SHERIFFDOM OF GRAMPIAN HIGHLAND AND ISLAND AT ABERDEEN

[2019] SC ABE 52

ABE-SQ56-18

JUDGMENT OF SHERIFF GRAEME NAPIER

in

APPEAL UNDER SECTION 139(6) OF THE BANKRUPTCY (SCOTLAND) ACT 2016 in the Sequestration of Nicola Ann Taylor or Hutcheon, residing at 36 Woodburn Avenue, Aberdeen

by

MICHAEL REID, as Trustee of the sequestrated estates of Nicola Ann Taylor or Hutcheon

Appellant

against

RICHARD DENNIS, Accountant in Bankruptcy

Respondent

with

the said NICOLA ANN TAYLOR or HUTCHEON

Debtor

and

ALEXANDER BUCHAN HUTCHEON, residing at 26 Rubislaw Den South, Aberdeen

Creditor

as interested parties

Act: Thomas, Solicitor, Ledingham Chalmers, Aberdeen
Alt: Lloyd, Solicitor, Harper McLeod, Glasgow
For the Creditor: Vallarino, Solicitor, Stronachs, Aberdeen
For the Debtor: Gillies, Solicitor, Pinsent Mason, Glasgow

ABERDEEN, April 2019.

The sheriff, having resumed consideration of the cause; Sustains the first plea-in-law for the Respondent and the first plea-in-law for the Debtor; repels the pleas-in-law for the

Appellant and for the Creditor; Dismisses the appeal; Finds the Appellant liable to the Respondent and to the Debtor in the expenses of the cause as the same may be taxed on the ordinary cause scale; Finds the Creditor liable to the Debtor in the expenses of the cause as same may be taxed on the ordinary cause scale; Allows Accounts thereof to be given in; and Remits same, when lodged, to the Auditor of Court to tax and to report.

NOTE:

[1] This is an appeal by Michael Reid as Trustee (hereafter 'the Trustee') against a decision of the Accountant in Bankruptcy (hereafter 'AiB') in the sequestration of Nicola Ann Taylor or Hutcheon (hereafter 'the Debtor'). She opposed the appeal. The respondent opposed the appeal. The Debtor's former husband, Alexander Buchan Hutcheon (hereafter 'the Creditor') is a creditor in that sequestration. His claim relates to a financial settlement in his divorce from the Debtor. He supported the Trustee's appeal but separately appealed against the AiB decision (case no. SQ57-18).

[2] It had previously been agreed by parties that this appeal and the Creditor's appeal, should be dealt with together on the basis of the pleadings and submissions. Although at one stage, in his submissions for the Trustee, Mr Thomas suggested that the court might wish to hear evidence and in his written submission Mr Vallarino, for the Creditor, had sought to argue that a proof was necessary, in the result Mr Vallarino departed from that position and I was satisfied that I should deal with the matter on the basis of the pleadings and submissions.

[3] Because of the positions adopted by parties and despite the Trustee not being a party to the Creditor's appeal, the substance of the arguments and reasoning for my decisions are

the same in both appeals. Other than necessary formalities this note and that for SQ57 – 18 are the same.

[4] The Trustee was represented by Mr Thomas. As I have said he is involved only in case SQ56-18. The Creditor is an interested party in the Trustee's appeal and insisted on his own appeal (SQ 57-18). Mr Vallarino represented the Creditor in both cases. The AiB opposed both appeals. He was represented by Mr Lloyd in both cases. The Debtor is an interested party to both appeals and opposed them. She was represented by Ms. Gillies.

[5] The agents for all parties had submitted written submissions in advance of the hearing. Those for the Trustee, AiB and Debtor in the Trustee's appeal (SQ56-18) form respectively nos. 14, 16 and 17 of that process. Those for the Creditor, AiB and the Debtor in the Creditor's appeal (SQ57-18) form, respectively, nos. 14, 15 and 12 of that process. The Creditor's submissions in his appeal were to be read across also to the Trustee's appeal. I heard all agents in oral submissions on 14 November 2018.

[6] Before I heard oral submissions, Mr Thomas, for the Trustee, moved a minute of amendment, in case SQ56-18. It proposed to introduce reference (in the Trustee's appeal only) to suspected offence reports (SORs) having been submitted by the Trustee to the AiB. Although amendment was opposed by the Debtor, I allowed same, it having been agreed by all parties that no answers to the Minute were necessary. There was, I was advised, no dispute that is a matter of fact, such reports had been submitted. Mr Thomas had anticipated that the amendment would be allowed and had prepared an amended record (No. 18 of process SQ56-18). Accordingly it was on the basis of that record and the record No. 13 of process in case SQ57 that I heard argument. Whilst the records for both cases incorporate detailed averments for the Trustee, Debtor and AiB, the Creditor makes detailed averments in his appeal (SQ57) and incorporates these into case SQ56 by reference.

Background

[7] The background to this matter was not substantially in dispute either on record or during submissions. The Creditor and the Debtor were previously married. That marriage was dissolved by virtue of decree of divorce granted at the Court of Session on 22 February 2017 following the Debtor and Creditor entering into a minute of agreement on 21 February 2017 whereby the Debtor agreed to make payment to the Creditor of a capital sum of approximately £900,000. An order for payment of that agreed amount forms part of the decree of divorce. It is accepted that that the decree for payment has not been satisfied.

[8] On 30 March 2017, the Debtor signed a moratorium in anticipation of submitting an application to the AiB for her sequestration which she proceeded to do on 5 April 2017 with an order for sequestration being granted on 24 April 2017. Blair Carnegie Nimmo was appointed trustee. The current trustee, Mr Reid, was appointed as replacement trustee at a creditor's meeting on 21 August 2017.

[9] In terms of section 137(2) of the Bankruptcy (Scotland) Act 2016, the AiB may grant a certificate of discharge of a bankrupt at any time after the twelfth month anniversary of the award of sequestration. Before granting a discharge the AiB must consider a report submitted by the trustee. That report should be submitted within the two months preceding the twelfth month anniversary and must contain certain prescribed information (section 137(4) and (5)). In the case of this Debtor, the Trustee's report recommended that the Debtor was not discharged. That report and covering letter are productions (5/3 of process SQ56). The report referred to an earlier report of December 2016 and expressed concerns regarding the Debtor's explanation as to certain missing jewellery and also raised the possibility of a private examination of the Debtor.

[10] Having considered the report, AiB initially refused to grant the Debtor a discharge and wrote to the Debtor and Trustee advising them of that decision on 12 April 2017.

[11] Thereafter, as she was entitled to do in terms of section 139(1) of the Act, the Debtor sought a **review by AiB** of the decision not to grant a discharge. The Trustee, as he was entitled to do, responded to that review request by reiterating his view that a discharge not be granted. He again made reference to the missing jewellery and pointed out that the Creditor "raises the issue of the jewellery on a regular basis". He also asserted that a public examination of the bankrupt would "be held in the near future".

[12] By letter dated 21 May 2018 AiB confirmed to the Debtor and the Trustee that the review had been upheld therefore allowing the Debtor to be granted a certificate of discharge. Thereafter the Trustee and the Creditor lodged appeals to this court against the review decision. In the light of these appeals the question of discharge is effectively on hold.

