of his electronic devices. All this has been compounded by his giving incredible evidence as to service of the

bankruptcy order (as the judge found) and as to the posting of the SOAL (as I would find). Even when he did produce a SOAL, under compulsion of the consent order of July 29th, 2020, that SOAL was demonstrably deficient and almost entirely uninformative. Further, Mr. Feetham made the point—a telling point, in my view—that pending the appeal Mr. King sought an order not just that he not be examined but also that he not even be interviewed. In my opinion, Mr. Feetham was justified in his trenchant overall submission that the idea that Mr. King has cooperated or will cooperate should he be discharged "is for the birds."

140 Mr. Davies again drew attention to the statements of Mr. King offering cooperation, as recorded at the end of the transcript relating to November 16th, 2017. But it must not be overlooked that, as I have said, Mr. Lloyd did not respond to the email of October 31st, 2017 or provide the requested answers. I would accept that it was perhaps unfortunate, all the same, that the joint trustees did not further attempt to contact Mr. Lloyd, even if they had taken the view that to do so would serve no meaningful purpose. Even more unfortunate was the failure of the joint trustees to apply for the private examination of Mr. King; particularly when they had in place the building-blocks for such an application in Scotland, having obtained from the Supreme Court in Gibraltar the appropriate letter of request and having presented a petition in the Court of Session in Edinburgh. It is regrettable that the joint trustees put in no evidence to seek to explain their failure to take these steps.

141 Nevertheless, I do not think that these (to an extent valid) criticisms of the joint trustees can mask the underlying reality. I repeat that Mr. King had, irrespective of any demands by the joint trustees, his own positive duties of cooperation and assistance: and he plainly did not comply with those so as to fulfil his statutory obligations.

142 It also must not be overlooked that this was an extremely complex bankruptcy. (I thus would, in the circumstances of this case, attach little weight to the complaint that the non-discharge application was filed relatively shortly before the expiry of the three-year period.) As the judge herself found, the task of the joint trustees was "monumental." The joint trustees have had to engage in complex litigation in several jurisdictions with a view to recovering assets (we were told that thus far £7.28m. has been recovered). They had no assistance, whether in the form of a SOAL or otherwise, from Mr. King in identifying assets. Moreover, whilst one need not—indeed, should not—express any view for present purposes as to whether or not Mr. King may have engaged in fraudulent conduct, what can at least confidently be said is that he has been connected with dealings and disposals of assets involving companies beneficially owned or controlled by him which cry out for investigation. Private examination is one obvious means of exposing such dealings and disposals to scrutiny but private examination would not be available in the event of discharge.

143 These considerations point strongly, in my view, to a conclusion that the public interest requires that Mr. King not be discharged from bankruptcy. That is only reinforced by the scale of the bankruptcy and the fact that debts admitted to proof exceed £100m.

Conclusion on appeal

144 I would for my part allow the appeal of the joint trustees: their non-discharge application should succeed. Mr. Feetham did not seek an order for a three-year extension of the bankruptcy (as had been sought below). He contented himself with seeking an extension of one year from the date on which the judgment of the Court of Appeal is handed down. For the avoidance of doubt, however, I should also record that Mr. Feetham reserved the right to seek a further extension, depending on how matters unfold in that one-year period.

The cross-appeal of Mr. King

145 In such circumstances, I can, I think, deal with the proposed cross-appeal very shortly.

146 On the challenge to the judge's decision on July 21st, 2022 to grant a stay pending determination of the appeal, that, on the face of it, would seem, in the circumstances, to have been an essentially academic exercise. In any event, I can see no proper basis for interfering with the judge's exercise of discretion in this respect. I accept that it is a strong thing to deprive a successful litigant of the fruits of success pending an appeal: the more so in this case when continuance of the bankruptcy is effectively penal in nature. But the judge had a balancing exercise to perform. That included consideration of the potential prejudice in the interim to Mr. King in the event that the appeal ultimately failed but a stay was ordered and the potential prejudice to the joint trustees (and creditors) in the event that the appeal ultimately succeeded but a stay was not ordered. I can see no arguable basis for impeaching the judge's conclusion on this.

147 As to the challenge to the judge's failure to award indemnity costs, this issue has become academic in the light of my conclusion (if my Lords agree with it) that the appeal of the joint trustees has succeeded.

