

Personal Insolvency Legal Update 2018

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Personal Insolvency Legal Update

Presented
by
Julian Dobson

Julian Dobson Senior Lecturer

Gendrot v Chadwick [2018] EWHC 48 (Ch)

- Deed of Trust transferred interest in properties to wife for no consideration
- Husband retains sole responsibility for the payment of the mortgages secured over the properties
- Promise to grant access to son and wife and not to seek judicial separation

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Gendrot v Chadwick [2018] EWHC 48 (Ch)

- No consideration provided by Mrs. Gendrot
- Promise of access and not to pursue judicial separation did not constitute valuable consideration
- There were no exceptional circumstances which would delay enforcement

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Pickard v Constable [2018] BPIR 140

- Mrs. Constable was the bankrupt
- Mr. Constable was a 50% joint owner
- Mr. Constable suffered from myasthenia gravis
- First instance the Judge suspended possession order until after Mr. Constable had died

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Pickard v Constable [2018] BPIR 140 Appeal

- Common ground there were exceptional circumstances
- Authorities considered included decisions where the order for sale was suspended until after death of the bankrupt's wife/husband in *Claughton v Charalambous* [1998] BPIR 558 and *Re Bremner* [1999] BPIR 185

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Pickard v Constable [2018] BPIR 140 Decision

- Appeal Court substituted twelve month postponement of order for sale
- Further ordered that Mr. Constable could re-apply to court for further suspension
- If such application made it must be supported by cogent evidence from medical experts, the non-availability of private sector accommodation, and engagement of Local Authority

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Reynard v Fox [2018] EWHC 443 (Ch)

- The bankrupt claimed trustee was in breach of contract and/or negligent
- Bankrupt's claim set out in 29 separate paragraphs
- Oraki v Bramston [2017] EWCA Civ 403

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Reynard v Fox [2018] EWHC 443 (Ch)

- Section 304(2) Insolvency Act 1986 – claim for loss to the estate caused by trustee can be brought by bankrupt with leave
- Section 304 – concern with loss caused to the estate rather than to the bankrupt personally
- David Richards LJ refused to exclude the possibility of the existence of a duty owed by a trustee in respect of loss caused to a bankrupt personally

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Reynard v Fox [2018] EWHC 443 (Ch) Decision

- Trustee was entitled to refuse to assign claim against accountants to bankrupt
- In refusing to assign the cause of action the trustees may take into account the following:
 - The risk of an adverse costs order even where no interest is retained in the outcome
 - The risk of challenge or enquiry from creditors in the event that the trustee did assign

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Reynard v Fox [2018] EWHC 443 (Ch) Decision

- The time and expense of dealing with such enquiries if action assigned
- The risk of enabling vexatious litigation against third parties who have no remedy in costs as assets have been vested in trustee

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Avonwick Holdings Limited v Shlosberg [2017] BPIR 1 - Court of Appeal

- The TIB obtained documents under s 311(1) (IA86) from other solicitors who acted for the bankrupt and Webinvest
- Three categories of documents:
 - (a) Litigation about a cat
 - (b) Statutory demands, petition and winding up petition
 - (c) A claim by Avonwick against the bankrupt and Webinvest

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Avonwick Holdings Limited v Shlosberg [2017] BPIR 1 - Court of Appeal

- At first instance Arnold J held:
 - The TIB acquired the benefit of the bankrupt's privilege in respect of category (a) documents but not category (b) or (c)
 - Notwithstanding the bankrupt's privilege the TIB could still take possession of the documents that relate to the estate or bankrupt's affairs.
 - Such documents could be used in discharge of his statutory duties

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Avonwick Holdings Limited v Shlosberg [2017] BPIR 1 - Court of Appeal

- The TIB appealed the decision in respect of category (b) and (c) documents

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Avonwick Holdings Limited v Shlosberg [2017] BPIR 1 - Court of Appeal Decision

- Privilege is not property which vests in TIB
- S 311(1) IA86 only allows the TIB to use privileged documentation for the statutory purpose of realising the bankrupt's estate if its use does not amount to waiver of privilege
- Trustee in bankruptcy cannot waive bankrupt's privilege in proceedings against third parties

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Avonwick Holdings Limited v Shlosberg [2017] BPIR 1 - Court of Appeal Decision

- The decision does not deal with the question of privilege in corporate insolvency
- Liquidators are agents of the debtor company
- A TIB is not an agent of the bankrupt

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Leeds v Lemos [2017] EWHC 1825 (Ch)

- The trustees had obtained solicitors files in respect of which Mr. And Mrs. Lemos claimed joint and sole privilege
- The trustees sought directions as to use of privileged material in s 423 proceedings

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Leeds v Lemos [2017] EWHC 1825 (Ch)

- Avonwick left two outstanding questions:
 - (1) Whether the Crescent Farm principle applies in bankruptcy?
 - (2) Whether Re Konigsberg still applied?
- A further question was whether the court could order Mr. Lemos to consent to the use of privileged documents?

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Leeds v Lemos [2017] EWHC 1825 (Ch) Decision

- (1) The Crescent Farm principle no longer applies in bankruptcy
- (2) The Re Konigsberg decision is effectively overruled

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Leeds v Lemos [2017] EWHC 1825 (Ch)

- (3) The court will not force a bankrupt to waive privilege in respect of documents or information subject to legal professional privilege
- (4) The court adopted a 'fudge' –

The trustee would have to make such applications as considered necessary.

Julian Dobson LL.M. (1994), FRCR (1995)

Willmont v Schlosberg [2018] BPIR 182

- Sharing of compulsorily obtained information between office-holders
- Joint Trustees and liquidators sought directions as to the use of three categories of documents
 - (1) Compulsion material
 - (2) Disclosure material
 - (3) Privileged material

Julian Dobson LL.M. (1994), FRCR (1995)

Willmont v Schlosberg [2018] BPIR 182

- Compulsion material – yes it could be shared with liquidator if it would serve one of two purposes
 - (a) It is beneficial to the bankrupt's estate or
 - (b) That it serves a wider public interest by discovering dishonesty or malpractice

Where it's for the benefit of the bankruptcy estate the court's permission would not be required in such circumstances.

Where it is proposed to share the compulsion material for the purpose of the wider public interest of discovering dishonesty or malpractice the court's permission should be sought.

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Willmont v Schlosberg [2018] BPIR 182

- Disclosure material – the joint liquidators/joint trustee could review material received by the liquidator under disclosure in proceedings in his capacity as trustee which would better inform the trustee.

Any further use of the disclosure material was prohibited unless one of the exceptions to CPR Rule 31.22(1) apply
- Privileged material – this would be dealt with by way of a Privileged Material Segregation Protocol which would provide adequate protection for Mr. S's privilege

Julian Dobson LL.M. (1994), FRCR (1995)

Summary

- Privilege does not vest in trustee – Avonwick
- Trustee can obtain and consider privileged documents / information in discharge of his statutory functions
- Trustee cannot waive bankrupt's legal professional privilege
- Trustee cannot force bankrupt to waive legal professional privilege – Lemos

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Summary

- No distinction is to be made as to whether privileged documents relate to assets or liabilities – Lemos
- A joint holder of privilege cannot maintain it against the other joint holder
- Has either the bankrupt or other party asserting privilege waived it?

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Summary

- The Crime Fraud exception
- Can the trustee use privileged material in proceedings against the bankrupt?
- Would that be a waiver of privilege which would not be permitted by Avonwick?
- Lemos – trustees would have to make such applications as they see fit!

Julian Dobson 10.10.2018

Summary

- Trustees may only share compulsorily obtained material with liquidators if serves either of two purposes above namely:
 - (a) beneficial to winding up of bankrupt's estate
 - (b) the discovery of dishonesty or malpractice
- Any doubt over the use of such material can be dealt with by application to court

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Practical steps

- Where possible obtain information from other non-privileged sources i.e. HMLR, HMRC, creditors, estate agents, accountants, auditors, questionnaires of bankrupt/spouse, private/public examination, Official Receiver, Banks, use of powers under s 311 & s 366
- Seek agreement/consent of bankrupt/spouse to consideration/use of privileged material
- Apply to court for directions as to use of privileged material?

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Ahmed v Ingram [2018] EWHC Civ 519

Chronology

- 23 January 2007 Bankruptcy Petition
- 29 March 2007 Creditors approve IVA
- 06 June 2007 Transfer of shares valued at £2,216,000
- 15 December 2008 IVA revoked
- 21 April 2009 Bankruptcy Order
- 14 April 2010 Appointment of Joint Trustees
- 30 June 2010 Valuation date – start of period of loss
- 27 February 2015 Transfer of shares to trustees 2nd valuation date

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Ahmed v Ingram [2018] EWHC Civ 519

- Earlier decision held that trustees entitled to difference in the value of the shares at the date of their original transfer and the value of the shares on their transfer back to the trustees

Appeal

The nature of the remedy available under s 284

- The remedy for breach of s 284 comes from the general law
- It is restitutionary in nature
- Trustees must demonstrate loss arising from breach of trust

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Ahmed v Ingram [2018] EWHC Civ 519

Decision

- Trustees are entitled to equitable compensation for loss suffered as a result of wrongful retention of the shares
- The Appellants held the shares on trust for the trustees in bankruptcy on their appointment

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Ahmed v Ingram [2018] EWHC Civ 519 Decision

- The loss commences on the date on which the trustees would have sold the shares – nearest valuation 30 June 2010
- Compensation would be difference between the value of the shares at 30 June 2010 and the date of their transfer back to the trustees on 27 February 2015
- Correct valuation method was fair value as opposed to market value

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Gwinnutt v George [2018] EWCH 2169 (Ch)

Trustee's claim to recover fees due to barrister on bankruptcy

- Barrister claimed outstanding fees were all on a non-contractual arrangement and therefore did not vest
- Historically barrister's unable to sue to recover fees
- Legal Services Act 1991
- Standard Contractual Terms Guide – Bar Council

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Gwinnutt v George [2018] EWCH 2169 (Ch)

- Barristers fees 3 bases:
 1. Standard Conditions of Contract for Supply of Legal Services by Barristers to Authorised Persons 2012;
 2. bespoke terms (contractual or non-contractual) drafted by barrister;
 3. bespoke terms drafted by instructing solicitor.

