Neutral Citation Number: [2022] EWHC 1973 (Ch)

Case No: CH-2021-000219

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
HIGH COURT APPEALS CENTRE, (ChD)

ON APPEAL FROM THE COUNTY COURT AT HERTFORD No 6 of 2018
Order of Deputy District Judge Wright dated 17 September 2021
IN BANKRUPTCY
RE: JODY KENNEDY

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 28/07/2022

Before :

MR NICHOLAS THOMPSELL

Sitting as a Deputy Judge of the High Court

- -

Between :

MR JODY KENNEDY	**Appellant**
- and -	
THE OFFICIAL RECEIVER	**Respondent**

- -
- -

Mr Max Marenbon (instructed by **Benchmark Solicitors LLP**) for the **Appellant**
Ms Lucy Wilson-Barnes (instructed by **TLT LLP**) for the **Respondent**

Hearing dates: 19 July 2022

- -

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10am on Thursday 28 July 2022.

.....

Mr Nicholas Thompsell:

1. Introduction

1. This judgment relates to an appeal against an 8-year Bankruptcy Restrictions Order ("**BRO**") made under section 281A and Schedule 4A to the Insolvency Act 1986. The BRO was made on 17 September 2021 by Deputy District Judge Wright (the "**Deputy Judge**") against Mr Jody Kennedy ("**the Appellant**" or "**Mr Kennedy**").

2. For the purposes of this appeal, I have benefitted greatly from the skeleton arguments, and oral arguments, from Mr Max Marenbon for the Appellant and Ms Lucy Wilson-Barnes for the Official Receiver, who is the Respondent in this appeal. I am grateful to both counsel for their learned and subtle arguments.

3. The Appellant looks to appeal on two grounds:

   (1) **Ground 1** is that the Deputy Judge made an error in law in distinguishing between authorities described as 'dissipation cases' and those described as 'borrowing cases' and as a result misled herself as to the principles and authorities to apply when determining the appropriate length of a BRO; and

   (2) **Ground 2** is that the Deputy Judge relied upon an unsupportable finding of fact. This was her finding or assumption that Mr Kennedy failed to tell the Official Receiver he had withdrawn the sums of £10,000 and £7000 from his overdrawn bank account after being made bankrupt.

4. The Appellant asked the court to agree that these grounds are sufficient to justify finding the Deputy Judge's imposition of the BRO, with its 8-year term, to be either wholly unjustified, or at least excessive.

2. Leave to Appeal

5. Somewhat unusually, this matter was listed for appeal before any leave to appeal had been given. Mr Justice Trower had previously directed (pursuant to CPR 52.4(1)) that the application for permission to appeal be heard orally with the hearing of the appeal (if permission is granted) to follow, in a single hearing.

6. I was invited by Mr Marenbon to deal with the application for permission to appeal, and the appeal itself together. He argued that the arguments relating to leave for appeal overlapped greatly with the matters to be heard at the appeal. Ms Wilson-Barnes considered, however, that it was more appropriate that I consider the application for leave for appeal first.

7. I agreed with Ms Wilson-Barnes on this point. Having reviewed the papers for the hearing, I considered that I was already in a position to determine the question of leave to appeal.

8. Under CPR 52.6, the court may give permission to appeal where it considers that the appeal would have a real prospect of success or where there is some other compelling reason for the appeal to be heard. Without predetermining the outcome before hearing argument, I considered that both grounds of appeal had a real (rather than a fanciful) prospect of success. It was also arguable that the points of principle raised in relation to the first ground of appeal ("**Ground 1**") might also provide a compelling reason anyway for the appeal on that ground to be heard. However, having found both grounds had a real prospect of success, it was not necessary for me to reach a view on this to order, as I did, that leave should be given and that the hearing should proceed.

3. The Second Ground of Appeal

9. Although the second ground of appeal ("**Ground 2**") was dealt with second at the hearing, it is convenient to dispose of this point first within this judgment. This will then allow the questions raised under Ground 1 to be considered on the basis of a fully established pattern of facts.

