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Personal Insolvency
Legal Update
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JULIAN DOBSON SOLICITORS

We are solicitors dealing exclusively with insolvency matters. Based in the City of Brighton & Hove, we are close to Brighton County Court, one of the busiest bankruptcy courts in the country. The firm acts mainly for insolvency practitioners throughout England and Wales.

As a firm of solicitors, we have a Licensed Insolvency Practitioner (non-appointment taking). We emphasize a practical approach in our dealings with clients, the courts and others. For all enquiries on insolvency related matters contact:

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Bankruptcy

Re Argent (a bankrupt): Tester v Long [2016] BPIR

Whether pre-action costs in respect of an unissued claim prior to bankruptcy is a provable debt?

Facts

This was an appeal by a creditor against the trustee in bankruptcy's decision to reject part of his proof of debt in the bankruptcy of Mr. Argent. The creditor's claim was initially for negligence against his former accountant – Mr. Argent. The creditor's solicitors sent a letter of claim to Mr. Argent together with a Part 36 offer of settlement. Before the time period for acceptance of the Part 36 offer had expired Mr. Argent was made subject to a bankruptcy order by HMRC.

In the subsequent bankruptcy the creditor lodged a proof for the damages that he was seeking to claim against Mr. Argent together with a claim for the pre-action costs that had been incurred by him with his solicitors.

Following the making of the bankruptcy order, the creditor was prevented from issuing his claim by reason of **s 285(3)(b)** of the **Insolvency Act 1986**. He could have sought the court's permission to issue the claim but together with his advisors decided not to do so.

The trustee in bankruptcy in considering the creditor's proof asked for further information, which involved the creditor in further expense. Having considered the claim, the trustee admitted the claim for damages but rejected the claim for pre-action costs incurred by the creditor. It was against the trustee's rejection of part of the proof that the creditor appealed.

The trustee's position in relation to the appeal was that he sought to assist the court in explaining why he reached the conclusion that he did, rather than openly opposing the creditor's application.

The question the court had to consider was whether the costs incurred in relation to a claim in respect of which no claim had been issued prior to the commencement of the insolvency fell within the definition of "bankruptcy debt" in **s 382** of the **Insolvency Act 1986**. This also involved a consideration as to whether or not it fell within the definition of a provable debt as set out in **Rule 12.3** of the **Insolvency Rules 1986** and whether or not it constituted a debt or liability within **Rule 13.12**.

Section 382 provides:

> *"(1) "Bankruptcy Debt", in relation to a bankrupt means (subject to the next sub-section) any of the following –*
>
> *(a) any debt or liability to which he is subject at the commencement of the bankruptcy*

(b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy by reason of any obligation incurred before the commencement of the bankruptcy)."

(c) n/a

(d) n/a

(2) In determining for the purposes of any provision of this Group of Parts whether any liability in tort is a bankruptcy debt, the bankrupt is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued.

(3) For the purposes of references in this Group of Parts to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in this Group of Parts to owing a debt are to be read accordingly.

(4) In this Group of Parts, except insofar as the context otherwise requires, "liability" means (subject to ss (3) above) a liability to pay money or monies worth, including any liability under any enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution."

S 382(1)(a) and **(b)** set out two mutually exclusive categories of liability.

Whilst **s 382(2)** means the bankrupt is "deemed" to have become subject to a liability in tort when the cause of action against him arose, it does not matter whether liability is established before commencement of the bankruptcy. If liability is only subsequently established after commencement of the bankruptcy, it is nevertheless a liability to which he is deemed to have already been subject to at commencement. However no liability to pay costs which might be incurred in relation to such a claim arises simply from the cause of action having accrued. Therefore, unless the bankrupt has become subject to a liability to pay such costs prior to commencement, they are not a bankruptcy debt if a liability to pay them does not come into existence until after the making of the bankruptcy order. That is, unless, under **s 382(1)(b)** an obligation to pay them had somehow otherwise been incurred. If Mr. Argent had accepted the Part 36 prior to the commencement of the bankruptcy then he would have become subject to a liability to pay the costs and the liability would have been within **s 382(1)(a)**. This however was not the case.

Whilst Mr. Argent was not under any obligation to pay pre-action costs, had the creditor sought permission to issue the claim under **s 285(3)(b)** it was more than probable that permission would have been given. The result would have been an order for payment of costs he was seeking to prove. Therefore his proof would have been accepted.

Decision

In dismissing the creditor's application appealing against the trustee's refusal to admit the pre-action costs as a provable debt in the bankruptcy Deputy District Judge Garwood made the following observations:

(a) Mr. Argent had no liability in respect of the pre-action costs as at the commencement of his bankruptcy.

(b) There was, at the commencement of it, a very strong probability that he would subsequently become subject to a liability in respect of them

(c) That probability does not result from an obligation previously incurred. Rather, the relevant obligation would come into existence only if, or as and when, a claim was issued.

(d) The issue of a claim would not have what amounted to retrospective effect by reason of it having been issued in respect of a cause of action which had accrued prior to commencement of the bankruptcy because of s.382(2) deems only the liability in damages to have arisen when the cause of action accrued.

Had the claim been issued prior to the commencement of the bankruptcy order then, notwithstanding the fact that no order had subsequently been made in those proceedings, the creditor would have been entitled to prove for any costs incurred by him.

The Deputy Registrar also observed that in such circumstances, the proof that was lodged must be for a sum of money and not a claim simply for costs the amount of which:

> *"...might be agreed, or in the absence of agreement, determined by the process of assessment."*

It is for the creditor to put in the proof of what he believes the amount should be and it is for the officeholder to determine what the likely amount would be, if arrived at by the process of assessment. It is not for the officeholder to state that he cannot come to a conclusion as to whether or not the court would order costs to be paid in such circumstances, thus forcing the creditor to have to seek permission to continue the proceedings in order to establish his entitlement to costs. This is because it is the responsibility and duty of the officeholder to adjudicate upon proofs lodged with him.

Comment

- **Rule 6.105(6)** provides that the trustee shall not be liable for the costs incurred in respect of any application challenging the trustee's decision on a proof unless the court makes an order to that effect. In the current case the court was satisfied that the trustee's costs should rank as an expense, subject to further argument being heard as to whether or not the creditor should also be liable to contribute towards the costs of the application.

- As the costs did not rank as a provable debt within the bankruptcy, it remained open to the creditor to either issue a claim with permission (or without permission after the completion of the administration of the bankruptcy) to recover the costs from the bankrupt outside the bankruptcy estate.

- This case provides useful guidance as to the approach that should be adopted by officeholders when dealing with claims for costs in relation to applications issued prior to commencement of the insolvency process. Notwithstanding the fact that the court may not yet have made any order as to costs, it is for the trustee to assess such a claim and to determine whether costs would be likely to be ordered were the litigation to be continued and if so to determine the amount of those costs. It is not open to an officeholder in such circumstances simply to throw up his/her hands and say that in the absence of an order of the court on the question of costs, they are unable to deal with such a claim.

- When submitting a proof for costs, it must contain a specific amount and not be described as "*subject to detailed assessment*" or similar.

Bankruptcy

BPE Solicitors v Gabriel [2015] UKSC 39

Trustee not personally liable for costs below in adopting an appeal

Facts

This was an application for directions brought by the trustee in bankruptcy of Mr. Gabriel. Mr. Gabriel had sued his solicitors, BPE Solicitors, for negligence. Having won at first instance, the Court of Appeal overturned the decision and set aside the costs order that had previously been made in favour of Mr. Gabriel. The Court of Appeal ordered that Mr. Gabriel pay BPE's costs up to and including the appeal. The costs amounted to some £469,170. Shortly after the Court of Appeal's judgment was given, Mr. Gabriel was made bankrupt on his own petition and a trustee in bankruptcy was appointed. The appeal vested in his trustee in bankruptcy, who then had to decide whether or not to pursue the appeal. His concern was the extent of his potential liability for costs if the appeal failed. In particular, whether or not he would be personally liable for the costs of the proceedings below.

The general rule is that a trustee is treated as party to any legal proceedings which he commences or adopts, and is personally liable for any costs which may be awarded to the other side. Against this, he has a right of indemnity from the insolvent estate. The trustee accepted that he was personally liable for the potential costs of the appeal, however he sought directions as to whether or not he would be personally at risk, by virtue of having adopted the appeal, for the costs of the proceedings below, in the event that the Court of Appeal's decision against Mr. Gabriel was affirmed.

