

**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO FSD 183 of 2010 (IMJ)**

**IN THE MATTER OF THE BANKRUPTCY LAW (CAP 7) (1997 REVISION)**

**AND IN THE MATTER OF ROBERT DON FOSTER, A DEBTOR**



**IN OPEN COURT**

**Appearances:** Mr. K Broadhurst of Broadhurst LLC for the Applicant  
Mr. P McMaster Q.C. and Mr. A Jackson of Appleby for the Trustee  
in Bankruptcy and the Agent of the Trustee

**Present:** Mr. Robert Don Foster, Applicant  
Ms. T Philander, Trustee in Bankruptcy, and Mr. M Penner of  
Deloitte & Touche, the Agent of the Trustee

**Before:** Hon. Justice Ingrid Mangatal

**Heard:** 9 June 2016

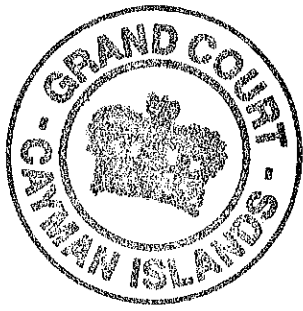
**Draft Judgment**

**Circulated:** 1 September 2016

**Judgment Delivered:** 7 September 2016

**HEADNOTE**

*Application for discharge of Bankrupt, pursuant to section 68 of the Bankruptcy Law (1997 Revision).*



## JUDGMENT

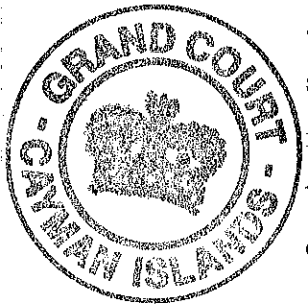
1. This is an application by the Bankrupt, Mr. Robert Don Foster ("Mr Foster"), for discharge from bankruptcy. The following is a broad chronology of events:-

### CHRONOLOGY OF EVENTS

DATE	ACTION TAKEN
7 October 2011	Mr. Foster was placed into provisional bankruptcy
17 November 2011	Mr. Foster provided a Statement of Affairs to the Agent of the Trustee
18 November 2011	Meeting of Mr. Foster's creditors held, at which creditors in attendance resolve that the adjudication of bankruptcy be made
9 December 2011	Mr. Foster adjudged Absolute Bankrupt
1 February 2012	Mr. Foster underwent public examination. The examination was adjourned generally.
24 May 2013	Trustee issued a notice of dividend of four cents to the dollar to three proved creditors of the estate.
2 July 2014	Mr. Foster issued an Application for Discharge (First Application)
12 August 2014	The Application was heard by the Hon. Mr. Justice Henderson. It could not proceed as the Report of the Trustee had not been filed. The court directed that the report be filed by 12 March 2015.
13 March 2015	The Agent filed the Report of the Trustee.
4 February 2016	Mr. Foster issued the current Application for Discharge.

## THE APPLICATION

2. The Application was first listed for hearing on 15 April 2016, but was adjourned because a number of the relevant papers were filed quite late, and the Court did not have sufficient time to read the Bundles filed by the parties. However, it seems that in the interim, Mr. Foster and the Trustee have managed to have some useful discussions and there has been considerable progress made in a manner favourable to the unsecured creditors.



## SUBMISSIONS ON BEHALF OF MR. FOSTER

3. On behalf of Mr. Foster, Mr. Broadhurst submitted that as at the date of the hearing of his Application, Mr. Foster will have been in bankruptcy for four and a half years. In the affidavit filed in support of the Application he has set out the severe impact which he says the bankruptcy has had upon him.
4. Mr. Broadhurst indicated that, up to 7 April 2016, it was not clear whether the Trustee would oppose the Application, or if she did, upon what basis she would do so. Counsel therefore in his written submissions at that time accordingly addressed two main points:
  - A. It is no longer of any benefit to the estate for Mr. Foster to remain in bankruptcy; and
  - B. The continuation of the bankruptcy will have a disproportionate punitive effect upon Mr. Foster.