10. When determining the length of the BRO, the Deputy Judge had clearly placed weight on the fact that Mr Kennedy did not tell the Official Receiver on 31 July 2018 about withdrawals he had made from his bank account on 20 July 2018 of £10,000 and £7,000. I will call this the "**Non-Disclosure Allegation**". The Applicant put forward two arguments as to why the Deputy Judge's decision should not have been made on this basis.

A. The first argument

11. The first argument was that the judgment demonstrates that the Deputy Judge proceeded on the basis that it was common ground that the Non-Disclosure Allegation was made out, whereas the transcript of proceedings shows that this point was in dispute. This argument was not developed in the hearing but was fully sketched out in Mr Marenbon's skeleton argument.

12. The argument essentially is based on a close reading of the paragraphs of the Deputy Judge's judgment. In paragraph 1 of her judgment, the Deputy Judge listed a number of matters which she considered to be common ground. Whilst the list in paragraph 1 did not include the Non-Disclosure Allegation, the Non-Disclosure Allegation was mentioned in the next paragraph and there were textual arguments suggesting that it should be regarded as being included in the list started in the first paragraph notwithstanding that the punctuation of her judgment suggested otherwise.

13. Whilst I agree that there is some ambiguity in how these paragraphs should be read, I do not think that it is correct to resolve this ambiguity by assuming that the Deputy Judge, had forgotten about Mr Kennedy's oral evidence challenging the Non-Disclosure Allegation. She had, earlier on the same day, sat through the exchanges in court where Mr Kennedy gave evidence in chief casting doubt on the Non-Disclosure Allegation and it is unlikely that she would have forgotten this so quickly.

14. In fact, the Deputy Judge later records (at paragraph [15] of her judgment) that Mr Kennedy *"denies withholding the fact of the £17,000 withdrawal from the Official Receiver when he spoke to them, and he says that subsequently he made full disclosure to the Official Receiver".* In my view, this paragraph makes it clear that the Deputy Judge acknowledged that Mr Kennedy did **not** accept that he had failed to tell the representative of the Official Receiver about the withdrawal and provides a complete answer to any ambiguity in the earlier part of her judgment.

15. Mr Marenbon sought to persuade the court that at this paragraph the Deputy Judge was not making a finding of whether there had been a failure to disclose, but only a finding whether that failure was wilful, having assumed that the parties had agreed that there had been a failure to disclose. With respect to Mr Marenbon, I see no merit in this interpretation. I have no doubt that the Deputy Judge was seeking to record that she found both that Mr Kennedy had failed to make a disclosure and that the failure was wilful.

16. I therefore do not accept the first argument.

B. The second argument

17. The Appellant's second argument in relation to Ground 2 was that the Deputy Judge was wrong to make the finding that Mr Kennedy failed to disclose the withdrawals from his bank account to the Official Receiver.

18. In essence, the complaint is that the Deputy Judge was wrong in preferring as evidence a contemporaneous file note made by a representative of the Official Receiver, to the oral evidence given by Mr Kennedy under oath. This was in circumstances where the file note had been put into evidence, but was not supported by any witness statement of truth and where the maker of the file note was not called as a witness and so was not available for cross-examination.

19. I do not accept that the Deputy Judge was wrong in forming this judgement. The Deputy Judge had ample reason to prefer a contemporaneous note made by an experienced examiner to the oral evidence that was given by Mr Kennedy. The Deputy Judge will have seen that Mr Kennedy, prior to the hearing, had not provided any clear denial that he had failed to disclose the withdrawals on the relevant occasion. Before the hearing, he had said, on at least one previous occasion, that he could not remember. It is evident, even from the transcript that at the hearing, that Mr Kennedy's denial was hesitant and less than convincing. He admitted that in speaking to the Official Receiver's case worker he had not been not clear about the amount that he withdrew. He did not say that he had given a complete explanation – he said that he had mentioned only withdrawing money for living expenses, and did not mention that there was a withdrawal to repay a debt to a friend. He does not remember if he told her "*exactly the amount*", and a few times uses variations on the formula "*I would have told her*", rather than stating definitively that he did tell her.