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Gwinnutt v George [2018] EWCH 2169 (Ch) Decision

- Barrister's non-contractual fees do not constitute property which vests in the trustee in bankruptcy
- The trustee may be able to claim barrister's fees as either after acquired property or under an IPO subject to the relevant provisions being satisfied

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SR v HR and SC (As Trustee in Bankruptcy of SR) [2018] EWHC 606 (Fam)

Relevant Dates:

- 24/05/2012 Orders made in matrimonial proceedings re property
- 07/10/2013 Order varying aspects of previous matrimonial orders
- 04/09/2017 W's Appeal against implementation
- 22/09/2017 H made bankrupt
- 04/10/2017 Judge makes new orders which gave £46,000 worth of value to W from H

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SR v HR and SC (As Trustee in Bankruptcy of SR) [2018] EWHC 606 (Fam)

Decision

- S 31 Matrimonial Causes Act 1973 the only capital award that can be varied is a lump sum order payable by instalments
- No jurisdiction to vary original matrimonial orders
- Intervening bankruptcy meant that orders could not be made in respect of property already vested in the trustee in bankruptcy

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Thomas and Hollander v Rathore [2018] BPIR (ChD) 501

Relevant dates:

- 06/07/2010 Purchase of 50% of shares in Company
- 16/07/2010 Transfer of 50% of shares SSR to W (value £72,500)
- 16/06/2013 Balance of shares gifted to wife "the Second Transfer" (value £77,250)
- 26/06/2013 Bankruptcy Order made
- 01/02/2018 Hearing - value of shares £0?

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Thomas and Hollander v Rathore [2018] BPIR (ChD) 501

Share transfers to wife

- No consideration
- Wife paid salary of £7,500 pa for two years
- Wife received dividends of £69,500
- Value of shares at date of hearing – nil
- Trustees claim under s 339 in respect of share transfers

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Thomas and Hollander v Rathore [2018] BPIR (ChD) 501

- Trustees claim under s 339 in respect of share transfers
- Trustees claimed value of two share transfers £149,750 or set aside share transfers and repay £15,000 salary and £69,500 dividends

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Thomas and Hollander v Rathore [2018] BPIR (ChD) 501 Decision

- Court considered remedies available under s 339 and compared with those under s 423 IA86
- Court ordered return of shares to bankruptcy estate
- Order that wife repay dividends of £69,500
- No order for repayment of salary

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Lock v Aylesbury Vale District Council [2018] EWHC 2015 (Ch)

Appeal against bankruptcy order for unpaid council tax

- Debtor had no visible assets of any kind
- Debtor appealed against bankruptcy order on the grounds that bankruptcy order would serve no useful purpose
- Council checklist referred to possible inheritance
- Could someone be too poor to be made bankrupt?

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Lock v Aylesbury Vale District Council [2018] EWHC 2015 (Ch)

Decision

- Public authorities who petition on unpaid council tax have additional burden to demonstrate the bankruptcy would achieve some useful purpose
- Council's preliminary assessment of possible inheritance was not put to the debtor
- The bankruptcy order was unjust and would serve no useful purpose
- The bankruptcy order was set aside

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Chadwick v Thomas-Chambers [2018] BPIR 354

- Trustee's application for possession and sale
- Debtor's application to enforce alleged agreement to sell trustee's interest at £50,000
- Trustee's offer to sell interest for £50,000 marked "*without prejudice save as to costs – subject to contract*"
- Debtor's solicitors accept offer
- Joint valuer revises valuation to higher figure
- Debtor alleges:
 - 1) Binding agreement to sell
 - 2) Collateral agreement to sell at joint valuer's initial valuation

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Chadwick v Thomas-Chambers [2018] BPIR 354

Decision

- Subject to contract correspondence does not create binding agreement
- In following the revised valuation trustee had not breached the principle in *ex parte James*
- There was no proprietary estoppel in favour of the debtor
- Similarly there was no collateral agreement in instructing the joint valuer to be bound by the valuation
- Order for possession and sale

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Bankruptcy

Gendrot v Chadwick [2018] EWHC 48 (Ch)

Deed of Trust fails as transaction at an undervalue

Facts

This was an appeal by Mrs. Gendrot against an order made in the County Court at Cambridge in favour of the trustee in bankruptcy of Edward Hagan, Mrs. Gendrot's husband.

The application brought by the trustee in bankruptcy of Mr. Hagan was to set aside the Deed of Trust dated 10 September 2011 ("Deed of Trust") under which the bankrupt's beneficial interest in two properties was purportedly transferred to Mrs. Gendrot and that the Deed of Trust constituted a transaction at an undervalue under **Section 339** of the **Insolvency Act 1986**.

Deed of Trust

The Deed of Trust was entered into to make financial provision for the bankrupt's wife and their son Michael and as far as possible to provide financial security for them. There were two properties 7 Hill Close London NW2 which was the matrimonial home and a flat at 269 West End Lane London NW6.

Under the terms of the Deed of Trust Mr. Hagan declared that he held both properties on trust for his wife and that he would be solely responsible for payment of the mortgages secured against the properties. The Deed contained no reference to any consideration provided by Mrs. Hagan for the transfer of the beneficial interest.

At the County Court at Cambridge the District Judge held that:

- (1) Mrs Gendrot had provided no consideration for the Declaration of Trust
- (2) As at the date of the Deed of Trust Mr. Hagan was insolvent
- (3) That the Deed of Trust should be set aside

Appeal

On appeal Mrs. Gendrot sought to raise two further arguments:

- (1) The Declaration of Trust in so far as it related to the matrimonial home at 7 Hill Close should be considered separately from the declaration in respect of the Flat and commercial premises.
- (2) Looked at in that way the only evidence which the District Judge should have accepted was that Mr Hagan's equity in 7 Hill Close was at most £12,000, and possibly less.

Appeal Decision

Mr. Justice Fancourt first of all identified that some of the arguments raised by Mrs. Gendrot had not been advanced at trial and that following a recent Court of Appeal decision new arguments should not be permitted on Appeal if they were not deployed at the lower court and if their being deployed might have caused the respondents to conduct their case differently as regards the evidence produced or otherwise.

Referring to Mrs. Gendrot's arguments that the value of the matrimonial home at 7 Hill Close should have been considered separately it was noted that if that had been raised at trial then the respondents would have sought to adduce evidence of the open market value and the equity in 7 Hill Close as at the date of the Deed of Trust. As it transpired, no such evidence was adduced at trial as it was accepted by all parties at trial that the properties together had substantial value.

The Judge noted that the Deed of Trust effected one transaction only and that Mrs. Gendrot provided no consideration. Mrs. Gendrot sought to rely on a possible collateral agreement in that she agreed to allow Mr. Hagan access to her once a week and to their son twice a week. Further there was the suggestion that in return for the Deed of Trust she would not proceed to petition for judicial separation. Mr. Justice Fancourt noted that as a matter of law giving up a right to pursue a claim can be valuable consideration see **Re Abbott [1983] Ch 45** and **Haines v Hill [2008] Ch 412**. The important point being that the right that is being given up must be enforceable in some way. There was no evidence that Mrs. Gendrot had entered into any binding agreement to submit to future access or not to pursue her right for a judicial settlement.

As the District Judge had found that Mrs. Gendrot had given no consideration the true value of the assets as at the date of the Deed of Trust became irrelevant.

On appeal Mrs. Gendrot argued that the Court should exercise discretion in relation to the matrimonial home because it was occupied by her and her 18 year old son and that whilst it now had substantial equity the value of the interest of Mr. Hagan at the time was no more than £12,000. The Judge rejected that argument noting that the trustees had not established the equity in the property as at the date of the Deed of Trust. Further the Judge did not consider it right to focus narrowly on the value of the equity at the date of the transaction if the property was of the kind capable of appreciating in value with the passage of time as in the current case.

As there were no exceptional circumstances, there were no grounds to postpone or stay the Order.

Comment

- Yet another case involving a declaration of trust which purports to deprive the bankruptcy estate of the bankrupt's beneficial interest in one or more properties.
- In this case the transaction for the purpose of Section 339 was held to be the date of that the Deed of Trust was entered into.
- Somewhat surprisingly the trustees did not put in any evidence as to the value of the property at the date of the Deed of Trust but preferring simply to rely on the fact that no consideration had been provided and that the property now had substantial value. Had Mrs. Gendrot been able to demonstrate that she provided some other

form of consideration at the date of the Deed of Trust, then the value of the equity in the property would have been relevant for the purpose of determining whether or not the Deed of Trust was a transaction at an under value.

- The case once again confirms that giving up a right in an enforceable way can constitute valuable consideration. Mere references to an agreement for access and a promise that she may not seek judicial separation was not a binding agreement to give up such rights and therefore could not constitute valuable consideration.

Bankruptcy

Pickard v Constable [2018] BPIR 140

Exceptional circumstances and the length of postponement

Facts

Mrs. Constable was made bankrupt on 02 October 2014. She lived with her husband, Mr. Constable in a property which they owned in equal shares. A one-half share of the property was worth £71,000.

The trustees applied for an order for possession and sale which was heard in the County Court at Eastbourne. Initially at the hearing at which Mr. and Mrs. Constable appeared in person the District Judge ordered possession be given by 01 October 2016. After the hearing Mr. and Mrs. Constable sought legal advice to challenge the date for giving of possession. Directions were given which required the filing of further evidence to deal with Mr. Constable's health, and the availability of alternative accommodation.

When the matter came back before the court, Mr. Constable had filed two witness statements, one himself and the other by his carer. It detailed the fact that he was 63 and suffered from myasthenia gravis which is a condition affecting muscles causing him to be weak and tired and affecting his breathing. He had previously been subject to prolonged spells in hospital and was subject to medication. He had to sleep sitting up and spent virtually all day in an armchair. His carer attended the property five times a week. Both Mr. and Mrs. Constable were dependent upon income support and stated they were unable to afford deposits or agency fees in relation to private sector lettings. They had made enquiries of the Local Authority but the Council said they would not re-house them as they would be deliberately homeless. If they were on the street, they would likely be placed into bed and breakfast accommodation. Mrs. Constable would need accommodation with suitable wheelchair access. She was 76 years old and suffered from rheumatoid osteoarthritis and pigeon lung.

The District Judge ordered that the sale of the property be postponed until the death or earlier permanent vacation of the property by Mr. Constable with a parallel postponement of the order for possession. The trustees appealed against that decision.

The relevant statutory provision is **Section 335A Insolvency Act 1986**. This provides that where a trustee makes an application for an order for possession and sale pursuant to **s 14 Trusts of Land and Appointments Act 1996**, the following shall apply:

- '(2) On such an application the court shall make such order as it thinks just and reasonable having regard to-
 - (a) the interest of the bankrupt's creditors;
 - (b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt's spouse or civil partner or former spouse or former civil partner -
 - (i) the conduct of the spouse, civil partner, former spouse or former civil partner, so far as contributing to the bankruptcy,

(ii) the needs and financial resources of the spouse, civil partner, former spouse or former civil partners, and

(iii) the needs of any children; and -

(c) all the circumstances of the case other than the needs of the bankrupt.

(3) Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt's estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.'

