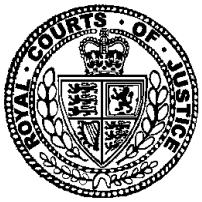

Neutral Citation Number: [2017] EWHC 983 (Ch)

Case No: 0163 of 2014
Appeal Ref: CH-2016-000162

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
On Appeal from the County Court at Kingston
Order of DJ Payne dated 9 February 2016
In Bankruptcy
Re: Claire Elizabeth Hilsdon

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/05/2017

Before :

MR JUSTICE NUGEE

- -

Between :

MICHELLE ANNE WEIR (as Trustee in Bankruptcy of Claire Elizabeth Hilsdon)	**Applicant/Respondent**
- and -	
CLAIRE ELIZABETH HILSDON	**Respondent/Appellant**

- -
- -

Clara Johnson (instructed under Direct Access) for the **Appellant**
Richard Ascroft (instructed by **Everys**) for the **Respondent**

Hearing date: 26 January 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. This is an appeal from an Order of DJ Payne, sitting in the County Court at Oxford, dated 9 February 2016. The Order was made in the bankruptcy of the Appellant, Mrs Hilsdon, on the application of her Trustee in Bankruptcy, Ms Weir. It suspended Mrs Hilsdon's discharge from bankruptcy, which would otherwise have taken place on 20 February 2016, until her Trustee confirmed to the Court that Mrs Hilsdon had complied with her duties.

2. Mrs Hilsdon sought to appeal by Appellants' Notice dated 8 July 2016. By Order dated 14 July 2016 Rose J granted her permission to bring the appeal out of time. By Order dated 30 September 2016 Norris J granted her permission to appeal, limited to the Grounds set out in her Appellant's Notice, refusing her permission to amend to add two further grounds.

3. There are 8 such Grounds of Appeal. They cover a number of different aspects, but in essence they assert that it was inappropriate for the District Judge to make the order that was made.

Outline Facts

4. I will give a summary of the facts here. I will have to give more detail later when considering the particular matters relied on.

5. Mrs Hilsdon's bankruptcy order was made on 20 February 2015. The background was that she and her husband had started a business through a limited company called Chariots and Cherry Pie Ltd. She was a director and had given a number of personal guarantees. Unfortunately, for reasons that need not be gone into, the business failed. In October 2014 the creditor under one of the guarantees, Armada Investments Ltd, petitioned for her bankruptcy. Mrs Hilsdon put the company into voluntary liquidation in November 2014. At the end of January 2015 Mrs Hilsdon approached Ms Weir, who was a licensed insolvency practitioner and a partner in the firm of Lameys. Ms Weir assisted her in applying for an Interim Order. Despite this the Court (DDJ Alderswick sitting in the County Court at Oxford) made a bankruptcy order on 20 February 2015.

6. On 17 March 2015 Mrs Hilsdon completed a form called the Bankruptcy Preliminary Information Questionnaire (form PIQB) for the Official Receiver. In it she gave details of her assets and liabilities. She said that since December 2014 she had been working as a self-employed freelance PR consultant under the trading name Candoo PR, giving her income from that as £1500 per month.

7. Between February and May 2015 Ms Weir sought to find a proposal acceptable to creditors, which led to a proposal for an IVA being put forward by Mrs Hilsdon on 7 May 2015, with Ms Weir as the Nominee and Supervisor. Ms Weir herself signed a Nominee's report on 14 May 2015, recommending the proposal as a serious proposal that was feasible and fair and fit to be considered by creditors. The proposed IVA however did not proceed and on 1 July 2015 Ms Weir was appointed her Trustee in Bankruptcy.

8. Ms Weir notified Mrs Hilsdon of her appointment on 10 July 2015 and enclosed an Income and Expenditure form for her to complete. Mrs Hilsdon completed and returned the form; although dated 1 August 2015, it was stamped as received by Lameys on 2 September 2015. In it Mrs Hilsdon gave her monthly income as a freelance PR consultant as £2500, but noted that the monies she received were variable depending on the contracts she was awarded.

9. There was a small amount of e-mail correspondence in the autumn in which Ms Weir sought some information from Mrs Hilsdon. On 22 December 2015 Ms Weir sent a more formal letter asking for a full response to a number of detailed queries by 5 January 2016. Mrs Hilsdon replied by e-mail dated 3 January 2016, but Ms Weir was not satisfied with the answers she provided, nor with those she provided on 18 January 2016 in answer to a further letter from Ms Weir dated 15 January 2016.

10. It was in those circumstances that Ms Weir applied to the Court on 19 January 2016 for an order suspending Mrs Hilsdon's discharge from bankruptcy. That came before DJ Payne on 9 February 2016. By then there had been considerable further correspondence but DJ Payne made the order as sought. Mrs Hilsdon was acting in person. He did not give a separate judgment but I have seen a full transcript of the proceedings. I will have to consider some of that further, but in essence he proceeded on the basis that Mrs Hilsdon accepted before him that there were some things which the Trustee still did not know; that it would be wrong to allow Mrs Hilsdon to be discharged from bankruptcy at the end of the 12 month period; that in those circumstances he had a choice between adjourning the hearing or making the order; and that it was preferable to make the order.

11. The precise form of order made was as follows:

> "The relevant period for the purposes of s279 Insolvency Act 1986 and Schedule 19 to the Enterprise Act 2002 shall cease to run until such time as the Trustee in Bankruptcy confirms to the court by filing a report that the bankrupt has complied with his duties and obligations or until the court orders otherwise."

The law

12. The relevant statutory provisions are as follows. By s. 278 of the Insolvency Act 1986 (**"the Act"**) the bankruptcy of an individual (a) commences with the day on which the bankruptcy order is made and (b) continues until the individual is discharged.

13. By s. 279 of the Act, the default position is that a bankrupt will be discharged after one year, unless the Court exercises its powers under the section, which, so far as material, provides as follows:

> "**279 Duration**
>
> (1) A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences.
>
> (3) On the application of the official receiver or the trustee of a bankrupt's estate, the court may order that the period specified in subsection (1) shall cease to run until—

(a) the end of a specified period, or

(b) the fulfilment of a specified condition.

(4) The court may make an order under subsection (3) only if satisfied that the bankrupt has failed or is failing to comply with an obligation under this Part.

(5) In subsection (3)(b) "condition" includes a condition requiring that the court be satisfied of something.

…"

The one-year period was introduced by the Enterprise Act 2002 with effect from April 2004. There was originally provision in s. 279(2) for an application for early discharge, but it was repealed in 2013. In the present case the practical effect is that Mrs Hilsdon would have been discharged on 20 February 2016 if no order had been made under s. 279(3).

14. Ms Johnson, who appeared for Mrs Hilsdon, drew attention to the fact that s. 279(4) imposes a threshold condition in that the power in s. 279(3) can only be exercised if the bankrupt has failed, or is failing, to comply with an obligation "under this Part". That is a reference to Part IX of the Act, headed Bankruptcy, which consisted at the relevant time of ss. 264 to 371 and contained all the main provisions relating to bankruptcy. Included in Part IX is s. 333(1) which provides, so far as material, as follows:

"**333 Duties of bankrupt in relation to trustee**

(1) The bankrupt shall—

(a) give to the trustee such information as to his affairs,

…

as the trustee may for the purposes of carrying out his functions under any of this Group of Parts reasonably require."

15. I was referred to a number of authorities but for the most part the law was not significantly in dispute. First, on the question of the purpose of making an order suspending a discharge, I was referred to *Bramston v Haut* [2012] EWCA Civ 1637. In that case, unusually, the bankrupt himself had applied for, and been granted, a suspension from his discharge, so as to give him time to put a proposal for an IVA before his creditors. The Court of Appeal allowed the trustee's appeal on the grounds that the order was not made for any purpose within s. 279(3): see per Kitchin LJ at [46]-[52]. In particular, at [50] he referred to the decision of Sir Andrew Morritt C in *Shierson v Rastogi (a bankrupt)* [2007] EWHC 1266 (Ch) where the Chancellor explained the nature and purpose of the power conferred by s. 279 in these terms:

"It is clear from the terms of s.279 of the IA 1986 that postponement of discharge is linked to a failure to comply with the obligations imposed on a bankrupt by Part IX. But is the purpose of the power to postpone a discharge to provide an incentive to full compliance? Or is it that the disabilities arising from being an undischarged bankrupt should, in the public interest, continue until there has been full

> compliance? I doubt whether, on the facts of this case, it is necessary to reach a final conclusion on those questions. But in my view the purpose of the power is the latter, even though its effect may be to achieve the former. Were it otherwise I would have expected Parliament to have made discharge conditional on full compliance."