20. I am also mindful of the much-quoted warnings of given by Leggatt J (as he then was) in *Guestmin* [2013] EWHC 3560 (Comm) about the unreliability of human memory, particularly in the context of litigation and where witnesses have a stake in a particular version of events. At paragraph [22] he says:

> *"In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."*

21. As a result, had I heard the same evidence, I find it more likely than not that I would have come to the same conclusion. In any case, as Ms Wilson-Barnes reminded me in her skeleton argument, an appellate court will be slow and cautious to reverse a trial judge's finding of primary facts. Ms Wilson referred me to dicta in *Cook v Thomas* [2010] EWCA Civ 227 [48]:

> *"an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue."*

22. Mr Marenbon sought to convince the court that the Judge's approach erred in principle because there had been no opportunity to cross-examine the note relied upon. However, at no point was there an application for the author of the note to be called as a witness.

The Appellant could have asked for this before the trial if he considered that he wished to challenge this evidence. It is too late to challenge it now.

23. Mr Marenbon also objects to the Deputy Judge's statement that there was *"no evidence to the contrary"* (that is, contrary to the position described in the file note) when in fact Mr Kennedy had given evidence on oath to the contrary. I do not draw from this statement any conclusion that the Deputy Judge had forgotten the oral evidence given by Mr Kennedy. I think it is more likely that she meant that there was no evidence substantiating that oral evidence to set against what appeared to be a *bona fide* contemporaneous note made by someone with no interest in falsifying what she was reporting.

24. In summary on this point, therefore, I do not see that there was anything wrong in the Deputy Judge's assessment of the evidence. Certainly, I see no grounds for amending her finding of fact. It will be apparent therefore that I do not accept that the Appellant has substantiated Ground 2 of his appeal.

3. First Ground of Appeal

25. The Appellant's first ground of appeal is that the Deputy Judge wrongly based her assessment of the severity of the Appellant's conduct by applying an unwarranted distinction between cases concerning the dissipation of assets and cases concerning the incurrence of further borrowing. The Appellant further argued that, two of the three cases cited to the Deputy Judge were properly understood as cases on additional borrowing rather than on (just) asset dissipation, making her distinction between those cases and the present case hard to understand.

A. Principles for the assessment of the length of a BRO

26. To consider what matters the Deputy Judge should have taken into account it is necessary to turn to Schedule 4A of the Insolvency Act 1986.

27. Under paragraphs 1-2, the Court may make a BRO on the application of the official receiver *"if it thinks it appropriate having regard to the conduct of the bankrupt (whether before or after the making of the bankruptcy order)"*.

28. This general, and very wide, test is supplemented by para 2(2) of Schedule 4A which contains a list of *"kinds of behaviour on the part of the bankrupt"* which the Court is required *"in particular"* to *"take into account"*. This list includes:

> *(h) incurring, before commencement of the bankruptcy, a debt which the bankrupt had no reasonable expectation of being able to pay […]*
>
> *(j) carrying on any gambling… which may have materially contributed to or increased the extent of the bankruptcy […]*
>
> *(m) failing to cooperate with the official receiver or the trustee.*

29. The list is not exhaustive: what is required to justify the making of a BRO is *"some form of misconduct or neglect or financial irresponsibility"* (see *Official Receiver v May* [2008] EWHC 1778 (Ch), [18]). As it was put in *Randhawa v Official Receiver* [2006] EWHC 2946 (Ch) (and commented upon in the Deputy Judge's judgment), the failure has to be a significant failure "*to live up to proper standards of competence or probity in the conduct of one's financial affairs. An element of culpability or irresponsibility will usually, if not always, need to be present"*, and the court will *"focus on specific allegations of misconduct and decide whether they are made out."*

30. It is common ground, and well-established law, that in determining the appropriate length of a BRO, the court will approach the matter by applying the three element of culpability or irresponsibility will usually, if not always, need to be present", and the court will "focus on specific allegations of misconduct and decide whether they are made out.". brackets used in the context of directors' disqualification as promulgated in *Sevenoaks Stationers (Retail) Ltd* [1991] Ch.164 and explained in *Randhawa* –

    (1) over ten years for *"particularly serious cases"* including repeat offenders;

    (2) six to ten years for *"serious cases which do not merit the top bracket"* and

    (3) two to five years where although a BRO is mandatory, *"the case is, relatively, not very serious"*.