In the current case it was accepted by both parties that the circumstances of the case were exceptional.

The court therefore must exercise its powers in accordance with **s 335A(2)**. It was recognised that the exercise of the discretion of the court in such circumstances is heavily fact-dependent although the authorities provide general principles which can be of assistance. It was to those authorities that the Appeal Court then turned its attention.

Grant v Baker [2016] EWHC 1782 (Ch), [2016] BPIR 1409

In that case the bankrupt's daughter suffered from developmental delays, mobility issues and obsessive-compulsive disorder. They were exceptional circumstances and the court ordered that the order for sale be postponed "*until such time as [the daughter] no longer resides at the property*". That period could potentially last for decades as the daughter was only 30 years of age and there was no evidence that her life expectancy was likely to be reduced. On appeal the court substituted a period of 12 months. The court finding that the District Judge had failed to take into account the statutory scheme of the bankruptcy legislation.

In that case on appeal the court held that the correct period of postponement was 12 months being the longest that it could reasonably impose. The court also referred to the guiding principles set out in **Dean v Stout [2005] BPIR 1113**, the court held that there were 6 principles that apply as follows:

1. The existence of exceptional circumstances is necessary to displace the presumption that the interests of creditors outweigh all other considerations, but the presence of exceptional circumstances does not prevent the court from making an order for sale.
2. Exceptional circumstances will usually relate to the personal circumstances of one of the joint owners, such as a medical or mental condition.
3. The categories of exceptional circumstances are not to be categorised or defined and the court will make a value judgment after looking at all circumstances.
4. The circumstances must be exceptional special circumstances which are outside the usual melancholy consequences of debt and improvidence.

5. The fact that the wife and children are faced with eviction and her beneficial interest will not be sufficient to buy a comparable home do not constitute exceptional circumstances.
6. The fact that the entire net proceeds of sale will be utilised in paying the costs and expenses of the bankruptcy will not constitute exceptional circumstances.

The court looked at **Claughton v Charalambous [1998] BPIR 558**

It was the bankrupt's wife who had a 50% interest in the property that suffered from chronic renal failure and chronic osteoarthritis. She was 60 years old and had a reduced life expectancy. In that case the order for possession and sale was postponed until the bankrupt's spouse either died or vacated the property.

In **Re Bremner [1999] BPIR 185** there was also an indefinite suspension of the order for sale although the suspension was likely to be a matter of months rather than years. In that case Mr. Bremner who was the bankrupt was aged 79 and had inoperable cancer. His life expectancy was not expected to exceed six months. His wife was 74 and was his only carer. She had no beneficial interest in the property but had a right to occupy by reason of their marriage. There was evidence that creditors would be paid in full in any event, and as such it was held that the circumstances were exceptional in that the needs of Mrs. Bremner (and not the bankrupt husband) should be recognised by deferring the sale until three months after the husband's death.

In the current case it was common ground that there were exceptional circumstances and the only question that needed to be decided was whether the postponement of the order was for the correct period of time.

Mr. Justice Warren noted that there was no evidence of either the bankrupt or his wife's assets, and the position with regard to the Local Authority re-housing them had been misunderstood. There was therefore no evidence that the Local Authority would not find suitable accommodation if the order were enforced. Similarly, there was no evidence of enquiries having been made to rent in the private sector.

Decision

Mr. Justice Warren held that although exceptional circumstances clearly existed, the District Judge had reached the conclusion that the implementation of the possession order should be suspended until the death of Mr. Constable had been based on a "feel" for the case and not the evidence before him.

On appeal it was held that the suspension until after Mr. Constable's death was not the appropriate order and as such the court substituted a suspension of twelve months. The court also ordered that Mr. Constable would have liberty to apply to vary the date of possession and that he could do so and submit further evidence.

The court did however state that should Mr. Constable make such an application he would have to produce clear evidence from medical experts as to his condition and the potential effects on him of the order for possession being enforced he will have to produce evidence demonstrating non-availability of private sector accommodation and of his attempts to engage with the Local Authority concerning re-housing. The evidence should also include full details of their respective financial positions.

Comment

- The circumstances in which exceptional circumstances will lead to a suspension of the enforcement of any order for possession and sale are heavily fact dependent. Nevertheless there are general principles which can be drawn from earlier cases and from the decision in **Pickard v Constable**.
- The onus on establishing exceptional circumstances is on the person seeking to rely i.e, in this case Mr. Constable. The Appeal Court took the clear view that the evidence put forward by Mr. Constable as to the lack of availability of accommodation in the private sector, the position with regard to the Local Authority and any subsequent re-housing, the effects on his medical condition in making an order for possession and sale was simply not sufficient in this particular case.
- Clear and detailed evidence must be put in by the party seeking to rely on exceptional circumstances
- The Court referred to **Grant v Baker [2016] EWHC 1782 (Ch)** and noted that the statutory scheme of the bankruptcy legislation provided for a three year period in which the trustee must deal with any property interest. If the trustee does act within that period, then the court should exercise its powers under **s 335A** with the object of enabling the bankrupt's interest to be realised and made available to creditors. Only in that way can the underlying purpose of the bankruptcy and legislation be achieved.
- The decision also confirms that an order for possession and sale should still be granted where the proceeds of sale will be swallowed up in dealing with the costs and expenses of the bankruptcy and that such an outcome is not in itself an exceptional circumstance.

Bankruptcy

Reynard v Fox [2018] EWHC 443 (Ch)

What duties does the trustee in bankruptcy owe to the bankrupt?

Facts

Mr. Reynard is a former ski tour operator who was made bankrupt. Following his bankruptcy his house was sold by NRAM as mortgagee for £1,020,000 which the bankrupt claimed was at an undervalue. The bankrupt also said he had claims against his former accountant and he sought an assignment of those claims from the trustee to him for a nominal sum. The trustee had refused that request.

There followed a long line of applications which culminated in the two applications before the court being:

- (1) Application by the bankrupt to transfer the claim back to the County Court Money Claims Centre
- (2) Application by the trustee to strike out the bankrupt's claim.

During the course of previous litigation, the bankrupt had sought to appeal an earlier decision albeit, unsuccessfully. In dealing with the application the court considered making a civil restraint order against the bankrupt but did not do so as the conditions were not satisfied. However, the Judge attached a provision to the order stating that any further application that the bankrupt wished to make must be made in the Bristol Civil and Family Justice Centre and marked for the attention of one of two District Judges, one of them being the HHJ McCahill QC who made the original order.

The most recent claim issued by the bankrupt was against his former trustee in bankruptcy for damages for breach of contract and negligence. In order to deal with the application, the court had to consider first of all whether or not it should be dealt with in the County Court or the High Court. On this point, it was noted that the High Court has more flexibility, having an inherent jurisdiction at common law, the County Court only having a statutory jurisdiction. Where questions arise as to the duties of the trustee in bankruptcy, these are better dealt with in the High Court. The claim would be transferred to the High Court.

The Court had to consider whether or not the current applications were in breach of the previous order made by HHJ McCahill QC. The court considered the history of both civil restraint orders and the earlier authority of **Grepe v Loam (1887) 37 ChD 168** and concluded that it was part of an order and the application was covered by the directions. However the claim would not be struck out for being in breach due to other factors.

In considering the trustee's application to strike out the bankrupt's application the court referred to the bankrupt's claim. This gave particulars of alleged negligence and/or breach of contract which the bankrupt had particularised over some 29 paragraphs. This included refusing to take any action against NRAM for selling at an undervalue, and to vest the litigation claim against the accountants in the bankrupt.

The claims were divided into two categories those arising under contract and those arising under tort in negligence.

On the contract claim the court took the view that it was inherently unlikely that the bankrupt and his trustee would enter into a contract which governed the trustee's conduct and the exercise of his functions. Therefore this element of the claim would be struck out.

In considering the claim of negligence the court referred to the recent case of **Oraki v Bramston [2017] EWCA Civ 403**. In that case the claimants were made bankrupt on the basis of a judgment debt which subsequently turned out to have been procured by fraud. The bankruptcy was set aside. The claimants sought to make the defendant trustees in bankruptcy liable for certain losses which they claimed to have suffered. At first instance Proudman J held that the claim failed on the facts. However, she also held that no duty of care was owed at common law by a trustee in bankruptcy to the bankrupt. On appeal, the Court of Appeal reached the same conclusion on the facts. But the court declined to express a view as to the position on the law. At the same time, some useful guidance was given. David Richards LJ noted that the claims pursued were for damages for loss said to have been caused to the bankrupt personally for breach of duty owed by the trustee to the bankrupt personally. The claim was not for loss caused to the bankruptcy estate or for compensation to be paid to the bankruptcy estate.

Any claim for loss to the estate would be subject to the requirement under **s 304(2) Insolvency Act 1986** for leave of the court where the claim is brought by the bankrupt. In that case at all material times the estates were accepted to be solvent and there would be a surplus. The bankrupts did have an obvious standing to make a claim in respect of the loss to the estates.

He further noted that leave could be given to a bankrupt under **s 304** even if there is unlikely to be any surplus dependent on the circumstances of the case.

S 304 provides a framework for claims for the benefit of the bankruptcy estate. It is concerned with, and confined to acts or omissions on the part of the trustee that have caused loss or damage to the estate. He noted that it would be inconsistent to have the provision in **s 304** requiring the bankrupt to have leave to take proceedings against the trustee if the bankrupt had a general right of action based on common law duty.

Whilst at first instance the Judge held that there was no common law duty in negligence apart from the statute i.e., **s 304**, David Richards LJ on appeal stated that **s 304** cannot be read as excluding any liability on the part of the trustee to a bankrupt. Whilst he did not decide whether or not there was a duty in respect of loss caused to the bankrupt personally and what the nature of that duty was, he did state at **s 304** does not exclude the possibility of such a duty.

In the current case HHJ Paul Matthews noted that David Richards LJ distinguishes between the possible liability of the trustee to the bankrupt's estate and the possible liability to the bankrupt personally:

"the former is governed by section 304 and the latter (if at all) by the common law"

Decision

The judge first of all considered the claims personal to the bankrupt which fell outside the scope of **s 304**. One of these being that the trustee had failed to assign the claim against the accountants to the bankrupt. In essence the bankrupt was claiming that the trustee owed a duty of care to the bankrupt to assign the claim to him. The trustee's legal advisors had concluded that the claim had insufficient merit to invest further time in contemplating and that as such the trustee was entitled to conclude that the claims were frivolous. The

bankrupt's application seemed to suggest that the trustee may retain some form of interest in the claim if pursued by the bankrupt. It was noted that it is settled law that if a trustee retains an interest in the outcome of litigation following an assignment of a cause of action he may be subject to an adverse costs order for the defendant's costs. Even if no interest is retained in the outcome it still remains possible that the trustee may be subject to an adverse costs order albeit unusual.

