

Appeal judgment clarifies principles on bankruptcy restrictions length (Kennedy v Official Receiver)

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Restructuring & Insolvency analysis: Individuals facing a bankruptcy restrictions order (BRO) can better predict how long the restrictions should last following the High Court's decision in Kennedy v The Official Receiver a reserved judgment handed down on 28 July 2022, following a one-day appeal hearing on 19 July 2022. A BRO is an order under section 281A and Schedule 4A to the Insolvency Act 1986 imposing restrictions (including disqualification from being a company director) for up to fifteen years on bankrupt individuals found to have committed some form of misconduct. Faced with conflicting authorities, Nicholas Thompsell (sitting as a deputy High Court judge) clarified the principles that a judge should apply in determining the length of a BRO. He decided that it is appropriate for the judge to have regard to previously decided cases with similar facts, and particularly facts which go to the culpability of the bankrupt. Written by Max Marenbon, barrister at Serle Court Chambers.

Kennedy v The Official Receiver [\[2022\] EWHC 1973 \(Ch\)](#)

What are the practical implications of this case?

Previous case law established that the court will determine the length of a BRO by applying the three brackets used in the context of directors' disqualification, as promulgated in *Sevenoaks Stationers (Retail) Ltd* [\[1991\] Ch 164](#): (i) over ten years for particularly serious cases; (ii) six to ten years for serious cases which do not merit the top bracket; and (iii) two to five years where the case is, relatively, not very serious.

However, there was a conflict of authority over the extent to which a judge, when deciding which bracket was appropriate for the bankrupt's misconduct, should have regard to the length of BROs made in previously decided cases with similar facts.

This had the potential to produce a lack of consistency in the BRO durations imposed for conduct of equivalent culpability.

The resulting unpredictability risked making it difficult to advise clients facing BRO proceedings on whether to defend them or to offer a bankruptcy restrictions undertaking (a consensual BRO) to the official receiver (OR), and if so, of what duration.

Now that this judgment has clarified that the court should have regard to the facts of previous cases, practitioners should expect greater consistency in the duration of BROs sought and imposed for misconduct of a similar level. This development makes it easier to predict the likely outcome of BRO proceedings with greater accuracy and advise clients on their options accordingly.

What was the background?

On 17 September 2021, Deputy District Judge Wright, on the OR's application, made an eight-year BRO against Mr Kennedy. The misconduct relied on was that in the knowledge he had been declared bankrupt, Mr Kennedy had withdrawn £17,000 from his overdrawn bank account (in part to repay a debt owed to a friend for legal expenses, and in part ostensibly for living expenses) and had failed to disclose the withdrawal to the OR at the first opportunity (at para [32]).

Mr Kennedy had relied on *Randhawa v Official Receiver* [2006] EWHC 2946 (Ch) and *Official Receiver v May* [2008] EWHC 1778 (Ch) as examples of cases where the misconduct was of a worse or similar level to that of Mr Kennedy but the BRO imposed was shorter than eight years. In *May*, the bankrupt had sold a motorbike which he held on hire purchase and dissipated the proceeds. However, the judge held that *May* was distinct from Mr Kennedy's case because it 'factually relate[d] to the dissipation of assets, which is not the case here' (paras [53], [58]). The judge did not mention *Randhawa* in her assessment of the length of the BRO (para [65]).

Mr Kennedy appealed, arguing that *May* and *Randhawa* were properly understood as cases on additional borrowing rather than on (just) asset dissipation (para [25]).

The OR argued that Mr Kennedy's reliance on *May* and *Randhawa* was misplaced because the court should not, when considering the conduct of a bankrupt, compare and contrast the lengths of BRO imposed in other cases (para [39]).

What did the court decide?

On appeal, the Deputy High Court judge contrasted two differing approaches from the (analogous) case law on directors' disqualification (para [36]).

Secretary of State v Rahman [2017] EWHC 2469 (Ch) decided, applying commentary in *Re Westmid Packing Services Ltd* [1998] 2 All ER 124, that it was 'obviously undesirable for the judge to be taken through the facts of previous cases' other than appeal decisions giving guidance on which bracket is appropriate (para [40]).

However, in *Sevenoaks Stationers*, the Court of Appeal held that 'fairness requires that there should be a degree of similarity between the periods of disqualification imposed by different judges or different courts for similar offences', and in *Re Cubelock Ltd* [2000] Lexis Citation 3170 Mr Justice Park held it was 'legitimate and desirable...to note the facts of other cases in which directors have or have not been disqualified, and to take some account of the outcome of those cases' (para [37]).

The court followed *Cubelock*, holding that 'Given the few cases available in relation to a BRO' it is appropriate (at least 'until overt principles for applying a BRO have been developed') to review factually similar cases, 'particularly in facts which go to the culpability of the bankrupt', without limiting the scope of the review to appeals giving guidance on principle as *Rahman* had suggested (para [42]).

Further, *Randhawa* and *May* were properly understood as cases on additional borrowing and not just asset dissipation. Mr Kennedy's conduct was not qualitatively more serious than the conduct in those cases and deserved to be in the same bracket as them—the lowest, of two to five years. Taking account of mitigation, the BRO against Mr Kennedy should therefore be reduced to four years.

Case details:

- Court: High Court of Justice, Chancery Division
- Judge: Mr Nicholas Thompsell (sitting as a deputy High Court Judge)
- Date of judgment: 28 July 2022

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