B. The Deputy Judge's assessment

31. The Deputy Judge determined that the circumstances fell within the middle bracket (6 to 10 years). She considered that a discount of one year should be applied to the term argued for by the Respondent of nine years, and so arrived at a term of eight years.

32. In the current case, the facts that were taken into account by the Deputy Judge as amounting to misconduct on the part of the Appellant may be summarised as his doing the following things in the knowledge that he had been declared bankrupt:

    (1) withdrawing £10,000 out of his bank account ostensibly for living expenses when this was in excess of what might reasonably be withdrawn for living expenses;

    (2) transferring £7,000 out of his bank account not for living expenses, but instead to repay a debt owed to a friend, who had paid legal expenses on his behalf;

    (3) withdrawing, or transferring the £17,000 aggregate of those two amounts from an overdrawn account without telling the bank that he was bankrupt, thereby creating new indebtedness;

    (4) deliberately not informing the Official Receiver of this at the first opportunity he had to do so about the above withdrawals.

33. The Deputy Judge was clear that she regarded these actions as being deliberate and calculated and that they amounted to misconduct on the part of the Appellant. She relied on these instances of misconduct to determine that the Appellant's misconduct fell within the middle bracket under *Sevenoaks Stationers* for *"serious cases which do not merit the top bracket"*.

34. I think the Deputy Judge may also have had doubts more generally about the quality of the Appellant's cooperation with the Official Receiver overall, and this may also have affected her determination.

C. How should the assessment be made?

35. In considering what approach the Deputy Judge should have taken, counsel each cited case law to emphasise a different approach.

36. Mr Marenbon emphasised the principle that there should be consistency so that similar levels of misconduct should attract a similar term of restriction under a BRO. This approach had been followed in relation to the regime for disqualification of Company Directors under the Company Directors' Disqualification Act 1986. He argued, I think

correctly, that following *Randhawa* legal principles established in the disqualification regime are applicable, with any necessary modifications, to BRO applications.

37. Dillon LJ found in *Sevenoaks Stationers* as regards director disqualification, that similar misconduct deserves similar periods of restrictions:

> *"… fairness requires that there should be a degree of similarity between the periods of disqualification imposed by different judges or different courts for similar offences."*

This principle was more fully outlined in *Re Cubelock Ltd* [2001] BCC 523 where at paragraph [55] Park J said:

> *" … although my decision whether or not to accede to the DTI's application for these directors to be disqualified must depend on my view of the facts of this case, it is, I believe, both legitimate and desirable for me to note the facts of other cases in which directors have or have not been disqualified, and to take some account of the outcome of those cases. I was shown several decisions at first instance (some of them based on predecessor statutory provisions), and invited to note the facts and the decisions upon them. I am not going to prolong this judgment by describing the cases, but I say in general terms that in most of them the conduct of the directors was significantly more blameworthy than the conduct of the directors in this case. Yet the judges, weighing up the whole matter, decided that the conduct was not so serious as to merit disqualification."*

38. With this point in mind, Mr Marenbon had at the hearing in question referred the Deputy Judge to a number of decisions which, he considered, involved comparable or a greater degree of misconduct or culpability than in the present case but where the conduct in question had been regarded as falling in the lowest of the *Sevenoaks Stationers* brackets.

39. Ms Wilson-Barnes acknowledged that it was appropriate to make some reference to previous cases but argued that the Court should not, when considering the conduct of a bankrupt, compare and contrast the periods of disqualification in other cases.