At an earlier hearing the court held that the claims had no merit. HHJ Paul Matthews expressed the view that such claims meant that it was unarguable that the defendant owed a duty whether in contract or in tort to the trustee to procure that the benefit of those claims worth many millions of pounds should not be turned to the account of the creditors but instead should go to the benefit of the bankrupt. On that basis alone he would strike out the claim.

The court also considered the question of possible issue estoppel. Issue estoppel means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him.

In deciding the case the Judge concluded that if the bankrupt were permitted to continue with common law claims he will in effect be re-litigating issues which had previously been decided under the **s 303** application which would constitute an abuse of process. The trustees claim would therefore succeed in striking out the applications.

Comment

- This case was a combination of some complex litigation. On the question of civil restraint orders it provides a useful history at paras 17-20 dealing with the development of such orders following earlier case of **Grepe v Loam (1887) 37 ChD 168** and others.
- The case examines the difference between claims that fall within **s 304 Insolvency Act 1986** and those that may arise otherwise. The conclusion being that **s 304** does not exclude the possibility of the trustee having liability in respect of a claim where the trustee owed a duty to the bankrupt. It should be emphasised however that such claims are likely to be extremely rare.
- The case also deals with the considerations that a trustee may take into account when considering whether or not to assign a cause of action to a bankrupt. In particular a trustee may take into account the risks of an adverse costs order being made against the trustee where the trustee retains no interest in the proceedings that have been assigned even though such an order would be unusual. The trustee is entitled to take into account low or even remote risks such as this.
- A further relevant consideration is that a trustee would where assigning a claim for a £1 take the risk of challenge by or an enquiry from creditors. Even if such challenges or enquiries are ill-founded the trustee will incur the time and expense of dealing with the same. That is a relevant consideration in refusing to assign claims for nominal consideration.
- The court referred to the decision in **Re Papaloizou [1999] BPIR 106** in which it was stated:

"It must not be forgotten that by so doing they are enabling the bankrupt to conduct possibly vexatious litigation against third parties who will have no

effective remedy in costs against him, since all his assets have been vested in the trustee."

- A further consideration being that a trustee before abdicating his responsibility by assigning a cause of action to a bankrupt should bear in mind the consequences to other parties in litigation for doing so in **Re Papaloizou** Browne-Wilkinson J said:

"My present view is that it should not be done unless clear and certain benefits are obtained for the creditors."

- The bankrupt made a further application to the court which was heard on 08 August 2018 under reference **Reynard v Fox [2018] EWHC 2141 (Ch)**. This time the bankrupt made an application for leave under **s 304** of the **Insolvency Act 1986** to bring proceedings against the trustee. The court once again re-visited the numerous claims that the bankrupt had made. HHJ Paul Matthews concluded by refusing permission to the bankrupt to pursue a claim under **s 304** effectively bringing the litigation to an end.

Bankruptcy

Avonwick Holdings Limited v Shlosberg [2017] BPIR 1 - Court of Appeal

Privilege does not vest in trustee

Facts

This was an appeal brought by the trustees in bankruptcy of Mr. S and Avonwick Holdings Limited ("Avonwick") against an earlier decision of Mr. Justice Arnold. Previously Mr. Justice Arnold had ordered that solicitors acting for both the petitioning creditor, the trustees in bankruptcy and the liquidators of Webinvest should cease to act for Avonwick. This was because the solicitors had a large quantity of documents, some of which were subject to Mr. S's legal professional privilege and which the trustees sought to allow Avonwick to use in proceedings by Avonwick against Mr. S ("the Conspiracy Proceedings").

The background was that Mr. S was the beneficial owner of Webinvest. Avonwick loaned US\$100m to Webinvest. Mr. S guaranteed Webinvest's obligations under the loan. Webinvest failed to repay the loan to Avonwick. Avonwick sought and obtained judgment. Subsequently it obtained a bankruptcy order against Mr. S and a winding up order against Webinvest.

The trustees in bankruptcy of Mr. S were also appointed as liquidators of Webinvest. The solicitors were retained by the trustees in bankruptcy, the liquidators and Avonwick itself. They had received CD's containing large numbers of documents from solicitors acting for Mr. S and Webinvest. The documents and information related to three different categories:

- (a) Litigation about a cat
- (b) Statutory demands, petition and winding-up petition
- (c) A claim by Avonwick against the bankrupt and Webinvest

Some of the documents in categories (b) and (c) were subject to joint privilege of Mr. S and Webinvest. The trustees wished to permit Avonwick to make use of the contents of the documents for the purpose of pursuing other litigation being the Conspiracy Proceedings.

Mr. Justice Arnold considered the provisions of **IA 1986 s 311(1)**. He held that the bankrupt's privilege does not pass to the trustee but it does appear to be implicit that the trustee can use the information contained in documents which he has taken possession of under **s 311(1)**, including privileged documents, in the discharge of his statutory functions. Mr. Justice Arnold noted that there was a difference between using information contained in privileged documents otherwise than for the purpose of proceedings and using it for the purpose of proceedings. Further he rejected the arguments that because the documents had vested in the trustee the trustee had also acquired the benefit of the privilege.

Court of Appeal Decision

The Court of Appeal reviewed the decision of Mr. Justice Arnold and upheld the earlier decision in that legal professional privilege did not vest in the trustee in bankruptcy.

Further the earlier decision in relation to the trustees position under s 311(1) was also upheld insofar as the trustee is entitled to take possession of documents for the overriding function of getting in, realising and distributing the bankrupt's estate and notwithstanding privilege is entitled to look at the documents to obtain information relevant to those matters. The trustee cannot however waive the bankrupt's legal professional privilege in taking steps against third parties for the benefit of the bankrupt's estate.

In upholding the earlier decision, it was also noted that the reality is that Avonwick is the majority creditor in the liquidation of Webinvest and that Mr. S cannot retain privilege against Webinvest in relation to information obtained from solicitors who acted jointly for Webinvest and the bankrupt. (See below)

Comment

- It was pointed out the decision does not deal with the question of privilege in corporate insolvency. This is because liquidators are agents of the debtor company whereas a trustee in bankruptcy is not an agent of the bankrupt.
- The court considered that the Crescent Farm principle (**Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd [1972] Ch 553**) and its possible application. In that case the court had held that legal and professional privilege of a predecessor in title to the land enures for the benefit of its successor. The court also considered the earlier decision of **Re Konigsberg [1989] 1 WLR 1257**. In that case the trustee in bankruptcy asserted privilege of the bankrupt against his wife on the grounds that he was a successor in title to the matrimonial home under the Crescent Farm principle and that the wife had effectively waived privilege in respect of their joint solicitors file by referring to and exhibiting in an affidavit a letter from their solicitor. It has been noted in discussion that Counsel in the Konigsberg case for the wife effectively conceded the point without much resistance in accepting that the privilege of the bankrupt had passed to the trustee and that as such the *"usual rule applied that one joint holder of the privilege (the wife) could not maintain it against the other joint holder (the trustee)"* (para 60).
- The court also considered the decision in **Barclays Bank PLC v Eustice [1989] 3 ALL ER 289** which deals with a possible crime fraud exception. See later decisions.

Bankruptcy

Leeds v Lemos [2017] EWHC 1825 (Ch)

Privilege does not vest in trustee - further developments

Facts

Following the bankruptcy of Mr. Lemos the trustees pursued enquiries concerning a property at 27 Bracknell Gardens NW3 estimated to be worth £16.5m, in which Mr. and Mrs. Lemos lived. The property was registered in the joint names of a Bermudian trustee company and one of its directors. The offshore trustees argued alongside Mr. and Mrs. Lemos that the property was held on trust for Mrs. Lemos alone. The trustees in bankruptcy had obtained documents from Withers solicitors in the course of the discharge of their functions as trustees in bankruptcy. Some of those documents may be subject to legal professional privilege belonging to the bankrupt either alone or jointly with his wife. Some of the documents it was claimed were subject to Mrs. Lemos' sole privilege.

The trustees considered that some of the documents would be useful for proceedings under **s 423 Insolvency Act 1986 (IA86)** in particular transactions entered into before the bankruptcy in respect of the property at 27 Bracknell Gardens.

The trustees in bankruptcy sought directions as to what use the potentially privileged documents that had been obtained from Withers (former solicitors of Mr. Lemos) could be used for and an order under **s 366** requiring Withers to deliver up any further documents relating to Mr. Lemos' affairs.

Following the decision in **Avonwick Holdings Limited v Shlosberg [2016] EWCA Civ 1138 Court of Appeal** the court recognised that this case raised fundamental questions as to the true meaning of that decision. It further recognised that the following questions remained to be determined:

- (1) Whether the Crescent Farm principle applies in bankruptcy? and
- (2) Whether the second ground for the decision in **Re Konigsberg [1989] 1 WLR 1257** is still good law?

For Mr. and Mrs. Lemos it was argued that the trustees in bankruptcy were not permitted to deploy in proceedings such as those relating to the property any documents which were subject to the bankrupt's sole or joint privilege without the consent of the bankrupt and in the case of jointly privileged documents, the consent of Ms. Lemos as well.

If that interpretation was correct, then the next question was whether or not the court had power to order Mr. Lemos to consent to the use of privileged documents in such proceedings. For the trustees in bankruptcy it was argued that if that interpretation was correct and the bankrupt could not be compelled to consent to the use of privileged documents being used in such proceedings, then this would have serious and far reaching consequences for the insolvency industry as a whole.

In evidence the trustees in bankruptcy set out various scenarios which would have serious consequences if the interpretation of **Avonwick** put forward by Mr. and Mrs. Lemos was correct:

- (1) The trustee in bankruptcy would not be able to disclose details of his investigation to creditors where it would reveal information contained within privileged documents. Creditors may question why they should continue funding the process.
- (2) When interviewing third parties the trustee in bankruptcy would not be able to refer to information contained in privileged documents which would make the interview process more difficult.
- (3) The trustee would be unable to disclose relevant privileged information to third party funders which may make the availability of such funding less likely.
- (4) When adjudicating on a creditor's claim if the trustee had seen privileged documentation which proved that the creditor's claim was wholly or partly without basis he may potentially be unable to evidence his reasons for rejecting the claim.
- (5) If a privileged document revealed the existence of an asset in the bankruptcy estate the trustee would be unable to use the document to further his investigations into the asset and its potential realisation.

Decision

HH Judge Hodge QC reviewed both the decision at first instance and the decision of the Court of Appeal in **Avonwick**. The Judge followed the decision in **Avonwick** and held that privilege held by a bankrupt does not pass to the trustee in bankruptcy. That rule applies irrespective of whether the information relates to assets or liabilities. There is no distinction between the two. The duty of the trustee to take possession of the documents under **s 311 IA86** means that the trustee is entitled to look at documents and information which is otherwise legally privileged. This does not however allow the trustee to waive the bankrupt's legal professional privilege in taking steps against third parties for the benefit of the bankrupt's estate.