[13] In the letter of 21 May 2018 AiB sets out the reasons for the review decision as follows:

> "**Decision**
>
> After considering your request, together with any documentation and/or submissions received, your review request has been upheld.
>
> **Reason for Decision**
>
> The reason for this decision is as follows:
>
> The Accountant in Bankruptcy must consider the following when making the decision whether or not to grant the discharge of a debtor under section 137 of the Bankruptcy (Scotland) Act 2016 (The Act):
>
> - The debtor has complied with any Debtor Contribution Order (DCO).
>
> A DCO was made for £0.00 by The Accountant on 28/04/17. Your trustee advised in his report that a review of the expenditure suggests that no variation of this amount was necessary, at the date of their report.

- The debtor has co-operated with the trustee in accordance with section 215 of the Act.

  Your original trustee prepared a statement of affairs from information provided by you on your Debtor Application and Standard Questionnaire. This includes details about various heritable and moveable assets.

  Your current trustee has not made any comment to the effect that you have not provided all the required relevant documentation.

- The debtor has complied with the statement of undertakings.

  Your trustee has stated that the non-compliance relates to you remaining as a director of a limited company.

  A check of Companies House confirms that you are still listed as a director of two companies and a limited liability member of a third company.

  Due to the current status of these two companies, I accept you are not able to act as a director. However, you must now apply to be removed from all of these positions immediately.

- The debtor has made a full and fair surrender of their estate.

  By examining your Debtor Application form and Supplementary Questionnaire, together with other documents provided by the trustee, I am of the opinion that you have made a full and fair surrender of your estate.

  I understand your current trustee has advised that there are three pieces of jewellery that he wishes to locate. You have provided an explanation for their loss which I consider acceptable. However, your trustee can continue to investigate in order to recover these assets following your discharge. You must provide full co-operation with any investigation.

- The debtor has made a full disclosure of all claims which the debtor is entitled to make against other persons.

  The original trustee recorded in the statement of affairs, two potential claims relating to Spanish property. There has been no comment by the current trustee to the effect that you have not made full disclosure regarding your assets.

- The debtor has delivered every document under the debtor's control relating to their estate, business, or financial affairs.

  There has been no suggestion by your trustee that you have not provided any requested and required documentation.

- The trustee has carried out all of their functions in accordance with section 50 of the Act.

  After reviewing the information that we hold, your original, and current, trustee have been able to undertake their functions as prescribed under section 50 of the Act.

- The debtor has completed a financial education programme, if so referred by the trustee.

  You were not referred for financial education.

- The report and recommendation provided by the trustee.

  The trustee recommended that you not be discharged, as he is of the opinion that you must remain un-discharged for a private examination to proceed.

  Part 9 of the Act does not require the debtor to be un-discharged in order for a private, or public, examination to be undertaken by the trustee.

  I therefore, do not consider this is grounds for not discharging you from your bankruptcy.

- Any representation received.

  No representation received.

Subject to an appeal of this review decision, a Certificate of Discharge will be issued to you shortly……..”

[14] It is against this decision that the Trustee appeals in SQ56-18 and the Creditor appeals in SQ57-18.

[15] Under the title “Discharge of Debtor: Review and Appeal”, section 139(1) of the Bankruptcy (Scotland) Act 2016 provides that the trustee or debtor may apply to the AiB for a **review** of a decision to refuse to discharge a debtor; a creditor, such as Mr Hutchison, may also apply for a review of a decision but only one to discharge the debtor. In such an application for review, section 139(5) requires the AiB to take into account any

representations made by an interested party. In terms of section 139(1) of the 2016 Act a trustee, debtor or creditor may also **appeal** to the sheriff against any decision of AiB.

[16] The two summary applications (SQ56 and SQ57) are both appeals in terms of section 139(5) of the 2016 Act in relation to the review decision of AiB. AiB deals with the reviews, the sheriff deals with appeals.

[17] The 2016 Act makes no other provision in relation to the form of appeal. During the course of submissions it was suggested by Mr Thomas (for the Trustee) that I should hear evidence. Although he departed from this position to some extent in oral submissions in his written submissions Mr Vallarino for the Creditor had 'insisted on' his client's right to lead evidence. I am not satisfied that there is any need for me to hear evidence although I accept that in a relevant case it might be appropriate for the Sheriff to do so. The relevant circumstances are quite clear from the pleadings. It seems to me that as an appellate court it is not for me to second guess the decision of the AiB or to carry out afresh the balancing act AiB is required to perform in the review process as though I was rehearing the case or reviewing the case as a substitute for the Accountant in Bankruptcy unless I am satisfied that AiB has acted unlawfully, in which case I can consider the matter on the merits. The primary role the sheriff performs in such an appeal is the traditional one of asking whether the decision of the AiB was wrong (*R* (on the application of R) v *Chief Constable of Greater Manchester* [2018] UK SC47).

Trustee's Appeal

[18] In case SQ56-18, the Trustee's principal plea-in-law is that the AiB erred in law *et separatim* exercised his discretion unreasonably in granting the discharge and the decision should be reversed and the Debtor's discharge should be deferred. The Trustee also has

pleas-in-law attacking the relevance and specification of the averments in answer of the AiB and the Debtor. In case SQ56 the Creditor has a plea-in-law supporting the appellant's first plea-in-law seeking reversal of the decision to discharge and for deferral of the Debtor's discharge. In case SQ56, AiB attacks the relevance *et separatim* specification of the appeal which he argues should be dismissed. He further argues that even if the appeal is relevant, there having been no error in law and no unreasonable exercise of discretion by him in carrying out the review process, the appeal should be refused. The AiB's position is supported by the Debtor who also argues that the appeal should be dismissed as irrelevant failing which nonetheless she, having complied with her statutory requirements, is entitled to discharge.

Creditor's Appeal

[19] In case SQ57-18 the Creditor invites me to reverse the decision to discharge the Debtor and to adhere to the original decision of the AiB to defer the Debtor's discharge. His plea-in-law is to the effect that AiB failed to give consideration to the representations of the Trustee and others when exercising his discretion, on the merits the decision to discharge should be reversed and the Debtor's discharge should be deferred. The AiB and Debtor each argue that the appellant has not set out a relevant case but in any event AiB not having erred in law and not having exercised his discretion unreasonably, the appeal should be refused. Again the Debtor argues that having complied with her statutory requirements she is entitled to discharge. The Trustee is not a party to this appeal.

Legislative Background

[20] The current provisions for discharge are found in part 11 of the Bankruptcy (Scotland) Act 2016 of which the following provisions are most relevant:

> **Section 137 (Discharge of debtor where Accountant in Bankruptcy not trustee):**
>
> (1) This section applies where AiB is not the trustee.
>
> (2) AiB may, by granting a certificate of discharge in the prescribed form, discharge the debtor at any time after the date which is 12 months after the date on which sequestration is awarded.
>
> (3) Before deciding whether to discharge the debtor under subsection (2), AiB must—
>
> > (a) consider the report provided by the trustee under subsection (4), and
> > (b) take into account any representations received during the 28 days mentioned in subsection (6)(b).
>
> (4) The trustee must prepare and send a report to AiB—
>
> > (a) without delay after the date which is 10 months after the date on which sequestration is awarded, and
> > (b) if the debtor is not otherwise discharged, before sending to AiB the documentation referred to in section 148(1)(b)(i).
>
> (5) The report must include—
>
> > (a) information about—
> >
> > > (i) the debtor's assets, liabilities, financial affairs and business affairs,
> > > (ii) the debtor's conduct in relation to those assets, liabilities and affairs,
> > > (iii) the sequestration, and
> > > (iv) the debtor's conduct in the course of the sequestration,
> >
> > (b) a statement of whether, in the opinion of the trustee, the debtor has as at the date of the report—
> >
> > > (i) complied with any debtor contribution order,
> > > (ii) co-operated with the trustee in accordance with section 215,
> > > (iii) complied with the statement of undertakings,
> > > (iv) made a full and fair surrender of the debtor's estate,
> > > (v) made a full disclosure of all claims which the debtor is entitled to make against any other persons, and

(vi) delivered to the trustee every document under the debtor's control relating to the debtor's estate, financial affairs or business affairs, and

(c) a statement of whether the trustee has, as at the date that the report is sent to AiB, carried out all of the trustee's functions in accordance with section 50.