Kitchin LJ then continued at [51] as follows:

> "A purpose of the power conferred by section 279 is therefore to extend the period of the bankruptcy and to ensure that the bankrupt continues to suffer the disabilities arising from his undischarged bankruptcy until he complies with his obligations. I accept the submission advanced by the trustee that in this sense the power is intended to be penal in character and used for purposes connected with the functions of the official receiver and the trustee and to allow the trustee to get in, realise and distribute the bankrupt's estate in accordance with the provisions of Chapter IV."

16. Kitchin LJ there refers to the disabilities which an undischarged bankrupt is under. I asked Ms Johnson what these disabilities were. Without purporting to provide an exhaustive list, she gave as examples restrictions on being a director of a company, on obtaining credit, on carrying on business and on holding certain public offices; and also referred to the fact that an undischarged bankrupt is subject to a number of criminal sanctions which do not apply after discharge, and can be required to attend a public examination. I have not sought to check the statutory provisions which provide for these or other matters, nor is it necessary to go into them in any detail. It is evident that there are significant practical disadvantages for a bankrupt if his or her discharge is suspended under s. 279(3): see *Chadwick v Nash* [2012] BPIR 70, a decision of Mr Registrar Nicholls, at [28] where he referred to the serious impact that bankruptcy can have on a debtor's ability to work, incur credit and carry out his ordinary activities for the benefit of himself and his family.

17. In *Hellard v Kapoor* [2013] EWHC 2204 (Ch) Penelope Reed QC, sitting as a Deputy High Court Judge, cited the passage from Kitchin LJ's judgment in *Bramston v Haut* and said that it seemed clear from that that the purpose was not only to penalise the bankrupt but to aid the trustee in collecting in, realising and distributing the estate of the bankrupt; and that that suggested that the purpose of incentivising the bankrupt to comply fully with the trustee's requests for information was also relevant to the exercise of the power: see at [9].

18. Second, it was common ground that a Court considering an application has first to be satisfied that the bankrupt has failed or is failing to comply with a relevant obligation (the jurisdiction stage or threshold question), and then must consider how it is to exercise its discretion (the discretion stage): *Bowles v Trefilov* (24 Feb 2016) at [33] per Chief Registrar Baister.

19. Third, so far as the jurisdiction stage is concerned, it was common ground that the Court has to be satisfied as to non-compliance: mere suspicion of non-compliance is not enough: *Official Receiver v Milburn* (Independent, 26 July 1999) per HHJ Rich QC, *Chadwick v Nash* at [54].

20. Ms Johnson referred me to what was said in *Hellard v Kapoor* at [11] where Ms Reed accepted a submission on behalf of the bankrupt that although s. 279 allowed the Court to look at whether the bankrupt *is failing* to comply, and that that ought to be judged at the hearing, the trustee should nevertheless be confined to the grounds set

out in his evidence filed with the application. Mr Ascroft, who appeared for Ms Weir, said that that was too inflexible an approach: see *Bowles v Trefilov* at [35] where Chief Registrar Baister rejected a submission that the applicants should be confined to their initial allegations, saying that it often happens that in applications of this kind the trustee's initial complaints prompt a response which gives rise to further questions. Mr Ascroft pointed out that s. 279(4) also permits an order to be made if the bankrupt *has failed* to comply, so that the threshold condition can be satisfied if there has been historic non-compliance. I was also referred to *Keely v Bell* [2016] EWHC 308 (Ch) where Norris J said (at [10(b)]) that given the broad scope and onerous nature of a bankrupt's statutory obligations, a bankrupt will not "fail to comply" for the purposes of s. 279 if he or she has done all that could reasonably be done to fulfil those obligations.

21. Fourth, so far as the discretion stage is concerned, Ms Johnson referred me (by way of example) to *Chadwick v Nash* where Mr Registrar Nicholls declined to make an order despite accepting that the information provided by the bankrupt to the Official Receiver was not as detailed as it might, and should, have been, and that there had been inaccuracies, omissions and inconsistencies in such information: see at [93]. Mr Registrar Nicholls in that case laid particular emphasis on what he described as considerable and prolonged delay on the part of the trustee in pursuing certain matters: see at [97].

The application

22. The relevant rules in force at the time were the Insolvency Rules 1986 (now replaced by the Insolvency (England and Wales) Rules 2016). Rule 6.215 applied where a trustee applied to the Court for an order under s. 279(3). Rule 6.215(2) required the trustee to file evidence in support of the application setting out the reasons why it appeared to him or her that such an order should be made. Rule 6.215(5) required a copy of the trustee's evidence to be sent to the bankrupt so as to reach him or her at least 21 days before the day fixed for the hearing.

23. In the present case Ms Weir's application was dated 19 January 2016 and issued for 9 February 2016. Her evidence in support was contained in a witness statement also dated 19 January 2016. (This did not form part of the grounds of appeal but it would appear, incidentally, that it must have been served at least a day late, as the requirement for service 21 days before the day fixed for the hearing is to be read as 21 clear days: see Rule 12A.55(1) of the Insolvency Rules, incorporating the provisions of CPR 2.8 under which (see CPR 2.8(2) and (3)) days are to be computed as clear days. The result is that a requirement to serve "at least 21 days before" 9 February 2016 (a Tuesday) requires service not by Tuesday 19 January but by Monday 18 January. Such an effect may appear counterintuitive, especially when the period is expressed, as it very often is, as a multiple of 7, but I do not think there is any doubt that this is the effect of the rule. Ms Weir appears to have thought, wrongly, that 14 days' notice was all that was required.)

24. Ms Weir's witness statement listed a number of items of information which Ms Weir said she had asked Mrs Hilsdon for but had not received. In summary they were as follows:

    (1) Mrs Hilsdon's explanation for 2 payments of £10,000 on 24 February 2015

and £10,027 on 10 March 2015.

(2) Copies of invoices delivered by her (as Candoo PR) to a client called Nominet, and of her contract with Nominet.

(3) Copy statements for a bank account in the name of her mother which Mrs Hilsdon was using.

(4) Copy statements for a Post Office cash card.

(5) An updated income and expenditure form.

(6) Mrs Hilsdon's explanation of why she had not been paid for services provided to a company called What's Ticking Today Ltd.

25. By the time of the hearing on 9 February, some of these items had been provided. Ms Weir's then counsel, Mr Hannant, enclosed a schedule to his skeleton argument which listed which of the matters referred to in the witness statement were still outstanding (namely (1), (2) (both invoices and contract), (3) and (6) above), as well as another 11 items of information which he said Ms Weir had requested and Mrs Hilsdon had failed to provide. For the purposes of the appeal however it was accepted by Ms Weir that this schedule was not wholly correct in that some of the information had in fact been provided by Mrs Hilsdon before the hearing.

26. As already referred to, the fact that information has been provided by the time of the hearing is not a complete answer to an application, as I accept that as a matter of jurisdiction the threshold condition will be satisfied if there has been a failure to comply with an obligation, even if it has been remedied, on the basis that the bankrupt "has failed" to comply. Nevertheless the extent to which information is still outstanding at the time of the hearing is likely to be material to the question of discretion, as is the extent and seriousness of any historic non-compliance.

27. I was taken by Ms Johnson through each of the 6 matters relied on in Ms Weir's evidence in support of the application and I should set out the position at the time of the hearing in relation to each of them in turn.

The payments of £10,000 and £10,027

28. Ms Weir said in her witness statement that she had discovered from statements which she had obtained from Mrs Hilsdon's bank that two payments had been made from Mrs Hilsdon's bank account, one of £10,000 on 24 February 2015 (4 days after the bankruptcy order) to Mrs Florey (Mrs Hilsdon's mother), and one of £10,027 on 10 March 2015 to Premium (in fact Premier) Lettings. Ms Weir had asked for an explanation for the £10,000 payment and been told that it was a payment of rent in advance. She was not satisfied that this was right as she believed the £10,027 to be for rent. She said she had asked Mrs Hilsdon for a full explanation of both payments and was still awaiting an explanation.

29. In fact there does not appear to have been any doubt over the later payment. Mrs Hilsdon said it was rent for a property which she rented from 23 February to 22 August 2015. Ms Weir had a statement from Premier Lettings which confirmed both

that rent of £13,800 had been charged (which would equate to 6 months at exactly £2,300 per month) and that payment of £10,027 was received on 11 March 2015.

30. So far as the earlier payment is concerned, the relevant correspondence is as follows. Ms Weir asked for an explanation of the payment of the £10,000 (letter of 22 December 2015). Mrs Hilsdon said that the £10,000 was money that she was given by her ex-husband (Mr Cairns) and that:

> "I explained to you at the time that I was desperate for a home for the girls and me so I used this as the deposit for the property and for the removal costs etc."