The position on costs, (depending upon which way it went), significantly affect any outcome for creditors.

Initially the trustee's application was opposed on the grounds of lack of jurisdiction. That argument was rejected on the grounds that **s 40(5)** of the **Constitutional Reform Act 2005** gave the court power:

> *"to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment".*

Further the **Supreme Court Rules 2009 (SI 2009/1603 (L17))** provide:

> *"Orders for costs*
>
> *46.- (1) The court may make such orders as it considers just in respect of the costs of any appeal, application for permission to appeal, or other application to or proceeding before the court.*
>
> *(2) The court's powers to make orders for costs may be exercised either at the final determination of an appeal or application for permission to appeal or in the course of the proceedings."*

Such questions are not normally decided before the hearing of the substantive appeal. However it was recognised that in this case there was every reason to make a ruling on the trustee's potential liability now and not to await the outcome of the appeal. This would enable both creditors and the trustee to decide whether or not they wished to then proceed with the appeal.

A trustee in bankruptcy is, unlike a liquidator, personally party to legal proceedings which he has adopted. He will be treated as the party, if he has in fact adopted the proceedings by conducting the litigation, even if there has been no formal substitution.

The Supreme Court also considered the earlier decision in **Borneman v Wilson (1884) 28 Ch D 53** where the Court of Appeal extended the personal liability of the trustee to cover costs incurred by the other side before his adoption of the proceedings. In that case the trustee had taken part, albeit on a limited basis in the litigation, and as such was deemed to have adopted the appeal.

It was however noted that at the time when **Borneman v Wilson** was decided, an order for costs could only be made against a party to the proceedings, whereas today, an order for costs may be made against a non-party as well as the parties themselves. (**Section 51 Senior Courts Act 1981**).

In **Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965** the court noted that once a party to legal proceedings had become bankrupt and the trustee had been substituted there was no possibility of obtaining an order for costs against the bankrupt and that even if it had been possible, i.e. because no formal substitution had occurred, it would have been pointless because a liability arising from a costs order made after commencement of the bankruptcy would not have been provable against the bankruptcy estate. That was the position in relation to such costs orders up until the decision in **Re Nortel GmbH (in administration) [2014] AC 209.** In **Nortel** the court overruled the earlier authorities and held that where proceedings had begun by or against the company before it went into liquidation, a liability for a costs order made after it went into liquidation was provable as a contingent debt. This also applied to bankruptcy.

Decision

The bankrupt had been ordered to pay BPE's costs at both stages up to and including the Court of Appeal. All of this happened before Mr. Gabriel became bankrupt. His liability under the costs order was therefore a provable debt.

The mere fact that the trustee had adopted the appeal could not possibly justify the court ordering that the trustee to pay the costs which the Court of Appeal had ordered to be paid by Mr. Gabriel.

The decision in **Borneman v Wilson** was no longer good law. The trustee is entitled to adopt the appeal without adopting the proceedings below.

In the event that the trustee adopts the appeal and pursues it subsequently, he will not be held personally liable for any costs incurred by the respondent in relation to this action up to and including the Court of Appeal decision below.

Comment

- This case gives clear guidance as to the considerations that a trustee in bankruptcy should take into account when deciding whether or not to adopt an appeal in existing proceedings and the extent of his personal liability for costs.

- Note the different position in relation to an appeal against the making of a bankruptcy order i.e, an appeal in the insolvency proceedings themselves and the position in respect of any costs orders made as held in the decision in **Cooke v Dunbar Assets plc [2016] EWHC 1888 (Ch).** In that case the court did not follow the position in **Nortel** and held that the costs of an appeal in the insolvency proceedings themselves do not constitute a contingent or provable debt and that as such they should be ordered to be paid by the bankrupt personally and to the extent that they are irrecoverable from the bankrupt they would rank as an expense within the bankruptcy proceedings.

Bankruptcy

Cooke v Dunbar Assets plc [2016] EWHC 1888 (Ch)

Whether petitioning creditors costs of appeal rank as an expense in the bankruptcy estate?

Facts

Mr. Cooke unsuccessfully appealed against the making of a bankruptcy order against him. An issue arose as to whether the costs of the petitioning creditor should be treated as an expense of the bankruptcy or alternatively should Mr. Cooke be ordered to pay them outside the bankruptcy estate. Mr. Cooke preferred the treatment of the appeal costs as ranking as an expense in the bankruptcy.

There were three possible ways in which the costs of the appeal might be treated.

1. As an expense of the bankruptcy
2. As a provable debt in the bankruptcy
3. As a liability outside the bankruptcy to be paid by Mr. Cooke personally.

In considering how the appeal costs should be treated, the court noted that there was no previous authority reported or otherwise which actually addressed the issue of the costs of an appeal against a bankruptcy order.

Provision for appeals is provided within the **Insolvency Act 1986** at **s 375(2).** Further provision is made at **Rules 7.48** and **7.49(A)(1)** of the **Insolvency Rules 1986.**

Bankruptcy debt is defined in **s 382** of the **Insolvency Act 1986** which provides (inter alia)as follows:

> 302(1) "Bankruptcy debt", in relation to a bankrupt, means (subject to the next sub-section) any of the following:
>
> (a) any debt or liability to which he is subject at the commencement of the bankruptcy
>
> (b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy,...

Rule 6.224 of the **Insolvency Rules 1986** establishes the priority of expenses of the bankruptcy. They include at 6.224 (1)(h)

> "the costs of the petitioner, and of any person appearing on the petition whose costs are allowed by the court.

The **Insolvency Rules** also contain provisions dealing with costs in insolvency proceedings.

These include **Rule 7.51A** which provides:

"(1) The provisions of the CPR in the first column of the table in this Rule (including any related practice direction) apply to insolvency proceedings by virtue of the provisions of these Rules set out in the second column with any necessary modifications, except so far as inconsistent with these Rules.
[The table here provides by the first column, *inter alia*, for the application of CPR Parts 44 and 47, by virtue of Chapter 6 of Part 7 of the 1986 Rules.]

(2) Subject to paragraph (3), the provisions of the CPR (including any related practice direction) not referred to in the table apply to proceedings under the Act and Rules with any necessary modifications, except so far as inconsistent with these Rules."

Rule 12.2 also deals with Costs and expenses etc. and provides:

> "All fees, costs, charges and other expenses incurred in the course of winding up, administration or bankruptcy proceedings are to be regarded as expenses of the winding up or the administration, or as the case may be, of the bankruptcy.

Counsel for Mr. Cooke sought to rely upon **Rule 12.2** as authority for Mr. Cooke's contention that the costs of the appeal should be borne as an expense in the bankruptcy and on the decision in **Re Nortel GmbH [2014] AC 209.** In that case a financial liability under the **Pensions Act 2004** was held to be a provable debt. She reasoned that the costs of the appeal could not fall outside the bankruptcy to be ordered to be paid personally by Mr. Cooke. Further the costs of the appeal were a contingent liability which existed before the bankruptcy order was made.

On behalf of Dunbar, it was argued that the costs of the appeal were not a debt provable in the bankruptcy because the liability was incurred post-bankruptcy. Further it was Mr. Cooke who decided to initiate the unsuccessful appeal, which by definition he did after the making of the bankruptcy order.

Dunbar argued that the order that should be made is that Mr. Cooke should pay the costs of the appeal, but if not paid by him then they might be treated as a cost of the bankruptcy. In support Counsel for Dunbar relied on the decision in **Foenander v Allan (trustee in bankruptcy of Foenander) [2006] BPIR 1392**

Decision

Mr. Jeremy Cousins QC first of all held that the starting point is **Rule 7.51(A)** of the 1986 Rules. This applies the general rules about costs contained in the CPR and in particular the provision that the unsuccessful party will be ordered to pay the costs of the successful party as well as the provision that the court may make a different order. This framework applies to costs in insolvency proceedings.