### **A. It is no longer of any benefit to the estate for Mr. Foster to remain in bankruptcy**

#### 5. **The Assets of the Estate have been identified**

Counsel submitted that the Agent has identified the assets contained within the estate. It did not avail itself of any further examination of Mr. Foster subsequent to 1 February 2012. As a result of the Order of the Hon. Mr. Justice Henderson on 12 August 2014, no further examination of Mr. Foster is permitted.

#### 6. **The Assets are significant**



Approximately US\$ 800,000 in realization has been received by the estate. Mr. Foster's interest in the property known as the Waterford Property is likely to result in a further realization in excess of US\$2,000,000, Mr. Broadhurst submitted. The total value of the proved claims in the bankruptcy is US\$2,615,192.97.

7. **The Assets of the estate will remain vested in the Trustee**

Pursuant to section 37 of the *Bankruptcy Law (1997 Revision)* (*the "Law"*) the assets of Mr. Foster were vested in the Trustee upon the making of the provisional bankruptcy order. Those assets remain vested in the Trustee when Mr. Foster is discharged. Further, pursuant to section 68(9) of *the Law*, Mr. Foster remains obligated to assist the Trustee with respect to the realization and distribution of those assets.

8. As the position of the estate will not be negatively impacted by Mr. Foster's discharge, it was submitted that this is a strong factor in favour of granting this Application.

**B. Continuation of bankruptcy will have a disproportionate punitive effect on Mr. Foster**

9. **Bankruptcy has lasted four and half years**

Pursuant to section 67 of *the Law*, the Trustee was required to make a report as soon as possible after the close of the public examination of the Debtor. Thereafter, the Debtor could make an application for discharge.

10. Pursuant to section 68(3) of *the Law* where an application of discharge is made, the Court may make several different orders including the suspension of the discharge for a period of not less than two years. It further provides that upon the expiration of two years from the date of such an order, the Debtor can make an application for a modification of that order.

11. Despite the examination being adjourned generally in February 2012, no further examination took place. The report of the Trustee was not filed until March 2015.

12. Had the Report been issued within a year of the commencement of the bankruptcy, Counsel submitted, Mr. Foster would have had the opportunity to bring an application for discharge at that time. If the Court had then ordered the discharge to be suspended or subject to some other conditions, two years would have now expired since the making of such an order. Mr. Foster would now be entitled to seek a review of such an order if necessary, Mr. Broadhurst reasoned.

13. Mr. Broadhurst submitted that effectively, the delay in the filing of the Report has operated such that Mr. Foster has been forced to remain in bankruptcy without Court review for four and half years. He lost the ability to seek a discharge and the ability to seek a review of that decision if it had not been granted. It was submitted that this is manifestly unjust to Mr. Foster.

14. **The Bankruptcy has had a dramatic punitive impact upon Mr. Foster**

While it is accepted that bankruptcy is by its very nature a difficult process, it was submitted that the position which Mr. Foster now finds himself in well exceeds what is to be expected. Mr. Broadhurst opines that at the time of the commencement, Mr. Foster was a man of significant wealth. The value of his assets well exceeded his liabilities. Despite his age, physical limitations and low earning capacity he was provided with no allowance for support for himself and his family after he was placed into bankruptcy.

15. In October 2013, Mr. Broadhurst wrote to the Agent requesting a reconsideration of its position with respect to the allowance to be provided to the debtor. Section 137 of *the Law* was expressly drawn to the attention of the Agent, together with the fact that Mr. Foster was expecting the birth of a child and his earning capacity remained limited. Despite this, Counsel indicated that the request for reconsideration was refused and Mr. Foster's legal aid certificate was amended to state that he not be permitted to instruct his attorneys to challenge the management of the affairs of the estate.

16. Due to having insufficient funds, the argument continued, Mr. Foster has gone without necessary medical treatment. He lives in a one-bedroom apartment with his wife and two year old daughter. They rely upon friends and family to allow them to make ends meet.

17. The full up-to-date costs of the Agent and its attorneys have not been disclosed. It however appears that the costs well exceed US\$2,000,000, Counsel submitted. Pursuant to section 138 of *the Law*, the debtor is entitled to any surplus remaining after payment of his creditors and the costs and expenses of the bankruptcy petition. If permitted, the charges of the Agent and its attorneys almost certainly guarantee, Mr. Broadhurst contends, that there will be no surplus for Mr. Foster. The impact of this is that even upon discharge, his future prospects given his age (64) and his health are very poor.