40. She cited *Secretary of State v Rahman* [2017] EWHC 2469 (Ch). In that case, Stephen Jourdan QC (sitting as a deputy High Court judge) considered the Court of Appeal's decision in the earlier case of *Re Westmid Packing Services Ltd (No.3)* [1998] B.C.C. 836. At paragraphs [36] to [38] he said the following:

> *"36. Second, the extent to which I should have regard to decisions other than Sevenoaks and Westmid in determining these grounds of appeal. This arises because of what Lord Woolf said in Westmid , delivering the unanimous decision of the Court of Appeal, at 838:*
>
> > *"The appropriate period of disqualification is something which, like the passing of sentence in a criminal case, ought to be dealt with comparatively briefly and without elaborate reasoning. It is obviously undesirable for the judge to be taken through the facts of previous cases in order to guide him as to*

> *the course he should take in the particular case before him. The principles applicable to the court's jurisdiction under the Act are now reasonably clear. The application of those principles to the facts of the particular case is a matter for the trial judge. The citation of cases as to the period of disqualification will, in the great majority of cases, be unnecessary and inappropriate."*
>
> *37. Ms Doran correctly points out that Lord Woolf did not impose a blanket ban on citation of previous authority; he said that citation of cases as to period would "in the great majority of cases" be unnecessary, not in all cases.*
>
> *38. In my view, a first instance decision of a particular judge in a particular case on the appropriate period of disqualification in that case, representing no more than that judge's reaction to the facts, is very unlikely to be of any assistance in most cases, unless it contains a decision on some point of principle. However, an appeal decision which gives guidance on which bracket is appropriate is of a different character, especially if the appeal court overrules the first instance judgment as having been wrong in principle. Such guidance as an appeal decision of that kind gives ought to be followed by an inferior court."*

41. Mr Marenbon sought to minimise the importance of these decisions. He pointed out that *Rahman*, as a decision in the High Court, did not necessarily need to be followed by another judge sitting in the High Court. He noted that the passage quoted within *Westmid* applied in the circumstances of director disqualification and was not strictly relevant to the circumstances of a BRO. There had already been, at the time that *Westmid* was decided, a large number of decisions under the legislation for director disqualification, allowing an overall view of what type of misconduct by a director deserved what type of sanction. By contrast, the BRO regime was still relatively new. Mr Marenbon had been able to find only 16 cases concerning BROs and only 12 touching on the question of the appropriate length of a BRO. It was therefore more necessary to look at the very few cases that there had been discussing how to determine the length of a BRO in order to establish some consistency in judicial decisions.

42. I think there is something in the latter of these points. I heed the warnings in *Rahman* and *Westmid* that one should not be unduly forensic in analysing previous cases. However, given the few cases available in relation to a BRO, I think it is appropriate, at least at this time until overt principles for applying a BRO have been developed by the court, that a judge should review cases that have relevance given a similarity in the facts, and particularly in facts which go to the culpability of the bankrupt, without disqualifying any cases which are not on appeal or which do not overtly state that they are following a particular principle as suggested by the learned deputy judge in *Rahman.*

43. In my view that approach is appropriate to follow what was said in *Randhawa*:

> *"In my judgment the appropriate period for a BRO must be fixed by reference to the gravity of the misconduct that is alleged and proved against the bankrupt, taken in conjunction with any aggravating or mitigating factors that may properly be taken*

> *into account. As in the context of directors' disqualification, the exercise should be performed with a fairly broad brush and without undue refinement or technicality".*

D. How should the appeal court approach the question?

44. Another pertinent legal question to consider is the role of the appeal court in these matters. I have already mentioned that an appeal court will be slow to overturn a lower court's finding of fact. It is also generally true that an appeal court will be slow to overturn a lower court's exercise of discretion.

45. The question arises whether the fixing of a tariff for a BRO should be regarded as an exercise of discretion as such.

