# Gill v Quinn

High Court of Justice Chancery Division

1 April 2004

**Neutral Citation Number: [2004] EWHC 883 (Ch)**

**2004 WL 2935822**

Before: Mr Justice Mann

Thursday, 1st April, 2004

## Representation

Mr M Winn-Smith appeared on behalf of the Claimant.

## JUDGMENT

MR JUSTICE MANN:

1. This is an application under s.282(1)(b) of the Insolvency Act 1986 for the annulment of a bankruptcy order, made by Mr Jasvir Singh Gill.

2. Mr Gill was bankrupted on his own petition on 18th May 1992 and received his automatic discharge on 18th May 1995. Those dates show that historically this is a somewhat old bankruptcy. It seems that, because of its age, it is no longer clear which, if any, of the creditors of Mr Gill have proved. The evidence before me, and the evidence in question is a statement in a letter from the bankrupt's solicitors in a form which I will refer to later, indicates that the records have been destroyed, and, for that reason, not even the Official Receiver, who remained the trustee of Mr Gill, knows which, if any, of the creditors have proved and, if so, for how much.

3. The only evidence of the creditors in this bankruptcy comes from the statement of affairs, which was prepared by Mr Gill presumably at the time of his bankruptcy, and a copy of that has survived. That shows unsecured creditors totalling £76,870. A report prepared by the Official Receiver for the purpose of this application extracts from the statement of affairs what Mr Gill's assets were, which were effectively a freehold property worth £90,000 less an amount due to secured creditors of £104,000. Obviously Mr Gill had no net assets at the time of his bankruptcy. There were two secured creditors at the time, neither of whom opposes this present application.

4. No creditor has been paid in the bankruptcy, and the bankrupt now, some 12 years later — or at least 12 years when the matter gets before me on appeal — seeks to annul the bankruptcy order. He has sought to contact all the creditors appearing in his statement of affairs, and a standard form letter was sent out to all of them on 16th July 2003, inviting them to prove their debts, giving them notice of the intended application, and quite properly giving them notice of their right to claim interest in the bankruptcy under certain conditions.

5. I will at this stage read relevant parts of that letter, taking one as a sample. This one is addressed to HSS Alarms Limited. It states that the solicitors act for Mr Gill and gives the date of the petition. It continues:

> "At the time of his bankruptcy, our client's statement of affairs indicated that he owed you a debt in the sum of [in this particular case £209.04]. Unfortunately, due to the age of the debt, neither our client nor his trustee in bankruptcy have any details of the debt or any record as to whether you have proved in the bankruptcy for this debt. The purpose of this letter is to advise you that our client is applying for an annulment of the

> bankruptcy pursuant to s.282 of the Insolvency Act 1986 , on the basis that he has paid his creditors in full. We are therefore inviting you to submit a proof of debt form in respect of the amount owed by our client. We enclose a proof of debt form for your use. Please complete this with the details of any amount you claim our client owed as at 18 th May 1992, together with copies of any supporting documentation to substantiate the debt. We shall then arrange for payment to be forwarded to you." ( Quotation unchecked )

There are then a couple of paragraphs drawing attention to the right to claim interest and inviting a claim for interest to be made, if appropriate. The letter then goes on:

> "We require you to return the enclosed proof of debt form to us within the next 28 days, i.e. by no later than 30 th August 2002. If you do not respond by that date, you may be excluded from proving in the bankruptcy, i.e. claiming payment. Please note that because all previous bankruptcy records have been destroyed, you will need to submit the enclosed proof of debt form whether or not you have previously submitted a proof of debt form to our client's trustee in bankruptcy. If you do not intend to prove in the bankruptcy, we shall be grateful if you would let us know by 13 th August 2003."