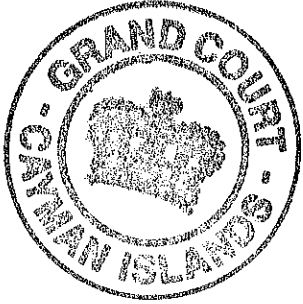
18. Taking into account the length of the bankruptcy and its impact upon Mr. Foster, Mr. Broadhurst opines that it has clearly had a deeply punitive impact upon him. It was submitted that this impact is well beyond what could be reasonably intended by the law or can be seen to be reasonable in all the circumstances of this matter.

#### **THE APPROACH OF THE AGENT OF THE TRUSTEE IN BANKRUPTCY**

19. When this Application for discharge first came on for hearing on 15 April 2016, it was opposed by the Trustee. Anne Scarborough (“Ms Scarborough”), who is the former wife of Mr. Foster and Petitioning Creditor, also opposed the Application. Appleby, who have previously advised Ms. Scarborough, filed an affidavit on her behalf for the hearing in April 2016.

20. However, the Trustee’s position, as set out in the sixth affidavit of Mr. Penner, the Partner at Deloitte & Touche with responsibility for appointment as agent of the Trustee, has changed. It is now that the Trustee takes a neutral stance on the question of discharge. This was the position taken at the hearing conducted in June 2016.

21. In his sixth affidavit, sworn on 8 June 2016, Mr. Penner stated as follows:



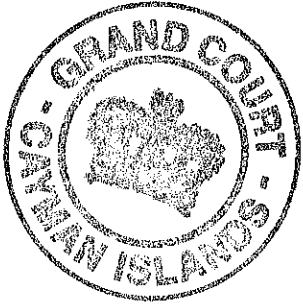
- "1) .....
- 2) *At the time of my fifth Affidavit in these proceedings, (15 April 2016) the Trustee opposed the application to discharge. There was concern that a discharge might prejudice recoveries of certain further assets for the benefit of the creditors of the bankruptcy estate. This Affidavit updates the Court on the progress which the Trustee has made with respect to recoveries since the Application was adjourned on 15 April 2016, and how that has affected the Trustee's position with regard to the application to discharge.*
- 3) *There is now produced and shown to me a paginated exhibit marked "Exhibit MBP-6" containing the particular documents to which I refer in this Affidavit. Unless otherwise stated, the page references provided below are references to the page numbers within that Exhibit.*
- 4) *The Court will have noted from my last affidavit that the assets from which the Trustee expected to make further recoveries are (a) a piece of real estate situate at West Bay Beach North Block 17A Parcel 198 ("Waterford") and (b) shares which Amity Cayman Ltd ("Amity") holds in National Cement Ltd ("NCL") and Cayman Brac Power & Light ("CBPL"). The Trustee had serious concerns about the effect that an unconditional discharge might have on the prospects of further recoveries.*
- 5) *Since the Application was adjourned on 15 April 2016, the following has occurred:*
- 5.1 *Amity has sold the shares which it held in NCL and divided and distributed the net sale proceeds equally to the Trustee and Gary Foster ("Gary"). The sale of those shares was completed on 6 May 2016, and the Trustee received CI\$65,850.00 in respect of those shares shortly thereafter.*
- 5.2 *On 13<sup>th</sup> May 2016, the chief executive officer and secretary of CBPL informed me that the 10,054 common shares which Amity held in that company had been divided equally between the Trustee and Gary, such that the Trustee and Gary each now hold the legal title to 5,027 common shares in that company. Whilst I have not yet received an updated copy of the register of members of CBPL or a share certificate reflecting that the Trustee is the legal owner of the aforesaid shares, I do believe that the Trustee is presently the legal owner of the aforesaid shares in CBPL based on the information that I have received. I am in the process of obtaining updated financial information of CBPL and pending*



receipt of this as well as making further appropriate enquiries of the company, I cannot yet say what the likely market value is for these CBPL shares. However I do note that the directors of CBPL estimated that the market value of the shares as at 31 December 2011 was approximately CI\$27.64/share, though there is no full explanation as to how they arrived at this estimate. I further note that the book value as at that date is approximately CI\$9.11/share. Should the book value be the more accurate estimate of the true value of the shares, then the Trustee may realize approximately CI\$46,000 from the eventual disposal of the shares.