Rule 12.2 of the 1986 Rules does not prevent the court from making an order that the unsuccessful party shall pay the costs of the appeal. Further there are good policy reasons why **Rule 12.2** should not render the costs of the appeal an expense of the bankruptcy. They are firstly:

i. Neither a bankrupt nor some other party should be afforded the opportunity to litigate in the bankruptcy without being at risk as to costs. The risk of an adverse costs order acts as a deterrent against the advancing of cases without merit.

ii. A person who appeals against the making of a bankruptcy order does so of their own volition and it is a distinct process initiated by the appellant. It is not something which flows from being caught up in the initial bankruptcy proceedings.

iii. The bankruptcy estate should be protected where possible from the need to fend off unmeritorious disputes which will dissipate the estate to the prejudice of creditors.

It was further held that the decision in **Nortel** does not assist the bankrupt. That case decided that where within a statutory scheme of priority a position as to ranking is established it is not open to the court to vary the order of priority. It is therefore not possible for the court to vary an item which is an expense of the bankruptcy to give it a higher or lower priority than set out in **Rule 6.224**.

In considering the arguments advanced on behalf of the bankrupt in relation to **Nortel**, the court considered whether the costs of the appeal were a contingent liability so as to give rise to a provable debt. In **Nortel** Lord Neuberger referred to earlier decisions where an order for costs was made against the person after an insolvency process had been commenced and where it was held that such a liability did not arise by reason of an obligation which had arisen before the bankruptcy proceedings. Lord Neuberger disagreed with this and said that costs made against a company in liquidation where proceedings had begun before it had gone into liquidation were provable as a contingent liability as the liability for those costs will have arisen by reason of an obligation which the company incurred when it became a party to those proceedings.

In the present case, Mr. Jeremy Cousins QC distinguished the costs of the appeal against the bankruptcy order from costs in litigation commenced prior to the insolvency process having been commenced. He stated:

> *"I consider it difficult to apply the reasoning in **Nortel** to the costs incurred in the insolvency proceedings themselves"*

He therefore held that the costs in the insolvency proceedings, i.e, the appeal, did not constitute a contingent debt or a liability for the purposes of being provable.

Following the decision in **Foenander** it was held that Mr. Cooke should pay the costs of the unsuccessful appeal in accordance with the general rules as to costs. It was further ordered that, to the extent that those costs were not paid by Mr. Cooke, then they may be treated as an expense of Mr. Cooke's bankruptcy within **Rule 6.224(1)(h)**.

Comment

- It is not uncommon for bankrupts to continue to litigate after the making of a bankruptcy order. This can often be in the form of an appeal or may take a different form such as an annulment application.

- Whilst costs ordered after an insolvency process has begun, but which relate to litigation commenced before the insolvency process was entered into, will constitute a contingent liability and therefore be provable, costs in insolvency proceedings themselves are to be regarded differently. They are not a contingent liability and are not provable, as held in this case.

- In such cases the normal rules as to costs should apply insofar as the costs of any appeal should be a personal liability of the bankrupt and will fall outside the bankruptcy estate. However the court may order that, to the extent that the liability is not met by the bankrupt, then the appeal costs may be payable as an expense of the bankruptcy.

- An order as made in this case may cause practical difficulties for trustees in determining whether or not costs are irrecoverable from the bankrupt, thereby making them an expense.

- Where the costs of the appeal do rank as an expense, this can place a substantial burden on the estate. Such costs will rank in priority to the trustee's own costs and remuneration.

Bankruptcy

Re Elichaoff (deceased) (in bankruptcy); Robert v Woodall [2016] EWHC 538 (Ch)

Whether bankrupt's claims under Matrimonial Causes Act 1973 vest in the trustee in bankruptcy?

Chronology

30 September 2008	£20,000 Payment (loan)W to H
27 November 2008- 9 December 2008	£10,000 x 4 payments H to W
9 March 2009	Bankruptcy petition presented
5 June 2009	Consent Order signed by parties
7 July 2009	Bankruptcy Order made
16 July 2009	Court approve Consent Order
28 August 2009	£10,000 x 1 payment H to W
28 September 2009	Trustee appointed
Subsequently	Bankrupt dies

Facts

This was an application on behalf of the wife (W) of the deceased bankrupt (H) to strike out the application of the trustee in bankruptcy.

A consent order entered into by the parties in matrimonial proceedings provided for periodical payments to be made by H to W of £24,000 per annum plus a similar sum to the children and finally that the H repay the W the sum of £1,412,300.

The trustee in bankruptcy issued an application claiming that:

> (i) the consent order was void under **s 284** of the **Insolvency Act 1986** (IA);
>
> (ii) that the trustee may apply for a lump sum payment or financial provision under the **Matrimonial Causes Act 1973** (MCA) on the basis that such cause of action was an asset of the estate which vested in the trustee; and
>
> (iii) 4 payments of £10,000 made by H to W in 2008 were transactions at an undervalue or preferences under **ss 339** and **340** of the **Insolvency Act 1986**.

The trustee also applied to amend his application to add in a further payment of £10,000 to W.

The wife applied to strike out the trustee's application.

Section 284 IA claim

The Registrar noted that a negotiated settlement reached between the parties in matrimonial proceedings is not a disposition until such time as the settlement has been approved by the court. Only then does the agreement become effective (see **Xydhias v Xydhias [1999] 1 FLR 683, [1999] 2 All ER 386, CA**) on being made a court order. The settlement is a disposition to which **s 284** applies if the other conditions are satisfied and it was made at a relevant time. As to the elements of the settlement, the Registrar noted that only the claims for periodical payments would constitute dispositions under **s 284 IA**. The obligation to repay the debt of £1,412,300 would also be a disposition insofar as it is an alteration of existing rights. As such the Registrar ordered that the negotiated settlement, the subject of the matrimonial order, was a void disposition.

MCA claim

The background to this unusual claim by a trustee in bankruptcy to pursue claims under the MCA against a former spouse was that W had substantial assets. The trustee asserted that the matrimonial settlement was a false compromise to protect her assets from his creditors. For the trustee it was argued that causes of action are comprised in the bankruptcy estate and will vest in the trustee in bankruptcy unless the claims are of an entirely personal nature. The Registrar having considered previous authorities held that the true construction of **ss 23, 24** and **31** of the MCA is that they create rights which can only be pursued by the spouses themselves. Further those rights do not extend beyond their joint lives. As such the provisions of **s 283 IA** cannot operate to vest the right to seek financial provision from a former spouse under those provisions in the bankruptcy estate.

Transaction at an undervalue/preference claim

The former wife claimed to be a creditor of the bankrupt. She had produced two accounts. The first was for transactions between 22 October 2003 to 27 July 2007 which was a running account of credits and debits totalling £1,452,822 debited from her account(s) by cheques made payable to her former husband. £714,900 was credited to her account by payments attributed to her husband and the outstanding balance due to her was £737,922.

She also produced a second account of loans made by her to her husband and credits in his favour. This covered the period 17 October 2007 to 9 December 2008. This totalled £484,444 debited and £50,000 credited. This left a balance due to her of £434,444.

The Registrar noted that the trustee had not adjudicated on the proofs of debt and that he had decided not to do so until he was in a position to pay a dividend thereby avoiding the costs of adjudication. Further the trustee had not recognised W as a creditor of the estate.

The trustee claimed for 4 payments made by H of £10,000 each from 27 November 2008 to 9 December 2008 which corresponded with the second running loan account produced by W. The trustee claimed the payments firstly as a transaction at an undervalue and secondly as preferences. The trustee also sought to add a further additional payment of £10,000 made on 28 August 2009.

Previously on 30 September 2008 W had transferred £20,000 to H.

Decision

On the transaction at an undervalue claim, the Registrar considered that the 5 repayments were repayments of loans, and as such could not be regarded as lacking consideration. Therefore the trustee's claim under **s 339** failed.

On the preference claim, the Registrar noted that the payments were made within the relevant period and that W was placed in a better position than she would otherwise have been in the bankruptcy and that the requisite desire to prefer is presumed between husband and wife. However, the Registrar found that it would be unjust to ignore the £20,000 loan made between the 4th and 5th payments. The analysis being that that payment reversed the previous £10,000 loan by restoring the loss of assets which resulted. Mr. Registrar Jones commenting:

> *"that restoration satisfied the rationale behind a preference."*

The trustee's application to amend to include the 5th payment was refused as the Registrar considered it would have no prospects of success.

Commenting further the Registrar noted that the £20,000 loan could not reverse any subsequent payments/preferences. However, Mr Registrar Jones noted that:

> *"...it <u>may</u> be evidence of an intention of Ms Woodall and an expectation of Mr Elichaoff that further loans will be provided in consideration for ongoing repayments from time to time. That being so, this would negate the intention of Mr Elichaoff to prefer. That possibility may be supported by the existence of a running account as described since 2003."*

The Registrar emphasised the significance in that statement of the word "may", in order to rebut the presumption that evidence would need to be heard on that point.