148 In any event, here too I can see no arguable basis for interfering with the judge's exercise of discretion. It is true that the joint trustees had unsuccessfully pursued, as one ground, an allegation that Mr. King had committed a fraud or breach of trust: in circumstances, moreover, where the judge had generally been critical of the lack of focus and particularization of the allegations being made. But the judge was well alive to the applicable principles (set out in numerous authorities which need no further citation here). She appreciated that an order for indemnity costs was an exceptional step, connoting conduct which was unreasonable

to a high degree, going beyond the ordinary and reasonable conduct of proceedings. There is no valid basis for challenging the judge's exercise of discretion not to award indemnity costs.

149 Accordingly, I would refuse permission to appeal on both these aspects.

Overall conclusion

150 I would for myself allow the appeal of the joint trustees. I would set aside the order of the judge and would direct an extension of the bankruptcy for a period of one year from the date on which this judgment is handed down (with liberty to the joint trustees to apply to the Supreme Court for a further extension). I would refuse the application of Mr. King for permission to appeal against the order granting a stay and against the refusal to award indemnity costs. The parties should endeavour to agree an appropriate minute of order. In default of any such agreement the court will settle the form of order.

151 **RIMER, J.A.:** I am grateful to Sir Nigel Davis, J.A. for his comprehensive account of the background to, and the issues raised by, this complicated litigation. I respectfully agree with his conclusion that the joint trustees' appeal should be allowed and that Mr. King's applications for permission to cross-appeal against the stay order and the refusal to award him indemnity costs should be refused. I agree also with Sir Nigel's reasoning that has led him to his conclusions. As, however, I regard the joint trustees' appeal as raising questions of some novelty and interest, I add a judgment of my own to explain my decision in my own words.

152 I note that Sir Nigel regards what I shall call "the *Long* v. *Farrer* principles" (see *Long* v. *Farrer & Co.* (9) ([2004] EWHC 1774 (Ch), at paras. 57–61)) as an application or extension of the principle explained in the speech of Lord Herschell, L.C. in the decision of the House of Lords in *Browne* v. *Dunn* (1) (6 R. at 71). Whilst the date and source of the emergence of the *Long* v. *Farrer* principles are unimportant, I have respectful doubts about Sir Nigel's suggestion. The principles referred to in *Browne* v. *Dunn* and *Long* v. *Farrer & Co.* may well be regarded as of a like kind, with both directed at achieving fairness in the conduct of litigation, but they are in fact concerned with quite different situations. *Browne* v. *Dunn* is concerned with the fair treatment of parties and their witnesses who give *oral* evidence at a hearing. The *Long* v. *Farrer* principles are concerned with the fair treatment of parties and their witnesses who give *written* evidence at a hearing.

153 *Browne* v. *Dunn* emphasizes the duty of a cross-examiner to put squarely to the witness any criticism he has of him or his evidence so as to give the witness a fair opportunity of dealing with it. In default, it will not

be open to the cross-examiner later to rely in argument on the criticism not so put. The underlying principle was more comprehensively explained in the English Court of Appeal by May, L.J. (with whose judgment Lord Phillips of Worth Matravers, M.R. and Jonathan Parker, L.J. agreed) in *Vogon Intl. Ltd.* v. *Serious Fraud Office* (11) ([2004] EWCA Civ 104, at para. 29):

> "It is, I regret to say, elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves. In the absence of such an opportunity, it is of little consequence to examine details of the evidence given to see whether the judge's findings might have been justified."

154 That principle is well recognized and was the basis of one of the successful grounds of appeal in this court's decision in *Royal Bank of Scotland Intl. Ltd.* v. *Magner* (10) (Sir Colin Rimer, Dame Janet Smith and Sir John Goldring, JJ.A.), discussed at 2018 Gib LR 54, at paras. 122–137.

155 The *Long* v. *Farrer* principles are concerned with a different situation. They affirm that, save to the extent that such evidence is manifestly incredible, it is not possible for a court to disbelieve the evidence given by a witness in an affidavit or a witness statement in the absence of the cross-examination of the witness. *Long* v. *Farrer* itself arose in bankruptcy proceedings in the Chancery Division of the English High Court of Justice. It was a decision of mine, reached after argument from two counsel well experienced in insolvency law. Save only that it may have been the first decision to apply the relevant principles also to witness statements, I was not purporting to establish any new principles but was applying those already well-established in relation to the treatment of evidence given by affidavit. The use of affidavits in litigation pre-dated *Browne* v. *Dunn* (to which no reference was made in *Long* v. *Farrer*) and I regard it as quite possible that the *Long* v. *Farrer* principles in relation to affidavits also pre-dated that decision.