- 5.3 The Trustee, Gary and WRC Ltd ("WRC") (which the Court will recall is the registered owner of the Waterford) entered into an agreement dated 3 June 2016 (the "Waterford Sale Agreement"). ..... The Waterford Sale Agreement provides *inter alia* that WRC is to sell Waterford at the best price obtainable within a reasonable period of time and apply and distribute the sale proceeds which it receives from Waterford in accordance with the terms of clause 5 of that agreement: in particular, the Waterford Sale Agreement entitles the Trustee to receive half of the balance of sale proceeds of Waterford which remains after certain (significant) agreed deductions are made, and entitles her to look to Gary to make good any shortfall in the event that she does not receive the entire amount to which she will be entitled from WRC. I am unable to say when the property will be sold or exactly how much it will realize. I understand that the property is currently being marketed at US\$8.35m. Over the years there have been a number of professional valuations of the land. In 2014, the Trustee commissioned her own professional valuation and the approximate value ascribed by the valuer (Charterland) at that time was US\$6,000,000. Clearly, the eventual sale price of the land is dependent upon what a willing buyer will pay, and I cannot of course say what price that may be – it may be materially higher or lower than the value estimated by Charterland in 2014. It is also not possible to say when the land will be sold. However, this valuation does at least give the Trustee an indication of the possible approximate sale price of the land.
- 6) These assets are now secured for the benefit of the creditors. In the circumstances, the Trustee now takes a neutral stance on the question of discharge.





- 7) *A summary of the current position of the estate is as follows: There is presently cash of approximately \$195,000 in the estate...The only major recoveries that remain to be affected are the sale of the CBPL shares, and estate's interest in Waterford. If the CBPL shares are sold for approximately the amount mentioned above, and if the Waterford is sold for the approximate valuation amount noted above (and to be clear there is no certainty that such realisations will be achieved, nor is there any certainty as to when they might be achieved), then the total net cash that may eventually be realized in the estate (before payment of outstanding professional costs and any second dividend to creditors) would be approximately US \$2,550,000, after appropriate division of the Waterford sale proceeds as agreed in the Waterford Settlement Agreement. After deduction of professional costs of approximately US\$1,300,000 (current amounts outstanding), approximately US\$1,250,000 would remain in the estate for distribution to unsecured creditors. As noted in the most current Statement of Liabilities of the estate...total admitted claims in the estate are approximately US\$2,450,000. There is also an additional claim for interest by the major creditor Anne Scarbrough of approximately US\$700,000 which the Trustee has rejected but which is subject to appeal. I can therefore calculate, for the purposes of example only, that should the estate achieve the above outcome (and I cannot give any assurance that it will), then the percentage recovery to unsecured creditors would range from approximately 40% to 51% of admitted claims, dependent upon the eventual outcome of any appeal by the major creditor in respect of her disputed claim for interest."*

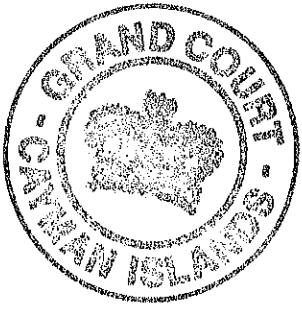
22. In her affidavit, sworn on 13 April 2016, at paragraphs 10-12, after recounting the fact that she has received but a very small amount from the estate, Ms. Scarbrough states as follows:

*"10. I am hopeful that some further money may be received in the future (6 months to a year or so) as I understand that Deloitte, the Trustee's Agents, are in negotiations with Gary Foster regarding the sale of the Waterford property mentioned in paragraph 7 of his affidavit. I also*



*understand that there are ongoing negotiations for the sale of company shares which are close to being agreed. I believe that Don's interest in the sale proceeds of the Waterford Property is a 50% interest, and worth a substantial sum, as he indicates. I understand from Mr. Penner, of Deloitte, that the Waterford Property is held through a company controlled by Gary Foster and I understand from advice that Appleby have given me in connection with this discharge application that the proposed order might well have the effect that any proceeds of a sale of the Waterford Property that took place after discharge would not vest in the Trustee but in Don, which gives me grave concerns given the amounts that remain outstanding.*