The Registrar concluded that the trustee has a cause of action in the context of a presumption which means that it will succeed unless it can be reversed by W. As a result there are reasonable grounds for bringing the claim and the onus is upon W to establish otherwise.

However the Registrar continued to state that this did not mean that he was content with the claim proceeding. He noted that there was nothing to suggest that the existence and effect of the running account had been properly considered by the trustee. Whilst the trustee did not wish to incur the costs of adjudicating on the proof and had not done so, the Registrar commented that the proof is plainly material to the proceedings and that the trustee's decision to choose to ignore the proof appears to be contrary to the overriding objective and to good practice. The trustee should therefore reconsider his decision.

Comment

- This case confirms that the category of claims that do not vest in a trustee in bankruptcy and the bankruptcy estate includes claims under the Matrimonial Causes Act 1973.

- Of particular interest to trustees in bankruptcy considering pursuing preference claims that are similar to the facts in this case are the comments of the Registrar on the running accounts. The Registrar raised the possibility that the intention/desire to prefer could be negated by evidence of a running account, where there was an expectation on behalf of the bankrupt that further loans would be made in consideration for ongoing payments.

- In this particular case whilst the Registrar allowed the trustee's claim because it was further supported by the presumption that applies between husband and wife, the Registrar was not "content" with the claim proceeding.

- Whilst there are clear and understandable reasons for not adjudicating on proofs until there are sufficient assets to declare a dividend, there will be circumstances where an officeholder may be criticised for not dealing with proofs earlier.

- See also the decision in the case of **Re Argent (a bankrupt): Tester v Long [2016] BPIR** on responsibility of officeholders to adjudicate proofs.

Bankruptcy

Grant v Baker [2016] EWHC 1782 (Ch)

Exceptional circumstances – indefinite suspension of possession order?

Facts

This was an appeal by the joint trustees in bankruptcy of Mr. Baker from an order for possession and sale made in the County Court at Chelmsford. The bankrupt and his wife lived in the property known as 132 Thaxted Road Saffron Walden, Essex ("the Property"). The Property was jointly owned between Mr. and Mrs. Baker.

The trustees made an application for an order for possession and sale in which it had been ordered that the bankrupt's beneficial interest amounted to one half of the Property. Whilst the order contained provisions for possession and sale, paragraph 8 provided that the sale was postponed

> *"until such time as Samantha Banker no longer resides at the Property".*

Samantha was the oldest of the Baker's three children. She had a condition known as global development delay. She also suffered from dyspraxia and obsessive compulsive disorder ("OCD"). She had a mental age of an 8 or 9 year old child and was incapable of living on her own. There was no prospect of her condition ever improving and she required a lot of supervision. There was no evidence that her life expectancy would be lower than normal. Samantha had always been cared for at home and the Bakers had, in 2007, moved from a three bedroomed flat to the Property which was a bungalow with four bedrooms. The absence of stairs was suited to Samantha's needs, as was the bigger bedroom.

The effect of the order was that the sale could be postponed for many years, even decades and it was against this paragraph of the order that the trustees appealed. The bankrupt's interest in the Property was the only asset in the estate and the only creditor was HMRC. The trustees appealed on the grounds that that the order did not contain any form of long-stop and that any postponement of the order should be no more than twelve months. Mr. Baker, who was a self-employed taxi driver, had no other creditors. His debt to HMRC had come about because his accountant had failed to take into account private use of the taxi for which he subsequently received a bill of £25,000 from HMRC.

The value of the Property was approximately £350,000 with an outstanding mortgage of £278,000. After taking into account costs of sale of 3%, this left equity in the region of £61,500. This valued the trustees' share at approximately £30,000.

Whilst there was some discussion of the Property having been adapted, it was common ground that there was no evidence of any actual adaptations of a structural nature having been made to the Property.

The Law

S 335(A) of the **1986 Act** was inserted into the bankruptcy legislation by **s 25(1)** of the **Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA 1996")** that provides as follows:

> *"(1) Any application by a trustee of a bankrupt's estate under **s 14** of **[TOLATA 1996]** (powers of court in relation to trusts of land) for an order under that section for the sale of land shall be made to the court having jurisdiction in relation to the bankruptcy.*
>
> *(2) On such an application the court shall make such order as it thinks just and reasonable having regard to –*
>
> *(a) the interests 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 ... -*
>
> *(i) the conduct of the spouse ..., so far as contributing to the bankruptcy,*
>
> *(ii) the needs and financial resources of the spouse ..., 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."*

S 14(1) of **TOLATA 1996** states that:

> *"Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section."*

S 15 then sets out the matters to which the court is to have regard in determining an application for an order under **s 14**, but by virtue of **ss (4)**, **s 15** "does not apply to an application if **s 335A** of the **Insolvency Act 1986** ... applies to it". In the present case, the application by the Trustees was made after expiry of the one year period mentioned in **s 335A(3)**. Accordingly, in exercising its powers under **s 14** of **TOLATA 1996** the court:

> *(a) must have regard to the matters specified in **s 335A(2)**; but*
>
> *(b) is directed to assume, "unless the circumstances of the case are*

exceptional, that the interests of the bankrupt's creditors outweigh all other considerations".

Any successful defence to an application for sale brought after the one-year period will depend upon establishing that the circumstances of the case are exceptional. If it is found that exceptional circumstances exist then the court:

> *"must make such order as it thinks just and reasonable having regard to all the matters specified in sub-section (2)".*

This still requires the interests of the bankrupt's creditors to be taken into account but the appropriate weight to attach to them will be in the discretion of the court.

What constitutes exceptional circumstances was summarised in **Dean v Stout [2005] BPIR 1113:**

1. The presence of exceptional circumstances is a necessary condition to displace the presumption that the interests of creditors outweigh all other considerations, but the presence of exceptional circumstances does not debar the court from making an order for sale.

2. Exceptional circumstances typically relates to the personal circumstances of one of the joint owners, such as a medical or mental condition.

3. Exceptional circumstances are not to be categorised and the court will look at all of the circumstances.

4. The circumstances must be exceptional or special circumstances which are outside the usual "melancholy consequences of debt and improvidence".

5. The fact that the wife and children will not be able to buy a comparable home in the same neighbourhood cannot be described as exceptional.

6. In weighing the interest of creditors, the creditors have an interest in the order for sale being made even if the whole of the net proceeds go towards the expenses of the bankruptcy.

The court considered the position in **Claughton v Charalambous [1998]BPIR 558** in which exceptional circumstances justified the postponement of any order for sale until the bankrupt's spouse either died or vacated the property. In that case it was the bankrupt's wife who had a 50% share in the property and suffered from very poor health, chronic renal failure and chronic osteoarthritis. She was 60 and had a reduced life expectancy.

In **Re Bremner [1999] BPIR 185**, the court also ordered an indefinite suspension of an order for sale where exceptional circumstances were held to exist. This was because the bankrupt aged 79 had inoperable cancer and a life expectancy of no more than six months. His wife aged 74 was his only carer. She had no interest in the property. In that case the court held that the needs of Mrs. Bremner (not Mr. Bremner whose needs were to be disregarded), should be recognised by deferring a sale until three months after her husband's death.

In **Everitt v Budhram [2009] EWHC 1219 (Ch)**, considered the definition of "*needs of any children*" in **s 335A(2)(b)(iii)** and held they are not confined to the needs of children whilst under the age of 18.

The trustees evidence included material indicating the costs of an alternative but cheaper property that could be purchased in the area as well as the cost of renting a three bedroomed bungalow. Consideration was also given to whether the local authority would assist in housing the family. This established that whilst the local authority would ensure that Samantha had a place to live, they could not provide accommodation for the parents, Mr. and Mrs. Baker.

Decision

Mr. Justice Henderson agreed with the Judge at first instance in finding that there were exceptional circumstances present.

On the question of whether or not the order should be postponed indefinitely the Judge found that insufficient regard had been given to the statutory scheme of bankruptcy legislation, namely that the interest would vest in the trustee and that the trustee should then realise the Property and distribute the proceeds amongst creditors. This is the purpose notwithstanding that the costs and expenses of the bankruptcy may swallow up all of the realisations. An indefinite suspension for what could be decades was incompatible with the underlying purpose of the bankruptcy code.