46. In *Rahman,* the judge considered that it was. At paragraph [27] the judge said:

> *"Fixing a period of disqualification involves the exercise of a discretion. Accordingly, an appeal court may only intervene and interfere with the judge's exercise of this discretion in accordance with the usual, well-established principles concerning the circumstances in which this court will intervene in a judge's exercise of a discretion vested in him: Re Swift 736 Ltd [1993] B.C.C. 312 at 313. Those principles are that an appeal court can only interfere with the exercise of a discretion if it can be shown that "... irrelevant material was taken into account, relevant material was ignored (unless the appellate court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached": per Lord Neuberger in BPP Holdings Ltd v Revenue & Customs Commissioners [2017] UKSC 55 at [21]; [2017] 1 W.L.R. 2945."*

47. Mr Wilson-Barnes has also drawn my attention to a passage in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, at paragraphs [114-115]:

> *"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. ... The reasons for this approach are many. They include*
>
> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*

> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.*

48. Mr Wilson-Barnes also cited *Prescott v Potamianos* [2019] EWCA Civ 932, at paragraph [76], where the Court of Appeal explained that:

> *"…on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw of law in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".*

49. Mr Marenbon argued to the contrary. He argued that that assigning the level of misconduct of a bankrupt to one of the three levels of tariff described in *Sevenoaks Stationers* is an evaluation of whether a threshold has been crossed. He referred to *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 and the discussion of *Re B* in *Potamianos* at [73]-[74]). These provided authority that if this evaluation is done wrongly it could, and should, be adjusted by the appeal court, applying the facts as found by the judge at first instance but applying its own judgement to whether a threshold is crossed. This should apply equally to the thresholds created by the *Sevenoaks Stationers* categories.

50. He considered that he was supported further in this view by dicta of Hoffman LJ (as he then was) the case of *In Re Grayan Building Services Ltd (in liquidation)* [1995] Ch. 241 (CA), another case involving director disqualification.

51. Hoffman LJ regarded a decision as to whether a director came within a particular standard of unfitness was in principle "*no different from the decision as to whether someone has been negligent or whether a patent is invention was obvious*". He went on to quote with approval a passage in the case of *In re Hitco 2000 Ltd.* [1995] B.C.C. 161 to the effect that

> *"... there may be cases where there is little or no dispute as to the primary facts and the appellate court is in as good a position as the trial judge to form a judgment as to fitness. In such cases the appellate court should not shrink from its responsibility to do so and, if satisfied that the trial judge was wrong, to say so."*

52. In truth, I am not sure that either approach, when applied to this case, would in practice make a great deal of difference. Under either approach, it must be accepted that the facts found by the trial judge should not be overturned by appeal court without good reason and that the appeal judge should only overrule the trial judge's evaluation of whether the

conduct met one of the thresholds described in *Sevenoaks Stationers* where it is clear that the judge has manifestly failed in his or her evaluation.

E. Did the Deputy Judge err in her assessment?

53. Mr Marenbon considers that there were at least three previous cases that, in his view, indicated that the Appellant's misconduct should have been placed in the lowest of the *Sevenoaks Stationers* categories. He summarised these as follows:

    (1) *Randhawa*. Here a three-year BRO (i.e. in the lowest bracket) was made and was supported on appeal. The bankrupt had withdrawn a similar sum of money to Mr Kennedy (£9,500) on his wife's credit card, after presentation of the petition against him (and, the court assumed, against his wife). Mr Marenbon argued that his misconduct was more serious than that found against Mr Kennedy, in that (i) some or all of this money had been gambled away; and (ii) it was held that the bankrupt had either given false statements on pain of perjury, or had lied to the court.

    (2) *Official Receiver v Bathurst* [2008] EWHC 1724 (Ch). A nine-year BRO (i.e. in the intermediate bracket) was made for conduct that Mr Marenbon considered was worse than Mr Kennedy's. The bankrupt had given his cousin a £70,085 charge on his property after presentation of the petition; sold a life policy for £13,000 after bankruptcy and transferred the money into a new bank account, without disclosing either the policy or bank account to the Official Receiver; and dissipated or given away the money. The loss to creditors was almost five times as great as in Mr Kennedy's case, and there were more instances of misconduct.