That the Court of Appeal in **Avonwick** overruled the second ground of the decision in **Re Konigsberg**. The second ground being that the trustee was a successor in title to the bankrupt in respect of all the assets of the bankrupt divisible amongst his creditors including the right to property transferred by a voidable settlement and following the **Crescent Farm** case was entitled to assert the privilege of the bankrupt as successor in title.

In **Re Konigsberg** it was accepted by Counsel for the wife that the privilege being a joint privilege of the bankrupt and his wife, the trustee having stepped into the shoes of the bankrupt, the joint holder of the privilege the wife could not maintain it against the other joint holder, the trustee. That part of the decision in **Re Konigsberg** no longer applies.

HH Judge Hodge QC went further and held that the **Crescent Farm principle** has no application in bankruptcy in relation to assets as well as liability documents. On the question of whether **s 333** and **363 IA86** could be used by trustees in bankruptcy to order the bankrupt to waive his privilege in any documents, he held that following the decision in **Horton v Henry [2016] EWCA Civ 989** just as a trustee cannot compel a bankrupt to elect to draw down income under his pension scheme the court has no jurisdiction to direct a bankrupt to waive privilege in any documents.

The Judge considered the point that **Avonwick** was only concerned with the use of documents against third parties and there therefore remained the question as to what extent the trustees could use privileged documents against the bankrupt and could the trustees deploy those documents covered by Mr. Lemos' privilege in proceedings against him. Those

proceedings might be against the bankrupt for an Income Payments Order or suspension of his discharge. HH Judge Hodge QC decided that he was unable to answer that particular question and that he would instead adopt a "fudge" and that he would in effect leave undecided what is the hypothetical question of whether the use of documents that are privileged is something that would amount to a waiver of privilege which is not permissible. As such the trustees application would be dismissed and the trustees would be free to make such individual applications in respect of specific identified documents as they saw fit.

Comment

- In this particular case once again the court only considered the position of the trustee in bankruptcy and not that of a liquidator.
- A claim under **s 423 IA86** is not a recovery of property comprised in the bankrupt's estate. This is because **s 314** provides a trustee may exercise any of the powers specified in Parts I & II of Schedule 5. Paragraph (2) of Schedule 5 is a power to bring institute or defend any action or legal proceedings "*relating to property comprised in the bankrupt's estate*". **s 283** identifies assets which comprise the bankrupt's estate. The relevant Part being (b) "*any property which, by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling with the preceding paragraph*". **s 423** does not fall within "this Part" i.e, Part IX (Bankruptcy) and therefore an asset the subject of a claim under s 423 cannot be treated as part of the bankrupt's estate by virtue of **s 283 (1) (b)**.
- Whilst a trustee in bankruptcy may apply to court for permission to use specific documents where there might be no privilege, or in respect of which the iniquity exception can be properly invoked, it seems that the trustee will have to rely on obtaining evidence from other sources in order to support any claims that he may bring in respect of the bankrupt's estate.
- Para 24 of the transcript repeated above gives practical examples of the effect of the **Avonwick** decision on trustees performing their tasks in a bankruptcy.

Bankruptcy

Willmont v Schlosberg [2018] BPIR 182

Sharing of compulsorily obtained information between office-holders

Facts

This was an application by joint liquidators and trustees in bankruptcy of Webinvest and Mr. Schlosberg (a bankrupt). Mr. Schlosberg ('Mr. S') was the beneficial owner of a company called Webinvest. Another company Avonwick loaned US\$100m to Webinvest which was personally guaranteed by Mr. S. Webinvest failed to repay the loan to Avonwick. Avonwick issued proceedings against Webinvest and eventually Avonwick petitioned for and obtained a bankruptcy order against Mr. S and a winding up order against Webinvest. JW and ES were appointed Mr. S's trustees in bankruptcy and JW and MF were appointed joint liquidators of Webinvest. All the office holders were from the same firm.

The trustees and liquidators had instructed the same firm of solicitors to act for them. The joint liquidators and the joint trustees applied to court for directions concerning the use of three categories of documents and information relating to both insolvency estates. The documents and information fell into three categories:

1. The compulsion material

Material obtained from third parties using the office holders' powers under the Insolvency Act 1986

2. The disclosure material

This consisted of material disclosed by Mr. S in other proceedings

3. The privileged material

This category related to material over which Mr. S had a claim for privilege in respect of which previously the Court of Appeal had held that for the most part Mr. S's privilege had not transferred to his trustee but was retained by Mr. S.

Decision

It is not unusual for there to be one or more common office-holders of connected insolvency estates. This can give rise to increased efficiency and reduced expense. Any conflicts of interest that may arise can be dealt with by application to the court.

Compulsion material

In respect of the compulsorily obtained material it was noted that such information could only be used by the office-holder obtaining it for which the power was conferred. Further, the office-holder owed a duty of confidence to the third party from whom the material was obtained to only use the material for such purposes. The powers under which the compulsion material can be obtained are contained within **s 235, s 236 and s 366 IA86**. Their purpose is to assist with the beneficial winding up of the company or bankruptcy.

It is possible that the sharing of the compulsion material by the trustee in bankruptcy with liquidators fell within the purpose for which the power to obtain the material was granted to the trustee in bankruptcy under **s 366**, namely, the beneficial pursuit of the insolvency proceedings in which the material was obtained. The potential benefit being that the use of the compulsion material by the liquidator would lead to recoveries which would in turn lead to a surplus and a distribution to the bankruptcy estate. The court's permission would not be required in such circumstances.

A further purpose of the powers conferred on an office-holder to compel production of material was to facilitate the discovery of dishonesty or other malpractice. Such a purpose served the public interest. Whilst the office-holders could use such material for themselves in bringing proceedings for the benefit of their own estate, (see para 79 onwards) it did not follow that they could share such material with third parties without permission of the court simply because it raises issues of dishonesty or malpractice.

In the current case there were allegations that there was wrong-doing as part of a dishonest scheme and as such, the court ordered that disclosure would be justified and the trustees would be granted permission to make it.

It did not follow that all of the compulsion material could be shared with the liquidators. The trustees should consider each category of documents and in particular whether disclosure to the liquidators would serve one of the two purposes considered above, namely that it is either (a) beneficial to the bankrupt's estate or (b) that it serves a wider public interest by discovering dishonesty or malpractice.

Disclosure material

The inspection by JW as liquidator or by the liquidators' solicitors of documents disclosed in previous proceedings of which the liquidators were a party did not constitute a breach of **CPR Rule 31.22(1)**. JW could, without permission, review disclosure material and that review would not be a collateral use even if it showed that the trustees might be able to take proceedings or would better inform them of proceedings already commenced. However, further use by JW of disclosure material through the deployment of the information obtained in that way was prohibited, except where one of the exceptions in **r 31.22(1)** applied whether that use was in his capacity as liquidator or otherwise.

Privileged material

Previously the trustee in bankruptcy had applied for directions regarding the bankrupt's privilege in documents obtained from his former solicitors. In that case the Court of Appeal subsequently held in relation to such privileged material that privilege did not (save for one exception), vest in the trustee in bankruptcy and remained with the bankrupt Mr. S.

In the current application the Privileged Material Segregation Protocol put forward by the trustees for the protection of Mr. S's privilege was held to provide sufficient protection for Mr. S. It provided that:

1. Any material that might be Privileged Material would be removed from systems to which the trustees in bankruptcy or trustees in bankruptcy's solicitors might have access.
2. Any such privileged material would be provided to separate solicitors to review in consultation with Mr. S.

3. Material which following review by the separate solicitors that was either (a) not privileged or (b) not relevant to the liquidation, would be provided to the trustees in bankruptcy and their solicitors and
4. The material which the solicitors identified as privileged and relevant to the liquidation would be kept separate from other material held by the trustees and the liquidators, and in particular withheld from the from the trustees and the trustees solicitors.

The court concluded that the Privileged Material Segregation Protocol provided adequate protection for Mr. S's privilege.

Comment

- The court recognised that it was not unusual for there to be common office-holders appointed in respect of both a bankruptcy estate and liquidation simultaneously.
- When an office-holder is appointed in respect of more than one estate, information obtained compulsorily by use of statutory powers obtained in relation to one estate can only be used in respect of the other estate where it would be beneficial to the estate who obtained the information in the first place, or that there is a wider public interest to discover dishonesty and malpractice.
- Where an office-holder acts in relation to two or more estates information obtained in proceedings in respect of an estate under disclosure can be considered by the office-holder in his capacity as the administrator of another estate to the extent that it might better inform the office-holder in that capacity. Any further deployment of that material is only permitted in the exceptions in **CPR Rule 31.22(1)**.
- See recent decision of the Court of Appeal in **SFO v Eurasian Natural Resources Corp. Ltd [2018] EWCA Civ 2006** (5 September 2018) which over turns a lower court's decision on litigation privilege. In relation to internal investigations.

Bankruptcy

Ahmed v Ingram [2018] EWHC Civ 519

Transfer of shares and s 284 of the Insolvency Act 1986

Chronology

23 January 2007	Bankruptcy Petition
29 March 2007	Creditors approve IVA
06 June 2007	Transfer of shares valued at £2,216,000
15 December 2008	IVA revoked
21 April 2009	Bankruptcy Order
14 April 2010	Appointment of Joint Trustees
30 June 2010	Valuation date – start of period of loss
27 February 2015	Transfer of shares to trustees 2 nd valuation date

Facts

This is an appeal against an earlier decision in which the joint trustees in bankruptcy obtained an order under **s 284 Insolvency Act 1986** ("IA86") in respect of shares transferred by the bankrupt to family members. The share transfers took place on 06 June 2007 after the bankruptcy petition had been presented and creditors had approved an individual voluntary arrangement ("IVA"). At an earlier hearing the court had noted that the value of the shares as at 06 June 2007 being the date of transfer to family members was £2,216,000.

Subsequently the IVA was revoked because of "vote rigging" and this was followed by a bankruptcy order. On the making of the bankruptcy order the joint supervisors of the IVA were appointed trustees in bankruptcy. The first trustees in bankruptcy were eventually replaced by Messrs Ingram & Hall on 14 April 2010.

Following the issuing of the application under **s 284** by the trustees in bankruptcy, the family members transferred the shares back to the trustees in bankruptcy on 27 February 2015 just before the trial date.