156 The cases cited in the judgment in *Long* v. *Farrer & Co.* (9) as supporting the principles I was applying were, respectively, two director disqualification cases and a case about an application to restrain the advertisement of a winding up petition. The principles have since been expressly affirmed by the English Court of Appeal in (i) *Coyne* v. *DRC Distrib. Ltd.* (3) ([2008] BCC 612, at para. 58, *per* Ward, Jacob and Rimer L.JJ.), a dispute arising in a company administration; and (ii) *Kireeva* v. *Bedzhamov* (7) ([2022] BCC 603, at para. 34, *per* Newey, Arnold and Stuart-Smith, L.JJ.), a dispute about the recognition of a foreign bankruptcy.

157 There are of course exceptions to the application of the *Long* v. *Farrer* principles in civil litigation and I shall come to them. But their application in the general run of civil litigation is so basic that they should be familiar to all judges dealing with civil law cases even if they have never heard of, let alone read, any of the reported decisions dealing with them expressly. Thus on interlocutory applications (for example, for a freezing order or other type of injunction pending trial), the judge will often be faced with witness statements from each side reflecting disputed matters of fact. In coming to his decision, the judge will discount anything asserted by either side that is manifestly incredible but otherwise will not engage in any attempt (whether by reference to the balance of probabilities or any other standard) to decide what the facts are; if any such determination is ever required, that will be a matter for the trial. As follows, the judge will also not direct a cross-examination of the deponents for the purpose of assisting the resolution of the interlocutory dispute. Were the practice to be otherwise, the process of civil litigation would seize up: interlocutory applications are expected to be disposed of expeditiously and with an economical use the court's resources. The judge will simply decide the particular application by applying the test applicable to it: for example, does the applicant's evidence disclose a "good arguable case" for the interim relief sought? In doing so, and having discounted anything manifestly incredible, he will take the deponents' untested evidence at face value.

158 This is the position that applies to the disposition of *interlocutory* matters. When it comes to a hearing in a piece of civil litigation at which the *final* rights of the parties are in issue, the practice will be different. By "final rights" I mean a stage in the litigation that can include either the trial of a claim or an application in proceedings whose determination will, subject to any appeal, dispose finally of a matter relating to the parties' respective rights. In that regard, as Sir Nigel has made clear, there is no doubt that the joint trustees' non-discharge application was one that did affect Mr. King's final rights: it was directed at affecting his valuable right as a bankrupt to be discharged from his bankruptcy after three years.

159 In contrast to the position obtaining at an interlocutory application, at a hearing (i) that is directed at determining the parties' final rights, (ii) at which the parties' evidence is given by affidavits or witness statements, and (iii) where there are material differences of fact between the parties' respective accounts in them, the *Long* v. *Farrer* principles implicitly recognize that a direction for the cross-examination of the witnesses on their written evidence is essential. Applications for such directions are commonplace and (at any rate in my own experience) are usually unopposed. Importantly, such directions will ordinarily include a provision that if any deponent does not attend the hearing for cross-examination, his written evidence will, save with the leave of the court, not be read at all.

This is entirely fair. A witness who gives oral evidence in chief at a trial of a claim with pleadings (which he will nowadays usually do simply by affirming the truth of a witness statement he will earlier have provided to the other side) is automatically subject to the prospect of being cross-examined and has no choice in the matter. The provision just mentioned is directed at achieving a like position in cases in which there are no pleadings and in which the witness's evidence in chief has (in effect) been given at an earlier stage of the proceedings, either in an affidavit or a witness statement.

160 There are of course exceptions to the application of the *Long* v. *Farrer* principles in the way I have described. For example, applications for administration orders in respect of an insolvent company (being orders which of course *do* deal with the parties' final rights) may be opposed but sometimes have to be heard with the utmost urgency; and in *Highberry Ltd.* v. *Colt Telecom Group plc* (5), Lawrence Collins, J. (as he then was) said ([2002] EWHC 2503 (Ch), 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."

