Bramston v Haut - IVAs and Suspension of Bankrupt's Discharge

Technical Bulletin No: 451

Case: Bramston v Haut [2012] EWCA Civ 1637; CA 14/12/2012

Synopsis: The power to suspend a bankrupt's automatic discharge from bankruptcy under s279 IA 1986 is intended to be penal, and is connected to the trustee's functions to realise and distribute the bankrupt's estate. Accordingly, an order for suspension which was made to allow a bankrupt some time to put a proposal for an individual voluntary arrangement ("IVA") before creditors was outside the scope of s279.

Topics covered: Bankruptcy; IVAs; Suspension of Bankrupt's Automatic Discharge from Bankruptcy

The Facts

The bankrupt's TiB appealed against a decision of Arnold J ([2012] EWHC 1279 (Ch), [2012] B.P.I.R. 672) suspending the bankrupt's discharge from bankruptcy and ordering the TiB to personally pay his costs. The bankrupt had made a proposal for an IVA shortly before the automatic discharge of his bankruptcy. It was supported by the majority of the bankrupt's creditors, but the TiB did not support it, as he believed that the bankrupt had failed to cooperate with him, had concealed his assets and had obscured the true state of his financial affairs.

The TiB refused to apply for an order suspending the bankrupt's discharge from bankruptcy. The bankrupt therefore made an application under ss 279 and 303 IA 1986. The Judge concluded that it would be in the creditors' interests for the bankrupt's discharge to be suspended, and he granted a suspension from discharge for six weeks, thus enabling the bankrupt to seek the creditors' agreement to the IVA with a view to applying to annul his bankruptcy. The TiB applied to have the suspension set aside. He believed that the proposed IVA was designed to thwart his efforts to carry out a thorough investigation of the bankrupt's affairs, and that the bankrupt had misled his creditors. The application was refused and the Judge concluded that the TiB had acted unreasonably in objecting to the suspension of the bankrupt's discharge. He was ordered to personally pay the bankrupt's costs.

On appeal, the TiB submitted that: (1) ss279 and 303 did not provide a proper jurisdictional basis for an order suspending the bankrupt's discharge for the purpose of an IVA; (2) the Judge had erred in concluding that the TiB had acted unreasonably; (3) the Judge had erred in exercising his discretion as to costs.

The Decision

Allowing the Trustee's appeal, Kitchen LJ (with whom Rix LJ and Arden LJ agreed) held as follows:

(1) The purpose of a suspension under s279(3) was plainly connected to a failure by a bankrupt to comply with his obligations under Part IX of IA 1986. The subsection contemplates an application being made by the TiB or the official receiver, not by the

bankrupt. r 6.215 of IR 1986 makes clear that the official receiver or TiB must file evidence setting out the reasons why it appears to him the order should be made; the court must fix a venue for the hearing and give notice of it to the official receiver, the TiB and the bankrupt; and the official receiver's report and the TiB's evidence must be served on the bankrupt at least 21 days before the date fixed for the hearing. Further, and importantly, s279(4) expressly provides the court may not make an order unless it is satisfied that the bankrupt has failed or is failing to comply with an obligation under Part IX.

(2) A purpose of the power conferred by s279 was to extend the period of the bankruptcy and to ensure that the bankrupt continued to suffer the disabilities arising from his undischarged bankruptcy until he complied with his obligations under IA 1986. In this sense the power was intended to be penal and used for purposes connected with the functions of the TiB to realise and distribute the bankrupt's estate.

(3) It was clear that the order made in the present case was not linked to the bankrupt's failure to comply with his obligations, but was made to give him time to put an IVA proposal before the creditors, and thereafter secure the annulment of his bankruptcy order. That was impermissible and outside the scope of the jurisdiction conferred by s279(3).

(4) The proper gateway for the bankrupt to have made an application for the suspension of his bankruptcy lay in ss 252 to 256. S252 confers jurisdiction upon the court to make an interim order which has the effect that, during the period for which it is in force, no bankruptcy petition relating to the debtor may be proceeded with. The orders which the court may make include (by s255(4)) a provision staying proceedings in the bankruptcy or modifying any provision in the Second Group of Parts (dealing with the insolvency of individuals and bankruptcy) and any provision of the rules in their application to the debtor's bankruptcy. Such a modification could therefore include a modification of s278(b) which provides that the bankruptcy of an individual against whom a bankruptcy order has been made continues until the individual is discharged. Thus in an appropriate case the court can make an order under s252 suspending the automatic discharge of the bankrupt for a specified period. The legislation does, however, incorporate important limitations to this jurisdiction and safeguards in relation to its exercise. In particular: (i) notice is required to be given to the official receiver and the TiB (by s253(4)); (ii) the court is given the opportunity of considering the IVA proposal at a hearing which the TiB and the official receiver are entitled to attend (by s255); and (iii) if the court makes an interim order, it can require the nominee to file a report for consideration by the court (by s256(1)). In the particular circumstances of this case, if the bankrupt had made an application for an interim order under s253 IA1986 it would inevitably have foundered.

(5) The Judge had fallen into error in concluding that TiB actions were unreasonable because: (i) he had adopted the *Wednesbury* unreasonableness test when he ought to have asked himself whether the TiB had acted perversely; (ii) it was wholly impossible to say that the TiB had acted perversely in refusing to allow the bankrupt to make an application on his behalf under s279(3) to put the IVA before the creditors when that subsection provided no jurisdictional basis for such an application; and (iii) it was not the duty of a TiB to respond affirmatively to a bankrupt's request that he co-operate in the promotion of an IVA proposal. The TiB had believed that the bankrupt was in continuing default of his obligations and that the proposed IVA was defective and prejudicial to the interests of the creditors with whom he had no personal connection. In those circumstances, the TiB had not acted perversely or as no other reasonableTiB would have acted. Accordingly, the Judge's order for costs could not stand.

Comment

This is an important judgment for three reasons. First, it clarifies the scope of the court's power to suspend a bankrupt's automatic discharge from bankruptcy under 279 of IA1986. The power conferred by that section is intended to be penal in the sense described above and is connected to the TiB's functions to realise and distribute the bankrupt's estate.

Secondly, it confirms that the proper gateway for a bankrupt wishing make an application for the suspension of his discharge from bankruptcy in order to put forward IVA proposals (and, if those proposals are approved, the annulment of the bankruptcy), is to seek an interim order under s252 IA 1986. In an appropriate case the court can make an order under s252 suspending the automatic discharge of the bankrupt for a specified period. Where the bankrupt seeks to put forward IVA proposals and no interim order is sought, the court will have no power to suspend the automatic discharge of the bankruptcy.

Thirdly, it confirms that the *Wednesbury* test of unreasonableness is not the appropriate test upon which the court will decide whether to interfere with the day to day administration by a TiB of the bankruptcy estate. Instead, the CA adopted a much stricter test approving the following passage from the judgment of Chief Registrar Baister in *Osborne v Cole* [1999] BPIR 251 at 255: *"It follows that it can only be right for the court to interfere with the decision the official receiver [or a trustee] has taken if it can be shown he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way."*

This is a high hurdle for any an applicant seeking to challenge the actions of a TiB to jump.