(e-mail of 3 January 2016). Ms Weir asked for an explanation as to why there were two payments (letter of 18 January 2016). Mrs Hilsdon said that she had asked for bank statements for her mother's account and once she had them she would be able to show what payments were made to whom in respect of her house move (e-mail of 22 January 2016). She later provided the bank statements (on 5 February 2016) but no further explanation was given.

31. Ms Johnson pointed out that the reference in Mrs Hilsdon's e-mail of 3 January 2016 to having explained the payment at the time was confirmed by her IVA proposal of 7 May 2015. Here she had said that she had divorced her former husband Mr Cairns in July 2013; that she was due a number of payments from him under a consent order, the first of which was £20,000 due by 28 February 2015; that she was at the time sleeping on her father's sofa and had no access to her children; that she had used some of the proceeds due to her from the divorce settlement to put a rent deposit down and pay some essential living expenses; and that these funds amounted to approximately £20,000. Ms Weir had helped Mrs Hilsdon put together her IVA proposal. In her Nominee's report of 14 May 2015, she said that she had advised Mrs Hilsdon that she should not utilise any of the proceeds of her divorce, and continued:

> "Despite this advice, as explained in the debtor's history, out of sheer desperation to be reunited with her children, she has utilised some of the divorce payments to place a rent deposit on the property and pay some essential living expenses."

As Ms Johnson says, that makes it clear that Ms Weir already knew that much.

32. On these facts Ms Johnson criticised Ms Weir's evidence as misleading in making no reference to what Mrs Hilsdon had told her at the time of the IVA proposal, and as incorrect to say that she had not received Mrs Hilsdon's explanation. What she should have said, submitted Ms Johnson, was that Mrs Hilsdon had provided a response but it was not full enough.

33. I think there is some justification in the criticism. Ms Weir's evidence was that the payment of £10,000 had been said to be a payment of "rent in advance", but that she did not accept this as the subsequent payment of £10,027 had been for the rent, thereby suggesting that Mrs Hilsdon's explanation had been untrue. In fact Mrs Hilsdon's explanation had been that it was for the deposit of the cottage and removal expenses; and in her IVA proposal that it had been for a rent deposit and some living expenses. Payment of a rent deposit is of course standard on residential lettings, and is not inconsistent with rent being paid subsequently, and the Premier statement confirmed that a deposit had been paid totalling £3,185.

34. On the other hand, it was I think correct that a full explanation had not been given. The deposit did not account for the full £10,000 (which was referenced on the bank statement as "Money I owe Mum"). No attempt had been made to give a breakdown of what the balance was for. After the hearing Mrs Hilsdon did indeed put forward an explanation (the total of £20,000 being used for 6 months' rent at £2,400 per month and a deposit of £3,200, making £17,600, and £2,400 for removal costs from storage), but this was not verified, was not precisely consistent with the Premier statement (which showed rent of £2,300 per month and a deposit of £3,185) and did not explain how the £10,000 paid on 24 February was used to pay rent which according to the statement was only paid on 11 March 2015.

The Nominet invoices and Nominet contract

35. These concern Mrs Hilsdon's income from Candoo PR for a client called Nominet. In her witness statement Ms Weir said that in her income and expenditure form Mrs Hilsdon had advised that her income was £2,500 per month, that she had obtained "some" Nominet invoices from Mrs Hilsdon which demonstrated income well in excess of £2,500, and that she had asked her to provide copies of all invoices delivered by Candoo PR to Nominet and details of her contract with Nominet. She said "I am still awaiting these invoices and information from [Mrs Hilsdon]."

36. It is common ground that the contract had been provided by the time of the hearing.

37. So far as the invoices are concerned, the relevant correspondence is as follows. Mrs Hilsdon disclosed that she was working as a freelance PR consultant in her Income and Expenditure form (received on 2 September 2015), giving her income as £2500 per month, but adding a note that the monies she got were variable depending on the contracts she was awarded. Ms Weir asked Mrs Hilsdon for evidence of her actual income in the form of payslips (e-mail of 16 September 2015). Mrs Hilsdon replied that she was not on a payroll but offered to send the invoices she had issued (e-mail of 16 September 2015), and then that she would gather the invoices up and send them (e-mail of 18 September 2015). She sent a number of invoices from Candoo PR for the Nominet project, numbered 3 to 9 (e-mail of 9 November 2015); these showed her services being charged out at £400 per day for various dates in September and October 2015, the total amounts being £5,200 for September and £7,200 for October. Ms Weir asked for a copy of Nominet invoice 2, copies of any invoices raised since October, and copy invoices for any other work carried out from 20 February 2015 (letter of 22 December 2015); Mrs Hilsdon sent a copy of Nominet invoice 2 (in the sum of £3,200 for September) (e-mail of 3 January 2016). She also said that she was not able to work much for Nominet in November and December as her sister had pancreatitis, and that as Nominet pre-paid her she would be reimbursing them £8,400. She asked which Nominet invoices Ms Weir had received, and said she had no other invoices. Ms Weir confirmed she had Nominet invoices 2 to 9 (letter of 15 January 2016). There was an issue about the repayment which Mrs Hilsdon said was due to Nominet, which Ms Weir wanted clarification on. Mrs Hilsdon confirmed that "you have had all the invoices I sent to Nominet" and attached an Excel spreadsheet headed "Bank Analysis" for clarification (e-mail of 4 February 2016).

38. Ms Johnson said that Mrs Hilsdon had supplied Nominet invoices 2 to 9 and confirmed that she had no others, and that in those circumstances it was inaccurate for Ms Weir to say that she was still awaiting invoices and information from Mrs

Hilsdon.

39. However, although I do not think I have seen the Bank Analysis spreadsheet, I have evidence that it listed a number of invoices as having been raised, including two for Nominet dated 1 September 2015 and 13 November 2015 which had not been provided to Ms Weir.

Statements for mother's bank account

40. In her witness statement Ms Weir said that Mrs Hilsdon had told her that she was using a bank account in her mother's name, and had asked for copy bank statements which she was still awaiting.

41. These bank statements were provided before the hearing (on 5 February 2016). There is however evidence that statements were not in fact provided for the period 20 to 26 February 2015 (the very start of the bankruptcy).

Post Office cash card statements

42. In her witness statement Ms Weir said she was still awaiting statements for a Post Office cash card which Mrs Hilsdon used.

43. Mrs Hilsdon had in fact sent an e-mail to Ms Weir on the evening of 18 January 2016 with log in details which enabled Ms Weir to access the statements on-line. Ms Johnson said that this was sufficient. I agree that this would be sufficient if the log in details were correct. Mr Ascroft told me that his instructions were that the password had been changed; Ms Johnson that her instructions were to the contrary. I have no evidence on this and cannot resolve who is right. I proceed on the basis that it has not been established that there was any continuing failure in this respect.

Updated income and expenditure form

44. In her witness statement Ms Weir said she was awaiting an updated income and expenditure form from Mrs Hilsdon together with supporting documents.

45. Mrs Hilsdon completed an updated income and expenditure form which was received on 25 January 2016.

46. Ms Johnson accepts that no supporting documentation had been received by the hearing. The relevant correspondence is as follows. Ms Weir asked for the form with supporting documents (letter of 22 December 2015). Mrs Hilsdon returned the form (on 25 January 2016). Ms Weir asked her for supporting documentation (letter of 27 January 2016). Mrs Hilsdon asked what documentation was required (e-mail of 30 January 2016). Ms Weir specified what she required, such as Council tax and utility bills (letter of 3 February 2016). They had not been provided by the hearing on 9 February 2016.

What's Ticking Today Ltd

47. In her witness statement Ms Weir said that Mrs Hilsdon had told her that she had carried out PR and marketing services for a company called What's Ticking Today Ltd (**"WTT"**) but had not received payment for her services, and that she had asked

for, and was still awaiting, an explanation for why she had not received payment.

48. By the time of the hearing Mrs Hilsdon had explained that she had in fact been paid for the work done for WTT.

Summary on original complaints

49. On the basis of the above, it seems to me that of the 6 matters relied on by Ms Weir in support of her application, the matters which could be said to be still outstanding at the time of the hearing were:

    (1) A full explanation of the payment of £10,000 to her mother.

    (2) Copies of the Nominet invoices for 1 September and 20 November 2015.

    (3) Bank statements for her mother's bank account for 20 to 26 February 2015.

    (4) The supporting documentation for the updated income and expenditure form.

