Sentencing Remarks

Her Honour Judge Deborah Taylor

Recorder of Westminster

R v Boris Becker

1. Boris Becker, you were found guilty after trial of four offences under the Insolvency Act 1986. All of these offences arise from your actions after a Bankruptcy Order was made on 21 June 2018 following a creditors bankruptcy petition presented to the High Court by Arbuthnot Latham & Co. a private bank. You were acquitted of 20 other offences, including all charges relating to your conduct prior to the Bankruptcy Order being made.

Background

2. Arbuthnot Latham lent you money in connection with development of The Finca, a Spanish property that you owned in Mallorca. On 27 July 2016, after protracted attempts by you and various sets of advisers to negotiate a settlement or to raise money elsewhere to pay the debt, a Statutory Demand was issued by the bank for the outstanding sum. You contested those proceedings. On 30th August 2016, you submitted a statement in opposition to the Statutory Demand. On 12th April 2017 your application to set aside the Statutory Demand was dismissed, and leave was granted for Arbuthnot Latham to present a petition . On 28th April 2017 the Bankruptcy Petition was presented to the High Court for £3,348,582.57. Your application of 16 June 2017 resisting the order was dismissed and on 21 June 2017 the petition was heard at the High Court and the Bankruptcy Order was made.

Relevant evidence

3. On your own evidence at trial you had not at any stage before 21 June 2017 expected that the Bankruptcy order would be made. That was your position in the defence of the bankruptcy proceedings. Despite the failure of the attempts to contest the proceedings, your evidence was that you thought more time would be given for a "White Knight" to assist you, or for you to raise money which would enable The Finca to be sold at a proper market value such as would enable your debts to be paid off.

4. Nonetheless, you were informed by your acting lawyers that the Bankruptcy order had been made on 21 June. You then immediately dispensed with their services, and over the next few days gathered around you a new team, firstly on 23rd a trusted team of friends and advisors, and then on 26 June, a specialist insolvency team . On 22 June, you were sent a bundle of standard insolvency material including the PIQB – the insolvency booklet setting out your assets - and the NTB/1 and NTB/2 Forms which contained explanatory notes setting out your obligations. You accept that those documents reached you, but your evidence was that initially you did not open them, but took the envelope to the insolvency practitioners on 26 June where the contents were discussed. Your focus was on an annulment of the Bankruptcy Order. Thereafter, the PIQB was filled in, not by you and never signed by you, and sent on 7 July 2017 to the Official Receiver by one of your advisers, on your evidence, without your consent.

Counts 10, 13, and 14: Failing to disclose properties and assets

5. Any deficiencies in the PIQB document and discrepancies between what you had told them, and what was in the document provided to the Official Receiver were therefore said to be the responsibility of your advisers or as a result of undue reliance on them. Similarly, any failure thereafter, to disclose the assets which are the subject of Counts 10, 13 and 14 of which you have been convicted, was as a result of a belief your advisers had disclosed these assets, and of leaving that disclosure to them, or as a result of their advice or interventions in interviews.

6. In relation to Count 10, the failure to disclose Im Schilling , a property you owned in Leimen, and Count 13 , failure to disclose a loan of E825,000 from the Bank of Alpinum in Lichtenstein secured by a land charge on Im Schilling, you relied on an email from your adviser to the Trustee dated 18 September 2017, as evidencing that

you had informed the adviser of your ownership of Im Schilling and that there was a mortgage on the property. In relation to Count 14, failure to disclosre ownership of 75,057 shares in Breaking Data Corp, you also gave evidence that you ahd disclosed this to your advisers. In all instances, you said that you coud not understand why the ownership of these assets had not been disclosed to the Trustee.

7. Your case on all of these counts was, as a result, that firstly that the prosecution had not proved that you had not, to the best of your knowledge and belief disclosed ownership to the Official Receiver or Trustee, and secondly, innocent intention in that you had no intent to defraud or to conceal the state of your affairs.

Count 4. Removal of Property contrary to sections 354(20 and 350(6) of the Insolvency Act.