In all save the most truly exceptional circumstances, the purpose must require realisation within a period of months rather than years.

There was no evidence that Samantha's condition was likely to improve and therefore her interests did not require postponement for longer than it would take to find suitable alternative rented accommodation.

The longest further postponement that could be reasonable to impose was one of twelve months. The appeal was therefore allowed.

Comment

- Whilst there will always be circumstances where the terms of the order made where exceptional circumstances are found will potentially provide for an indefinite period i.e, until death as in **Claughton v Charalambous**, in most cases any suspension of implementation of the order for possession and sale where exceptional circumstances are found will be unlikely to exceed twelve months.

- Although it was unlikely that it would have any effect on the outcome on appeal, the trustee had usefully provided evidence as to the cost of purchasing an alternative property or renting alternative accommodation. This assisted the court in exploring all the options available in this case.

Bankruptcy

Ingram v Ahmed [2016] EWHC 1536 (Ch)

Transfer of shares and S 284 of the Insolvency Act 1986

Chronology

23 January 2007	Bankruptcy Petition
29 March 2007	Creditors approve IVA
5/6 June 2007	Transfer of shares
21 April 2009	Bankruptcy Order
	Appointment of Joint Trustees

Facts

This was an application by the joint trustees in bankruptcy for an order under **s 284** of the **Insolvency Act 1986** in respect of shares transferred by the bankrupt in various companies. The trustees having issued an application under **s 284** were faced with a cross-application for validation of the transfers on the grounds that they were made before the commencement of the bankruptcy, in good faith and without notice of the petition. The debtor had entered into an individual voluntary arrangement ("IVA") which was subsequently revoked. The arrangement was approved by creditors but was revoked, because family and associates had voted for claimed debts of nearly £7m when the actual amount was less than half that sum.

It was not until the eve of the trial that the respondent offered to restore the shares to the bankruptcy estate. At that stage the respondent claimed that the shares were now worthless. Notwithstanding that, the respondent offered the sum of £120,000 to purchase the shares.

The question before the court was whether the trustees were entitled to relief in the form of the value of the shares as at the date of the transfer or at some other date.

At an earlier hearing Mrs Registrar Derrett ordered that dates be agreed for the purposes of the valuation of the shares between the parties. For the respondent it was argued that the joint trustees were not entitled to any payments in respect of the shares as they had suffered no loss. That argument was rejected by the court.

S 284 of the **Insolvency Act 1986** provides that:

> *"Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court."*

S 284 does not actually specify what remedy is available to a trustee in bankruptcy.

The court first of all considered when the respondent became a trustee for the shares following their transfer in breach of **s 284**.

On this point the court noted that **s 284** renders the transfer void, however the transfer of title is not a nullity but operates so as to pass the legal estate, making the transferee a trustee. In this case the second respondent became a trustee of the shares immediately on their transfer and the trust commenced on the date of the transfer and not at the date of the bankruptcy order or any later date.

The Judge had particular concerns over the respondent's evidence. Seeking to list the matter he told the court that he was travelling to the Middle East on a business trip when in fact he was in Barcelona to see his son. Further there had been a deliberate attempt to rig votes at the IVA meeting in order that the family should retain the shares, and it was frankly incredible that any of the respondents were unaware of the bankruptcy petition. Further, the respondents did not act in good faith as required by **s 284(4)**.

Valuation

Mrs Justice Proudman then went on to consider the valuation evidence in relation to the shares. It was common ground that an earnings-based valuation should be used, and the valuation evidence ranged between £2.216m based on "fair valuation" and £567,000 based on a "market valuation". 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. In this instance the Judge decided that the correct basis valuation was what an insider would have paid as that was the benefit that the second respondent had actually received. Both experts were aware of the provisions of the Articles of Association of the companies concerning the director's discretion to register shareholders and had taken these provisions into account when valuing the shareholdings.

Decision

Mrs. Justice Proudman held that the appropriate basis of valuation was a fair value rather than a market value and further that the audited accounts must be taken as providing a true assessment of the assets and liabilities (despite the arguments to the contrary).

On that basis it was held that the shares were valued at £2.216m on 5/6 June 2009 and against this, credit would have to be given for their value as at the date that the shares were returned to the trustees on 27 February 2015. That being the case the shares would need to be subject to further valuation as at the date they were returned to the trustee, in order to establish the loss.

Comment

- The respondents sought to rely on the exception to **s 284** namely that the transfers were received before commencement of the bankruptcy in good faith, for value and without notice of the bankruptcy petition. The respondents failed to demonstrate that any of the elements of that defence were satisfied in this case.

- The period to which **s 284** applies is the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting of the bankrupt's estate in his trustee. That is the date on which the trustee is appointed and not the date of the bankruptcy order. Until vesting the estate remains vested in the bankrupt.

- The court was unwilling to depart from the figures stated in the company's audited accounts as lodged at Companies House concerning the value of its assets.

Bankruptcy

Keely v Bell [2016] BPIR 653

Suspension of discharge for non-cooperating bankrupt

Facts

This was an appeal by a bankrupt against an earlier order suspending his discharge for a period of twelve months. Mr. Keely ("Mr. K") had been in dispute with executors of a Will Trust. As a result of unpaid costs orders he owed the Will Trust £128,350. The executors petitioned for Mr. K's bankruptcy and he was adjudged bankrupt on 4 July 2014. The trustee in bankruptcy was appointed on 25 September 2014.

The bankrupt completed the Official Receiver's preliminary questionnaire booklet and provided certain documents and information concerning his affairs. He also signed an authority to obtain copies of statements for his bank account. Following his appointment the trustee in bankruptcy sent a questionnaire to Mr. K who completed it stating that he was employed and giving a variable income from self-employment of £1,450 per calendar month against this he had outgoings of £2,400 per month including £100 for telephone charges. He disclosed legal matters relating to the deceased estate with which he was in dispute.

Although the bankruptcy did not appear complex, it was not an easy one for the trustee to administer. In replies Mr. K claimed that he had expended £100 on the telephone but did not have use of a landline as the telephone was for the exclusive use of his lodger. Mr. K said he did not have a mobile telephone, but when he made calls from a mobile telephone the phone would be borrowed from a friend. Mr. K could and did send faxes, but these were from a facility that did not belong to him, and he could not receive faxes in reply. Mr. K would email the trustee but he did not himself have an email address, the broadband connection being for the exclusive use of his lodger. Mr. K lived at the property but was unable to receive post there and had to use the address of a friend as a correspondence address. Unfortunately he could not receive post when his friend was away. Mr. K's records were not kept at the property but were stored off-site in a facility under the control of a third party which was unlocked and shared with others who had open access to it, and who moved the stored records about. Mr. K was unable to say at any time what was "in his possession".

Whilst stating he was not in regular full-time employment, he was only available to attend bankruptcy matters on a Friday afternoon (and had requested all court hearings to be fixed for Friday afternoon). He requested that all meetings be held on at least 6-8 weeks' advance notice. Mr. Justice Norris commented:

> *"...if a bankrupt had set about being deliberately obstructive it is difficult to see what greater obstacles he could have placed in the way of his trustee than those that apparently arose out of Mr. Keely's circumstances".*

Under **s 279** of the **Insolvency Act 1986** Mr. K was due to receive his discharge from bankruptcy on 4 July 2015. On 30 June 2015 the trustee applied under **s 279(3)** of the

Insolvency Act 1986 for an order that his discharge be suspended. The hearing was listed for 14 July 2015.

Mr. K took issue with the trustee's application stating that it was out of time. It was accepted that the trustee had not served his evidence on Mr. K at least 21days before the hearing as required by **Rule 6.215** of the **Insolvency Rules 1986**.