6. The result of that trawl was not particularly fruitful. There are some 20 or 21 unsecured creditors listed in the statement of affairs. Of those, one known as KS Gill, who may be a relative, a creditor for a substantial amount exceeding £34,000, waived his or her debt. Of the others, one amounting to £90 claimed and was paid. The local authority made a claim for rates, which was paid in full in a negotiated sum slightly less than the amount appearing in the statement of affairs. A Mr Morgan was paid a sum of £3,600. HM Customs and Excise, who according to the statement of affairs were owed £7,690-odd, indicated they were unable to trace the debt because a VAT number could not be supplied. There is some very short correspondence dealing with that. All the rest, in amounts ranging from a couple of hundred of pounds to £4,500 and sums in between, either gave no response or, in two cases, the letter came back "Gone away". That is not surprising after this length of time, and it is to be anticipated that, no matter how long one waits in respect of those people, unless extensive and expensive enquiries are made that state of affairs will prevail and those people are unlikely to make a claim.

7. In addition to those letters going out, there was an advertisement placed in the London Gazette giving notice of the application and inviting proofs and any comments on the application from any creditors. Again that has produced apparently no response, and again not surprisingly. Advertising in the London Gazette is a largely formal act, and looking at the list of creditors it does not surprise me in the slightest that none of them would have picked up a reference to this application from that publication. That is not to say that I am critical in any sense of the step taken by advertising in that publication.

8. The Official Receiver does not oppose this application. His costs of £152.17 have already been paid.

9. The position, therefore, is that a very limited amount of the creditors have been paid. A couple of the secured creditors remain secured, and one is not pressing. The balance unpaid of the debts as they appear in the statement of affairs, excluding the secured creditors and the waived debt, is £33,353.82. That sum excludes any interest which might be payable on any of those debts.

10. Mr Gill's solicitors are holding £35,528, which is available to be held as security for those debts so far as that may become relevant. It will, if necessary, be paid into court, but otherwise, as I understand it, the proposal would be that, so far as those unpaid debts need to be secured, the security will be constituted by the solicitors continuing to hold those funds.

11. The jurisdiction for the application is, as I have indicated, s.282 of the Insolvency Act 1986 . Section 282(1) reads, so far as material, as follows:

> "The court may annul a bankruptcy order if at any time it appears to the court … (b) that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court."

There are then other provisions, to which I need not refer.

12. There are provisions in the Insolvency Rules dealing with this, contained in Chapter 21. So far as relevant, they provide as follows. Having dealt with the application and its contents and a report by the trustee and a power to stay, rule 6.209 provides as follows:

> "Where the application for annulment is made under s.282(1)(b) and it has been reported to the court under rule 6.207 that there are known creditors of the bankrupt who have not proved, the court may (a) direct the trustee, or, if no trustee has been appointed, the Official Receiver, to send notice of the application to such of those creditors as the court thinks ought to be informed of it, with a view to their proving their debts if they so wish within 21 days; and (b) direct the trustee, or, if no trustee has been appointed, the Official Receiver, to advertise the fact that the application has been made so that creditors who have not proved may do so within a specified time; and (c) adjourn the application meanwhile for any period not less than 35 days."

I need not read rule 6.210 , but 6.211 is significant. 6.211(1):

> "This rule applies with regard to the matters which must, in an application under s.282(1)(b), be proved to the satisfaction of the court.
>
> (2) Subject to the following paragraph, all bankruptcy debts which have been proved must have been paid in full.
>
> (3) If a debt is disputed, or a creditor who has proved can no longer be traced, the bankrupt must have given such security (in the form of money paid into court, or a bond entered into with approved sureties) as the court considers adequate to satisfy any sum that may subsequently be proved to be due to the creditor concerned and (if the court thinks fit) costs.
>
> (4) Where under paragraph (3) security has been given in the case of an untraced creditor the court may direct that particulars of the alleged debt and the security be advertised in such manner as it thinks fit. If advertisement is ordered under this paragraph and no claim on the security is made within 12 months from the date of the advertisement (or the first advertisement if more than one), the court shall on application in that behalf order the security to be released." ( Quotations unchecked )

13. The matter came before Deputy District Judge Quinn on 20th January 2004. On that occasion he dismissed the application, and it is an appeal from his decision that is before me. He held, so far as relevant, as follows. He started by setting out the grounds for an application, and having pointed out that the first ground in (a), which I have not read, does not apply, he said:

> "It then follows the third ground is an annulment on the ground that the debts have been paid in full. Debts have not been paid in full. That is quite clear from the schedule of liabilities prepared by the Official Receiver and from the applicant's own affidavit. One might say, well, letters have been written to these creditors setting out fully the circumstances of what they can and cannot do, but these debts were incurred almost 14 years ago and before. It is not surprising in this day and age that many of these creditors have moved on, have not responded, and, in the case of HM Customs and Excise, which is one of the larger debts, they are unable to trace it because they quite clearly do not keep their records for as long as 12 years. I have to consider whether this annulment should be made, and I also have to take into account the interests of public and commercial morality which must protect it. In my opinion, it would be too easy for somebody many years down the line to seek an annulment of a bankruptcy which was properly made by writing to old creditors who are not going to be in a position to respond. Therefore, on the grounds that the debts have not been paid in full, I am going to dismiss this application." ( Quotation unchecked )

That was his ruling.

14. The basis of the appeal before me is that the deputy district judge got the matter wrong for two or

three reasons. First of all, it is said that he did not consider whether the debts were or would be adequately secured, in circumstances where Mr Gill was clearly offering to place money with solicitors or otherwise in order to secure them. Secondly, he did not consider whether the debts should be treated as being paid "to the extent required by the rules", which is what the section actually requires. There has also been a suggestion (not advanced in oral argument but appearing elsewhere) that the deputy district judge was wrong to refer to the interests of public and commercial morality which required protection, because there was no question of immorality or improper behaviour on the part of Mr Gill in this case.

15. It seems to me to be arguable that the district judge did not consider the question of security for these debts adequately, because it was quite apparent that the debts had not been paid, and on that basis I am prepared to reconsider the matter *de novo* . It is not clear what his reference to public and commercial morality was intended to mean. Since no allegation was made that the bankrupt had behaved improperly, which is what is usually encompassed by the deployment of that concept in this context, then it may be that again he took into account something which he ought not to have taken into account. Again, for that reason, I am prepared to consider the matter *de novo* .

16. The jurisdiction to annul is discretionary. However, in the case of *In Re Robertson [1989] 1 WLR 1139* , Warner J indicated that it would not be exercised simply on proof that debts which had been proved and not proved had been paid. I take it by that that he was acknowledging the exercise of a real discretion. He also seems in that case to have accepted a submission that there could be no application until debts have actually been proved, but I do not think, with all due respect to that learned judge, that formulation is quite correct, since rule 6.209 , which I have already read into this judgment, contemplates that an application might be made in the face of unproved debts, and in effect provides a mechanism for compelling or accelerating or requiring a proof.

17. I therefore proceed on the footing that the court can survey the debts proved and unproved and exercise its discretion in the light of the evidence as to proof of debts, the reason for non-proof, the conduct of the debtor, the amount of the payment, the nature of any security to be offered, the history of the matter — which in my view is very important in this case — and so on, including all other relevant factors.

18. In this particular case it is quite clear that there is no evidence that any debts were proved. They might or might not have been. All the records have been lost. So in effect the application has proceeded on the footing that no debts have been proved, although at one stage Mr Winn-Smith, who appeared for the bankrupt, did seek to say that they probably had been. I think the realistic approach is that since it cannot be proved that any debts have been proved, that none of them have been.

19. In the circumstances, rule 6.209 is available for trying to generate some interest from creditors. It is obvious from the terms of that rule that it has not actually been complied with, because that rule anticipates the court giving a direction to a trustee, who will then advertise, circulate, give notice, and so on and so forth. However, in the circumstances of this case, I am prepared to proceed on the footing that rule 6.209 has been complied with, because the relevant steps have in effect been taken by the solicitors for the bankrupt, who are probably in a better position to do so than the Official Receiver. The letter sent out, which I have already read, was entirely proper and was no doubt exactly the sort of letter that the Official Receiver would have sent. It seems to me that I can treat, for practical purposes, that rule as having been complied with. It would be otiose to require the Official Receiver to do them all over again if they would otherwise be appropriate.