50. Do these amount to a failure by Mrs Hilsdon to comply with her obligation under s. 333(1) of the Act to give to the trustee "such information as to [her] affairs … as the trustee … reasonably require" such that the threshold test is passed? It seems to me that the answer must be Yes. Each of these items of information had been required by Ms Weir. It cannot be said that those requirements were unreasonable. Mrs Hilsdon had failed to give her such information. That seems to me to come within the plain words of the statute. The threshold test is a hard-edged or yes/no question, and in many cases I suspect it is capable of being answered relatively simply. That will no doubt not always be the case as it may involve (in a case of failing to provide information) such questions as whether the trustee was acting reasonably, and whether the bankrupt has done all he or she reasonably can to answer the request. But if there has been a failure to provide information reasonably requested, that is sufficient to satisfy the threshold test and confer jurisdiction on the Court; the seriousness of the failure, and whether it is still continuing at the hearing, is not as I see it relevant to this part of the application, although it may be very relevant to the exercise of discretion. In the present case, as appears below, at the hearing Mrs Hilsdon accepted that there had been some failure to comply with Ms Weir's requests, and it seems to me that she was right to do so.

Further information outstanding

51. As referred to above, Mr Hannant's schedule for the hearing listed another 11 items of information that had been requested and were then outstanding. I will deal briefly with these, as follows:

    (i) Supporting documentation for the updated income and expenditure statement.

        This has already been referred to above.

    (ii) Copy invoices relating to payments for GoDaddy.com.

        Ms Weir asked for copies of invoices for 14 payments to GoDaddy.com (letter of 15 January 2016). These were small payments (between £3.49 and £43.06),

most of which pre-dated the bankruptcy. Mrs Hilsdon said she had no receipts (e-mail of 18 January 2016). Ms Weir said she wanted invoices not receipts (letter of 3 February 2016). Mrs Hilsdon asked where in the Insolvency Act it states that receipts could be requested for the period before the bankruptcy (e-mail of 4 February 2016). Ms Johnson accepted therefore that invoices had not been provided but said that this explained why.

(iii) Information regarding a card ending 2435.

It is accepted that Mrs Hilsdon had stated that she did not know whose card this was (e-mail of 4 February 2016).

(iv) Copy invoices for work carried out for WTT.

When Mrs Hilsdon said she had been paid for work done for WTT she asked if Ms Weir wanted the invoices (e-mail of 18 January 2016). Ms Weir said she did (letter of 22 January 2016). Ms Johnson accepted that they had not been provided but said that Mrs Hilsdon could not be said to have failed to co-operate.

(v) Details of funding provided by Mrs Hilsdon to WTT.

It is accepted that Mrs Hilsdon had provided this (e-mail of 4 February 2016).

(vi) Invoices for payments made on Post Office cash card.

Ms Weir asked for details, including copy invoices, for a large number of payments made on the Post Office cash card (letters of 22 January 2016 and 3 February 2016). Ms Johnson accepted that these had not been provided but said it was an unreasonable request.

(vii) Details of Mrs Hilsdon's insurance policy as required by the PR Network contract (that is the Nominet contract).

It is accepted that Mrs Hilsdon had said that she did not have such an insurance policy (e-mail of 4 February 2016).

(viii) An explanation of why Mrs Hilsdon was paying creditors of WTT.

It is accepted that Mrs Hilsdon had explained that she was helping a friend and had sold some furniture to help fund WTT (e-mail of 30 January 2016).

(ix) An explanation of why the Rock Cottage tenancy had been termimated and what had happened to the deposit?

It is accepted that Mrs Hilsdon had explained why the tenancy had been terminated. Ms Weir asked what had happened to the deposit (letter of 3 February 2016). Ms Johnson said it was unreasonable to expect Mrs Hilsdon to provide an answer within 2 days. In fact Mrs Hilsdon explained that she had not received it but had asked for it back (e-mail of 4 February 2016).

(x) An explanation why the WTT telephone number transferred to Mrs Hilsdon's

number.

It is accepted that Mrs Hilsdon had provided this.

(xi) Details of Mrs Hilsdon's trip to Warsaw.

Ms Weir asked for details of a trip that Mrs Hilsdon had made to Warsaw including copies of invoices for travel, accommodation and the like (letter of 3 February 2016). Mrs Hilsdon explained that it was to meet a company that had asked her to do some PR for them, and that she financed the trip. She said she would send the receipts.

Ms Johnson said that this was an unreasonable request.

52. Ms Johnson's overall submission was that although there were one or two items that had not been provided at the hearing, a very large amount of information had been requested in a very short time. This was unreasonable and oppressive. Mrs Hilsdon had attempted to provide comprehensive information and could not be characterised as failing to co-operate.

The hearing

53. So far as the hearing was concerned, Ms Johnson took me to the transcript. This shows that DJ Payne indicated that he had read Mr Hannant's skeleton argument and looked at *Hellard v Kapoor*, and that he had also looked through another little clutch of documents which Mrs Hilsdon had left, and Ms Weir's witness statement. Mr Hannant outlined some of the history and some of the matters which he said were outstanding; when he asked if he should continue because there were a large number of issues, DJ Payne said that he had flagged up enough for him to ask Mrs Hilsdon to seek to deal with them. He did so, and in the course of her address she made some admissions as follows:

> "I agree that I have over the last year not been as compliant as I should have been"

and:

> "I agree that I haven't given all the information as I should have done at the time but I'm just…I just want someone to help me."

At that point DJ Payne said that he appreciated that she had more that she could probably say to him but that he had got the picture. There was then this interchange:

> "DJ Payne: the key thing is the trustee has got legal responsibilities too and effectively the trustee is saying to me now "There are still some things which we don't…
>
> Mrs Hilsdon: Yes
>
> DJ Payne: …know and we, I need to know", and I think you are conceding that.
>
> Mrs Hilsdon: I absolutely agree
>
> DJ Payne: And it seems to me therefore that it follows pretty inevitably that it

> would be wrong for me to say that the bankruptcy comes to an end on the twelve month…
>
> Mrs Hilsdon: I understand that…
>
> DJ Payne: …period.
>
> Mrs Hilsdon: …as well.
>
> DJ Payne: Now that gives me – well thank you for that, that's…
>
> Mrs Hilsdon: Of course.
>
> DJ Payne: …that's helpful because you're not trying to persuade me that black is white."

54. On that basis DJ Payne then said that he had two options, one being to adjourn to give her the opportunity to file stuff with the Court (to which Mrs Hilsdon said she didn't know that she could), but this would involve her doing a lot of work, and there would be another hearing, and further costs; the other option was to say that the bankruptcy would continue until the trustee told the Court she had all the information she wants. He then decided that his inclination was to prefer the latter option rather than fixing another court date as it was one less thing for her to contend with, and after giving her another opportunity to address him, made the order in the form I have already set out.

55. I can now consider the Grounds of Appeal, of which there are 8.

Ground 1 – Taking into account the letter of 3 February 2016

56. Ground 1 is that DJ Payne erred in taking into account the information sought by Ms Weir in her letter of 3 February 2016.

57. Ms Johnson's submissions were as follows. She relied on the principle accepted in *Hellard v Kapoor* that the trustee should be confined to the grounds set out in the evidence filed with the application. Mrs Hilsdon was given no notice that reliance would be placed on the matters raised in the 3 February letter until she received a copy of Mr Hannant's skeleton argument just moments before going into court. The letter itself placed unreasonable demands on Mrs Hilsdon: it raised 9 new matters and sought further information in relation to 8 outstanding matters, but required a full response by 5 pm on 5 February 2016. Mrs Hilsdon had provided a partial response by e-mail dated 4 February 2016 which was not produced to the Court. It was not properly arguable that because she had failed to comply in full with this letter by the time of the hearing that she was failing to co-operate with Ms Weir.

58. Mr Ascroft relied on the more flexible approach adopted by Chief Registrar Baister in *Bowles v Trefilov*. He also said that for the most part the matters pursued in the letter of 3 February had been the subject of, or arose out of, prior requests, or information provided to Ms Weir by Mrs Hilsdon.

59. Insofar as there is a tension between what was said in *Hellard v Kapoor* and *Bowles v Trefilov*, I prefer the approach of the Chief Registrar. The purpose of Rule 6.215(2) and 6.215(5) was evidently to give the bankrupt advance notice of the case he or she has to meet, and it would no doubt be contrary to this policy for the trustee to be able

to spring an entirely new allegation on the bankrupt at the hearing, at any rate without the bankrupt being offered the opportunity of an adjournment to consider the position and answer the new case. But I see no reason to doubt, and every reason to accept, the experience of the Chief Registrar that applications such as the present, based on an alleged failure by the bankrupt to provide information, often evolve between the initial application and the hearing as the bankrupt provides some answers but these give rise to further questions. It seems to me that he is right that the Court should retain the ability to look at the position not only as it stood at the time of the initial application but as it stands at the time of the hearing.