8. You were convicted of this offence which involved the removal of sums of money by payments made to others on dates between 23 June and 28 September 2017 from the BBPOL Euro Metro Bank Account, a company account which you used for both business and personal purposes. The money in this account was part of the second tranche of proceeds of sale of Mercedes Car Dealerships which had been withheld and then released by the German Tax Authorities. You were acquitted of Counts 1 and 2, concealing the proceeds of that sale in the BBPOL account both before and after the Bankruptcy Order was made, and Count 3 Removal of property by payment made to others before the Bankruptcy Order was made. You were also acquitted of other counts 5-9 of concealing property by transfers both before and after the Bankruptcy order to other accounts operated by you.

9. It was agreed in relation to Count 4 that the moneys had been removed from the account by you, and whilst it was not accepted that the sums were moneys which should have been delivered up to the Trustee, that was not substantially disputed. Your defence in relation to this count was, as with all counts, that of innocent intention, that you had no intent to defraud or conceal the state of your affairs.

<u>Basis of sentence</u>

Count 4.

10. The clear indication from the Jury's verdicts is that they drew a distinction between offences alleging concealment, of which they acquitted you, and offences of removal In respect of the latter, there was a further distinction clear from the verdicts between offences prior to the Bankruptcy notice, and those after. This offence was both an offence of removal of assets and after the Bankruptcy order. The jury concluded by their verdicts that you were unable to discharge the burden of proving that it was more likely than not that you had no intention to defraud or conceal in making these payments. The effect of that is that they must have concluded that it was more likely than not that you did have such an intention.

11. I have considered the submissions made on your behalf that the Court should conclude that there was a period after the Bankruptcy order during which the payments made in Count 4 should be discounted as being before you realised that you should not be making any more transfers. Some emphasis was placed an the exchange with Mr Bint in the interview of the 11 July 2017 about the use you could make of companies and company accounts. Not only was that after several of the payments at the beginning of the period covered by this Count, but also at a time when Mr Bint was unaware of the personal use you were making of the company account.

12. I reject the submission that there is any period within Count 4 in which payments made to others should not be considered as subject to the verdict of the Jury to which I have referred, the fact that a substantial sum was paid to Mr.Moghadem and then his account used as a surrogate account is an additional factual indication of the manner in which you were treating this money.

13. In the circumstances I take into account in respect of this count that removal was conducted over a period of 3 months and that the whole sum paid out has been lost to the bankruptcy estate, to the detriment of your creditors, other than those you chose to pay. The full amount of €426,930.90 was lost. At today's exchange rate that is approximately £390,000.

Counts 10, 13 and 14:

14. The Jury convicted you of these counts, and were therefore satisfied that you owned these assets and that they were assets which should have been disclosed. They rejected the defence of innocent intention.

15. Whilst I accept that you had advisers upon whom you relied, it is clear from the evidence that you knew that the obligation was on you, not them, to disclose the assets to the Official Receiver and Trustee. What was apparent from the evidence was that increasingly you left communication with the Trustees to others, showing little or no interest in engaging yourself, using them as a shield against the requests from the trustees for information and compliance.

16. In relation to Count 10, irrespective of the lack of disclosure in the PIQB, you were told at the 13 September 2017 meeting that if you had a property, say in France, that the Trustee had not asked about, it was incumbent upon you to say, either, that you own the property, or it's owned in trust for these reasons. The fact that , in relation to Im Schilling you had doubts about your mother's interests did not prevent you from raising this with the Trustee. You were able and willing to accept ownership and use it to raise money or for purposes advantageous to you, as is clear from the Habke/Cleven email in August 2008, the Ennes email in January 2017 and the Jensen email in March 2017.

17. I accept that the failure to disclose was of relatively short duration, being between June 21 2017 and your letter on 27 September 2017 when you provided the address of the Im Schilling property, and accepted co- ownership at least.

18. As far as this Count is concerned the property has not yet been sold, but is available to the estate. The latest valuation is £1,053,720.

Count 13 Bank Alpinum

19. In this respect I accept the submissions that this loan was not taken out in a plan ahead of bankruptcy. The loan was applied for, received and mostly spent prior to the Bankruptcy notice. Two payments were however, made after the Notice in July 2017.