In the first instance the District Judge set out the legal basis for the trustee's application as follows:

> a) The power to make an order suspending the automatic discharge could be exercised only if it was sufficiently proved that the bankrupt had failed or was failing to comply with his or her statutory obligations;
>
> b) Given the broad scope and onerous nature of those statutory obligations a bankrupt will not "fail to comply" if he or she has done all that could reasonably be done to fulfil those obligations;
>
> c) A bankrupt who has not done all that could reasonably be done may by order under s. 279(3) be made, in the public interest, to suffer the continued disabilities of being an undischarged bankrupt;
>
> d) The making of such an order may provide an incentive to full compliance with the statutory duties, but that is not necessarily its primary purpose:
>
> e) Whilst an application might be made at any time during the bankruptcy, trustees who leave it to the last minute to apply run the risk that the judicial discretion will be exercised against the grant of relief;
>
> f) Even after discharge a bankrupt remains under an obligation to provide information to his trustee, but the criminal sanctions for breach of that obligation no longer apply (so that there is a risk that compliance may thereafter be more difficult to secure).

As to Mr. K's alleged breaches the District Judge held that he had:

(a) failed to give notice of an increase in income;

(b) failed to disclose records relating to a bank account with Allied Irish Bank;

(c) conducted litigation against the estate without consulting the trustee;

(d) failed to deliver up other records;

(e) failed to comply with reasonable requests to afford access to the property;

(f) failed to correspond in good time with the trustee and had imposed unreasonable terms for correspondence.

The District Judge postponed discharge for one year, taking the view that he could not make the discharge dependent upon satisfaction of conditions because, in the absence of information, the appropriate conditions could not be specified.

Decision

Mr. Justice Norris considered the alleged breaches and found that:

(1) Mr. K had told the Official Receiver that he was unemployed but that he accepted that he earned money.

(2) He provided details of his expenses but not of his income.

(3) Mr. K failed to deliver details of an open bank account with Allied Irish Bank containing £10.23.

(4) Mr. K continued to litigate with the estate without consulting with the trustee

(5) Mr. K failed to deliver up records referring to computer issues and telling the trustee to obtain information from the Official Receiver.

Mr. Justice Norris held that the District Judge was entitled to find that Mr. K was in breach of his statutory obligations, having failed to do all that could reasonably be done to discharge his duties.

He commented that a clear message must go to those who are made bankrupt that it is not sufficient to say:

> *"My computer is broken. I have lost some of my records. Others of my records are in store and I'm not sure where they are because other people can move them".*

He also concluded that Mr. K had failed to allow proper access to his property to the trustee's valuer, denying access to a locked area. In upholding the District Judge's order for a general period of suspension discharge, he commented that a conditional order is appropriate where there are one or two specific shortcomings. However, where the proven breaches of statutory obligation are more in the nature of examples of thoroughgoing non-cooperation, as in this case, then a suspension for a period is appropriate.

The lateness of the trustee's application to suspend the discharge would not in this instance affect the outcome.

Comment

- This case provides confirmation that the court will uphold a trustee's application to suspend a bankrupt's discharge where the character of the bankrupt's engagement with his trustee is one of general non-cooperation and obstruction, whilst seemingly appearing to comply with specific requests.

- It is however important that for trustees to remember that an application to suspend a bankrupt's discharge must be made in a timely fashion and, at the very least, in sufficient time to allow the evidence to be served at least 21 days before the hearing on the bankrupt as required by **Rule 6.215**.

- The Judge refused the trustee's application for a civil restraint order against the bankrupt.

Bankruptcy

Lockston Group Inc v Wood [2016] BPIR 94

Deceased's insolvent estate – date when debts to be quantified

Chronology

23 March 2013	Date of death
29 April 2013	Receivers appointed
10 April 2014	General Administrators of Estate appointed
22 October 2014	Letters of Administration
30 October 2014	Petition for Insolvency Administration Order presented
6 November 2014	First hearing of petition
26 January 2015	Insolvency Administration Order in respect of estate made
26 January 2015	First meeting of creditors – appointment of trustees

Facts

This case involved Boris Berezovsky who was found dead at his home in Berkshire on 23 March 2013. He died insolvent with an estimated shortfall of £40m+.

Following the issue of a petition for an Insolvency Administration Order ("IAO"), the court made directions for a meeting of all persons to consider the appropriate persons to be appointed as trustees. Eventually a meeting of creditors was held on the same date as the IAO was made. This appointed the two trustees who were already receivers of the estate as trustees under the IAO. The voting for their appointment was close with £128,986,545 voting in favour of the receivers and £116,364,421 for alternative trustees.

Following the appointment of the trustees, Lockston, a creditor, seeking the appointment of alternative trustees, applied to court challenging the appointment. They argued that the chairman of the meeting had not correctly applied the relevant statutory provisions when admitting claims to prove the purposes of voting. The chairman had converted foreign currency debts into sterling as at the date of death and had also allowed claims for interest to be proved down to that date but not beyond it. Lockston submitted that the correct date for both purposes was the date on which the IAO was made. Had the proofs been calculated as at that date, this would have resulted in their nominees having been appointed as trustees.

The court first of all looked at the legal framework under which insolvent estates of deceased persons may be administered. The three optionsidentified were:

(1) If a bankruptcy order has been made or a creditor's bankruptcy petition has been presented before the date of death the proceedings continue, unless the court

otherwise orders, as if the debtor were alive with the small number of modifications to the **Insolvency Act 1986**, as specified in **Schedule 2** of the **Administration of Insolvent Estates of Deceased Persons Order 1986 (the 1986 Order).**

(2) Where death takes place before the presentation of a bankruptcy petition, the estate may be administered in bankruptcy on the making of an Insolvency Administration Order (IAO). In such a case, a large number of provisions relating to bankruptcy in the Act apply, but with significant modifications, as set out in the **1986 Order.**

(3) The estate may be administered otherwise than in bankruptcy, in which case, subject to very limited exceptions, Art 4(1) of the 1986 Order provides that the same provisions under the law of bankruptcy in respect to the assets of individuals adjudged bankrupt shall apply to the administration of the estate.

Where the administration in bankruptcy commenced by the making of an IAO, then the 1986 Order sets out a number of modifications to the bankruptcy provisions, contained in the **Insolvency Act 1986.** Whilst it makes no amendments to the Insolvency Rules, it provides that they:

> "*shall apply accordingly*".

The modifications include the substitution of key terms:

> *"'The date of the Insolvency Administration Order' is substituted for 'the commencement of the bankruptcy' and*
>
> *'an insolvency administration order' is substituted for 'a bankruptcy order'."*

Other key changes substitute the date of death in place of the commencement of the bankruptcy and provide that the estate comprises all the deceased's assets at the date of death (**s.283 modified**). The definition of 'bankruptcy debt' in **s.382** is modified to refer to the date of death in place of the commencement of the bankruptcy. However, other provisions provide to the contrary, and **s.288**, as modified, enables the Official Receiver to require a statement of affairs to be prepared as at the date of the IAO and not the date of death. Other changes include **s.328(**4) which has the effect that "any surplus is applied in paying interest on proved debts for the periods during which they have been outstanding since the date of death". Other modifications include change to the relevant time for the purposes of **s.341** of the Act for a transaction at an undervalue and preferences with the period ending with the date of death rather than the presentation of the petition.

Decision

David Richards J found against Lockston finding that the arguments presented by them were inconsistent with a fundamental feature of insolvency law that there is to be a single date for the ascertainment of liabilities. Whilst the provisions of the **Insolvency Act 1986**, as modified, contain references to the date of the IAO, such as for the purpose of providing a statement of affairs, the modifications all pointed towards the date of death as being the date on which proofs should be calculated, and that interest should be provable up until that date only.

It therefore followed that, for the purpose of calculating proofs as at that date, foreign currency would be quantified at the date of death at the then prevailing exchange rates.

The appointment of the trustees at the meeting of creditors was held to be valid.

Comment

- The number of Insolvency Administration Orders made each year is very small. When dealing with a petition or order, this case provides a useful analysis of the key modifications made to the **Insolvency Act** by the **Administration of Insolvent Estates of Deceased Persons Order 1986.**

- In this case the petition sought an order that the nominees who had already been appointed personal representatives of the estate should be appointed as trustees. There is no provision in either the **Insolvency Act 1986** or the **Administration of Insolvent Estates of Deceased Persons Order 1986** to enable the court to appoint trustees in such circumstances. In this particular case, creditors opposed such an appointment in any event, and the appointment of the trustees was dealt with by a meeting of creditors.

Bankruptcy

Pretty v Crosbie [2016] BPIR (ChD) 460

Common intention constructive trust – whether bankrupt held a 50% beneficial interest?