60. But in the present case I do not think I need reach a concluded view on this. As the transcript makes clear, DJ Payne's order was not based on specific findings of fact. No doubt if there is a dispute whether the bankrupt has or has not failed to provide information to the trustee, the Court will normally have to consider the evidence and reach a conclusion on the material before it before deciding how to dispose of the application. But it is clear that what happened in the present case is that the process was cut short by the admissions made by Mrs Hilsdon that she had not been as compliant as she should have been, that she had not given all the information that she should have done at the time, and that there were still things that the trustee needed to know. In those circumstances, DJ Payne was not concerned with the exercise, as the appeal before me was, of considering each item of specific information that was said to be outstanding, when it was requested, when and to what extent (if at all) it had been answered, and whether it was reasonable to pursue it. He concluded that he could proceed straight to an order. As I read the transcript he did so on the basis that Mrs Hilsdon's admissions made it unnecessary for him to make specific findings in respect of particular matters.

61. The real question on this aspect of the appeal, it seems to me, is not whether DJ Payne should have had regard to the letter of 3 February 2016 and the information said to be still outstanding from it – it is in any event unclear to what extent he relied on that rather than the initial 6 complaints set out in Ms Weir's witness statement. The real question is whether he was entitled to proceed on the basis that Mrs Hilsdon did not dispute that there had been failures by her to provide information as she should have done, or whether, despite her admissions, he should have insisted on being taken through the evidence in detail to satisfy himself.

62. A hearing such as this one no doubt poses considerable difficulties for a litigant in person. Ms Johnson said that Mrs Hilsdon did not even know that she could oppose the application. Rule 6.215(6) provided that the bankrupt might file in court a notice specifying any statements in the trustee's evidence which he intended to deny or dispute, but Mrs Hilsdon did not do this, and I have no information as to whether she was told that she could. Nevertheless there was nothing ambiguous or hesitant about Mrs Hilsdon's acceptance that she had not complied as she should have done. Faced with an unqualified admission by Mrs Hilsdon that she had in the past year not provided the information that she should have done, it is very difficult to criticise DJ Payne for taking this at face value and proceeding on the basis that there was no dispute that the threshold condition had been met. I have already referred to the fact that jurisdiction is established if the bankrupt "has failed" to comply, so that historic non-compliance is enough; but in fact in this case Mrs Hilsdon's acceptances went further and she accepted that there was information which the trustee did not know

and needed to know.

63. In these circumstances I consider that DJ Payne was entitled to form the view that jurisdiction had been established and that it was not necessary for that purpose to go through the evidence in detail to satisfy himself of what had been accepted by Mrs Hilsdon.

64. Let me assume that I am wrong however, and that (i) in considering whether the threshold condition had been satisfied, the Court should be strictly confined to the matters set out in the trustee's initial evidence and (ii) that despite Mrs Hilsdon's acceptance of the position, DJ Payne should have satisfied himself of that by going through the evidence in detail. Nevertheless, as the careful analysis undertaken on appeal demonstrated, there had been some failures in those respects, and some of them were still outstanding at the date of the hearing (see above). That in my judgment was sufficient to establish jurisdiction, and the remaining question is one of discretion.

65. At that point, I do not see that it can be improper to have regard to what has happened between the application being made and the hearing – it will often be very relevant to the exercise of the discretion what progress has been made by the bankrupt to answer the trustee's questions since the application was brought, which of those matters are still outstanding and what new requests have been made and are unanswered. All these matters are likely to be relevant to the exercise of the Court's discretion once the threshold has been passed, and I do not read *Hellard v Kapoor* as saying anything to the contrary.

66. For these reasons I reject this ground of appeal.

Ground 2 – Failure to consider Mrs Hilsdon's documents

67. Ground 2 is that there was a serious procedural irregularity in that DJ Payne did not properly consider the documents placed before him by Mrs Hilsdon.

68. Ms Johnson was at a disadvantage in that Mrs Hilsdon was unable to recall precisely what documents she had put before DJ Payne, and so was unable to specify what they would have demonstrated. But she submitted that although Mrs Hilsdon did not take him to the documents, he ought to have considered them in detail of his own accord or at least invited her to explain them to him.

69. So far as *jurisdiction* is concerned, the position seems to me to be the same as under Ground 1: in the light of what Mrs Hilsdon had accepted, it was not in my judgment incumbent on DJ Payne to invite her to explain what was in the documents, or take that task upon himself, before concluding that it was open to him to make an order. The transcript indicates that he had looked through the documents so he would have had some idea of what they contained.

70. So far as *discretion* is concerned, it is convenient to take this together with the other grounds that go to discretion, namely Grounds 3, 5, 6 and 7. I will come back to those grounds after considering Grounds 4 and 8.

Ground 4 – Ms Weir's real purpose was to apply for an Income Payments Order

71. Ground 4 is that DJ Payne erred in failing to take into account that the real purpose of Ms Weir's application was so that she could later apply for an Income Payments Order (**"IPO"**).

72. Under s. 310(1A) an IPO may be made only on an application instituted by the trustee before the discharge of the bankrupt. Ms Johnson submitted that the s. 279(3) jurisdiction should not be invoked if it is being used by the trustee for the purposes of extending time to apply for an IPO. She referred to *Chadwick v Nash*, where one of the observations by Mr Registrar Nicholls was as follows (at [95]):

> "The real issue underlying the matter has been the pursuit by the trustee of an income payments agreement which the debtor has refused to enter into in the belief that he has no income and the payments he and his family receive are payment for his expenses. The reasonableness, or otherwise, of those payments is a matter for an application for an income payments order and not for an application for the suspension of an automatic discharge."

Ms Johnson submitted that in the present case Ms Weir had confirmed her intention to pursue an IPO as early as her letter of 10 July 2015, but had then, apart from seeking invoices, not sought any other information until her letter of 22 December 2015, which did not leave her sufficient time to apply for an IPO. It ought to have been obvious to DJ Payne that the real purpose of the application was to extend time for Ms Weir to apply for an IPO; indeed in an e-mail of 28 January 2016, Ms Weir said in terms that the application to suspend had been made:

> "because I am not in receipt of all the information necessary to make an informed view as to whether an Income Payments Order is relevant."

73. Mr Ascroft said that Ms Weir's letter of 10 July 2015 did not show an intention to pursue an IPO. It merely said that she wanted Mrs Hilsdon to complete the income and expenditure form so that she could ascertain if an IPO were applicable. That I accept, and I see nothing in the correspondence to suggest that Ms Weir had decided to apply for an IPO at that early stage. Indeed I see no reason to doubt her statement in her e-mail of 28 January 2016, and I will proceed on the basis that Ms Weir is to be taken at her word. That indicates that she was still not in possession of all the information she needed to decide whether to apply for an IPO, and that that was why she applied for the discharge to be suspended.

74. That does therefore squarely raise the question whether it is impermissible to use the application to suspend for this purpose. I have no difficulty with the proposition that it would be an inappropriate use of an application to suspend a discharge if the trustee had simply not got round to investigating the income of the bankrupt, and had allowed the year to run out, and wanted more time: the application can only be made, as Ms Johnson said, on the ground of the bankrupt's failure to comply with an obligation, and it is apparent from *Bramston v Haut* that an order is penal in character, the purpose of an order being to continue the disabilities from being an undischarged bankrupt in the public interest until there has been full compliance, and that it is not to be used simply as a means of extending time generally so that applications which could have been made earlier can be made.

75. But, as Mr Ascroft submitted, *Bramston v Haut* also shows that the power is intended to be used for purposes connected with the functions of the trustee and to allow the trustee to get in, realise and distribute the bankrupt's estate. By s. 283(1) of the Act the bankrupt's estate includes not only the bankrupt's assets at the commencement of the bankruptcy but also any property which is comprised in the estate under any of the subsequent provisions of Part IX of the Act. That includes s. 310. By s. 310(1) the Court may make an IPO, and by s. 310(5) sums received by the trustee under an IPO form part of the bankrupt's estate. Mr Ascroft said, and I have no reason to doubt that he is right, that, depending on the circumstances, an IPO may represent a valuable (or even the most valuable) valuable source of recovery for creditors. Considering whether to apply for an IPO is therefore part of the functions of the trustee in getting in the bankrupt's estate, and it is self-evident that in order to do that the trustee needs information about what the bankrupt's income is. Hence there cannot be any doubt that the trustee may "reasonably require" the bankrupt to provide information about his or income "for the purpose of carrying out his functions under any of this Group of Parts" within the meaning of s. 333(1). Indeed, even without being asked, the bankrupt is in fact under a statutory obligation under s. 333(2) to notify the trustee of any increase of his or her income after the commencement of the bankruptcy (and within quite a short period, namely 21 days). In the present case Ms Johnson said that Mrs Hilsdon was never advised of the obligation under s. 333(2) and that a breach of s. 333(2) did not form part of the application. There is in fact a reference to it in the PIQB ("If your income increases while you are bankrupt, you must inform your trustee of the increase within 21 days"), although I have not been shown anywhere else in the correspondence where Mrs Hilsdon's attention was drawn to the obligation, and I accept that the application was not based on a breach of s. 333(2).