(6) The trustee must, at the same time as sending a report to AiB under this section, give to the debtor and to every creditor known to the trustee—

(a) a copy of the report, and
(b) a notice informing the recipient that the recipient has a right to make representations to AiB in relation to the report within 28 days beginning with the day on which the notice is given.

(7) A discharge under this section is not to take effect before the expiry of 14 days beginning with the day of notification of the decision;

Section 139 (Discharge of debtor: review and appeal):

(1) The trustee or the debtor may apply to AiB for a review of a decision to refuse to discharge the debtor under section 137(2) or 138(2).

(2) Any creditor may apply to AiB for a review of a decision to discharge the debtor under section 137(2) or 138(2).

(3) Any application under subsection (1) or (2) must be made within 14 days beginning with the day of the notification of the decision in question.

(4) If an application is made under subsection (2), the discharge is suspended until the determination of the review by AiB.

(5) If an application is made under subsection (1) or (2), AiB must—

(a) take into account any representations made by an interested person within 21 days beginning with the day on which the application is made, and
(b) confirm or revoke the decision within 28 days beginning with that day.

(6) The debtor, the trustee or any creditor may appeal to the sheriff, against any decision of AiB under subsection (5)(b), within 14 days beginning with the day of the decision; and

Section 145 (Effect of discharge under section 137, 138 or 140):

(1) On the discharge of the debtor under section 137, 138 or 140 the debtor is discharged of all debts and obligations contracted by the debtor, or for which the debtor was liable, at the date of sequestration.

(2) Subsection (1) is subject to subsections (3) and (5).

(3) The debtor is not discharged by virtue of subsection (1) from—

(a) any liability to pay a fine or other penalty due to the Crown,
(b) any liability to pay a fine imposed in a justice of the peace court (or a district court),
(c) any liability under a compensation order (within the meaning of section 249 of the Criminal Procedure (Scotland) Act 1995,
(d) any liability to forfeiture of a sum of money deposited in court under section 24(6) of the Criminal Procedure (Scotland) Act 1995,
(e) any liability incurred by reason of fraud or breach of trust,
(f) any obligation to pay—

(i) aliment, or any sum of an alimentary nature, under any enactment or rule of law, or
(ii) any periodical allowance payable on divorce by virtue of a court order or under an obligation, or

(g) the obligation imposed on the debtor by section 215.

(4) The obligations mentioned in paragraph (f) of subsection (3) do not include—

(a) aliment, or a periodical allowance, which could be included in the amount of a creditor's claim under paragraph 2 of schedule 2, or
(b) child support maintenance within the meaning of the Child Support Act 1991 which was unpaid in respect of any period before the date of sequestration of—

(i) any person by whom it was due to be paid, or
(ii) any employer by whom it was, or was due to be, deducted under section 31(5) of that Act.

(5) The discharge of the debtor under section 137, 138 or 140 does not affect any right of a secured creditor for an obligation in respect of which the debtor has been discharged, to enforce the security in respect of that obligation.

(6) In subsection (3)(a), the reference to a fine or other penalty due to the Crown includes a reference to a confiscation order made under Part 2, 3 or 4 of the Proceeds of Crime Act 2002.

(7) Nothing in this section affects regulations in relation to which section 73B of the Education (Scotland) Act 1980 (regulations relating to student loans) applies.

[21] Accordingly, where a trustee is not the Accountant in Bankruptcy, at any time after the date 12 months from the date on which sequestration is ordered, AiB **may** discharge the

debtor. Discharge is discretionary. As I have already noted the procedure precedent to the granting of a discharge is set out in section 137 of the Act. This requires the submission of a report by the trustee setting out specified information. AiB is required to take into account representations in relation to the report made to them within 28 days of the AiB informing the debtor and creditors that they have right to make such representations. Discharge, if granted, does not take effect until 14 days after the date the AiB notifies the creditor and debtor and trustee of the decision. The trustee or the debtor may apply to AiB for review of the decision to refuse discharge of the debtor. A creditor may apply for review of an AiB decision to discharge the debtor.

[22] On a review application being made AiB is required to send copies to the trustee, debtor and creditors advising them of their right to make representations and must take into account such representations and then confirm, amend or revoke the discharge decision within 28 days of the application and thereafter notify that decision to the trustee, debtor and creditors.

[23] The debtor, the trustee and any creditor may appeal to the court against that decision. In terms of section 214 of the 2016 Act, such an appeal may be on a matter of fact, a point of law, or the merits.

Submissions

[24] As noted the agents had prepared written submissions. For the Trustee these form no. 14 of process SQ56-18; for AiB they form nos. 16 of process SQ56-18 and 15 of process of SQ57-18; for the Debtor they form nos. 17 of process SQ56-18 and 12 of process SQ57-18; and for the Creditor, no. 14 of SQ56-18, although these submissions were said to relate to both cases.

[25] During the course of these written and later oral submissions, the agents referred to the following legislation, authorities and textbooks:

The Bankruptcy (Scotland) Act 2016;
Act of Sederunt (Sheriff Court Bankruptcy Rules) 2016;
Smith v *Berry's Trustee, No. 2 1966 SLT (Sh. Ct.) 80;*
Haigh and Ringrose Limited v *Barrhead Builders Limited* 1981 SLT 157;
Scottish Power Generation Limited v *British Energy Generation (UK) Limited* 2002 SC 517;
Mitchell v *Glasgow City Council* 2009 SC (HL) 21;
Accountant in Bankruptcy v *Campbell* 2012 SLT (Sh. Ct.) 35;
Alexander Inglis & Son Limited, Edinburgh Sheriff Court, 21 November 2013;
Macphail, *Sheriff Court Procedure,* 3rd edition 2006;
Gloag & Henderson, *The Law of Scotland*, 14th edition, 2017; and
McKenzie Skene, *Bankruptcy*, 2018.

[26] I was also referred to the notes for guidance for trustees issued by the Accountant in Bankruptcy in November 2016.

Submissions for Trustee

[27] It had been agreed amongst parties that Mr Thomas, for the Trustee (the appellant in SQ56-18 but not a party to SQ57-18) would lead in submissions. He adopted his written note of arguments (No. 14 of process SQ 56-18). The essence of the Trustee's case is that he had lodged four suspected offence reports ('SORs') under section 50(3) of the 2016 Act. A trustee is required to submit an SOR to AiB pursuant to sections 50(3) and 218 of the 2016 Act if it is believed that the debtor has committed a criminal offence. AiB is then required to consider all SORs against Crown Office and police guidelines and decide whether to refer the report to Crown Office. In terms of his own guidance the AiB is required to inform the trustee (but not the debtor) whether the offence has been reported to Crown Office or not (with reasons). As the guidance by the AiB is that SORs are absolutely privileged and should not be disclosed, the SORs had not been produced in these proceeding and that was the explanation for the very late amendment to include reference to them. However it was

accepted by all parties that the Trustee had lodged four such reports dated 5 December 2017, 6 February 2018, 29 May 2018 and 12 July 2018. Submitting such a number of reports was, Mr Thomas suggested, unusual. He pointed out that his client is an experienced insolvency practitioner, and it was extremely unusual for him to submit even one SOR.

