



The High Court decision in *Randhawa* fleshes out the nature of the recently introduced bankruptcy restriction order. Tim Akkouh reports

THE ENTERPRISE ACT 2002 (EA)

implemented various changes to the personal insolvency regime. Some are already well known. For instance, a three-year 'use it or lose it' period was introduced in relation to a bankrupt's former home: see s 282A of the Insolvency Act 1986 (IA), implemented by s 261 of the EA. Another important modification was the reduction in the usual length of time a bankrupt must wait before his discharge—down from three years to one: see s 279(1) of the IA, implemented by s 256 of the EA. This latter change was accompanied by the introduction of the bankruptcy restriction order regime, which enables a court, on the application of the Secretary of State or the Official Receiver, to impose a period of time from two to 15 years during which a bankrupt will, despite being discharged, remain under many of the restrictions that are imposed on undischarged bankrupts. As the bankruptcy restriction order (BRO) regime is less well known than some of the EA's other modifications to the IA, I will set out its main features before going on to assess *Randhawa v Official Receiver* [2006] All ER (D) 02 (Jul).

What is a bankruptcy restriction order?

The provisions relating to BROs are chiefly set out in Sched 4A to the IA. Paragraph 2(1)

of that Schedule is the most important of all, providing that "the court shall grant an application for a bankruptcy restriction order if it thinks it appropriate having regard to the conduct of the bankrupt (whether before or after the making of the bankruptcy order)".

Paragraph 2(2) proceeds to set out types of behaviour that the "court shall, in particular, take into account". The list refers, *inter alia*, to the failure on the part of a bankrupt to keep records which account for a loss of his property, the giving of a preference, entering into a transaction at an undervalue, gambling, rash and hazardous speculation, and fraud. On the other hand, the court cannot take into account any conduct of the bankrupt pre-dating 1 April 2004: see Art 7 of SI 2003 no 2093.

An individual subject to a BRO remains under many of the disadvantages of an undischarged bankrupt – more particularly, a person subject to a BRO:

(a) cannot be a company director or a member of a limited liability partnership (see, for example, s 11(1)(b) of the Company Directors Disqualification Act 1986);

(b) cannot obtain credit in excess of £500 without disclosing the fact that he is subject to a BRO (see s 360(5) of the IA); and

(c) cannot hold a large number of elected and other offices.

Given that there is no prior reported decision assessing the BRO regime, the decision of Lancelot Henderson QC (sitting as a deputy High Court judge) in *Randhawa* is of considerable importance.

Facts of *Randhawa*

Mr Randhawa incurred substantial debts while operating a restaurant business with his wife. By May 2004, it had become clear that he had no realistic prospect of paying those debts as they fell due, and Mr Randhawa put forward an IVA proposal to his creditors. This proposal was ultimately rejected in June 2004.

On one occasion prior to the rejection of his IVA proposal, and on 18 separate occasions thereafter, Mr Randhawa withdrew the sum of £500 from his wife's credit card account. The £9,500 so withdrawn had been spent by Mr Randhawa prior to the date on which he was adjudged bankrupt in early July 2004.

Mr Randhawa did not disclose the debt created by these withdrawals in his statement of affairs. When it eventually came to light, he said, first, that the money had been withdrawn to pay for his children's school fees and for his family's living expenses. He later conceded that, in fact, the money had been lost at a casino in an ill-judged attempt to win the £454,000 required to repay his

creditors. Mr Randhawa's witness statement in the BRO proceedings changed this story again. Instead of alleging that he spent the £9,500 gambling on his own, Mr Randhawa alleged that the money was given to a man by the name of Danny, who had previously worked in Mr Randhawa's restaurant business, to gamble on Mr Randhawa's behalf.

At first instance, the district judge found that Mr Randhawa's conduct was such as to warrant the making of a BRO, and imposed a period of three years. Mr Randhawa appealed to the High Court against both the making of the BRO and the duration imposed.

The judge's reasoning

Lancelot Henderson QC's judgment sets out a number of important principles that must be taken into account when assessing whether a BRO should be made, and in determining the length of such an order.

1 The court does not exercise a general discretion

The judge considered that the court does not have a general discretion as to whether to impose a BRO. Rather, the court must "examine and evaluate the bankrupt's conduct and ... form a view whether that conduct merits the making of a BRO. If the court concludes that it does, the court then has no choice in the matter and is obliged to make a BRO for at least the minimum period of two years".