76. If the bankrupt fails to provide information when asked, the trustee may be unable to assess the appropriateness of applying for an IPO. Mr Ascroft submitted that in such a case the trustee should not be criticised for failing to apply for an IPO within the year, and that suspension of the discharge ought not to be refused because the practical effect will be to extend the time for making an IPO application.

77. I accept these submissions. In such a case the application for suspension is indeed being brought because of the bankrupt's failure to provide information, and so as to extend the effects of being an undischarged bankrupt until there has been full compliance. One of those effects is that the bankrupt remains vulnerable to an application for an IPO, and whether or not this is aptly described as a "disability" it is certainly a consequence of being an undischarged bankrupt. That seems to me to be well within the purpose of making an order under s. 279(3) as explained by Morritt C in *Shierson v Rastogi* and Kitchin LJ in *Bramston v Haut*, namely that the bankrupt should continue to suffer the consequences of being an undischarged bankrupt until there has been full compliance, the order being used for purposes connected with the functions of the trustee in getting in, realising and distributing the bankrupt's estate.

78. I do not read *Chadwick v Nash* as saying anything to the contrary. What was said by Mr Registrar Nicholls in that case must, as always, be read in the context of the particular facts of the case. It appears from [53] that before him the trustee did indeed contend that:

> "the information he had received was both inadequate and inconsistent and therefore he has been unable to properly investigate, prior to the end of the discharge period,

whether Mr Nash [the bankrupt] ought to be making payments to his creditors."

Mr Registrar Nicholls however rejected this contention on the facts: Mr Nash had made his position clear (that money he had received from a discretionary trust was not income but payment towards his and his family's expenses), and the question whether that was right or wrong was more appropriately to be decided by the trustee applying for an IPO than by applying for a suspension. There is nothing to suggest that Mr Registrar Nicholls would have taken the same view had he accepted the trustee's contentions on the facts.

79. I reject this ground of appeal.

Ground 8 – the form of the Order was contrary to s. 279(3) of the Act

80. Ground 8, which it is convenient to take next, is that the form of order made by DJ Payne was either a form of order that was wrong in principle or should not have been granted on these facts.

81. s. 279(3) provides that the Court may make an order suspending discharge until either (a) the end of a specified period or (b) the fulfilment of a specified condition. In the present case the form of order (which is set out at paragraph 11 above) was purportedly made under s. 279(3)(b), the condition being that the trustee confirm to the court by filing a report that the bankrupt has complied with his duties and obligations (or that there is a further order of the Court).

82. Ms Johnson's submission was that in reality an order in this form is an order for indefinite suspension. She submitted that that was contrary to the intention of the legislation. She referred me to an article by Philip Patterson, *Indefinite Suspension of discharge from bankruptcy – a worrying trend?* (Insolv. Int. 2016, 29(2), 21-3). This discusses two cases where an order in this form has been upheld, the decision of Rose J in *Mawer v Bland* [2013] EWHC 3122 (Ch), and that of HHJ Behrens in *Wilson v Williams* [2015] EWHC 1841 (Ch).

83. *Mawer v Bland* was an appeal from Chief Registrar Baister. He had made a number of findings against the bankrupt (Mr Bland) in strong terms (see Rose J's judgment at [3]-[15]). Mr Bland's affairs were complex, but he had provided his trustee with virtually no documents relating to his affairs, which remained shrouded in confusion. He had put forward excuses for non-disclosure of documents which the Chief Registrar found incredible, had sought to frustrate the trustee's access to documents, and had been involved in an attempt to destroy documents. He had tried to dispose of shares after the bankruptcy by backdating them. The unsatisfactory explanation which he gave of this was characterised by the Chief Registrar as:

> "the plainest possible proof [of] non-co-operation, breach of bankruptcy obligations, indeed downright dishonesty in Mr Bland's dealings with Mr Mawer."

The Chief Registrar summarised the position as follows (see at [21]):

> "The picture I have is of a trustee trying to do a proper job of investigating a bankruptcy of some complexity with little assistance from the bankrupt in terms of the provision of documents, the giving of reliable and truthful information and of a trustee being impeded by conduct designed to defeat or delay his proper avenues of

inquiry."

In those circumstances he made an order in materially the same form as that made here. Rose J rejected a submission that that form of order (which counsel for the bankrupt accepted was in a form commonly used in bankruptcy proceedings) was inappropriate, and should be replaced by an order for a particular time or that the condition should be much more specific. She was initially attracted by those submissions but concluded that it was neither necessary nor desirable to change the order: the trustee was not acting oppressively, and if the bankrupt considered he had answered all the questions asked, he could activate the provision in the order giving him liberty to apply.

84. *Wilson v Williams* was an appeal from a District Judge which again was in materially the same form. HHJ Behrens, sitting as a Judge of the High Court, dismissed the appeal. The underlying facts were that the only significant asset disclosed by Mr Wilson was his pension fund, worth in excess of £1m, which Mr Wilson contended did not vest in his trustee, and which he had steadfastly refused to provide any information about. By the time of the appeal Mr Wilson was in breach of an order to do so, a breach which HHJ Behrens regarded as both significant and serious. On the form of order he said that it was clear from the judgment of Rose J that an order in that form is commonly made in bankruptcy proceedings, and that Mr Wilson was protected by his right to apply to the Court under the express provisions of the order.

85. Ms Johnson, drawing on Mr Patterson's article, submits that these decisions go against the intention behind the changes made by the Enterprise Act 2002. These included the reduction of the period for automatic discharge from 3 years down to 1 year, while at the same time introducing Bankruptcy Restriction Orders designed to address those bankrupts considered dishonest or blameworthy. The intention behind the changes was explained by the Insolvency Service in April 2004 as follows:

> "The suspension order should either specify a period of time for which the running of the discharge period will be suspended or one or more conditions to be fulfilled before the running of the discharge period can be resumed. The undischarged bankrupt should not be put into the position of not knowing what he has to do to reinstate the running of his discharge period, if the suspension is not for a determined period of time."

This was essentially reaffirmed in guidance issued in 2008:

> "The bankrupt's discharge can only be suspended for a specific period or until certain conditions are met and not indefinitely. It is important that the bankrupt knows what he/she has to do to reinstate the running of the discharge period or otherwise when the discharge will have effect."

86. Ms Johnson accepted that in both *Mawer v Bland* and *Wilson v Williams* the Court had accepted that the bankrupt was adequately protected by the ability to apply to the Court. But she submitted that this undermined the purpose of s. 279(3). Parliament had legislated to provide the bankrupt with certainty when he will be discharged by imposing a date or a clear condition with which he knows he must comply before he will be discharged. The type of order here made does not provide the bankrupt with any certainty or clarity as to what he must do to obtain his discharge, although this is what the Act envisaged. The matter is left entirely to the subjective assessment of the

trustee.

87. That, she said, had the perverse effect of disincentivising the trustee from pursuing the matter with any expedition, and leaves the bankrupt totally at the mercy of the trustee. In the present case, for example, Mrs Hilsdon had sent an e-mail to Ms Weir almost immediately after the hearing on 9 February 2016 in which she said:

> "I really want this behind me so please let me know what else you require so I can comply fully and so you thereafter can inform the court that my bankruptcy can be discharged."

But it was not until 15 March 2016 that Ms Weir sent a response indicating what information she still required. That vividly illustrated that once an order had been made in the form it was here, the pressure is off the trustee and the bankrupt is left in limbo without knowing what she should be doing and without giving her any clear goal to work towards.

88. Nor is the ability of the bankrupt to apply to the Court for his own discharge an adequate safeguard: to put the onus on the bankrupt to initiate an application for discharge is a significant shift away from the policy of the Act. As Mr Patterson put it in his article, in the ordinary course the bankrupt can expect his or her bankruptcy to be discharged after a year has expired, and the onus is on the trustee to bring an application and establish that the bankrupt is in default; but if, following such an application, an order is made in *Mawer v Bland* form, the polarity shifts completely and unless the trustee accepts that adequate compliance has occurred, the onus is then on the bankrupt to apply to the Court to free themselves from the bankruptcy.