[28] Mr Thomas referred me to the respondent's own guidance to trustees at paragraph 6.25.3. That guidance suggests that when an SOR has been submitted to Crown Office for consideration of criminal proceedings and Crown Office has indicated that it is proposed to take the matter further, the trustee should consider applying to AiB for deferment of the debtor's discharge. The guidance also suggests that Crown Office has advised that failure to apply for deferral of discharge may affect the court's view of the seriousness of the offence. As at the date of the consideration by the AiB of the debtor's review request, these SORs remained undetermined and accordingly allowing discharge in those circumstances was premature.

[29] Mr Thomas pointed out that the trustee's report to AiB, required to be completed in terms of section 137(4) of the 2016 Act, was completed and submitted on 2 March 2008, recommended that the debtor be not discharged. That recommendation appeared to have been accepted in the original decision of AiB. Nonetheless without any new material and following review AiB reversed that decision and accepted that the debtor could have her discharge.

[30] In Mr Thomas' submission the Debtor's request for review offered no new information and the AiB's decision letter of 21 May 2018 did not set out any explanations as to why AiB had altered position on the granting of a discharge. He pointed out that AiB had failed to answer calls on him in the pleadings to set out what specific information was contained in the Debtor's letter that caused him to reverse his original decision.

[31] Mr Thomas argued that the Trustee's attack is essentially on the merits of the respondent's decision (section 214(1)(c) of the 2016 Act). He argued that it was incongruous for AiB to suggest that in reviewing the decision issued on 12 April 2018 he acted reasonably in allowing a discharge given the Debtor's conduct and the fact that no new information had been placed before him that would have justified reaching a decision different from the initial decision.

[32] In support of this argument my attention was drawn to Sheriff Holligan's decision in *Accountant in Bankruptcy* v *Campbell*. That was a decision under section 54 of the 1985 Act. As noted under that Act discharge was automatic unless deferral was granted by the court following an application. Mr Thomas suggested that Sheriff Holligan's comments at paragraph 14 of that decision support the appellant's position that the debtor's conduct is extremely relevant to the decision as to discharge. Sheriff Holligan noted that when the court was asked to interfere with the right to an automatic discharge:

> "…… attention will focus upon the conduct of the debtor and of the sequestration itself. That seems to me to be very much the thrust of the statutory provisions ... in my opinion, although it may have, a deferment need not have a specific future purpose in the sense that if it is not granted then the trustee may not be able to do something. I see no reason why the court should not look back at past events and, having regard to these, conclude that the debtor is not entitled to his discharge".

[33] The Trustee argued that in the instant case the Debtor's conduct had been documented in his report of 2 March 2018. That report (See Trustee's production No. 3) recorded that he (Trustee) had previously made a report to AiB (in December 2017) regarding instances of non-compliance in respect of the Debtor's Statement of Undertaking and that he had previously submitted SORs. The Trustee argued that AiB had failed to give adequate weight to those matters. The Trustee also argued that given the AiB's own guidance, rather than potentially prejudicing any criminal case, the prudent course of action,

where an SOR had been submitted to Crown Office, was for a trustee to consider applying for deferment of the debtor's discharge. It followed, it was argued, that it was illogical for AiB to have overturned his previous decision about discharge when a decision still required to be made in relation to the SORs.

[34] The conclusion I was invited to draw was that the decision-maker in deciding to grant the Debtor's discharge on review was either unaware of the existence of the SORs or decided to grant the discharge notwithstanding that the SORs continued to be undetermined. The former explanation was suggested to be a significant and material oversight justifying granting of the appeal. The latter explanation was said to be inconsistent with the spirit of the respondent's own guidance and thus justified the granting of the appeal.

[35] The Trustee argued that even if those criticisms were not justified, in any event certain aspects of the Debtor's conduct and behaviour, which had been drawn to the attention of the AiB in the report and SORs, warranted deferral of discharge.

[36] Neither the Debtor nor AiB disputed that the following issues had been raised with AiB: (a) That during the 'relevant period' for the purpose of the Act, the Debtor had used the balance at credit of her current account (some £40,893) to purchase what were described as luxury items; (b) Two days before signing the moratorium the Debtor spent £4,144.40 at Harrods in London on what are described as "luxury items", including cosmetics and hair treatments, using an American Express Credit Card; (c) On the day she signed the moratorium she spent £3,498.49 on flights to London and Miami; (d) On the day after signing of the moratorium she spent £1,211.50 at Boxfit.co.uk and £2,020 on a designer handbag at Gucci.com; (e) on the date of the submission of the application for sequestration she spent £4,694 to purchase what is described as 'designer' clothing and accessories at

Netaporter.com using a credit card; (f) On the day following the submission of the application for she spent £923 purchasing designer clothing and accessories at Netaporter.com using a credit card; (g) On 8 April 2017 she spent £195.64 using her credit card for a restaurant meal and alcohol; (h) On 10 April 2017, she spent a further £10,730 on designer clothing and accessories at Netaporter.com; (i) the Debtor remained a registered director of a limited company (The Mortgage and Property Centre Limited) despite being sequestrated and having been advised on 17 May 2017 that she could not be a director of a limited company while sequestrated; (j) On 2 March 2017, shortly prior to signing the moratorium, the Debtor disposed of her shareholding in Legal & General Group Plc for a return of £9,484.71; (k) the Debtor entered into the minute of agreement with the Creditor on 21 February 2017 in which she agreed to pay the Creditor £900,000; and (l) the Debtor signed two loan agreements on 10 March 2017 one in favour of her father and the other in favour of a family trust (the Taylor Discretionary Trust) for £121,987.06 and £268,895.80 respectively.

[37] Sheriff Holligan indicated in *AiB* v *Campbell* that the debtor's conduct is at the heart of the decision whether to grant a discharge; and as he saw no reason why the court should not look back at past events. I was invited to adopt a similar approach and to conclude that the AiB had failed to take that behaviour into account or alternatively he failed to give appropriate weight thereto. Had he done so it was argued that he would have concluded that the debtor was not entitled to discharge. The Trustee argued that this conduct by the Debtor showed a complete disregard for the sequestration process and her creditors.

[38] It was accepted that there was no suggestion in *Campbell* that the deferral of discharge should serve a specific future purpose. In this case, however, it was suggested that at the very least deferral would prevent the Debtor from incurring more credit and possibly prejudicing future creditors. It was also suggested that the Debtor would be more co-

operative with the sequestration process if she remained undischarged. The Trustee drew attention to his having lodged additional SORs even after the 12 month anniversary of sequestration, suggesting that there remain serious outstanding questions which should be determined before the Debtor is discharged.

[39] My attention was also drawn to the terms of the letter from AiB advising of the outcome of the review. Mr Thomas suggested that it was unclear from that why the position initially adopted by AiB had reversed. The reasoning was, he said, entirely lacking in specification saying merely that "after considering the request together with any documentation and/or representations, the review has been upheld".