Chronology

16 July 1993	First bankruptcy
10 May 2002	Second bankruptcy
22 January 2003	Assignment of beneficial interest
24 April 2004	Final charging order over beneficial interest of Mr. C
24 May 2005	Mr. and Mrs C execute legal charge over Property
July 2009	Interim charging order over beneficial interest of Mr. C
8 December 2009	Mrs. C's Statutory Declaration
27 September 2010	Third Bankruptcy Order

Facts

This was the third bankruptcy for Mr. Crosbie. His current trustees applied to court for a declaration as to the extent of the bankrupt's beneficial interest in the property known as Boxley Oast Street Farm ("the Property"). The bankrupt described himself as a property developer. Mr. and Mrs. Crosbie ("Mr. and Mrs. C") had been married since 1986. Prior to their marriage Mrs. Crosbie owned her own property in respect of which she paid all the outgoings. She sold that property and used the proceeds towards the purchase of land in Boxley in the joint names of herself and the bankrupt. Together they developed the land and built two houses, one of which was sold, the other being the Property the subject of the application.

Mr. C was also involved in the development of Ridge Golf Club Limited however following its liquidation he was adjudicated bankrupt under personal guarantees he had given in respect of the company's liabilities.

Following the first bankruptcy order having been made Mr. C put forward a proposal for an IVA which was approved and the first bankruptcy order was annulled. The proposal included his 50% interest in the Property.

In February 2002 his supervisor wrote to Mr. C explaining that charges over the Property were for his own business interests and as such the Property was in negative equity and that Mrs. C could purchase it for £250. That arrangement was accepted by letter from Mrs. C. Following this the IVA failed and the supervisor presented a petition for Mr. C's bankruptcy in respect of which a bankruptcy order was made on 10 May 2002.

Following the second bankruptcy order being made, solicitors instructed by Mrs. C wrote to the trustee referring to the agreement to dispose of the bankrupt's former interest in the Property for £250 and requesting that the formalities be completed. The assignment was completed on 22 January 2003, but the TR1 that was prepared was never registered at HM Land Registry. Subsequently creditors obtained charging orders over Mr. C's beneficial interest in the Property although Mrs. C did not challenge the charging order applications. Later both Mr. and Mrs. C executed a legal charge over the Property.

In December 2009 Mrs. C signed a statutory declaration declaring that she owned the entire Property and its contents. She later described the statutory declaration as being '*like gold-dust*' and that it was intended to '*prevent bailiffs distraining*'.

Mr. and Mrs. C were also involved in Ashford Town Football Club Limited. Following its administration the administrators sought to sell the assets and Mr. C applied for an injunction to prevent the sale. As he was required to give a cross-undertaking and to demonstrate that he was of '*suitable financial standing*', he filed a witness statement in which he stated that he owned half of the Property.

The question the court had to consider was whether a common intention constructive trust to hold the Property beneficially for both Mr. and Mrs. C arose after Mrs. C purchased Mr. C's beneficial interest from his trustee in bankruptcy and prior to the third bankruptcy order being made. Mr. Registrar Briggs considered the authorities and in particular the principles on common intention constructive trusts as set out in **Jones v Kernott [2011] UKSC 53.**

The principles that can be deduced from that decision being as follows:

1. The starting point is that equity follows the law. Where parties hold property in joint names with no declaration of trust there is a presumption that they are beneficial joint tenants;

2. There is no place at all for the presumption of a resulting trust based on unequal contributions in joint names cases involving unmarried cohabitants. The only applicable presumption is that equity follows the law;

3. The presumption of a beneficial joint tenancy can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

4. The task of the court is to ascertain the parties' actual shared intention, whether expressed or by inference from their conduct;

5. Where the court is unable to ascertain the parties shared intention because there was no discussion or express agreement and because the court cannot make an inference from the conduct, the court may impute an intention event if the parties never had such an intention; and

6. Each case turns on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended or fair; **Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432, [2007] BPIR 913 HL para 69.**

Turning to the evidence Mrs. C called a witness who was a legal executive who dealt with the injunction proceedings. During the course of evidence a transcript from the original injunction proceedings was referred to and in those proceedings it was stated on behalf of Mr. C that whilst the Property had been beneficially owned 100% by Mrs. C they were considering getting divorced and that as part of those considerations Mrs. C agreed to transfer 50% of the beneficial interest in the Property to him. Mrs. C's explanation as to why she did not oppose the charging orders that were secured over Mr. C's interest in the Property was unconvincing.

Decision

Mr. Registrar Briggs accepted Mrs. C's evidence that there was no discussion between them about who would own the Property particularly as the assignment of the beneficial interest to Mrs. C secured the Property.

On the assignment itself, the Registrar inferred that it was Mr. C who had paid the £250 for the assignment and not Mrs. C.

Further, notwithstanding Mrs. C purportedly instructing solicitors to complete the formalities, the TR1 was never registered at HM Land Registry.

After 2002 Mr. C treated the equity in the Property as if it were his and Mrs. C's together, further they both consented to the charge that was registered against the Property in 2005 and despite knowing of the charging order application Mrs. C chose not to warn off the charging order.

Mrs. C's conduct was consistent with joint beneficial ownership and that taken together with statements made by Mr. C in the injunction proceedings, supported the existence of a constructive trust.

They were in every sense a family unit working together and as such they had a common intention to hold the Property on trust for themselves beneficially.

The Registrar went further in stating that in the event that that was wrong, he held that Mrs. C had made a gift of the 50% beneficial interest in the Property during the injunction proceedings in 2010 and prior to the making of the bankruptcy order.

As to the quantification of their respective shares, and having regard to the whole course of dealing between them, he further concluded that the Property was held in equal shares.

The joint trustees were therefore entitled to a declaration that 50% of the Property was comprised in the estate in bankruptcy, and as there were no exceptional circumstances, an order for possession and sale would be made.

Comment

- Although the outcome of this case was dependent upon the very particular facts of the case, it provides a useful examination of the factors that will be relevant in seeking to establish a common intention constructive trust.

Bankruptcy

Sands v Singh [2016] EWHC 636 (Ch)

Trustees challenge to charges and consent order in matrimonial proceedings

Chronology

20 October 2006	Purchase of Priors Croft with mortgage Northern Rock
16 February 2008	Mr. Singh and Mrs. Kaur move into Priors Croft
End 2009	Mrs. Kaur consults family law solicitors
20 January 2010	January Charge in favour of father £506,000
15 April 2010	April Charge to Mr. Singh's sister £70,000
28 July 2010	Deeley issued proceedings
4 August 2010	Mrs. Kaur leaves Priors Croft
17 September 2010	Divorce petition issued
23 December 2010	Decree Nisi
31 January 2011	Consent Order - Matrimonial proceedings
31 January 2011	Freezing Order obtained by G W Deeley Limited
19 February 2011	Decree Absolute
28 September 2011	Mr. Singh made bankrupt

Facts

Following Mr. Singh's bankruptcy, his trustee in bankruptcy sought to challenge transactions entered into by the bankrupt with his family members. This involved a property known as 'Priors Croft' which Mr. Singh had bought on 20 October 2006 for £976,000 with a mortgage from Northern Rock plc for £700,000.

On 16 February 2008 Mr. Singh married Mrs. Kaur following which they both moved in to Priors Croft. Mr. Singh commissioned extensive building works to be carried out by G W Deeley Limited ("Deeley"). Following an initial payment of £200,000 the balance of Deeley's invoice remained outstanding at £913,719 plus VAT.

In 2009/2010 Mrs. Kaur consults Family Law Solicitors. They were requested to register her rights under the **Family Law Act 1986** over Priors Croft.

On 20 January 2010 Mr. Singh agreed to charge Priors Croft in favour of his father in respect of an alleged loan of £506,000. On 15 April 2010 Mr. Singh agreed to grant a charge over Priors Croft in favour of his sister for £70,000.

On 28 July 2010 Deeley issued proceedings against Mr. Singh. On 4 August 2010 Mrs. Kaur left the matrimonial home and she consulted Family Law Associates to file a divorce petition.

They put forward a proposal that Prior's Croft be transferred to Mrs. Kaur, subject to the mortgage, and that Mr. Singh pay £5,000 per month maintenance, plus 20% of income for the children as child maintenance. On 17 September 2010 a divorce petition was issued. Solicitors acting on behalf of Mr. Singh were also involved in defending the Deeley claim. They instructed Counsel to settle the terms of the consent order as proposed by Mrs. Kaur. Instructions were referred to Mr. Valentine Le Grice QC who commented:

> *"that the proposed consent order may be grossly unfair to Mr. Singh"*

And further

> *"..........Mrs. Kaur's proposal is absurd and grossly unfair on Mr. Singh."*

During the negotiations Mr. Singh agreed the terms but requested that Priors Croft be held on trust for his children as opposed to being transferred to Mrs. Kaur in its entirety.