161 Lawrence Collins, J.'s point there made was, if I may say so, obviously a sound one. My own experience as a former judge of the English Chancery Division was also that applications for an administration order often had to be dealt with as a matter of urgency. In some very extreme cases the window between the likely collapse of an insolvent company (and the consequential laying off of employees) and its hoped-for rescue by the making of an administration order might sometimes be measurable in hours rather than days. In the case of an opposed application, such a window simply does not allow for the luxury of orders for disclosure and/or cross-examination. The highest ideals of justice have sometimes to yield to the exigencies of the particular circumstances of a case.

162 A further exception, as Sir Nigel notes, is that the judges of the Administrative Court in England and Wales, when deciding judicial review and administrative law cases, are often faced with factual disputes in the written evidence before them and usually resolve them on the papers alone, with cross-examination being permitted only exceptionally. They do so by applying the balance of probabilities standard. Orders for cross-examination can of course be made in judicial review cases; and there will be some cases where it will be perceived that justice cannot be done without it. But cross-examination is apparently the exception rather than the rule: see the discussion about this, and the mass of authority cited, in

Michael Fordham, Q.C. (as he then was) (ed.), *Judicial Review Handbook*, 6th ed., at paras. 17.4–17.4.20 (2012).

163 The *Long* v. *Farrer* principles do not, therefore, apply across the board in all cases in all circumstances. But they enjoy the express endorsement of the English Court of Appeal and there is in my view no question that they became potentially engaged in the fair disposition of the non-urgent, non-discharge application with which this appeal is concerned. They are valuable principles, aimed at achieving fairness and justice in the conduct of civil litigation. For most litigants (or their witnesses) who make affidavits or witness statements in civil proceedings, it is probably a once in a lifetime experience. One would like to think that all who do so will have prepared their evidence with conscientiousness and care. If they then suffer the experience of a judge ruling against it, without so much as even asking them about it, on the basis of his assessment that other written evidence was more likely to reflect the truth, many would be likely to feel outraged. The *Long* v. *Farrer* principles recognize the potential for that and are directed, so far as practicable, at avoiding it. They are about achieving fairness in the conduct of litigation and should be commended. Justice delivered in accordance with them is likely to be better than that delivered by reference to an assessment of conflicting written statements on the balance of probabilities.

164 Having commenced their non-discharge application, and whether or not they were aware of the *Long* v. *Farrer* principles, the joint trustees applied to cross-examine Mr. King. That is no surprise. They had read his affidavits filed on September 2nd and 4th, 2020 in answer to the application and disputed some of what he had said in them, in particular his important assertion in the former that he had posted a SOAL to them in November 2017. They wanted by such cross-examination to undermine his claim to have complied with his statutory obligations in the bankruptcy (in particular, that under s.344(1) of the 2011 Act to make discovery of his assets to the joint trustees) and thereby assist the making good of their non-discharge application insofar as they were relying on s.412(4)(a) of the 2011 Act. By their (apparently undated) application returnable on February 16th, 2021, they sought an order "that the [joint trustees] be permitted to cross-examine [Mr. King] for the purposes of their application for an extension of the bankruptcy."

165 There is no doubt what they were there asking for. "Cross-examination" is the oral testing of a witness's evidence-in-chief, in this case Mr. King's evidence in his affidavits. That was all the joint trustees were entitled to cross-examine Mr. King on; they were not entitled to engage in a roving oral examination in relation to the conduct of the bankruptcy, nor were they seeking to do so. Their skeleton argument for their application was succinct and clear; it emphasized that they wanted to cross-examine Mr. King on his affidavit of September 2nd, 2020, in

particular on his assertion in paras. 27 and 28 that he had posted a completed SOAL to them in November 2017. They had never received any SOAL so posted and their assessment of Mr. King was that it was improbable that he was being truthful about what he had there asserted.

166 The joint trustees' application was straightforward and I would not have expected it to have been opposed. Such applications rarely are. Why should a truthful witness object to being cross-examined on his written evidence? In the event, Mr. King's lawyers responded with a 19-page skeleton argument that made it clear that Mr. King was anxious to avoid being cross-examined. The skeleton argument made the point that the original agreed directions for the non-discharge application provided for the exchange of affidavit evidence, but did not include a provision for cross-examination by either side of the other. It asserted that this meant the parties were agreeing to the disposal of the substantive application "in the conventional way, without disclosure or cross-examination." It asserted that "it is exceptionally rare for the court to make a [cross-examination] direction in insolvency applications of an administrative nature," for which it cited the earlier quoted paragraph of Lawrence Collins, J.'s judgment in the *Highberry* case (5) ([2002] EWHC 2503 (Ch), at para. 35).