[40] Mr Thomas pointed out that the Debtor's review request had not dealt in any substantive way with the points raised by the Trustee or relied on in the initial refusal. The initial reasons given by AiB for refusing to grant the discharge, as set out in the AiB letter to the Trustee dated 12 April 2018, were "failure to fully co-operate with the trustee, failure to fully comply with the statement of undertakings". The Debtor's review letter merely stated: *"I've given 100% co-operation to the trustee. I've co-operated with everything they have requested, provided paperwork, attended meetings etc."* I was told that the Trustee was not aware of AiB having received any additional information or documentation. None is referred to in the pleadings and it seemed to be accepted by the Debtor's agent that no additional information had been provided nor any additional representation made. I was invited to and am content to proceed on the basis that the AiB review considered exactly the same information as that available at the time of the decision on 12 April 2018.

[41] For all these reasons I was invited to grant the appeals.

Submission for the Creditor

[42] In relation to both his own appeal (SQ57-18) and in support of the Trustee's appeal (SQ56-18) the Creditor argued that the AiB's decision to discharge the Debtor should be reversed. Although in his written submission the Creditor suggested that it might be necessary to lead evidence, in his oral submissions Mr Vallarino departed from that position and confirmed that his client no longer insisted on leading evidence. In those written submission Mr Vallarino had argued that evidence was necessary to show that the Debtor had blatantly disregarded the rights of her creditors by alienating assets, providing unsatisfactory explanations as to three expensive items of jewellery which could not be located and in relation to her non-compliance with her Statement of Undertaking. Additionally, he argued that it would be necessary to hear evidence in relation to the Debtor's extravagant spending on cosmetic and beauty treatments during the months of August, September and October 2017, post-sequestration. Having conceded that his client could not insist on evidence being led, he later suggested that the court might consider it beneficial to hear evidence, his position being that this is an unusual case and that the court has discretion to hear evidence if not satisfied that the matter can be dealt with without hearing it. He suggested that I would be entitled to remit one or more issues to proof. Mr Vallarino argued that in terms of section 214 of the 2016 Act, I can decide the appeal on its merits and as I am entitled to review the matter in the round it may be appropriate to hear evidence. If I did that, so he argued, I am not restricted to considering only the material which was available to AiB when the review was carried out. In any event he drew my attention to those elements in the Trustee's averments which, if proved, might constitute offences under the 2016 Act. As these are denied by the Debtor he suggested that if I considered them relevant to my decision they would require proof.

[43] Essentially the Creditor's position is that if his or the Trustee's appeal is upheld then the original decision of the AiB dated 12 April 2018 should be adhered to and the discharge of the Debtor should be deferred. I understood the Creditor's position was that deferral of discharge would serve a legitimate purpose, namely to leave the Debtor subject to criminal sanction. He did not address the issue of what weight I should give to the effective deferral brought about by these proceedings.

[44] Mr Vallarino drew attention to the following features of the Bankruptcy regime which were germane: the general duty of a debtor, while sequestrated, to co-operate with his or her trustee (section 215 of the 2016 Act); and the provisions whereby a debtor may be guilty of offences under the Act (in terms of section 218) but only where such offences are committed within 'the relevant period', which ends with discharge. He also noted that where a trustee has reasonable grounds to believe that an offence has been committed, that matter must be reported to the AiB and where the AiB has reasonable grounds to suspect that an offence has been committed, the AiB must report that matter to the Lord Advocate (sections 50 and 200 of the 2016 Act).

[45] Although it is clear that the Trustee has submitted SORs to AiB, it is not clear to me whether any matter has been reported to Crown Office / the Lord Advocate. There are no averments on Record to this effect although in his submission Mr Vallarino suggests that his client has been led to believe that such a referral has been made.

[46] I was invited by the Creditor to conclude that the representations made by the Debtor in her review letter did not address every ground on which the original decision was made. He argued that the granting of a discharge in favour of the Debtor would make it more difficult for the Trustee to apply for a Bankruptcy Restriction Order under section 156 of the Act. He did not, however, elaborate upon why that should be.

[47] The Creditor argued that the Debtor having signed significant documents of debt in favour of her father and the family trust without disclosing those during the settlement negotiations in the divorce proceedings between the Creditor and Debtor might indicate that the 'debts' were fabricated in order to harm or otherwise prejudice the interests of creditors. Although initially it had been suggested that the Creditor wished to lead evidence about these debts, following his earlier concession Mr Vallarino restricted to suggesting that at the very least deferral would allow that matter to be fully investigated by the Trustee. He was accepted that discharge would not bring the sequestration process to an end and that the Trustee might still be able to apply for an examination of the Debtor, but the effect of discharge would be that the Debtor would avoid facing any penalty for a contravention of the 2016 Act.

[48] The Creditor's primary motivation for discharge being deferred seems to be that he and other creditors have lost very substantial sums to the Debtor as a result of her voluntary sequestration. He argued that the creditors are entitled to expect that the sequestration process be followed to its conclusion. That he submitted must include deferral of the discharge to prevent the Debtor's "obligations to a trustee being diluted at a time while it is understood she and her family are under investigation for the circumstances surrounding her sequestration and behaviour/actions leading to the sequestration".

The submissions for AiB and the Debtor

[49] The solicitor for the Debtor led in submissions in opposition to both the Trustee's and the Creditor's appeals. The Debtor's arguments were equally applicable to both the Trustee's and the Creditor's. The Accountant in Bankruptcy effectively adopted those arguments.

[50] The Debtor's position was that she co-operated fully with the Trustee; made a full and fair surrender of her estate; and to the best of her knowledge there were no further outstanding investigations being carried out by the Trustee (see answer 9 in the Trustee's appeal (SQ56)). There were accordingly, she argued, no grounds upon which discharge might properly be deferred. That decision on review was made by the AiB as statutorily responsible for overseeing the sequestration process. It was reached following consideration of the circumstances of the sequestration and the representations of the Trustee and the Debtor. It was reached following an appropriate exercise of discretion; it was not irrational or unreasonable; and was not a decision that AiB was not entitled to reach. Accordingly there was no basis for interfering with the decision, or at least there was no material on record to justify such interference.

[51] Both the AiB and Debtor argued that the appellant's appeals lacked specification, were irrelevant and should be dismissed. But they both also argued that if I was persuaded that there was a relevant case to answer I should accept that as the Accountant in Bankruptcy was acting in a quasi-judicial capacity I should only interfere with his discretionary decision if satisfied that AiB did not exercise that discretion; that he misdirected himself in law; that he misunderstood or misused the material facts before him; that he took into account an irrelevant consideration; that he failed to take into account some relevant consideration; or that the exercise of discretion was in some other way wrongful.

[52] The agent for AiB argued forcefully that the various factors which the Trustee and Creditor relied on as supporting their appeals were not ones which AiB was entitled to have regard to when reaching his decision as to whether or not to reverse the earlier decision on review. I was invited not to interfere with the decision and to refuse the appeals.