Earlier decision

Proudman J held that the appropriate basis for valuation of the shares was a fair value as opposed to a market value. The difference being that a fair valuation would take into account the price of a transfer between the debtor and the rest of his family whereas a market value would be the amount someone would be prepared to pay reflecting the restrictions on transferring shares. The Judge decided that the correct basis of valuation was what an insider would have paid because that was the benefit that the Respondents had actually received. The Judge holding that the fair value of the shares at the transfer date i.e, 06 June 2007 was £2,216,000 and as such she ordered the Appellants to pay the value of the shares as at that date, less the fair value of the shares as at the date of return to the trustees on 27 February 2015.

The Appeal - issues

- (i) Whether **s 284** of the **Act** provided a freestanding right to recover the value of the shares as ordered by the Judge, namely the value of the shares as at the transfer date, less their value on their transfer back to the trustees.
- (ii) If **s 284** did not provide a freestanding remedy, then were the trustees entitled to be compensated automatically in respect of the difference in value between the value of the shares at the transfer date less the value on which they were transferred back?

OR

Were the trustees only entitled to be compensated for any diminution in the value of the shares which the trustees in bankruptcy could prove that the estate had actually suffered as a result of the breach of trust on the part of the Appellants?

- (iii) If issue (ii) is decided on the basis of "the loss" basis that the trustees in bankruptcy were obliged to prove the loss which the estate had actually suffered, had the trustees pleaded and proved such a breach of trust adequately?
- (iv) If issue (ii) is decided on "the loss" basis at what date should "the loss" be calculated?
- (v) Was the Judge correct that the shares should be valued at a "fair" as opposed to "market value"?
- (vi) Was the Judge correct to find the family members jointly liable with the First Appellant?

Decision

S 284 does not provide a freestanding right to recover compensation. It merely operates to render void relevant dispositions. The appropriate remedy for breach of **s 284** is governed by general Law.

The right to recover is restitutionary and as such the trustees had a right to the return of the shares and were entitled to claim equitable compensation in respect of a loss suffered as a result of the wrongful retention. That liability was fault based. The appellants had to make good the loss in fact suffered and caused by the breach of trust.

The earlier decision that the Appellants were fixed with liability as at the date of transfer without loss being demonstrated was wrong.

As at the transfer date (06 June 2007) the Appellant held legal title to the shares:

- (i) contingently for the bankrupt in the event a bankruptcy order was made; and
- (ii) subject thereto, for himself as absolute owner of both the legal and beneficial title.

As from the date of the bankruptcy order, the Appellant and/or the sisters held the legal title on trust for the bankrupt and on appointment for the trustee in bankruptcy.

The Appellants were effectively constructive trustees and their obligation was to immediately restore the shares to the bankruptcy estate on the appointment of the trustee. The Appellants were in breach of trust immediately following their failure to restore the shares to the trustee in bankruptcy.

The loss did not flow from the transfer date but commenced on the date on which the trustee would have actually sold the shares. The Court considered that the second joint trustees would have most likely sold the shares within 3-6 months of their appointment, i.e, within 3-6 months from 14 April 2010. The valuations that were obtained and considered by the court at the earlier hearing included a valuation at 30 June 2010. That would be the most appropriate valuation and would be the starting point in calculating the period of loss. The loss would then be calculated from that date up until the date on which the shares were transferred back to the trustees, i.e, the difference between the value at 30 June 2010 and the value at 27 February 2015.

The correct method of valuation of the shares would be a fair value as opposed to a market value.

The sisters were held to be jointly liable with the First Defendant to the extent of their respective shareholdings as they had an obligation to hand those shares back to the trustees on their appointment.

Comment

- This decision confirms that s 284 does not provide any remedy in itself. The remedy applicable to a breach of the provision is restitutionary in nature and derives from general law. As such it would be for a trustee in bankruptcy to plead the loss suffered as a result of the disposition or breach under s 284 complained of.
- The case sets out the basis of the trust which will arise in relation to any void disposition. Such trust being in the nature of a constructive trust the duties of a constructive trustee will depend upon the circumstances of the case. The nature of the trust that arises is described in para 45 of the Judgment. In considering the nature of the trust that arises in para 46 of the Judgment Gloucester LJ rejects the suggestion that the recipient of the shares became a bare trustee of the shares for the bankrupt immediately the transfer took place. In rejecting that proposition he stated:

"It was only on the making of the bankruptcy order that the First Appellant became a bare trustee of the shares for the bankrupt, and on the latter's appointment for the trustee in bankruptcy."

- Note however that at para 45 Gloucester LJ states that:

"as from the transfer date the recipient held legal title to the shares on the following trust:

(i) contingently for the bankrupt in the event the bankruptcy order was made against him; and

(ii) subject thereto, (ie in the event that no such order was made) for himself as absolute owner of both the legal and beneficial title."

- In calculating the period during which any loss was to be calculated the court took the view that it will be 3-6 months following the appointment of the trustees before a sale could be achieved. Since the events took place in this case, **s 291(A) IA86** has

come into force which provides that on the making of the bankruptcy order the Official Receiver becomes trustee in bankruptcy of the bankrupt's estate. This would mean that the date on which any transfer of the shares back to the trustee should have been made will occur simultaneously with the making of the bankruptcy order and not at a later date.

Bankruptcy

Gwinnutt v George [2018] EWHC 2169 (Ch)

Trustee's claim that barrister's outstanding non-contractual fees vest

Facts

Mr George is a barrister. On 21 March 2012 he was made bankrupt for the third time. In his preliminary information questionnaire he disclosed outstanding fees of £76,000 at the date of his bankruptcy. Whilst the outstanding fees did not include Legal Aid monies, they did include some conditional fee agreements. All of the fees were expressly carried out on a non-contractual basis. Following the making of the bankruptcy order Mr Gwinnutt was appointed trustee in bankruptcy of Mr George.

The trustee sought details of the outstanding fees from the barrister and his clerk. Approximately £38,000 of the outstanding fees were subsequently received and paid to the bankrupt. The trustee demanded repayment. In an attempt to recover the outstanding fees the trustee reported the matter to the police although the police decided to take no action. The trustee also complained to the Bar Standards Board which resulted in disciplinary proceedings. In defending the disciplinary proceedings Mr George argued that the fees were not contractually due and therefore did not vest in the trustee. The disciplinary tribunal did not agree with Mr George and eventually Mr George pleaded guilty to the charge brought before the Disciplinary Tribunal.

The trustee then issued proceedings for the recovery of the outstanding debts received by Mr George. Mr George's defence was that there was no contractual arrangement and as such he would rely on what was described as the:

"honorarium defence".

The question the Court had to decide was whether a non-contractual arrangement entered into by a barrister for work for a fee was one which vests in his trustee in bankruptcy.

Historically, Counsel's fees were paid as a gratuity and therefore could not be demanded. In **Wells v Wells [1914] P167** a wife divorcing her barrister husband sought a garnishee order in respect of his unpaid fees. In that case the Court of Appeal held that such fees were not debts and therefore would not be subject to a garnishee order.

In **Re Sandiford (No. 2) [1935] 1 CH 681** the Court held that a barrister had no right to prove for his fees in the administration of the insolvent estate of a deceased solicitor.

Historically, attempts to justify this relationship were linked to the fact that barristers could not be sued for negligence. That position changed following the decision in **Hedley Byrne & Co Ltd v Heller & Partners [1964] AC 465**. In that case Lord Reid noted that whilst Counsel could not previously be sued for professional negligence that wasn't in any way connected to their inability to sue for their fees.

A possible explanation for the unique position on recovery of their fees was that Counsel should not have any temptation to endeavour to get a particular verdict.

The position changed with the coming into force of the **Legal Services Act 1991** which provided that barristers could enter into a contract for provision of their services. From 2013 onwards the position on barristers' fees is set out in the "**Standard Contractual Terms Guide**" used by the Bar Council. This provides that instructions may be received by a barrister on three different bases:

1. On the Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons, 2012;
2. On "bespoke terms" (contractual or non-contractual) drafted by the barrister or his chambers;
3. On "bespoke terms" drafted by the instructing solicitor.

The judge observed that the current position is:

1. If terms of engagement are expressly agreed to be on a non-contractual basis then there is no legal right for the barrister to claim his fee.
2. If a contract is reached then the barrister has his usual contractual remedies including damages and/or in debt.
3. If no contract is reached and there is no express concord that the engagement is to be on non-contractually binding terms, there is no reason why restitutory remedies should not be available in the usual way, i.e. on a quantum meruit basis.

The current case is that the barrister was engaged on express terms that there should be no contract between him and the person instructing him as per sub-paragraph (1) above.

Decision

His Honour Judge Davis-White QC having identified the different types of arrangements that may be reached with barristers for their services then considered whether or not fees would constitute income within the provisions of **s 310 IA86** (Income Payments Order). The Judge first of all noted that **s 306** (Vesting of Property), **s 307** (After-acquired Property) and **s 310** are mutually exclusive.

The Judge observed that in **Re Landau [1998] Ch 223** the Court held that if property vests under **s 306** it cannot fall within **s 310**. As such the benefit of the pension policy that vested in the trustee under **s 306** did not form income under **s 310**. The Judge then went on to consider whether non-contractual fee income constituted "property" which could vest under **s 306**. If it did not constitute property then subject to the provisions being satisfied the trustee could seek to obtain some or all of the fees as after-acquired property or under an Income Payments Order.

As to whether a barrister's non-contractual fees constitute "property", the Judge concluded that any fees at the date of the commencement of the bankruptcy which arose under a non-contractual honorarium agreement do not or have not vested in the trustee in bankruptcy.

Comment

- When looking at a barrister's fees in the context of bankruptcy it is important to establish the precise nature of the relationship between the barrister and those

instructing for payment of fees. The decision in this case is limited to non-contractual fees.

- It was suggested that historical evidence of a barrister's inability to sue for his fees could be found in the very robe that a barrister wears. At the back of it there is still a flap with a little pocket where the client could place his gratuity. Unfortunately such a romantic description of the little pocket is historically inaccurate. According to Ede & Ravenscroft the bag at the back of a barrister's gown is not for legal fees but has its roots in a mourning hood.
- The Law Society ceased to accept complaints on the basis of non-payment of barristers' fees in 1998. The professional obligation on solicitors to pay barristers' fees was removed in July 2007.

Bankruptcy

SR v HR and SC (As Trustee in Bankruptcy of SR) [2018] EWHC 606 (Fam)

No power to vary property adjustment order after bankruptcy

Facts

Relevant Dates were:

- 24/05/2012 Orders made in matrimonial proceedings re property
- 07/10/2013 Order varying aspects of previous matrimonial orders
- 04/09/2017 W's Appeal against implementation
- 22/09/2017 H made bankrupt
- 04/10/2017 Judge makes new orders which gave £46,000 worth of value to W from H

The Court made orders in matrimonial proceedings for the distribution of property between spouses. A subsequent Appeal hearing resolved to replace the earlier orders with new orders with the effect that the husband gave £46,000 to W in value/assets. The trustee in bankruptcy who was appointed to H intervened in the H's Appeal against the subsequent orders to support the Appeal.