11. *The high level of Trustee fees and Attorney fees in this matter, and the issues complained about by Don in his affidavit, are as a result of Don's own actions in opposing the Trustee and refusing to cooperate with her agents. If Don had been cooperative then the costs incurred by all parties may have been substantially reduced. In the meantime, Don's son and I have been waiting ten years for the child maintenance award in the Consent order and (as explained in paragraph 7.2 above) have received less than 5 % of the total admitted claim. I have concerns that a valuable asset may be lost as a result of this application. If that valuable asset is lost, I am worried that it is likely that I will not recover anything further from the estate.*
12. *The effect of a discharge in this case would be to relieve Don of any obligation to make financial provision for his son who will continue to be a minor for another 4 years, whether by way of any lump sum or monthly maintenance payments. This is not what was envisioned by the Court in approving the "clean break" arrangement set out in the Consent Order, nor would it represent a just result under the matrimonial Law. Don is not simply asking to be relieved of any legal obligation to settle his past debts, he is asking to be relieved of a*



*moral obligation to continue providing for his child. I do not believe that the Court should countenance such an outcome....”*

23. Mr. McMaster QC has indicated Ms. Scarbrough’s position remains that Mr. Foster should not be discharged until assets are realized and dividends become payable. However, as Mr. Broadhurst has pointed out, although she had earlier provided an affidavit, Ms. Scarbrough has not appeared at this hearing to show cause why the Bankrupt should not be discharged. Importantly, the underlying factual substratum has changed considerably since Ms. Scarbrough swore her affidavit. As Mr. Penner states in his sixth affidavit, the assets under consideration have now been secured for the benefit of the creditors of Mr. Foster’s estate.

#### **THE RELEVANT LAW**

24. *The Bankruptcy Law (1997 Revision)* (“*the Law*”) provides as follows:

**“Part XIII – Discharge of a Bankrupt**

*s.67 Report of a Trustee, its purport*

*(1) It shall be the duty of the Trustee as soon as possible after the close of the public examination of the debtor, to make a report as to the state of the debtor’s affairs and as to the conduct of the debtor both before and during the bankruptcy, and he shall note particularly any matters which in his judgment might constitute offences under this Law, or any law relating to bankruptcy or which would justify the Court under this Law in refusing, suspending or qualifying an order for the debtor’s discharge.*

*(2) Such report may be made, as to the bankrupt’s affairs and estate although, if the estate has not been fully administered, the Trustee may be unable to speak precisely as to details:*

*Provided that in such a case, if it appears to the Court or the Judge before whom the debtor’s examination was held material to do so with reference to an application on the part of the debtor for an order of discharge, it shall be lawful for the Court or Judge to*



*order the Trustee to make a further and exact report, and in any case where the estate of the debtor has been fully administered, the Trustee shall make a further and full report to the Court as to the assets and liabilities of the debtor, and as to the dividend paid.*

s.68 Consideration of application for discharge and dealing with same.

*(1) The debtor may, at any time after the filing of such report, apply to the Judge hereinafter mentioned to appoint a day for hearing his application for an order of discharge. The Judge shall thereupon appoint a day and place for hearing such application. The prescribed notice of the time and place appointed shall be given in the prescribed manner. Any such application for an order of discharge shall be made in open court, before the Judge before whom the examination of the debtor was held unless such Judge is ill, absent from the Islands or otherwise incapacitated, in which case it shall be made before the locum tenens or successor of such Judge:*

*Provided that in such case it shall be lawful for such locum tenens or successor to use the notes of the Judge before whom the examination was held, and to take such action upon them as the Judge himself might have taken under this Law.*

- (2) The Trustee or any creditor may oppose the discharge and may show cause why it should be refused, postponed or made subject to conditions.*
- (3) Whether any such opposition is made or cause shown or not, the Court shall take into consideration the report of the Trustee, and may either grant or refuse an absolute order of discharge, suspend the operation of the order for a specified time or grant an order or discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the debtor, or with respect to his after-acquired property;*