    (3) *Official Receiver v May* [2008] BPIR 1562. A BRO of two years and six months was made for conduct which Mr Marenbon considered was similar to Mr Kennedy's. Mr May's misconduct was (i) the sale of a motorbike that did not belong to him, but which he held on hire purchase; (ii) at an undervalue; and (iii) failing to account to the owner for the proceeds. He continued to make hire purchase payments, but petitioned for bankruptcy soon afterwards. At the date of bankruptcy, he owed £4,066 to the finance company that owned the bike. Mr May knew that the bike was not his to sell, but there were some significant mitigating factors. The loss to creditors was smaller than that caused by Mr Kennedy, but Mr May's conduct was otherwise, in Mr Marenbon's view, of similar gravity to Mr Kennedy's. As Ms Wilson-Barnes pointed out, however, there is, however, a point of distinction in this case in that in *May* the sale at an undervalue came considerably ahead of the bankruptcy.

54. Mr Marenbon argued that the Deputy Judge wrongly based her assessment of the severity of the Appellant's conduct by applying an unwarranted distinction between cases concerning the dissipation of assets and cases concerning the incurrence of further borrowing.

55. These points were originally pleaded as amounting to an error of law, but I find it difficult to accept a proposition that drawing a distinction between different types of conduct could be regarded as an error of law as such. When I put this point to Mr Marenbon, he maintained that even if not strictly an error of law, they amounted to an unwarranted distinction that had blinded the Deputy Judge to making a proper comparison between previous cases and the case that was before her, causing her to fail to evaluate properly how the misconduct that she had identified should be categorised within the *Sevenoaks Stationers* categorisation.

56. I have two problems with this analysis. First, I do not think that the Deputy Judge did ignore these cases because she made such a distinction. Secondly, I do not think that making the distinction is unwarranted.

(i) Did the Deputy Judge ignore relevant cases?

57. Mr Marenbon based his argument that the Deputy Judge held that the principles in these authorities were of no application to the present case because they were "dissipation cases" principally on the Deputy Judge's comments at paragraph [40] of her judgment.

58. This does not seem to me to be a fair summary of what the Deputy Judge said in this paragraph. Referring to the decisions in *May* and in *Bathurst*, she did make the observation that "*they are both factually related to the dissipation assets, which is not the case here*", and did draw this as a distinction, but she does not say that she ignored them. Quite the contrary, she itemises a respect in which she played particular attention to comments in *May*.

59. Mr Marenbon suggested that this unwarranted distinction also caused the Deputy Judge to ignore the precedent set by the error in *Randhawa*, but this is not evident from the paragraph to which he had referred.

(ii) Is the distinction made unwarranted?

60. Mr Marenbon argued that to set up a formal distinction between cases involving the dissipation of assets and cases concerning further borrowing is wrong in principle and therefore unwarranted. He pointed out that, as regards the general body of creditors, creditors are better off if a bankrupt borrows and then dissipates the borrowed assets than they would be if they just dissipate existing assets, and he illustrated this with some mathematical examples.

61. In my view, this misses the point. As Ms Wilson-Barnes pointed out, it fails to consider the position of the individual creditor who is the victim of the fresh credit being taken. The effect of conduct on an individual creditor should be considered as well as the effect on the general body of creditors. In addition, obtaining credit whilst bankrupt is more than a breach of the bankruptcy restrictions. It is also a bankruptcy offence under section 360 IA 1986. For these reasons, it is neither unreasonable, nor a category error, to draw a distinction between the wrongful act of taking credit from someone who does not know you are bankrupt, and then dissipating those proceeds, and the wrongful act of dissipating proceeds that should have been available to creditors anyway.

62. Mr Marenbon referred me to various director disqualification cases including *Re St John Law* [2019] BCC 901, *Re Bath Glass* (1988) 4 BCC 130 and *Secretary for Trade v Taylor* [1997] 1 WLR 407. He invited me to accept that these demonstrated that the courts made no distinction between dissipating assets and incurring further debt. He cited, in particular, the decision by Chadwick J that the two forms of misconduct were:

> *"two facets of the same perceived vice—that is, the vice of continuing to trade when the company was insolvent at the risk, and to the detriment, of one class of creditors, namely the cottage owners".*

63. In my view the context of these cases - wrongful trading or trading after a bankruptcy petition had been served, is very different to the position of an individual dealing with

his personal affairs. Wrongful trading almost inevitably involves incurring further debts, so it is right that the fact that new debts were created does not add any additional wrongful conduct to an accusation of wrongful trading. The position is entirely different in the case of an individual bankrupt where the dissipation of assets and the incurrence of debt are entirely separate matters. Accordingly, I do not accept Mr Marenbon's argument that I should apply these wrongful trading cases in the different context of personal bankruptcy.