[53] For AiB Mr Lloyd argued that it was not the role of AiB to 'punish' the debtor. Sequestration itself may have a punitive impact but that was not its essential purpose. Its purpose was to ingather the assets of an impecunious debtor for the benefit of creditors. Mr Lloyd accepted that Scottish sequestration legislation recognises that not all debtors are co-operative. He pointed out that trustees are provided with a number of remedies including private or public examinations; seeking to set aside pre-sequestration contracts; and submitting reports to AiB. He also pointed out that Bankruptcy Restriction Orders may be sought by AiB. His position was that essentially sequestration proceedings are a balancing act: balancing the rights and interests of debtors with those of their creditors. He emphasised that since 1985 the debtor is essentially entitled to discharge. Mr Lloyd accepted on the authority of Sheriff Holligan's decision in *Campbell* that there may not require to be a purpose to a deferral of discharge but argued that there still has to be a reason, some factor in relation to the sequestration process that can be pointed to which would justify not granting the discharge.

[54] I was invited to look at the process which had been followed by the Accountant in Bankruptcy and consider whether there was any suggestion that the decision-maker had taken irrelevant factors into account, had not considered relevant factors or had manifestly made an irrational decision. It was submitted that it is not a question of whether the court would have made the same decision as the Accountant in Bankruptcy. The appellate function of the court requires to be differentiated from the review function of the Accountant in Bankruptcy. A section 139(1) review and a section 139(6) appeal serve different purposes. Although it was accepted that the appeal could deal with matters of fact, points of law or the merits (section 214 of the 2016 Act) that did not, as Mr Lloyd put it, allow me to "wade in".

[55] Mr Lloyd explained that the Accountant in Bankruptcy's office is organised in such a way that the initial decision in relation to whether or not to allow a discharge would have been made by an 'initial decision-maker'. The review would have been carried out by a different section of the AiB's office. The reviewer would have had access to all of the material submitted in relation to the review and also all information available to the original decision maker. As this was a review, the reviewer would be entitled to come to a different decision from the first decision-maker. That is essentially different from the approach a sheriff requires to adopt acting as an appeal court where the court is looking for procedural errors, factual errors or unjustified conclusions. Both the Trustee and the Creditor argue that no such flaws are set out in the pleadings for either of these appeals.

Discussion

[56] Discharge of a debtor from bankruptcy has developed over time. The current regime for discharge of a sequestrated debtor requires to be viewed in the context of the historical development of the Scottish bankruptcy regime, particularly in the context of developments over the last 40 years. Prior to the Bankruptcy (Scotland) Act 1985 discharge of a bankrupt was regarded as a privilege, not a right. The 1985 provisions were introduced following a 1982 report by the Scottish Law Commission, which concluded that the then existing discharge provisions were not satisfactory for modern times. The Commission recommended that discharge should be granted automatically to a bankrupt after 5 years from the date of sequestration whether or not there had been composition of the bankrupt's debts. The Commission also recommended that the automatic right be subject to deferral by the court following an application either by a trustee or a creditor and that the court should be able to grant an accelerated discharge after 12 months.

[57] When enacted the Bankruptcy (Scotland) Act 1985 provided for automatic discharge after 3 rather than 5 years. The provision for earlier discharge by the court was seen as unnecessary and was not enacted, although the power of the court to defer discharge was.

[58] The 1985 regime was then altered by the Diligence etc. (Scotland) Act 2007. This followed on from a Scottish Government consultation paper issued in November 2003 seeking views about ways to modernise the Scottish approach to bankruptcy. Mirroring provisions already in place in England the idea was to reduce the automatic discharge period to one year, but that subject to certain 'safeguards'. Following the 2007 Act discharge of a bankrupt has been granted after one year, but with power to defer discharge on an application by a trustee or a creditor.

[59] When the 'modern' discharge regime was introduced by the 1985 Act no particular grounds for deferral of discharge were specified in the Act. Courts have in the past taken the view that there nonetheless has to be a good reason for deferral. Deferral is not automatically granted on application. Conduct of the debtor alone has not been seen as sufficient justification (*AiB* v *Campbell*).

[60] Not only did the 2007 Act amend the provisions for automatic discharge but it also introduced the concept of the Bankruptcy Restriction Order. This was one of the safeguards introduced to 'complement' the reduction of the period for automatic discharge. Such orders make provision for certain restrictions on a debtor post-discharge, if justified by the debtor's conduct during the sequestration. Such orders could be imposed by the court or, if offered by the debtor, accepted by the AiB. These orders limit the effect of discharge but no explicit link was created between the two regimes. There is accordingly considerable scope for overlap. Issues arise as to what are the appropriate tests for each.

[61] A further Scottish Government consultation on bankruptcy law reform in 2012 led to further changes to the regime. These were implemented by the Bankruptcy and Debt Advice (Scotland) Act 2014. Arising out of apparent concerns about debtor co-operation with trustees and because of the perception that applications for deferral were quite difficult to deal with in the relatively short timescales available, the 2012 consultation sought views on changes to the debtor discharge regime. The government proposal was that discharge should be more closely linked to co-operation by the debtor with the trustee on the basis that the benefits flowing to a debtor from discharge should be 'earned' (Scottish Government *Consultation on Bankruptcy Law Reform* (February 2012), at paragraph 13.2, referred to in *McKenzie Skene* at paragraph 17.49). It was also proposed that the Accountant in Bankruptcy should have power to defer discharge for lack of co-operation, without recourse to the court. However the opportunity was not taken to clarify the relationship between the Bankruptcy Restriction Order regime and the discharge regime.

[62] In policy terms at least it appears that the issue of the debtor's conduct in relation to co-operation is regarded as relevant to discharge as well as restriction (*McKenzie Skene* 17.49 referring to *Accountant in Bankruptcy* v *TW*, 23 September 2013, a Sheriff Court decision to which I was not referred by parties).

[63] Following the consultation exercise the Scottish Government indicated its intention to introduce provisions for discharge being granted but only on application and being conditional on co-operation of the debtor with the trustee. When enacted, the Bankruptcy and Debt Advice (Scotland) Act 2014 repealed the existing regime of automatic discharge so that discharge was no longer automatic except in certain minimal asset cases (with which these appeals are not concerned) and became subject to deferral.

Effect of discharge

[64] It is also helpful to understand the effect of a discharge in the context of the overall procedure for sequestration. Unless there has been judicial composition, a sequestration continues and is not brought to an end by the discharge of a debtor, not even by the discharge of both the debtor and the trustee, although the discharge of a trustee following completion of their administration of the estate does effectively bring the sequestration to an end, subject to possible revival (*McKenzie Skene*, paragraph 18.04).

[65] The effect of discharge of a debtor is that the debtor is discharged of all debts and obligations for which the debtor was liable as at the date of sequestration. Notwithstanding discharge, however, the debtor retains the obligation in terms of section 215 of the 2016 Act to co-operate with the trustee (2016 Act, section 145) because discharge may take place before administration of the estate is concluded.

[66] The substance of the Trustee's appeal (SQ56) lies in article 9 of condescendence where he invites the court to reverse the AiB decision on review on the basis that there are "still a number of investigations that require to be carried out by the appellant, including the possibility of an application for an examination of the Debtor." It also appears that the Trustee is not satisfied with the Debtor's explanation as to the whereabouts of three missing items of jewellery. Essentially the Trustee argues that discharge is "premature". He argues that AiB having erred in law *et separatim* having exercised his discretion unreasonably in granting the Debtor's discharge from sequestration, the decision should be reversed so that discharge is deferred.