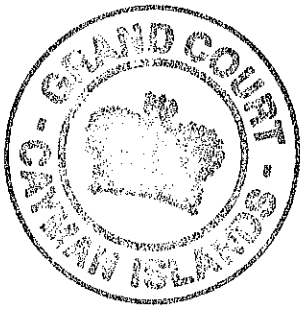


*Provided that the Judge shall refuse the discharge in all cases where the debtor has been convicted of an offence under this Law or any other offence connected with his bankruptcy, unless for special reasons to be stated in the order the Judge otherwise determines; and further if, on consideration of the report of the Trustee, or of representations made by the Trustee or any creditor on the hearing of the application, and of the Judge's notes of the examination of the debtor, and of the evidence, if any, adduced at the hearing of the application, and after hearing the debtor in support of the same, it appears to the Judge that any of the facts set out in subsection (4) has been proved the Judge shall-*

- i. refuse the discharge;*
- ii. suspend the discharge for a period of not less than two years;*
- iii. suspend the discharge until a dividend of not less than fifty cents in the dollar has been paid to the creditors; or*
- iv. require the debtor as a conditions of his discharge, to consent to judgment being entered against him by the Trustee for any balance, or part of any balance, of the debts to be paid out of the future earnings of after-acquired property of the debtor in such manner and subject to such conditions as the Judge may direct; but execution shall not be issued on the judgment without leave of the court, which leave may be given on proof that the debtor has since discharge acquired property or income available towards payment of his debts:*

*Further provided that, if at any time after the expiration of two years from the date of any order made under this section, the debtor satisfies the Court that there is no reasonable probability of his being in a position to comply with the terms of such order, the Court may modify the terms of the order, or of any substituted order, in such manner and upon such conditions as it may think fit.*

*(4) The facts referred to in sub-section(3) are-*



*(a) that the debtor's assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities, unless he satisfies the Judge that the fact that the assets are not of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities has arisen from circumstances for which he cannot justly be held responsible;*

.....

*(d) that the debtor has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it;*

*(e) that the debtor has failed to account satisfactorily for any loss of assets, or for any deficiency of assets to meet his liabilities;*

....

*(g) that he has failed to perform any of the duties cast upon him by section 39.*

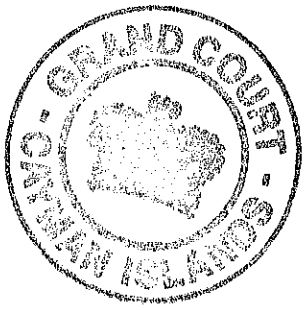
*(5) For the purposes of this section, a debtor's assets shall be deemed of a value equal to fifty cents in the dollar on the amount of his unsecured liabilities when the Court is satisfied that the property of a debtor has realized, is likely to realize or with due care in realization might have realized, an amount equal to fifty cents in the dollar of his unsecured liabilities, and a report by the Trustee shall be prima facie evidence of the amount of such liabilities.*

*(6) For the purposes of this section the report of the Trustee shall be prima facie evidence of the statements therein contained.*

.....

*(8) The powers of suspending and of attaching conditions to a debtor's discharge may be exercised concurrently.*

*(9) A discharged bankrupt shall, notwithstanding his discharge, give such assistance as the Trustee may require in the realization and distribution of such of his property as is vested in the Trustee, and if he fails to do so he is guilty of contempt of Court; and the Court may also, if it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition or payment duly made or*



*thing duly done, subsequent to the discharge but before its revocation.”*

25. Sections 39 and 40 of *the Law*, provide as follows:

*“s.39. Duty of debtor to aid Trustee*

*When a provisional or an absolute order has been made against a debtor, it shall become the duty of the debtor to the utmost of his power, so far as he may be required, to aid in the realization of his property, and the distribution of the proceeds amongst his creditors, and subject to this Law to submit to such examinations in respect of his property or his creditors as the Trustee or the Court may require, and to execute such powers of attorney, conveyances, deeds and instruments, and generally to do all such things in relation to his property and the distribution of the proceeds amongst his creditors, as the Trustee or Court may reasonably require or as may be prescribed.*

*s.40. When debtor punishable as for a contempt of Court.*

*If the debtor wilfully fails to perform any of the duties imposed on him by this Law, or if he fails to deliver up possession of any part of his property, which is divisible amongst his creditors under this Law, and which may, for the time being be in his possession or control, to the Trustee or any person authorized by the Court to take possession thereof, he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of Court and may be punished accordingly.”*

26. In the course of his submissions on behalf of the Trustee, whilst Mr. McMaster QC indicated that the Trustee maintains a neutral stance, Learned Counsel asked the Court to look at certain features of Mr. Foster’s behaviour. Reference was made to sub-section 68(3) of *the Law* and the provisos therein, and to sub-section 68(4) of *the Law*, in particular sub-paragraphs (a), (d), (e), and (q).