167 These points were unsound. There was nothing unusual about not including a cross-examination direction in the original consent order; the parties did not then know whether the exchange of affidavit evidence, when complete, would disclose factual differences or matters of dispute whose determination would require cross-examination. The submission based on para. 35 in the *Highberry* case was also mistaken. The point in *Highberry* was that the time-critical urgency that can arise in applications for administration orders means that they are the type of application in which, if opposed, orders for cross-examination will only be made exceptionally. Lawrence Collins, J. was there drawing a contrast with other types of insolvency application affecting the final rights of the parties in which no like urgency arises and in which orders for cross-examination will, if appropriate, be made.

168 The further suggestion in the skeleton argument that non-discharge applications are conventionally decided on the papers, without disclosure or cross-examination, would appear to me to be also wrong in principle. It may perhaps be, I know not, that in many such applications the evidence discloses no relevant material factual differences or disputes between the parties and so no cross-examination is required. But in a case in which there *are* such material differences or disputes, cross-examination is essential and it will, or ought to be, directed as a matter of course. The giving of such a direction will enable the court to determine the application in the fairest way: oral evidence on disputed factual matters usually provides judges with the best assistance. It is, at any rate in my experience, unheard of in

the ordinary course of general civil litigation for a court to seek to decide the final rights of the parties by the application of a balance of probabilities standard to conflicting or disputed written evidence without the essential additional benefit of oral evidence elicited under cross-examination.

169 I regard it as probable that the joint trustees regarded their likelihood of success on their cross-examination application as high. They had expressly identified at least one area of legitimate, and important, cross-examination: they had made it clear in their skeleton argument that they disputed Mr. King's claim to have posted a SOAL to them in November 2017, and whether he had done so or not was of central importance to their case that he had breached his obligations under the 2011 Act. Of course that issue was not formally a matter of difference between both sides' affidavits: the joint trustees' evidence that they had never received a SOAL from Mr. King did not prove that he had not posted one to them, any more than his evidence that he had posted them a SOAL disproved their assertion that they had never received one. But the joint trustees were entitled to question whether Mr. King had in fact done what he had claimed and their wish to cross-examine him on that was legitimate. A cross-examination application of the type the joint trustees made is not confined to cross-examination on matters on which the parties' written statements give conflicting accounts. It is open to either side to seek an order for the cross-examination of the other party's witnesses on any matter in their written evidence that they dispute.

170 In the event, by her reserved judgment of April 29th, 2021, the judge refused to permit any cross-examination of Mr. King. She was sufficiently impressed by Mr. Davies, K.C.'s reference to the *Highberry* case to say, at para. 15, that, even though the non-discharge application was not subject to the like urgency as can arise in applications for an administration order, the making of a cross-examination order would delay the disposal of the non-discharge application when, as the three-year anniversary of the bankruptcy begins to loom up, "it is easy to see why at that point the issue of discharge should become urgent to the bankrupt." With respect to the judge, if that consideration carried any weight in her decision to refuse a cross-examination direction, it should not have done. There was no relevant element of urgency in this case.

171 The judge observed, at para. 18, that "the fundamental difficulty facing the Joint Trustees is that it is difficult to understand precisely what aspect of [Mr. King's] behaviour prompted the cross-examination application," following which she asked (but did not attempt to answer) which of six alternatives it was. The third alternative was "the content of [Mr. King's] affidavit." That was of course the explanation for the cross-examination application, as had been made clear in the joint trustees' application and skeleton argument, but by this stage the judge may have overlooked that. The ratio of the judge's decision appears, at para. 20, to

be that, as the joint trustees had not sufficiently articulated "the particular reason for the request to cross-examine, it is impossible for the court to define the scope of the proposed cross-examination." The judge explained that more fully at para. 21, where she said:

> "21. Mr. Salter [counsel for the joint trustees] submits that for the purposes of this application, that the Statement of Assets [Mr. King's August 2020 SOAL] is defective, evasive, non-cooperative and uninformative, but there is no particularisation. 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 generalisations 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 the discretion."