The Court considered whether or not it had powers to vary the matrimonial orders in the way that had taken place. Under **s 31** of the **Matrimonial Causes Act 1973** the only capital award that could be varied was a lump sum payable by instalments.

Apart from an order for a lump sum payable by instalments a capital award could not be varied or discharged by the Court at first instance. Further the liberty to apply provision did not entitle the Court to re-write non-variable capital awards to make different ones.

Decision

Mostyn J set aside the subsequent orders made in the matrimonial proceedings on the grounds that there was no jurisdiction to vary the original orders that had been made.

The Judge further noted that there was an additional reason why the later orders must be set aside, that being that the husband had been made subject to a bankruptcy order which meant that on the making of the bankruptcy order all of the husband's property vested in the trustee in bankruptcy.

When the Judge subsequently made an order which had the effect of ordering that £46,500 worth of property belonging to the bankrupt should be given to the wife the order was not capable of achieving that objective as the husband's assets were vested in his trustee. The result was that the position was restored to the original orders that were made prior to the husband's bankruptcy.

Comment

- Whilst the outcome in this case will not come as a surprise to practitioners the facts of the case show once again the clashes that can take place between matrimonial and bankruptcy law.
- The decision is consistent with **Mountney v Treharne [2003] 2LR 406** in which the court held that it is the date on which the order is made which is the effective disposition and not the date when a property is subsequently transferred pursuant to such an order. If the order for property adjustment/provision is made after presentation of the bankruptcy petition then it will be a void disposition unless ratified by the court.
- In the current case whilst it records the date on which the husband was made bankrupt, it does not state whether it was his own debtor's petition or whether a petition had been presented by a creditor prior to that date.
- When considering the effects of matrimonial orders and bankruptcy, the decision of the Court of Appeal in **Hill v Haines [2007] EWCA Civ 1284** is relevant. The Court looked at the value of consideration provided by the parties in relation to a matrimonial adjustment order. In cases where spouses reach agreement to compromise a claim for ancillary relief the foregoing of such a claim does constitute consideration. Such consideration is also valuable for the purposes of considering whether or not a transaction at an undervalue exists. Following the decision in **Hill v Haines**, a trustee will unlikely to be successful in challenging an order following a contested hearing. A trustee in bankruptcy seeking to challenge a matrimonial property adjustment order will need to establish that the parties have colluded or there was a vitiating factor such as fraud, mistake or misrepresentation.

Bankruptcy

Thomas and Hollander v Rathore [2018] BPIR (ChD) 501

Form of relief under Section 339 Insolvency Act 1986

Facts

Relevant dates:

- 06/07/2010 Purchase of 50% of shares in Company
- 16/07/2010 Transfer of 50% of shares SSR to W "the First Transfer" (value £72,500)
- 16/06/2013 Balance of shares gifted to wife "the Second Transfer" (value £77,250)
- 26/06/2013 Bankruptcy Order made
- 01/02/2018 Hearing - value of shares £0?

This was an application brought by the trustees in bankruptcy of Surjit Singh Rathore (SSR) for an order under **s 339** of the **Insolvency Act 1986** (IA86) in relation to the transfer of shares by the bankrupt in Global IT Networks Limited ("the Company") to his wife.

On 06 July 2010 SSR agreed to purchase 50% of the shares in the Company from a Mr. England and his wife for a total sum of £356,456. On the purchase SSR paid the sum of £120,000 with the balance payable by instalments.

On 16 July 2010 SSR then transferred 50% of the shares in the Company to his wife as a gift for no consideration.

In the meantime SSR did not pay the balance for the shares and the England's obtained a judgment against SSR for the balance of £147,707.

On 16 June 2013 SSR gave his wife the remaining 50 shares in the Company. Less than two weeks' later on 26 June 2013 SSR presented a petition for his own bankruptcy and was made bankrupt on the same day. No consideration was provided by the Respondent for the Second Transfer of the shares.

Although SSR's wife was appointed a director of the Company shortly before the second share transfer to her, she had no involvement in the management of the Company itself. She did however draw a salary of £7,500 for the two tax year's following the Second Transfer. She did not undertake any meaningful work for the Company in those years. She also received in the two ensuing tax years dividends totalling £69,500.

There was no actual dispute as to the facts and the Respondent accepted that the transfers had been made for no consideration and were therefore transactions at an undervalue for the purposes of **s 339 IA86**. In the course of proceedings a single joint expert was appointed the value the shares at the date of each transfer. The expert valued the shares at the date of the First Transfer at 16 July 2010 at £72,500 and at 16 June 2013 the value was £77,250. Total value of shares transferred £149,750.

There was no evidence before the court as to the value of the shares at the date of the bankruptcy order, or at the date of the hearing. Both parties invited the court to proceed on the basis that the shares had little or no value at the date of the hearing.

The dispute between the parties concerned the remedy that should be granted by the court to the bankrupt's estate. For the trustees it was argued that the Respondent should pay the total value of the two share transfers totalling £149,750. The trustees adopted a secondary position that the court should set aside both share transfers and that the Respondent should be ordered to repay £15,000 of salary payments, and dividends totalling £69,500 received by her.

For the Respondent it was argued that the court should simply order that the shares be transferred back to the bankruptcy estate. It was further argued for the Respondent that the trustees had not pleaded their secondary position and therefore should not be given relief in those terms. The court had some sympathy with this argument and whilst it was prepared to accept that the application was drafted in terms that were wide enough to include an order for repayment of the dividends, the salary payments were not pleaded in the application.

For the purpose of the proceedings the Respondent accepted that the bankrupt was insolvent at least on a balance sheet basis at the date of the first share transfer in July 2010. It was unclear as to whether or not the Respondent was actually aware of her husband's insolvency at that point. The question that the court had to decide was what was the appropriate remedy in all the circumstances.

S 339(2) IA86 provides that on a successful application under the Section the court

"shall.....make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction".

A non-exhaustive list of remedies is set out in **s 342** and provides that an order under **s 339** may:

"(a) require any property transferred as part of the transaction....to be vested in the trustee of the bankrupt's estate as part of that estate.....and may

(d) require any person to pay, in respect of benefits received by him from the individual, such sums to the trustee of his estate as the court may direct."

For the Respondent it was put that the shares are now worthless and therefore the shares should be simply transferred back to the bankrupt's estate. For the trustee it was said that justice would not be served by simply ordering a straight transfer back of the shares as this would be like:

"taking a full bottle and giving an empty one back"

As there was little authority on the types of orders that could be made, the court was invited to look at **s 423** and the case-law relating to orders made under that provision. However in doing so Ms Registrar Barber stated:

"the court should guard against an unthinking application of case-law under ss 423 to 425 in a s 339 context."

In considering the differences it was noted that under **s 339(2)** the court is required to simply to:

"make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction."

Under **s 423(2)**:

*"the court may.....make such order as it thinks fit for (a) restoring the position to what it would have been if the transaction had not been entered into; **AND** (b) protecting the interests of persons who are victims of the transaction."*

Further under **s 423** there are purpose requirements and as such the court may only make an order if it is satisfied the person entering the transaction did so for the purpose of:

"(a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or

(b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make."

In the case of **s 339** there is no purpose required to be demonstrated on the part of the transferor or any requirement to consider the transferee's knowledge.

The court was referred to the case of **Ahmed v Ingram [2016] EWHC 1536 (Ch)**. At the time that decision was under appeal to the Court of Appeal and a decision has subsequently been made. In **Ahmed**, the case concerned the operation of **s 284** and Proudman J held that the recipient of the shares became a trustee of the same upon receipt, and as such owed fiduciary duties, including a duty to preserve the value of the shares. The shares had fallen in value. Rather than ordering a re-transfer, the Judge ordered payment of monetary compensation representing the amount by which the shares had fallen in value over the material period. This was treated as the equivalent to restoring the trust fund.

Registrar Barber distinguished **Re Ahmed** from the present case in noting that transfers that contravene **s 284** are automatically void whereas transactions which offend **s 339** are valid until such time as they are set aside by the court. As such the trust analysis in **Re Ahmed** did not lend itself so readily to the **s 339** context. A further difference was that in **Re Ahmed** the recipient had resisted restoration of the shares whereas in the current case there was no such resistance.

In rejecting the trustees argument that the Respondent pay the sum of £149,750 being the value at the time of the two transfers of shares Registrar Barber noted that in the **4Eng Ltd v Harper [2009] EWHC 2633 (Ch)** case, a **s 423** claim, even where the recipient is found to have been knowingly complicit in the impugned transfer and its purpose, does not, of necessity, mean that the recipient should be ordered to make a payment which would have the practical effect of holding the victim of the transaction harmless against all and any adverse market fluctuations affecting the value of the transferred property since the date of the impugned transfer. This was supported by HHJ Havelock-Allan QC in **Walker v WA Personnel Ltd [2002] BPIR 621** in which they proceeded on the basis of asset losses arising simply in the normal course of business would not, without more, be laid at the door of the transferee. Whilst factors may exist which may require an order to be made in which the transferee would be required to compensate the insolvent estate for a loss in value of an asset transferred since the date of transfer, in this case the trustees had failed to establish any such factors.

Decision

Justice in this case would be served by ordering the return of the shares to the bankruptcy estate together with the dividend payments received by the transferee in respect of the

shares totalling £69,500. This would achieve a restoration of the status quo.

The court would not order that the transferee repay the salary payments claimed by the trustees.

Comment

- It was argued that the trustees' application did not plead the relief that it sought, specifically in relation to repayment of dividends and salary. This was partly because the trustees were only informed that dividends had been paid sometime after the proceedings had already been commenced. The possible payment of salary to the Respondent had not been even envisaged or included in the application notice.
- In granting relief under **s 339(2)** each case is dependent upon its facts. There is no presumption in favour of monetary compensation or in setting the transaction aside; **Re Thoars (Dec'd); Reid v Ramlort Ltd (No 2) [2004] EWCA Civ 800**.
- Since this case the Court of Appeal dealt with an appeal in the case of **Ahmed v Ingram [2018] EWHC Civ 519**. In that case where shares were transferred in breach of **s 284 IA86**, the Court determined that the starting date for calculating the period of any loss in the value of the shares transfers was the date on which the trustees in bankruptcy having been appointed would have most likely sold the shares (3-6 months after their appointment – the initial share valuation being made at that date. A further valuation of the shares would have been made on the date on which they were re-transferred back to the bankruptcy estate. The transferees were held to be liable for the difference in the value of the shares between those two dates. That was the period when the loss suffered by the bankruptcy estate commenced.