[67] As far as the Creditor's appeal (SQ57) is concerned the essence of the argument is found in article 10 of condescendence where the Creditor argues that the Debtor may have acted in contravention of section 218 of the 2016 Act (which provides that a criminal offence

may be constituted by a debtor making false statements; by destroying, damaging, concealing or disposing of part of the sequestrated estate; or by falsifying documents). It seems to me that if such behaviour took place it took place within the 'relevant period' irrespective of whether or not the discharge was granted or deferred by AiB. Deferral of discharge would only have the effect of extending the relevant period so that any future actions could be subject to criminal proceedings. That cannot be the purpose of deferral of discharge. The Trustee's investigations may well be ongoing but it is not obvious to me that anything will be achieved in relation to those investigations by deferring discharge.

[68] Despite the Accountant in Bankruptcy and the Debtor having different interests in the matter the basis for their opposition was similar. Both adopted the same primary position that the appellants had failed to state relevant appeals.

[69] As I understand it the argument is that the discretion conferred on the Accountant in Bankruptcy in terms of the 2016 Act in relation to the question of discharge of a debtor, at first instance under section 137 and on review under section 139, must be exercised within the confines of the parameters set by those sections, consistent with what were described as the 'long established' principles governing appeals under the earlier legislation (in particular under section 54 of the 1985 Act) and that despite the power of the court in relation to deferral of discharge under the 1985 Act now being exercised by the Accountant in Bankruptcy under section 137.

[70] In *AiB* v *Campbell* Sheriff Holligan held that the discretion to refuse automatic discharge was to be exercised "within the confines of the provisions ... and the material put before the court [as it then was] ... material which satisfied section 54(4) (b) (2) of the 1985 Act and the reports satisfying section 54(5) of the 1985 Act". Whilst I am not bound to accept that interpretation it seems to me to be a sensible approach. Accordingly I propose to deal

with these appeals on the basis that AiB's discretion in relation to the granting or refusal of discharge requires to be exercised in accordance with the matters identified as material by the 2016 Act (see *Scottish Power Generation Limited* v *British Energy Generation* per Lord Reid at page 524)

[71] Section 137(3) of the 2016 Act requires the Accountant in Bankruptcy to consider (but not be bound by) the section 137(4) report by the Trustee and also to take into account any representations from the Debtor and any creditor in terms of section 137(6). The section 137(4) report requires to include information about specified matters (section 137(5)). When a review is carried out section 139(5) of the 2016 Act provides the terms on which it is to take place.

[72] These provisions seem to me to delimit the material the Accountant in Bankruptcy should to take into account in considering the question of discharge whether on review or at first instance. The nub of the Trustee's and the Creditor's argument is that the only material AiB should have taken into account for the review are the representations made by the Debtor in seeking the review and those made by the Trustee in his response (the Creditor did not, of course, make any representations) so without considering all material available, including that available to the initial decision maker. As was pointed out on behalf of the Debtor, the effect of such an approach would be that the review would ignore the whole additional material. The Creditor and Trustee were effectively suggesting that there was an onus on a debtor to draw new material or arguments to the attention of AiB. If they did not do so it was implicit that the reviewer was bound to reach the same decision as the initial decision maker. They pointed out that the only representations made by the Debtor were that she felt that she had co-operated with the appellant. She provided no supporting evidence (see article 3 of condescendence in the Trustee's appeal).

[73] However, section 139(1) of the 2016 Act in providing for a right to apply for a review of a decision to refuse a discharge does not set out what that application requires to contain. The right to ask for review is independent of the provision in Section 139(5) which allows for representations being made by an interested party where such a review has been sought. It would be wrong to conflate the two provisions. As the Debtor pointed out, an application for review will require to be considered by AiB irrespective of the making of any representations by the debtor or any other party. If made, such representations require to be taken into account but the review must proceed irrespective of the making of such representations. Accordingly the provision of a right of review must contemplate more than simply reviewing representations. The interpretation which makes sense of this provision is that the Accountant in Bankruptcy in exercising his power of review is expected to review the matter *ab initio*. It cannot be correct to attempt to delimit the Accountant in Bankruptcy to considering only any representations as the Trustee and Creditor effectively suggest.

[74] In my view the Accountant in Bankruptcy and Debtor are correct to argue that the Trustee and Creditor have pled irrelevant cases. The factors relied upon by both in support of their appeals are not relevant to the exercise by the AiB of his discretion. Deferral of discharge is of course recognised to be a very serious matter (*Alexander Inglis & Sons*, paragraph 11). In their commentary on the Act, the learned authors of the latest edition of Gloag and Henderson's, T*he Law of Scotland*, suggest that the 2016 Act links the debtor's discharge with the degree to which the debtor has co-operated with the trustee (paragraph 49.41). Although I was not referred to any direct authorities on the interpretation of section 137 of the 2016 Act, my attention was drawn to certain cases dealing with the predecessor provision (section 54 of the 1985 Act). These were said to be of assistance in clarifying the approach I should take to these appeals. I was invited to conclude that under

the 2016 Act in considering the question of discharge the focus requires to remain on the Debtor's compliance or otherwise with the obligations of disclosure and co-operation imposed upon a debtor just as it was under the 1985 Act, so that a debtor disregarding those requirements should not be considered deserving of discharge (per Sheriff Holligan in *Campbell* at paragraph 14).

[75] The Debtor invited me to consider whether there was any material put before AiB at the time of the review from which it could be concluded that the Debtor failed to co-operate. The question which it was suggested AiB should ask was: "Did she fail to disclose assets or co-operate with the Trustee?"

[76] There is nothing within the material available to me to suggest any such failure. The matters relied upon by the appellants include the following:

a) It is said that the Debtor indulged in spending surplus income on beauty and cosmetic products in disregard of the sequestration process. But both the Trustee and Creditor acknowledge that the Debtor had a no contribution requirement in her Debtor Contribution Order. Accordingly she was free to spend such income as she had without limit.

b) There is reference to the Debtor not having completed a financial education course. But it is accepted that she was not required to do so by the previous trustee (because the requirements of section 117of the 2016 Act which allows for the making of such a requirement had not been met). As there was no requirement for her to attend such a course, not doing so could not be a relevant consideration.

c) There is reference to the Trustee's dissatisfaction with the Debtor's explanation about the whereabouts of missing jewellery. However the

Trustee acknowledges that his investigations into this continue. He has extensive powers to carry out investigations accorded to him by the 2016 Act. Discharge does not affect these powers. Accordingly this cannot be a basis for deferring discharge.

d) The possibility of the Trustee applying for a private or public examination of the Debtor under section 118 of the Act is raised. But whether the Trustee chooses to do so or not is not affected by discharge. That is a decision for the Trustee alone.

e) The suggestion is made that the Debtor will be no longer be required to co-operate with the Trustee post-discharge. But that is simply a misunderstanding by the appellants of the legal position. As I have already noted the requirement of continued co-operation is quite clear from the terms of the 2016 Act.

f) The fact that the Trustee wishes to continue to investigate the whereabouts of estate vested in him *qua* trustee is not a factor which the Accountant in Bankruptcy needed to take into account. The question of discharge is irrelevant to that. The fact that the Trustee wishes to continue investigation does not indicate the lack of co-operation by the Debtor. Had the Trustee or Creditor considered that there was a lack of co-operation then details of where that lack of cooperation can be shown should have been set out clearly in the pleadings. It was not.

g) It is suggested that the Debtor's conduct prior to sequestration is a relevant factor. I do not discount it being a relevant factor but of more concern is the post-sequestration position. In any event the Trustee has extensive powers of

investigation including private examination and public examination; he can raise proceedings to recover assets; he can take proceedings to reduce transactions but has not done so suggesting this is not a serious issue.

h) The prospect of a Bankruptcy Restriction Order being sought is raised but only the AiB can seek such an order. It is not clear to me on what basis that prospect could justify deferral of discharge. The provisions are independent and in any event it does not seem that AiB does intend to do so.

i) The appellants suggest that the submission of SORs is relevant. This seems misguided. SORs have a life independent of the question of discharge.