2 The policy justifications underlying the BRO regime

The judge also considered the policy justifications underlying the BRO regime. He held that "the main object of making a BRO must undoubtedly be the protection of the public". Nevertheless "the jurisdiction is also intended to have a deterrent effect. This is shown above all by the minimum period of two years for a BRO... The minimum period suggests rather that Parliament intended to impose a substantial sanction in any case where the bankrupt's conduct was shown to have fallen below the appropriate standard, whether or not he still represented a danger to the public by the date of the hearing". Accordingly, "even if I were satisfied that Mr Randhawa had learnt his lesson and is no longer a danger to the public, none of this would have any avail (save perhaps by way of mitigation) if the court were nevertheless satisfied that the misconduct alleged by the Official Receiver was made out and that it was of sufficient gravity to merit the making of a BRO".

3 The appropriate test for making a BRO

When, then, will conduct be of sufficient gravity to merit the making of a BRO? For Henderson, the answer is when a bankrupt's conduct exhibits "a failure in some significant respect 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. Mitigating factors may of course be taken into account, and need not be confined either to matters directly related to the allegations of misconduct or to events after 1 April 2004". It therefore appears that mitigating factors – such as, perhaps, a bankrupt's lack of financial experience, relatively low intelligence, or personal difficulties – can be taken into account when determining whether a BRO should be made at all; such factors can also, as we shall see, be taken into account when the court comes to assess the appropriate length of any BRO that is imposed.

Adopting this test, Henderson held that "even if Mr Randhawa's evidence is accepted at face value, his withdrawal of the £9,500 was a self-confessed act of folly; and his latest version of what he did with the money (in effect giving it to Danny to gamble on his behalf) displays conduct which is, if anything, even more reckless and irresponsible than the explanation which he ended up giving to the Official Receiver's examiner... (gambling it himself in a last effort to restore his fortunes). Whichever version of events is the truth, Mr Randhawa's conduct seems to me to have fallen significantly below the standard of financial competence and probity in the conduct of a person's financial affairs that should be fixed by the court, and therefore merits the making of a BRO".

This conclusion was supported by the fact that Mr Randhawa had given inconsistent accounts of his conduct to the Official Receiver's examiner, and in his witness statement. The fact that Mr Randhawa had changed his account of events was, in the judge's eyes, "further misconduct of a kind that the court is required to take into account".

4 The appropriate length of Mr Randhawa's BRO

Although the appellant's notice had indicated that Mr Randhawa would seek a reduction in the length of the BRO made against him, this argument was withdrawn during the hearing of the appeal. As such, Henderson QC only addressed this issue en passant. Nevertheless, his comments are still

useful. He started from the premise that "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".

He proceeded to note that "it is helpful and appropriate in the context of BROs to adopt the same three brackets that the court now routinely applies in the context of directors' disqualification". Thus "the most serious cases, attracting a period of disqualification within the suggested top bracket of 10 to 15 years, will include cases of deceit and fraud. To draw the line between cases which should fall in the suggested bottom bracket (two to five or six years) and the middle bracket (five to six to ten years) is more difficult. However, possible areas of distinction are (a) whether the serious failures came about deliberately or with knowledge of their potential result and harm they would cause, or innocently and through lack of knowledge or incompetence, and (b) whether the failures were 'one off' or part of a pattern" (per Dillon LJ in *Re Sevenoaks Stationers Ltd* [1991] Ch 164, 171).

Welcome guidance

The decision provides considerable guidance in relation to whether a BRO should be imposed by the court. It is, therefore, to be welcomed. Yet it might be said that the stark facts of *Randhawa* made the judge's decision relatively easy. There will, no doubt, be more difficult cases to come where, for instance, individuals have continued in sole tradership or partnership after it has become obvious to the reasonable man that their business is doomed to fail, or where credit card or other debts have been accumulated in an honest but misguided belief that an individual will obtain a new job, promotion or some other financial windfall. Furthermore, the decision does not address in detail the approach to be taken in fixing the length of BROs. Lancelot Henderson QC's careful and thoroughly reasoned decision is, therefore, certainly not the last that we shall hear about BROs.

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