20. It is obvious in this case that not all the unsecured debts have been paid. Only a handful of them have been paid, and that is since July 2003. On the present evidence, those that have not been paid are most unlikely to be paid. I think the difficulty for the present application lies in the delay that has given rise to that situation. It is not surprising, as the district judge observed, that after a dozen years a large number of creditors are unresponsive. That is likely to be the case in a lot of bankruptcies, large and small. The effect of that in the case of an application for an annulment such as this is that they will not prove, if they have not already proved, and they will not be paid, whether they have proved or not, if contact has been lost with them. If an annulment order is made, it will be made in the face of evidence that a significant body of creditors has not in fact been paid through no fault of their own. That does not seem to me to be a sound background against which to make an annulment order, nor a very desirable effect to achieve with such an order. It is no real answer to the point to say that they have not proved or, if they have not proved, they have not applied for payment and that they have not responded to letters. While that is true as a matter of fact, it still remains the case that they have not been paid, and the reason that they have not been paid is because the bankrupt did not pay

them originally and that a long time has now elapsed since the bankruptcy. The annulment would, in circumstances such as this, therefore have the effect of undoing the bankruptcy while leaving creditors unpaid, and in effect it might be viewed as a cheap way of getting out of the bankruptcy. I accept that rule 6.211(4) anticipates that money paid into court will be released back to the bankrupt after 12 months if that mechanism is deployed, but that is in respect of proved debts where there has at least been some historic process of communication between trustee and creditor. In the present case, it is not clear that any of the debts were proved at all and that there was any such contact, and that is a result of the destruction of records which accompanies the inevitable passage of time.

21. So the problem in this case arises out of the delay since the bankruptcy. That means that records have been lost and contact has been lost. If that poses a difficulty, I do not think that the bankrupt should be able to take advantage of it and potentially get out of his bankruptcy by paying less than the full apparent amount of his debts and, he no doubt hopes, getting the return of his security at some point in time, whether the 12 months provided by rule 6.211(4) or some other period of time, if and when the creditors do not respond, which is to be anticipated. That is not the purpose of the annulment jurisdiction. There is no fixed time limit on making the application, but obviously the sooner it is made the better. If it is made sooner, there is a better chance of the genuine creditors being genuinely paid. Bankrupts should not assume that they can wait for a long period and then hope to have the bankruptcy set aside by, in effect, paying off less than the debts because some creditors have disappeared or lost interest.

22. At this point I should say there is no suggestion in the evidence that Mr Gill has embarked on a conduct of deliberately doing that. His desire for an annulment was apparently triggered by something else; namely, a realisation that discharge did not get him his property back. Nevertheless, an annulment granted in circumstances such as this, i.e. after a period of time when creditors can no longer be found, would potentially pose the risk that I have described.

23. In my view, the body of creditors likely to be unpaid in this matter, both in terms of numbers and in terms of their amounts, is too substantial to allow an annulment. If there were the odd creditor who could not be traced and was unlikely to be paid, my view might well be different. But in fact there is a very substantial body in this case that will not be paid. The proposed security arrangements for ostensibly paying them are perfectly satisfactory in themselves, i.e. money would be available, but they are in practice not going to result in creditors actually being paid on the basis of the evidence before me, because the creditors are unlikely to reappear.

24. In the circumstances, and because creditors are unpaid and will remain unpaid and the security proposals will not enhance their prospects of being paid, and in the light of the number and the amount of the creditors involved and the length of time that has elapsed since the bankruptcy and the loss of the records that that has given rise to, which creates the present difficulties or some of them, I am afraid I refuse the application. But in doing so, finally I should say, lest there be any doubt about it, that I do not for one moment question the good faith of Mr Gill in bringing this application. I am not suggesting that he has deliberately waited for a considerable period of time, allowing his creditors to disappear and then hoping he can buy his way out of the bankruptcy rather cheaply. There is no suggestion of that, and I do not accuse him of it. It is basically because I think this application is made too late with too many untraceable and untraced creditors that I think it would not be right to grant the annulment sought in this case. I therefore dismiss the appeal.