89. Alternatively, she submitted, if this form of order is in principle available to the Court, it was wrong for DJ Payne to grant it here. It is a draconian and penal form of order that was disproportionately severe on the facts of this case.

90. Mr Ascroft submitted that an order in the form made here complied with the terms of s. 279(3) and (5) (which provides, as set out above, that "condition" for the purposes of s. 279(3)(b) includes a condition requiring that the Court be satisfied of something); that it has been approved twice by the High Court in decisions binding on DJ Payne; that it is unobjectionable for the reasons given by Rose J and HHJ Behrens, and that the difficulty of framing a condition with any greater certainty also tells in favour of this form of order.

91. I propose first to consider whether an order in this form is in principle one that can be made under s. 279(3) before considering whether it was appropriate on the facts of this case. The points made by Mr Patterson in his article and by Ms Johnson in her submissions have considerable force, and it is noticeable that both Rose J and HHJ Behrens were initially attracted by the submissions for the respective bankrupts. But I am not persuaded that such a form of order is always wrong in principle.

92. I say that for the following reasons. First, I accept that as a matter of language the order comes within the literal terms of s. 279(3). A suspension of the discharge "until the trustee confirms to the court by filing a report that the bankrupt has complied with his duties and obligations" (or until the Court otherwise orders) satisfies the statutory requirement that the suspension be until "the fulfilment of a specified condition."

93. Second, the terms of s. 279(5) are to my mind of considerable assistance. If s. 279(5) were not there, it would support the suggestion that what Parliament envisaged was a condition of the form "until the bankrupt does X" (which would strengthen the argument that the bankrupt should be able to know exactly what they had to do to obtain their discharge). But s. 279(5) makes it plain that Parliament envisaged that the condition could be of the form "until the Court is satisfied that the bankrupt has done X", and given that the Court can make an order under s. 279(3) on the ground that the bankrupt is failing to comply with his or her obligations, it would be surprising if the Court could not make an order under s. 279(5) suspending the discharge until the Court was satisfied that the bankrupt had complied with those obligations. That would entirely accord with what Morritt C said the purpose of an order under s. 279(3) was, namely to continue the disabilities from being an undischarged bankrupt "until there has been full compliance". It seems to me therefore that an order under s. 279(3) suspending the discharge "until the Court is satisfied that the bankrupt has fully complied with his obligations under s. 333(1) of the Insolvency Act 1986" would be a permissible form of order in principle (although whether it would be an appropriate order in any particular case would of course depend on the facts of the case).

94. If that is right, the next step is to consider what such an order would mean in practice. The trustee would specify the information he required from the bankrupt, and the bankrupt, in order to obtain his discharge, would have to provide answers. At that stage the bankrupt might consider that he had fully complied with the trustee's request. The trustee would either agree or disagree. If the trustee agreed, there would still need to be an application to the Court so that the Court could be satisfied as otherwise the condition would not be fulfilled. And since the condition would require the Court to be satisfied, it seems likely that the Court would have to go through the evidence itself before it could be satisfied and the suspension lifted, so even if there was no dispute, there would still have to be some form of hearing or at least consideration on the papers by the Court. If however the trustee did not agree that the bankrupt had complied, the bankrupt would have to apply to the Court and seek to persuade the Court that he had done enough. Since the discharge would be suspended until the Court was satisfied, it seems to me that the onus on such an application would in practice be on the bankrupt to satisfy the Court.

95. It is now possible to compare the practical effect of an order in the form made here. This suspends the discharge until the trustee confirms to the Court by filing a report that the bankrupt has complied with his duties and obligations. (In the form made in *Mawer v Bland*, it also incorporates a positive duty on the trustee to file and serve such a report within 14 days of being satisfied thereof, which seems to me a useful addition). Again in practice if the bankrupt considers he has provided all the information requested of him, the trustee will either agree or disagree. If he agrees, the trustee will file a report and no application to the Court will be necessary. If he disagrees, the bankrupt will have to apply to the Court to obtain his discharge and in practice will have to demonstrate that he has done what was required of him. It can be seen that the practical difference between this form of order and an order suspending discharge until the Court is satisfied that the bankrupt has complied is not very great. In practice the difference is that if the trustee accepts that the bankrupt has complied, the necessity of applying to the Court can be avoided as the trustee will file a report; if however the parties disagree, the bankrupt will have to apply to the Court

under either form of order.

96. Third, as Mr Patterson himself says in his article:

> "There may well be circumstances in which policy considerations strongly point to such an order being required. It is well-known that bankrupt individuals often take significant steps to obstruct and mislead trustees. It may well be that, even after one year, the trustee is not only unable to state that full compliance has occurred, but also unable to know how much more there is to discover."

On the findings of the Chief Registrar, *Mawer v Bland* itself was such a case. In such a case, the difficulty for the trustee, and hence for the Court, is that of "unknown unknowns", that is that the trustee may well not know quite what it is that he does not know. The answer to any particular question may very well lead to a whole host of further questions. In a case where a bankrupt is being unco-operative, obstructive, misleading or downright dishonest, there is therefore a real difficulty in framing an order as suspending the bankruptcy until the bankrupt has answered a specific list of questions, as the bankrupt may very well do the minimum necessary to be able to claim to have answered the specified questions, while leaving the trustee still in the dark.

97. Fourth, although one High Court Judge is not strictly bound by a decision of another, it is the practice to follow the decision of another High Court Judge unless convinced that it is wrong. This is a useful practice which prevents matters being routinely relitigated at the same level, and is perhaps particularly apt where the High Court is exercising appellate jurisdiction, as it is helpful for the District Judges and Registrars who have to exercise the s. 279(3) powers to have consistent guidance from the High Court rather than be faced with conflicting decisions. Although I suspect I have had the benefit of more detailed submissions than Rose J or HHJ Behrens did, I am not convinced that they were wrong – indeed for the reasons I have given, I consider that they were right, and that an order in the form made here is one that it is open to the Court to make.

98. I therefore do not accept the submission that the form of order made by DJ Payne was wrong in principle and contrary to s. 279(3). Such an order in my judgment is both something that the Court has power to make under s. 279(3) and something that can be an appropriate and indeed necessary response to a bankrupt's failure to co-operate with a trustee in suitable cases.

99. It does not however follow that it is an appropriate form of order to make in all cases. In this context I accept many of the points made by Mr Patterson in his article and by Ms Johnson in her submissions. The Insolvency Service in 2007 described the primary purpose of the individual insolvency provisions of the Enterprise Act 2002 as:

> "to provide a modern bankruptcy regime that encourages business start-ups and allows those who have failed honestly to achieve financial rehabilitation whilst repaying the most they can reasonably afford to their creditors and to have a second chance to make an economic contribution to society."

100. I accept therefore that it is not only in the interests of bankrupts, but also in accordance with the policy of the reforms introduced by the Enterprise Act, that a

bankrupt should be able to tell with some precision when their discharge will take place, so that they can move on and rebuild their financial lives. If the case merits a suspension under s. 279(3), a suspension for a fixed period, or until some specifically identified condition has been fulfilled, satisfies that desirable aim. A suspension in the *Mawer v Bland* form does not: for the reasons put forward by Ms Johnson, I accept that it does have significant adverse consequences for the bankrupt, and puts the bankrupt at the mercy of the trustee, and I accept that under this form of order there is no real incentive on the trustee, after obtaining the order, to pursue enquiries with great diligence, and that leaves the bankrupt suspended for an indefinite period. It is true that the bankrupt always has the option, if the trustee is dragging his or her feet, of applying to Court, but bankrupts are often obliged to act in person, and that, and the time and costs involved in initiating an application of this sort, means that it is a far from perfect solution.

101. Mr Patterson suggests that routine use of an order in the *Mawer v Bland* form may also act as a disincentive on the trustee to make progress during the year before automatic discharge takes place. The way he puts it is as follows:

> "A functioning and efficient personal insolvency regime must properly impose an obligation on the trustee to make substantial progress during the period prior to the automatic discharge. Save in the most exceptional circumstances, a court could reasonably expect a trustee to be able to identify, by the time the application for a suspension is made, either a time period during which full compliance will likely be achieved or a list of questions which remain to be answered. In those mainstream cases, the court should properly suspend the discharge either for that fixed period or until such time as the bankrupt has provided honest and cooperative answers to those questions.
>
> The ability of a trustee to request the type of order made in *Mawer* and *Wilson* provides something of a disincentive to make this progress. The making of such an order deprives the bankruptcy of the sense of urgency which is needed to create an efficient and functioning system. Bankruptcies cannot be allowed to become drawn out whilst the trustee undertakes increasingly speculative searches for assets and information."

