# Permission to Challenge a Trustee in Bankruptcy's Remuneration

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## Singh v Hicken [2018] EWHC 3277 (Ch)

### The Decision

This was an appeal against the decision of a County Court judge refusing permission to Mr Singh, a discharged bankrupt, to challenge his trustee's remuneration. Under Insolvency Rule 2016 18.35 the permission of the court is required before a bankrupt can make such a challenge. I was instructed both at first instance, where permission was refused, and on appeal to the High Court where the appeal was dismissed.

In dismissing the appeal Mr Justice Nugee considered the approach to be adopted to such applications, including the applicability of the provisions in the Insolvency Practice Direction ("the Practice Direction") dealing with remuneration applications.

### 3 PB's Analysis

The facts: Mr Singh had been declared bankrupt in 2009. The bankruptcy debt was £9,690 for council tax arrears. There were further minor debts of £2,001 to HMRC and a mortgage shortfall of £4,931. There were three properties in the estate, although only equity in two. The bankruptcy was protracted and at times acrimonious. A number of payment in full calculations were produced by the Trustee, the most recent at the time of the hearing was 5 December 2017. By that time the estimated amount required to discharge the bankruptcy, including liabilities and costs, was £285,089.

Mr Singh applied to challenge the Trustee's remuneration and expenses. He required the permission of the court under IR 18.35. The particularly relevant provisions were IR 18.35(4) which provided that the court must not give permission unless the bankrupt showed that there is or is likely to be a surplus (or would be but for the remuneration or expenses) and 18.35(5) which provided that 18.35(4) was without prejudice to the generality of the matters which the court could take into account.

The evidence at first instance consisted of four payment in full calculations, time and fees print-outs from the Trustee and his respective firms of solicitors. The Trustee had also provided a narrative statement. Mr Singh's solicitors then commented on the print-outs.

The county court judge, DDJ Lewis, was referred to the cases of Mattu v Toone [2015] EWHC 3506 (Ch) and Brook v Reed [2011] EWCA Civ 331. He listed a number of factors which he took into account, including the duration of the bankruptcy, the fact that it had been acrimonious, the number of steps which had been taken to realise the properties and the time records produced. He refused permission on the basis that reductions of the order necessary to produce a surplus (over 75%) were not likely in the circumstances of the bankruptcy.

### The Appeal

Mr Singh was granted permission to appeal relying on four grounds of appeal. The majority of argument concerned ground one. There was no dispute that IR 18.35(4) was satisfied, and that it was a threshold question for the granting of permission. If it were not satisfied that would be the end to an application for permission.

Mr Singh sought to argue that once that threshold was satisfied the onus switched to the Trustee. He then had to provide sufficient information, taking into account the guiding principles of Part Six of the Practice Direction, to justify his claim for remuneration.

Mr Singh relied on the case of Mattu v Toone an appeal where the court had been presented with bald statements without supporting analysis. Mr Justice Nugee did not accept that the position was comparable with Mattu. DDJ Lewis had not been

presented with bald statements and there was not a shortage of evidence.

The court did not accept that permission applications should be determined by the application of the guiding principles: i) a permission application was not a remuneration application and the guiding principles only applied to remuneration applications (Para 21.1.1) and ii) the suggestion was impractical because it would require a trustee to prepare as if for a substantive hearing.

The court rejected "real prospect of success" as the test for permission. That threshold was found under the permission test for appeals under the CPR by express reference.

In contrast the language used in IR 18.35(5) indicated a broad discretion. Permission should be granted if it was appropriate in all the circumstances. There was nothing wrong in the court considering whether the application was likely to be of benefit to the bankrupt: whether the claimed remuneration and cost would be likely to be reduced so there was an overall surplus for the bankrupt. The court made clear that it was not suggesting that was the only material consideration, but whether the application was likely to benefit the bankrupt was likely to be a very material consideration.

Such an assessment of the likely surplus could only be carried out as a high level review, no doubt bearing in mind that if the matter proceeded to a substantive hearing the guiding principles would apply. There was, however, no burden of proof on the trustee. The burden was one of persuasion and it rested with the applicant throughout.

Considering that as the correct approach the conclusion DDJ Lewis that "reductions of that order, in a case with this history and circumstances, do not seem to me likely" was one which it was open to him to reach.

The other grounds were dealt with more swiftly. Of note is the finding that it was "obviously right" for the court to work from the most up to date payment in full calculation rather than one prior to the issuing of the application.

The DDJ had been alive to the issue of the disparity between remuneration and expenses and the original petition debt. He went on to consider why that was so and whether there was a likelihood of the remuneration and expenses being reduced sufficiently. He took into account the history of the matter and the difficulties the Trustee had faced. This led him to the conclusion that it was too simplistic to simply compare the level of bankruptcy debts with the amount of costs and expenses. This was an approach would could not be faulted.

Implications

This is a case providing important guidance on how the permission stage should be approached and where the burden on such an application lies. The applicant will need to demonstrate that there is likely to be a surplus, although that may not be the sole consideration.

The case should also provide useful guidance for Trustees when preparing to respond to such applications. A proportionate approach to the provision of information and supporting evidence is required to avoid falling into the position in Mattu v Toone where no detail or evidence had been provided. However, the Trustee is not expected to prepare a full remuneration report as envisaged in the Practice Direction.

**5 December 2018**

**This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.**

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