(iii) Mistaken categorisation of Randhawa and May

64. Mr Marenbon's second argument relating to Ground 1 was that *Randhawa* and *May* are not "dissipation" cases and were mistakenly treated as such by the Deputy Judge.

65. I agree with Mr Marenbon that *Randhawa* was also a case that concerned further borrowing. However, it is not clear that the Deputy Judge did treat it as a mere dissipation case or indeed consider it at all as a precedent in relation to the term of a BDO. It is not mentioned at all in her assessment of the length of the bankruptcy order.

66. I have no reason to believe that she misunderstood the facts of that case. However, what emerged during the hearing, is that the Deputy Judge may have been misinformed about the **outcome** in *Randhawa.* This is because it was discussed during the course of the trial as being a case that had been placed in the middle *Sevenoaks Stationers* bracket whereas in fact it had been in the lowest bracket. I consider therefore that there is a strong possibility that the District Judge had inadvertently been misled on this point. The force of this point is slightly reduced by the fact that in *Randhawa* the Official Receiver had not asked for a higher tariff, but, nevertheless, the point has considerable significance.

67. As regards *May*, I agree with Mr Marenbon that the conduct of Mr May in that case of selling a motorbike that he did not own at an undervalue was more than "mere dissipation" and represents wrongful conduct at least as serious as borrowing knowing that one is bankrupt. The fact that this conduct was found to have fallen within the lowest of the three bands recognised in *Sevenoaks Stationers*, would argue for the Appellant's conduct being similarly treated. However, it may again be relevant that in that case the Official Receiver had only asked for a BRO in the lowest band and that there were temporal differences - the wrongful act in selling motorcycle occurred before the bankruptcy proceedings were in place, rather than immediately after the bankruptcy had been put on course.

(iv) Are there then grounds to upset the decision?

68. Whilst it is clear that the Deputy Judge did give some consideration to all the cases before her, applied the *Sevenoaks Stationers* categories and I do not agree that she was wrong to make a distinction between (mere) dissipation cases, I do have two concerns about the basis of her decision. These were, that the District Judge was inadvertently misled as to the outcome in *Randhawa* and, that in dismissing *May* as a dissipation case, she may have not given sufficient consideration to the features in that case that made it more than a mere dissipation case.

69. In my view these facts are sufficient for me to consider (within the principle enunciated in *Prescott v Potamianos)* that there is "*a real danger that the judge was wrong by reason of some identifiable flaw of law in the judge's treatment of the question to be decided,*

such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion".

70. In particular, I consider that it is difficult to look at the bankrupt's conduct in *Randhawa* and in *May* and to conclude that Mr Kennedy's misconduct was qualitatively more serious than the misconduct described in those cases such as to put it into a higher bracket of seriousness. I agree with Mr Marenbon that the gravity of Mr Kennedy's misconduct deserves to be in the same bracket as that in those cases, that is, the lowest bracket of two to five years. There is as far as I can see no principle that differentiates these cases from the present case and I would be ignoring *Cubelock* if I were to fail to take these cases into account.

4. Conclusion

71. For the reasons given above, I consider that a case is made out that the Deputy Judge's reasoning in relation to the length of the BRO was not securely founded, and that accordingly I should reconsider the length of the BRO by reference to principle and precedent.

72. Having regard to the examples provided by *Randhawa and May* in particular, and to the instances found by the Deputy Judge of the Appellant's failure "*to live up to proper standards of competence or probity in the conduct of one's financial affairs"* (as it was put in *Randhawa*), I consider that the BRO order should be amended. Its term should be reduced to 4 years. I calculate this by taking the top of the lowest *Sevenoaks Stationers* category and reducing this by one year to reflect the mitigation that the Deputy Judge had found to be present.

73. I will make an order accordingly.