Again there is considerable force in this point and I accept the validity of it.

102. There is an inevitable tension between the desirability of a bankrupt knowing exactly what they have to do to obtain their discharge, and the desirability of preventing bankrupts who are unco-operative, obstructive or downright dishonest from frustrating the legitimate inquiries of trustees who are seeking to fulfil their functions of getting in assets for the benefit of creditors. As so often in discretionary matters, the task of the Court is to strike a balance between these competing considerations. Where the balance is to be struck in any particular case must depend on the facts of the case, and I am reluctant to lay down any general principles, not least because cases vary infinitely in their facts. But it does seem to me that the Court should be hesitant about reaching for the *Mawer v Bland* type of order as a routine or standard form. I in fact have no material to assess whether, as counsel told Rose J, it is a form commonly used in bankruptcy proceedings, or whether, as Ms Johnson suggested to me, this is incorrect. Nor do I have any material on which to assess how obstructive the typical bankrupt who comes before the Court on a s. 279(3) application is. There is obviously a spectrum between bankrupts who are being as difficult as possible and

doing everything to frustrate the trustee's inquiries, and those who are in the main co-operative and seeking to provide information to the trustee but have nevertheless failed to comply properly with their obligations. Where any particular bankrupt lies on the spectrum seems to me to be of the first importance in deciding what form of order, if any, under s. 279(3) is appropriate. In particular, the Court of Appeal has made it clear that an order under s. 279(3) is penal in character, and as a matter of general principle it seems difficult to deny that where a Court is asked to make a penal order, the severity of the order should reflect the seriousness of the failing.

103. In my judgment therefore the Court should always consider whether an order in *Mawer v Bland* form is really justified on the facts of the case, rather than treating it as the default option on an application under s. 279(3).

104. In the present case it seems likely from the transcript that DJ Payne was not asked to consider, and did not consider, the range of orders that can be made under s. 279(3). He considered whether to adjourn the hearing for a fuller investigation, something he said would involve further costs and Mrs Hilsdon doing a lot of further work for the Court, and decided against it; but there is no consideration of whether it was a case which merited an order in the form which he made, or some lesser order such as a suspension for a fixed period, or until certain specific questions had been answered. He did say that the Court always thought carefully about making an order that the bankruptcy continue until the trustee tells the Court she has got all the information she needs because the Court is in an sense waving goodbye to the case and leaving people to get on with it; but that does not appear to be in the context of choosing between different forms of suspension, but in the context of disposing of the application or adjourning it for a further hearing.

105. The limits on an appellate Court disturbing a discretionary decision made in the lower Court are well-known, but it does seem to me that the present case is one where DJ Payne's decision to impose an order in this form was flawed for failure to take into account the range of orders that could be made under s. 279(3) and failing to consider whether Mrs Hilsdon's failings really justified an order in this form. I should add that this is not intended as a criticism of DJ Payne: District Judges have a heavy workload which they need to manage efficiently, and in practice they are no doubt influenced by the form of order sought by trustees. But the fuller consideration which I have had on appeal has persuaded me that it is inappropriate to make an order of the *Mawer v Bland* type without consideration of whether the facts justify it, or whether a less stringent order would meet the situation.

106. That means that I am persuaded that the order should be set aside. Mr Ascroft said that if I reached the conclusion that the form of order was inappropriate, I could invite submissions as to what should be done, whether by way of an alternative order or otherwise. That seems to me a sensible course, and I will therefore hear counsel when the judgment is handed down as to the appropriate way forward.

Other Grounds – 3, 5, 6 and 7

107. In the light of my conclusion on Ground 8, it is not necessary to consider the other Grounds at great length. They are all put forward as grounds why DJ Payne's exercise of discretion was flawed, and since I have held that it falls to be set aside under Ground 8 in any event, the details are less important. I will however consider

them briefly.

108. Ground 3 is that DJ Payne failed to take into account that Ms Weir was guilty of delay and that was the true cause of the application. Ground 5 is that he failed to take into account the unreasonable and oppressive nature of Ms Weir's requests for information and documentation. Ground 6 is that he failed to take into account the fact that Mrs Hilsdon had provided reasonably full responses to those requests. Ground 7 is that DJ Payne's attention was not drawn to *Chadwick v Nash*.

109. The first three of these can be taken together (as can the remaining aspect of Ground 2). It is plain from the transcript that DJ Payne did not go through the material in detail, and that it is therefore correct that he failed to have regard to any question of delay, or oppression, or the extent to which Mrs Hilsdon had provided responses. That was because Mrs Hilsdon accepted that there had been failings, and in those circumstances he concluded that the most appropriate disposal was to make an order in the *Mawer v Bland* form which he hoped would enable matters to be resolved without the need for further Court time to be taken up. Since I have already concluded that he should not have made such an order without considering the range of orders available and satisfying himself that the facts did justify an order in this form, it is in a sense inevitable that his failure to consider the particular facts of the case, however understandable, was itself flawed. In those circumstances I do not think it is necessary to consider these grounds in detail.

110. But it may be of assistance if I give my views briefly. On Ground 3, the suggestion of total inactivity by Ms Weir is not borne out: it is true that she left it until 22 December 2015 before making her first significant inquiries of Mrs Hilsdon, but the chronology shows that that was because of two particular triggers, one being the receipt of bank statements from Lloyds Bank which Ms Weir had first asked for on 17 August 2015, and thereafter regularly chased, but which she did not receive until 17 December 2015, and the other being an approach from a creditor of WTT, with information about Mrs Hilsdon's involvement with WTT, on 18 November 2015, supplemented by a bundle of evidence on 7 December 2015. None of this suggests inordinate delay such as to disentitle Ms Weir from pursuing the application.

111. As to Ground 5, I am not satisfied that Ms Weir was acting oppressively. It is true that after a number of months in which she asked relatively few questions, the pace and scale of her inquiries speeded up as the hearing approached, with letters on 22 December 2015 (asking for a response by 5 January 2016), 15 January 2016 (response by 22 January 2016), 22 January 2016 (response by 27 January 2016), and 3 February 2016 (response by 5 February 2016). It is also true that although some requests in these letters are chasing up information already requested, some are new. But it was understandable that with the looming deadline of the hearing, Ms Weir should seek to pursue matters, and I am not persuaded that the inquiries she actually made were unduly burdensome.

112. As to Ground 6, however, I accept Ms Johnson's submissions that Mrs Hilsdon had gone to considerable lengths to provide the information requested of her, and had provided reasonably full information. In particular in answer to the letter of 3 February 2016, which set out "the queries still outstanding", Mrs Hilsdon replied by e-mail dated 4 February with detailed answers. The answers were not entirely complete and I have already said that the jurisdiction threshold was met, but no case

has been sought to be made that she was being deliberately obstructive or misleading. On the basis of the material I have seen, I regard this case as very much at the lower end of the scale of seriousness.

113. As to Ground 7, this is based on counsel's duty to draw relevant authorities to the attention of the Court, a duty which is said in the Bar Standards Board Handbook to be "particularly important" when a litigant is acting in person. It is said in particular that *Chadwick v Nash* should have been cited, as well as s. 363 of the Act under which even after discharge a bankrupt whose estate is still being administered remains under a duty to do all such things as he may be directed to do by the Court for the purposes of the bankruptcy and the administration of the estate, and is liable to be punished for contempt of court if he fails to do so.

114. The duty is well established. It forms an important part of the way in which justice is administered as it enables judges to rely on counsel to place before them fairly an explanation of what the law is. But I am not aware of any authority – and none was cited to me – which explores how far it goes. It plainly does not require counsel to cite every authority which might conceivably be useful to their opponent, especially as almost every decision is now reported in one form or another. In essence I think it is an aspect of counsel's obligation not to mislead the court: if counsel submitted that the law was X and suppressed an authority that established that the law was not X but Y, that would be misleading. In the present case, I do not think counsel can be said to have come anywhere close to misleading the Court, or to placing the law before the Court in an unfair manner. Mr Hannant cited *Hellard v Kapoor*. That had the advantage of including citations from both *Shierson v Rastogi* and *Bramston v Haut*, and also of referring to authority to the effect that the trustee must not wait until the last moment to bring the application, with specific reference to an order being refused on this ground in *Chadwick v Nash.* I do not think it was incumbent on counsel to do more. Nor do I think that he was under an obligation specifically to draw attention to s. 363 of the Act: it is true that that provides a method of enforcing a bankrupt's obligations to assist the trustee even after discharge, but it does not undermine what Mr Hannant said to the Court.

Conclusion

115. For the reasons I have given however I allow this appeal under Ground 8. I will hear counsel as to what is the appropriate way forward.