[77] The Trustee's and Creditor's positions are based on the premis that the granting of a discharge brings to an end of the Trustee's powers and the Debtor's responsibilities. This is to misunderstand the law. As *Mackenzie Skene* emphasises (at paragraph 17–79) discharge of a debtor does not absolve the debtor of responsibility to co-operate with the trustee (see sections 145(9) and 215(6) of the 2016 Act).

[78] Deferral of discharge ought not to be granted in the hope that something may later emerge (per Sheriff Holligan in *Alexander Inglis & Son Limited*). Accordingly, averments that further investigation might lead to further steps being taken in relation to the debtor cannot be justification for deferral of discharge.

[79] Putting aside the irrelevant factors upon which the appeals are based there is nothing on record to suggest that AiB in deciding to exercise his discretion to grant the application for review of the earlier decision (and thus to allow the Debtor's discharge) did so by considering anything other than relevant material. Both the Debtor and AiB argued that the material before the AiB justified the conclusion which he reached and that there is no proper basis set out in the pleadings for impugning that decision. I am not persuaded by the

arguments of the Trustee or Creditor to the contrary. I am satisfied that there is no basis for arguing that AiB erred in the approach taken to the review. Accordingly the appeals fall to be dismissed. I accept that there are outstanding SORs but they can take their course.

[80] The only practical effect of discharge which might have an impact on the appellants' interests is that no offences under the Act can be committed after discharge. AiB is not the final arbiter of whether there are to be proceedings in relation to any offences. The basis on which AiB deals with such matters is not, it seems to me, determinative of the question of discharge. Whilst offences under section 218 of the 2016 Act can only be committed during the relevant period (section 219) and that period ends as at the date of discharge, that does not act as a bar to offences identified during that relevant period being subsequently reported and prosecuted. It cannot be right that discharge should be deferred simply to extend the period during which a debtor's acts might be criminalised under the Act.

[81] AiB in exercising the review function under the Act acts in a quasi-judicial capacity, effectively exercising a function, formerly carried out by the sheriff. The test for interfering with the exercise of such a discretionary decision is as set out in Macphail at paragraph 18.111 as follows:

> "The appellate court may interfere if it is satisfied that the judge did not exercise his discretion at all; or that in exercising it he misdirected himself in law; or misunderstood or misused the evidence or the material facts before him; or took into account an irrelevant consideration; or failed to take into account some relevant consideration; or if his conclusion is such that no erroneous assumptions of law or fact can be identified, he must have exercised his discretion wrongly".

[82] It seems to me that, as the Debtor puts it (in paragraph 30.2, written submissions), each appellant "Simply avers various bases upon which it is said the debtor's discharge ought to be refused" and does not properly deal with the nature of the AiB discretion and

exercise thereof. The pleadings do not identify any failure by the AiB of the type suggested in Macphail. On that basis also seems to me that the appeals fall to be dismissed.

[83] The principles relating to the question of discharge require the decision-maker to consider whether the debtor has failed to disclose assets or otherwise co-operate with the Trustee but there is no material presented to me which would justify the AiB in so concluding.

[84] This sequestration arises out of acrimonious divorce proceedings litigated over a number of years in the Court of Session. But I am not persuaded that is relevant to the question of discharge. I have no doubt that both parties would have been advised by solicitors and counsel in relation to those proceedings and in relation to the appropriateness of any agreement between them to settle those proceedings. It may well be that the Creditor is dissatisfied with how matters developed thereafter. It may well be that he and the Trustee are dissatisfied with the explanation the Debtor has produced in relation to the missing jewellery. But the fact that the Trustee knows about the missing jewellery does not suggest an uncooperative debtor. The Creditor and the Trustee may have reservations about documents of debt entered into by the Debtor but if they do there are remedies available to them. In particular the Trustee can take steps to have these set aside but he has not done so. Deferral of discharge does not impact on that.

[85] Parliament considers that AiB is best placed to assess the question of discharge. I am of the view that the court should be slow to interfere with the exercise of discretion by AiB unless there is a clear and demonstrable departure by the decision-maker from a rational decision-making process.

[86] These appeals do not relate to a complex sequestration involving a multitude of business and personal assets. These are not cases such as that of *Campbell* where there was

demonstrable failure to cooperate (there was evidence of the debtor consistently ignoring the sequestration process, continuing to trade while sequestrated and failing to disclose interests in (a) a bank account; (b) a racehorse; and (c) a limited company. Nor is it a case such as *Alexander Inglis & Sons* where there was a failure to disclose (a) ownership of shares (b) an interest in a boat (c) an interest in three Bahamian companies the disposal of a vehicle without accounting for sale proceeds; and the arranging for the contents of a house to be sold at auction but also reporting them as stolen. In each of these cases the court did defer discharge, in *Campbell* for two years and in *Inglis* for one year and 3 months.

[87] In the instant case by virtue of this appeal the Debtor's discharge has been delayed. It might otherwise have taken effect on 6 June 2018. Even if I were now of the view that the appeals should be upheld, it seems to me that discharge would be justified on the basis that the *Campbell* and *Inglis* cases are taken as guides to the appropriate length of 'deferral'.

[88] In all the circumstances I consider that both appeals falls to be dismissed.

Expenses

[89] The agent for the Debtor invited me to find the Trustee and the Creditor liable to the Debtor for expenses in their respective appeals and that on an agent and client, client paying basis. This she argued was justified as the appeals were bound to fail from the outset having regard to the inadequate basis of appeal. The appeal process had, she argued, resulted in significant prejudice to the Debtor who has not only effectively had discharge delayed but has also had to finance her opposition to these proceedings. She, it was said, is the only person to have suffered financial loss as a result of this process.

[90] I can well understand the Debtor's frustration at the impact of these appeals. The intention of Parliament cannot have been to make the discharge process an unacceptably

long and complex process. The method of appeal is by Summary Application. However extended periods were allowed for the adjustment of pleadings and I have taken longer than I wished to issue this decision because of other court commitments. I regret that the matters have not therefore been dealt with summarily.

[91] In relation to the Trustee's appeal Ms Gillies suggested that an order should be made by me to the effect that the Trustee should not be entitled to recover his fees and outlays from the sequestrated estate. In this latter respect I was referred to *Mackenzie Skene* at paragraph 12-18 (b) and the case of *Smith* v *Berry's Trustee* 1996 SLT (Sh. Ct.) 80. I am not persuaded *Smith* v *Berry* is authority for my doing what the agent suggested. That case related to an entirely different situation where a trustee had instituted proceedings which were incompetent as opposed to irrelevant or unfounded.

[92] The Accountant in Bankruptcy simply invited me to find him entitled to the expenses on the usual basis.

[93] It seems to me that in the whole circumstances the normal rule for expenses following success should apply and I will find the Trustee liable to the Debtor and to AiB and find the Creditor liable to the Debtor and to AiB in respect of the successful parties' expenses incurred in their respective appeals on the normal party/party basis.

[94] I was not invited by AiB to make any separate finding of expenses against the Creditor in respect of his support for the Trustee's appeal.