Bankruptcy

Lock v Aylesbury Vale District Council [2018] EWHC 2015 (Ch)

Council Tax bankruptcy order set aside

Facts

This was an appeal by Harriet Lock against a bankruptcy order made against her by Aylesbury Vale District Council ("the Council"). The bankruptcy petition was based on a statutory demand of £8,067 in respect of unpaid council tax. The evidence filed on behalf of the Council dealt with the liability order on which the petition debt was based but said nothing about assets available to the Appellant or the reasons why a bankruptcy order would achieve any sensible purpose.

The Appellant was a person living in social housing and had initially been dependent on benefits and more recently the support of her daughter. For the Council it was argued that the liability order had not been set aside rescinded or challenged or in any way rendered unenforceable. The statutory demand had been issued and had not been set aside.

After several hearings Morgan J gave permission to appeal on the ground that the District Judge who made the bankruptcy order had not considered the point that a bankruptcy order would serve no useful purpose and would be of no benefit to the Respondent, so that it would not be an appropriate exercise of discretion to make a bankruptcy order. In other words, the Appellant's argument was that the bankruptcy order would serve no useful purpose and would be of no benefit to the Respondent because the Appellant has absolutely no assets to satisfy any liability in her bankruptcy and no investigation by a trustee in bankruptcy or the Official Receiver would bring any assets to light.

The Appellant relied in particular on **s 266(3) Insolvency Act 1986** ("IA86"):

"266(3) [Power of dismissal or stay] The court has a general power, if it appears to it appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason, to dismiss a bankruptcy petition or to stay proceedings on such a petition: and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit."

It was further argued:

"that the Court should conduct a higher level of scrutiny into a public body petitioning creditor than other petitioning creditors"

During the course of the appeal it became apparent that the Council had completed a bankruptcy checklist before issuing the petition and that that confirmed that the Appellant was not working, was not in receipt of benefits and was not a home owner. The checklist did however state:

"...a possibility that the appellant may have received funds from an inheritance. However, it must be stressed that [the respondent had] no documents to support this and this would have to be investigated by an appointed Trustee".

The appellant argued that the "inheritance" was no more than a legacy under an estate where probate had been granted some years before and when nothing had been received or was likely to be received.

The Court considered earlier authorities which included **Shepherd v The Legal Services Commission [2003] BPIR 140**. That case was authority for the principle that a lack of assets could form a proper basis for refusing a bankruptcy order. However, to engage the discretion the debtor must establish to the court's satisfaction both that there were no assets and no prospect of such assets.

In **Re Field [1978] Ch 371** the court recognised the person might indeed be too poor to be made bankrupt, but the Judge observed that the burden of proof was heavy.

In **Re Betts [1897] 1 QB 50** Lord Esher MR stated that if a debtor merely swore an affidavit saying it was no use making him bankrupt because he had no assets and no prospects of having any, the court would not accept that as a ground for not making a bankruptcy order because, at that stage, the court was in no position to know whether the statement was true.

For the Council it was argued that the Appellant's evidence had not dealt with the question of her prospects of acquiring any assets in the future and that the burden was on the Appellant to show that she had no assets.

It was further argued that no other creditors had opposed the making of the bankruptcy order.

For the Appellant her daughter, who was her representative, countered by pointing out that no other creditors had positively supported the making of a bankruptcy order.

Decision

HHJ Hodge QC observed that:

"In bankruptcy petitions of the present kind, however, founded upon unpaid council tax, it does seem to me that there is a burden upon a public authority, petitioning for a debtor's bankruptcy, to at least raise a prima facie case that a bankruptcy order will achieve some useful purpose."

It was noted that the bankruptcy checklist said nothing about what purpose the bankruptcy might achieve in the current case.

Despite the various directions that had been given for the conduct of the hearing of the petition the Appellant had never been directed to file any evidence of current or prospective assets. Had the Appellant been made aware of the Council's thinking concerning the inheritance, she would have had an opportunity to respond to it.

The bankruptcy order was unjust and the District Judge had not considered whether any useful purpose would be served by making the bankruptcy order. Further, as indicated above, the petitioning creditor had not expressly drawn the attention of the debtor to the belief that there might be the possibility of funds from an inheritance and so there was no opportunity to respond to that point.

Everything in evidence indicated that the Appellant was not worth "powder or shot" and that a bankruptcy order would achieve no useful purpose. As such the bankruptcy order would be set aside.

Comment

- Whilst this case does highlight the possibility of a bankruptcy order being set aside where a bankruptcy would serve no useful purpose, there is a heavy burden on the debtor to demonstrate that no useful purpose would be served and that there is no prospect of any assets becoming available should a bankruptcy order be made.
- For councils petitioning on the basis of unpaid council tax the case identifies an additional burden on a public authority:

"to at least raise a prima facie case that a bankruptcy order would achieve some useful purpose".

- If a council considering petitioning for a bankruptcy order has any inclination that an apparently impecunious debtor may have the prospect of receiving some assets at some point in the future, then that assertion should be put to the debtor before a bankruptcy petition is presented to enable them to respond specifically on that point.

Bankruptcy

Chadwick v Thomas-Chambers [2018] BPIR 354

Whether trustee had entered into a binding contract to sell his interest in a property to the debtor?

Facts

There were two applications. The first by the trustee in bankruptcy for an order for possession and sale of a property in London. The property was registered in the sole name of Mr Thomas-Chambers who had been made subject to a bankruptcy order. The second application was made by the debtor seeking an order that the trustee transfer his interest in the property to the debtor in compliance with an alleged agreement reached between the parties on 08 January 2016 and that upon completion of the transfer the debtor do pay to the trustee in bankruptcy the sum of £50,000 less the costs of the application.

The court first of all considered the debtor's application. The debtor wished to remain in the property and had instructed solicitors to negotiate with the trustee with a view to purchasing the trustee's interest in the property. Initially, the trustee would not accept the valuation produced by the debtor at £775,000. Subsequently it was agreed to jointly instruct a valuer who duly reported that the value of the property as at August 2015 was £820,000.

In December 2015 the trustee's solicitors wrote to the debtor's solicitors offering to transfer the trustee's beneficial interest in the property back to the debtor for the sum of £50,000. The correspondence was marked "without prejudice save as to costs – subject to contract". The offer was made on the basis that the sum of £50,000 was to be paid by 31 March 2016, and that if it were to be accepted, the offer must be accepted by 08 January 2016. It was further stated that any different payment date would be treated as a counter-proposal.

The debtor's case was that his solicitors had accepted the offer on his behalf by letter dated 08 January 2016. That letter was also headed "subject to contract – without prejudice except as to costs". The letter stated that whether or not the letter accepting the offer created an accord between the parties, it would be prudent to draw up a formal contract.

Approximately one month later on 23 February 2016 the trustee became aware that a flat in the same building had been offered for sale at the price of £1,195,000. The trustee's solicitors sought to obtain consent from the debtor's solicitors to instruct the joint valuer to review his valuation. When that agreement was not forthcoming the trustee instructed the valuer to review it on behalf of the trustee in any event. By May 2016 the trustee had learnt from the mortgagees that the debtor's solicitors with a view to staving off possession proceedings had sent them particulars showing that the debtor's flat had been put on the market for £1,350,000. Around the same time the joint valuer, following the sale of another flat, confirmed that his valuation was now in the revised sum of £1,090,000.

Following further correspondence with the debtor's solicitors the debtor sought to argue that the acceptance of the trustee's offer of £50,000 constituted a binding agreement. Further the debtor sought to rely on a collateral agreement to the effect that by jointly instructing a valuer, the trustee had accepted by implication that the amount that would be required to be paid would be the amount determined by the valuation.

At the hearing it was conceded on behalf of the debtor that the effect of "subject to contract and without prejudice save as to costs" correspondence meant that there was no binding contract for the trustee to sell his interest in the property for £50,000. However the

debtor persisted in arguing that there was a collateral contract and that by instructing a joint valuer the trustee was bound to accept that valuation for his interest.

Decision

District Judge Lambert in considering the debtor's application first noted that it was settled law that an agreement for the sale of land expressed to be "subject to contract" is incomplete and no legally binding contract comes into existence until the exchange of formal written contracts takes place, or unless and until that condition is waived. Amongst the authorities the District Judge referred to was the case of **Boorer v Trustee in bankruptcy of Boorer [2002] BPIR 21**:

In that case, the second defendant, who was the wife of the bankrupt, applied to review a consent order entered into between her and the bankrupt's trustee in bankruptcy to settle the trustee's share in the matrimonial home. There were negotiations for the purchase of what had been the second defendant's husband's share of the property, and which now was the trustee's share, on the basis that the share was worth nothing because the property was in negative equity. There had been correspondence in which the trustee had agreed to transfer his share in the property to the second defendant, and the matter proceeded to a deed of transfer being prepared. However, the trustee then realised that there were two endowment policies on the mortgage with the result that the property was not in negative equity.

In that case Jacob J held that the preparation of the Deed to execute the contract could not have been regarded as creating a contract. He also considered the claim that the trustee had behaved unfairly in not observing the unenforceable contract in correspondence and on this point the court considered the decision in **Condon; ex parte James [1874] 9 Ch App Cas 609**. He concluded:

*"If this had been a case where the trustee had simply changed his mind, having promised to do something, and had done so for no good reason, there might have been something to be said for the application of the **James principle**...."*

In that case the argument was unsuccessful.

In reaching her decision the District Judge also considered whether or not any proprietary estoppel had arisen to prevent the trustee relying on the qualification of "subject to contract". She identified the three elements that must be present for that to be the case.

They are:

- (i) a representation made or an assurance given;
- (ii) reliance on that representation or assurance; and
- (iii) detriment suffered by the claimant in consequence of such reliance.

She concluded that as both the debtor and the trustee knew that the acceptance of the offer was "subject to contract", and that there can be no legally binding contract until a

formal written signed contracts had been exchanged, there could have been no representation by the trustee that he would sell for the sum of £50,000 in the absence of formal written contracts, on which the debtor could have relied to his detriment.

On a collateral agreement, the District Judge rejected that submission and rejected the debtor's application.

The debtor having failed in his application, the District Judge then made an order for possession and sale of the property.

Comment

- This case highlights the need for clarity when negotiating the sale of any property interest or any other asset comprised in the bankruptcy estate.
- Where it is proposed to instruct a joint valuer, it should be emphasised and highlighted in correspondence that the purpose of appointing a joint valuer is in an effort to see if agreement can be reached to purchase the trustee's interest in the property not to fix a price for that interest, and that the provision of a joint valuation shall not be taken as any agreement or settling of the price at which the trustee will sell his interest in the property.