172 We do not have the benefit of a transcript of the argument on the cross-examination application and so know nothing of the flow of the argument. A possible inference is that Mr. Salter may perhaps have conveyed to the judge that the joint trustees wanted to use the non-discharge application as the occasion for a rather wider, but illegitimate, interrogation of Mr. King. If so, that would not have helped his case. But the outcome was that the judge refused to direct a cross-examination of Mr. King at the hearing of the non-discharge application. Mr. King had opposed the making of any such order and so had won the argument.

173 I have to say, with respect, that in my judgment the judge's decision to refuse to allow the cross-examination of Mr. King (there was no cross-application by Mr. King for leave to cross-examine Mr. Lavarello) was both surprising and wrong. The joint trustees had identified a legitimate and material area of dispute in relation to Mr. King's affidavit of September 2nd, 2020, namely his assertion about the posting of the SOAL, and were entitled to test that evidence by cross-examination. The judge's complaint that the joint trustees had not identified the matters of alleged dispute by "evidence" was misplaced: such identification could not have been a matter for evidence. So also was her assertion that the trustees should have particularized their proposed areas of cross-examination so as to enable Mr. King "to answer the [cross-examination] application." When, at a trial, counsel rises to cross-examine a witness on his evidence-in-chief, he is not required first to provide either his opponent or the court with particulars of the areas of dispute on which he proposes to cross-examine. The court

simply lets him get on with it, whilst of course monitoring its course so as to ensure that he keeps to points relevant to the case. The joint trustees' wish to cross-examine Mr. King on his evidence-in-chief (*i.e.* his affidavits) was no different. The only procedural difference was that, subject only to the giving of a cross-examination direction, the case at the substantive hearing would have proceeded on the papers alone; and so the joint trustees had to apply for such a direction. But this difference did not justify the judge in complaining that the joint trustees should have, but had not, provided evidence and particulars identifying precisely what they wanted to cross-examine Mr. King about. They had identified a material assertion in his affidavit evidence that they disputed, they were in principle entitled to cross-examine him on his affidavits and the judge should have allowed them to do so. By failing to do so, the judge (i) deprived herself of the assistance of oral evidence at the substantive hearing that would have enabled her to deal with the application in the fairest way; and (ii) unwittingly laid the ground for an argument at that hearing that induced her to hold that it was not even open to her to make findings as to truth of Mr. King's affidavit evidence on the usual civil law standard of the balance of probabilities.

174 I come to the substantive hearing. Mr. Davies, K.C., for Mr. King, introduced the judge to the *Long* v. *Farrer* principles and submitted that, as Mr. King had not been cross-examined, those principles required her to take his affidavits at face value and unquestioningly accept every word he had said in them. The judge made no reference in her judgment to, let alone uttered in it any expression of surprise about, the fact that she had not been referred to the *Long* v. *Farrer* principles during the cross-examination application, an omission that had now presented her with an evidential problem she cannot then have foreseen. Sir Nigel speculates that had Mr. Davies, K.C. referred her to *Long* v. *Farrer & Co.* (9) during that application, her decision would have been different, that is, she would have made an order for the cross-examination of Mr. King. I agree that that is possible, although her judgment of April 29th, 2021 was so critical of the joint trustees' application that I would not regard that as certain. But consideration of this anyway does not assist us in answering the questions now before us in the light of what actually happened.

175 Sir Nigel is also of the view that, in light of the way Mr. King's case was put to the judge on the cross-examination application, she would have been left with the understanding that her role at the substantive hearing of the non-discharge application would be to resolve any factual differences appearing to arise on the affidavits by reference to the usual civil standard of the balance of probabilities. I agree that that is likely. But if she did in fact have that in mind, it makes her refusal to direct cross-examination the more surprising.

176 Sir Nigel's further view is that, in the circumstances he explains, and given that at the substantive hearing an issue *did* arise at least as to the truth of Mr. King's assertion in his affidavit that he had posted a SOAL to the joint trustees in November 2017, the only fair way for the judge to have resolved a dispute such as that was for her to have applied the usual balance of probabilities standard rather than the uncompromising standard imposed by the *Long* v. *Farrer* principles which she was invited to, and did, apply. The judge herself indicated in her judgment that, had the former test been the applicable one as regards the claimed sending of the SOAL to the joint trustees in November 2017, she would have found that it had not been sent. She was, however, persuaded that she had to apply the *Long* v. *Farrer* principles to Mr. King's untested affidavit evidence: that is, that as Mr. King had not been cross-examined, she was bound to accept at face value his written assertion that he had posted a SOAL to the joint trustees in November 2017.