20. The seriousness of this offence lies in the concealment. I accept on the evidence that your advisers may well have known about it, but it was again your duty to disclose it and there were ample opportunities to do so, in particular as a result of the extensive correspondence about the land charge.

21. None of the loan was recovered. Therefore, the debt of the full amount €825,000 is lost from the estate.

Count 14 the Breaking Data Shares

22. The same considerations apply to this offence. The Jury rejected your defence of innocent intention. The shares were sold £9,256 .25. Whilst the Prosecution say that this was for less than the estimated sale price, there is no substantial evidence that this was not a fair market price .

Approach to Sentence

23. There are no Guidelines for Insolvency Act offences. Whilst I have been referred to decisions in other cases, including from the Court of Appeal I do not find them of great assistance as all these cases are fact specific . Nonetheless, the principles to be gained from these cases are to emphasis the importance of adherence to the Insolvency regime and that in general cases involving failure to do so will be the subject of a custodial sentence.

24. In the absence of a specific Guidleins, the starting point is, the Sentencing Council's General Guideline Overarching Principles. In this respect I take into account the statutory maximum, sentencing judgements of the Court of Appeal (Criminal Division) for the offence, and definitive sentencing guidelines for analogous offences. In this case some assistance can be gained from the Bribery Fraud and Money Laundering Guideline, although care must be taken as the offences are different in significant respects.

25. I start by assessing the seriousness of the offences. In relation to all counts I consider culpability and the harm. I have set out the basis upon which I sentence. In relation to Count 4 these were payments made knowing of the bankruptcy order. Whilst it has been suggested that your actions were merely to make preferential creditors of those you paid, who may well have been paid in any event had the Trustee been given the information, that was not a choice they were given. This applies for example in relation to the payment made to your former wife and second wife from whom you were separate. That fails to take into account that it was not your choice to make and the result is that a large sum, £390,000 has been lost to the estate permanently. This would be category 2 in the Fraud Guidelines.

26. As far as Counts 10, 13 and 14 are concerned, I assess the culpability as medium and both Count 10 and 13 in Category 1 on value, although there are other features

of this offending which indicate that this is not the only factor, as the assets have remained within the estate.

27. I therefore take as a starting point, in relation to Count 4, a period of 2 ½ years imprisonment, which is for example in line with the category in the False Accounting Guideline. Whilst the sums are greater, the offences in Counts 10, 13 and 14 have not resulted in the loss to the estate, and in relation to those offences I take a starting point of 18 months for each count.

28. In terms of aggravating features , I do not consider there was significant planning. I accept that you were in chaos - having learned of the bankruptcy order, you did what you could to pay those closest to you, which was not a decision which was sophisticated or planned,The effect on others is taken into account in the offending.

29. I also take into account the previous conviction for tax evasion which I consider to be a similar offence, although some time ago, it is of significance in this case that you did not heed the warning you were given and the suspended sentence which was imposed, that is a significant aggravating feature.

30. In mitigation I take into account what has been described as your fall from grace. You have lost your career, reputation and all of your property as a result of your bankruptcy. I have taken into account the letters from your family and your reference for charitable works. However, you have shown no remorse or acceptance of your guilt, and have sought to distance yourself from the offending in your bankruptcy. Whilst I accept the humiliation you have felt as a result of these proceedings, there has been no humility.

31. Overall, having regard to all the features of this case, and having regard to the aggravating and mitigating features, and taking into account totality , I impose the minimum sentence commensurate with your offending .

32. In relation to Count 4 the sentence will be one of 2 years 6 months

    I impose concurrent sentences of 18 months in relation to Counts 10,13 and 14.

    The total sentence is therefore one of 2 years 6 months,

    The effect of that is that you will serve half the sentence before being released from custody subject to licence conditions. If you fail to comply with your licence

conditions you may be recalled to serve the remainder of the sentence in addition to any sentence for any further offending,

33. I make no Directors Disqualification order having regard to the fact that you remain an undischarged bankrupt and therefore are unable to be a director.

    I make no order for confiscation having regard to the fact that the bankruptcy is continuing.

    I make no order for Prosecution Costs.