27. However, as Mr. Broadhurst pointed out in his oral submissions in relation to sub-section 68(3), Mr. Foster has not been charged with any offences under *the Law*, so it stands to reason that he cannot therefore have been convicted of any offences. As to some of the other allegations which had been made in Mr. Penner's fifth affidavit, or in the earlier submissions on behalf of the Trustee, I accept Mr. Broadhurst's submissions that it would be inappropriate to conduct a mini-trial in respect of such matters at this application.

28. Further, as Mr. Broadhurst pointed out in relation to section 68(4)(a) of *the Law*, there was nothing in the Trustee's report or the fifth affidavit of Mr. Penner as to what the value of the assets are, versus what the unsecured liabilities are. However, in his sixth affidavit, Mr. Penner states that should the estate achieve the outcome discussed in paragraph 7 of his affidavit, then the percentage of recovery to unsecured creditors would range from approximately 40% to 51% of admitted claims, dependent upon the eventual outcome of any appeal by the major creditor Ms. Scarbrough in respect of her disputed claim for interest.

29. On the evidence before me, on balance, I am not satisfied that any of the matters set out in sub-paragraph 68(4) of *the Law* have been proved.

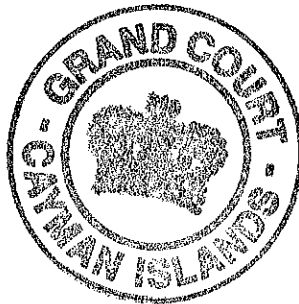
30. In all of the circumstances, this Court has a discretion to exercise, and that discretion must be exercised judicially, and fairly. This bankruptcy has lasted for a considerable period of time. In my view, some of the time is accounted for by the fact that there were legal claims which the Trustee pursued, including in particular in Cause No. FSD 11 of 2015(IMJ) - *Tabitha Philander (As the Trustee in Bankruptcy of the Estate of Robert Don Foster, a Bankrupt) v GKF Holdings Ltd and Gary Kirk Foster*. Judgment was delivered by me in December 2015, with the Trustee's claim against GKF Holdings Ltd and Gary Foster being unsuccessful. However, by any standards, this bankruptcy has lasted for a substantial time.

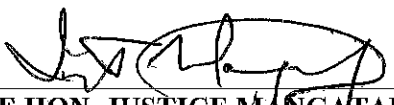
31. I take into account the fact that much has transpired since the Report of the Trustee dated 12 March 2015. There has been considerable progress and the assets have now been



secured for the benefit of the creditors. I have regard to the fact that, in light of that development, the Trustee has moved from opposing the application for discharge, to taking a neutral position. I take into account that whilst of course there is no guarantee, (as indeed Mr. Penner indicates in his affidavit), that the anticipated realisations will be achieved or when, it is no longer of any substantive benefit to the estate or the creditors for Mr. Foster to remain in bankruptcy. I also have regard to the fact that the costs of the Trustee and her Agent's legal fees have been quite significant – see paragraph 27 of Mr. Foster's affidavit. It is clear that Counsel for Mr. Foster cannot be allowed to delve into the management of Mr. Foster's affairs by the Trustee. However, to the extent that those fees are sizable, and to the extent that it might have been suggested that the assets may not be worth 50% on the amount of the unsecured liabilities, sub-section 68(5) indicates that the Court has to have regard to what the property of Mr. Foster is likely to realize, or with due care in realization might have realized.

32. In my view, having regard to all of the relevant factors and circumstances, it is appropriate to make the order unconditionally, and without suspension. I therefore make an Order of discharge in favour of Mr. Foster as requested.



  
THE HON. JUSTICE MANGATAL  
JUDGE OF THE GRAND COURT