177 I respectfully agree with Sir Nigel on this, namely that the correct way for the judge to have dealt with disputes on Mr. King's affidavit evidence emerging at the substantive hearing was indeed by reference to the balance of probabilities standard. In my judgment, by that stage in the proceedings, and in the unusual circumstances that had by then unfolded, the *Long* v. *Farrer* principles, at any rate as regards the assessment of *Mr. King*'s affidavits, were quite simply no longer in play.

178 Those principles are directed at enjoining judges from disbelieving the written evidence of party A until such time as it has been the subject of cross-examination by party B, when it may perhaps then be undermined in whole or in part. If, however, in an application affecting the parties' final rights, party A expressly refuses to agree to any such cross-examination by party B and persuades the court to excuse him from it, the prospect of light being cast on party A's disputed written evidence by oral evidence from him is thereby finally extinguished, and is so extinguished by party A's own choice. The *Long* v. *Farrer* principles tell us nothing about how the court should approach the assessment of party A's affidavit evidence in those unusual circumstances. In my judgment, however, the consequence is obviously not that party A's untested, and now untestable, written evidence becomes immune from disbelief. On the contrary, as all prospect of any illuminating oral evidence about it has, at party A's choice, now been extinguished, the court has no alternative but to proceed on the basis that his written evidence simply represents the full extent of his actual and potential evidential offering at the hearing. In then discharging its function of deciding the relevant facts by the application of the usual standard of the balance of probabilities, the court will necessarily have to apply that exercise in relation to *all* the evidence before it, including party A's affidavit evidence. If the court concludes that, on the probabilities, any part of that evidence should not be believed, it is fully at liberty so to find.

Nothing in the *Long* v. *Farrer* principles requires it to accept party A's evidence at face value.

179 In the event, the judge wrongly accepted Mr. Davies, K.C.'s submission that the *Long* v. *Farrer* principles *did* require her to accept Mr. King's written evidence at face value. In doing so, she fell into error. She should instead have applied the balance of probabilities standard to the assessment of Mr. King's affidavits, in particular as to the dispute as to whether Mr. King in fact posted a SOAL to the joint trustees in November 2017. We know from her judgment that, had she done so, she would have found that he did not. That is what she should have found. She was in error in not doing so.

180 All that said, if I am wrong in my conclusion that by the time of the substantive hearing of the non-discharge application the *Long* v. *Farrer* principles were no longer in play as regards Mr. King's affidavits, those principles of course include the "manifestly incredible" exception that entitles judges to reject any written evidence that can fairly be so characterized. For the full reasons he has given, Sir Nigel has also advanced his alternative view that the judge was anyway wrong not to reject, as manifestly incredible, Mr. King's evidence that he sent a SOAL to the joint trustees in November 2017. I shall say no more than that, for the reasons he gives, I respectfully agree with Sir Nigel on that aspect of his conclusions.

181 I also agree with Sir Nigel that the judge was wrong to refuse to admit into evidence and take account of the SOAL dated August 7th, 2020 that Mr. King had produced. That document spoke volumes about Mr. King's willingness to provide the joint trustees with the information he was obliged to provide. He could hardly have created a document that spoke more eloquently of his unwillingness to provide it.

182 Once the conclusion is reached that the judge was in error in these respects, I agree with Sir Nigel that it inevitably follows that she should also have found a further material failing on the part of Mr. King in the performance of his statutory obligations, namely a breach of his obligations under s.344(1) of the 2011 Act to make discovery of his assets to the joint trustees. That materially strengthened the joint trustees' case under s.412(4)(a) of the 2011 Act in their application and justifies a re-opening by this court of the discretionary judgment that the judge had to make. I agree with Sir Nigel, for the reasons he gives, that that discretion should be exercised afresh by this court in the different way he proposes.

183 I too would therefore allow the joint trustees' appeal. In agreement with Sir Nigel, I would also refuse Mr. King permission to appeal on both elements of his cross-appeal.

184 **KAY, P.:** I have read the judgment of Sir Nigel Davis and agree that this appeal should be allowed and the application of the respondent for permission to cross-appeal should be refused for the reasons he gives. I have also read and agree with the further analysis of Sir Colin Rimer.

Appeal allowed; cross-appeal refused.