In the matrimonial proceedings Forms E were exchanged. However Mr. Singh's solicitors did not refer to his bank account with Barclays Bank or that he had an interest in sixteen properties.

A consent order was drawn up and Mrs. Kaur signed the consent order on 2 December 2010. The consent order was sent to the court and on 23 December 2010 it was reported that a decree nisi had been pronounced and that the consent order would be sealed in the New Year. Previously Mrs. Kaur had dis-instructed her solicitors Family Law Associates. Dent Abrams, the solicitors for Mr. Singh, pressed the court to make the order in the terms of the consent order. The urgency was explained because:

> *"Mrs. Kaur was very anxious to complete this matter as soon as possible so that she and the children may return to the matrimonial home."*

31 January 2011 the court made an order in the terms of the consent order. On the same day Deeley obtained a freezing order against Mr. Singh which extended to his Barclays account and fifteen properties, including Priors Croft. The freezing order was subsequently discharged in respect of Priors Croft following the court's order in the matrimonial proceedings.

Mr. Singh was subsequently declared bankrupt by Deeley on 28 September 2011.

Previous proceedings

In 2013 Mr. Singh's father Mr. Thandi issued proceedings claiming to be the beneficial owner of sixteen properties which were registered in Mr. Singh's name. That claim was subsequently dismissed and the Judge Cooke noted that both Mr. Singh and his father:

> *"would be prepared to give any evidence, written or oral, that they thought would assist them to keep the family assets away from creditors."*

The deed of trust that was relied upon by Mr. Thandi was found to have been produced some three years after its date and had been back-dated. Further it was held to be a sham.

The Claims

In the current application the trustee challenged both the January and April charges as shams or alternatively that they were preferences. In relation to the consent order in the matrimonial proceedings, the trustee contended that it was a transaction defrauding creditors under **s 423** of the **1986 Act** or a transaction at an undervalue for the purposes of **s 339** of the Act.

Decision

January Charge

The meaning of the word "sham" was described in **Snook v London & West Riding Investments Ltd [1967] 2 QB 786 (at 802)** in which it was stated:

> *"acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".*

Mr. Thandi explained that he had loaned his son £307,000 as a deposit for the purchase of Priors Croft and that he had loaned him a further £200,000 later. Documents revealed that £237,000 of the cost of buying Priors Croft came from the proceeds of sale of another property owned by Mr. Thandi. With regard to Mr. Thandi's claim of having lent a further £200,000, documents from 2009 suggested that the money was raised on security over properties which in the previous proceedings had been held to have been beneficially owned by Mr. Singh.

Even assuming that Mr. Thandi had provided his son with sums totalling £506,000, it was noted that there was a difference between 'giving' and 'lending' the money. The January Charge was unexecuted until sometime after the payments had been made in January 2010. Mr. Justice Newey concluded that the January Charge was intended to give the impression that Mr. Thandi had lent his son the sum of £506,000 when in fact both parties were aware that Mr. Singh had not been lent any money and there was no indebtedness to secure. As such the January Charge was a sham and therefore a nullity.

April Charge

This was to secure a loan of £70,000 made to Mr. Singh by his sister Ms. Susan Kaur in April 2010. The evidence demonstrated that Ms. Kaur had paid a cheque for £70,000 into the Barclays account in April 2010.

On the April Charge it was held that £70,000 had been paid by Ms. Kaur into Mr. Singh's account with Barclays and that the April Charge was to give security for that loan.

The trustee further alleged that the April Charge constituted a preference. In considering this claim it was noted that the Charge was entered into at more or less the same time as the funds were advanced and as such it did not constitute a preference.

Matrimonial Consent Order

The trustee sought to challenge the consent order made in the matrimonial proceedings on the grounds that it was a transaction defrauding creditors under **s 423** of the **1986 Act** or that it constituted a transaction at an undervalue pursuant to **s 339** of the **1986 Act**.

Both sections require there to be a transaction at an undervalue. The leading case of **Hill v Haines [2007] EWCA Civ 1284** involved a husband transferring his interest in the former matrimonial home to his wife in pursuance of an order made under **s 24** of the **Matrimonial Causes Act 1973**. Subsequently the husband was made bankrupt and his trustee in bankruptcy sought to set aside the transfer pursuant to **s 339** of the **Insolvency Act 1986**. In that case the trustee's claim failed because it was held that the wife did give consideration:

> *"the consideration provided by the wife is in money or money's worth and its value was not less than the value of the consideration provided by the bankrupt whether significantly or at all".*

Notwithstanding that, the court recognised in Hill v Haines that where an ancillary relief order is the product of collusion between the spouses designed to adversely affect the interest of creditors then the trustee could intervene in the ancillary relief proceedings and apply for the order to be set aside.

In the later decision of **Re Jones (a bankrupt) [2008] BPIR 1051** ancillary relief claims had been dealt with by way of a consent order giving the vast majority of the couples' assets to the husband who remained in the matrimonial home with the children. On that occasion the court declined to grant the trustee's application that the consent order be set aside as a transaction at an undervalue. The Chief Registrar confirming that:

> *"...following Haines v Hill the court will not ordinarily be able to go behind a consent order. It will only do so where there is a vitiating factor."*

Mr. Justice Newey helpfully summarised the law in relation to consent orders and made the following points:

(1) Giving up a claim for ancillary relief does constitute "consideration" for the purposes of **s 339**

(2) It will not normally be possible to attack such an order under **s 339**. The value of the claim for ancillary relief will generally be taken to have been equivalent to the value of the property transferred.

(3) This applies to both consent orders as well as those made after contested hearings.

(4) A trustee may succeed in setting aside an order where there is a "vitiating factor". Vitiating factors include fraud, mistake or misrepresentation and "*fraud or some broadly similar exceptional circumstances*". This may also include "*dishonesty, collusion, fraud or concealment*".

(5) It may be possible to challenge an order even where there is no collusion. A husband facing financial difficulties may be tempted to overstate his assets in order to make a more generous order in favour of his wife and children. Whilst a court may set aside an order in such circumstances, it is likely to be slow to do so in the absence of collusion.

(6) As referred to above, **Hill v Haines**, referred to the trustee intervening in the ancillary relief proceedings. There is no reason why this cannot be dealt with by way of a separate application.

Mr. Justice Newey having already held that the January Charge was a sham but refusing to set aside the April Charge, considered the consent order and the alleged collusion. Whilst it was noted that Mrs. Kaur had dis-instructed her solicitors at a seemingly key moment, against this Mr. Singh had insisted that the property be transferred in trust for his children and not for Mrs. Kaur. In consequence Mr. Justice Newey held that there was no collusion. As to whether or not the consent order should be set aside on the grounds that the consideration was wholly inadequate, it was noted that Mr. Singh had failed to disclose his Barclays account or his interest in various properties which were held to belong to Mr. Singh in the earlier proceedings. Had those been disclosed, then this would have increased the provision that might have been thought appropriate for Mrs. Kaur and her children. Accordingly, the Judge refused to set aside the consent order under **s 339** or **s 423** of the **Act**.

Comment

- This case demonstrates that following **Hill v Haines**, it will be extremely difficult for trustees in bankruptcy to successfully challenge orders made in matrimonial proceedings.

- A successful challenge to a matrimonial order for ancillary relief will need to show evidence of collusion, fraud, dishonesty or deliberate concealment, mistake or mis-representation

Individual Voluntary Arrangement

Franses v Hay [2016] BPIR 355

Determining when an IVA comes to an end

Chronology

29 August 2012	Creditors approve voluntary arrangement
25 November 2014	General Meeting of Creditors
9 December 2014	Adjourned Meeting of Creditors
23 December 2014	Certificate of Termination
20 January 2015	Final Report to Creditors Pursuant to Rule 5.34

Facts

This was an application by the Supervisor of an individual voluntary arrangement for directions in respect of the termination of the arrangement. The debtor was a practising barrister who, following an accumulation of tax arrears, had entered into an IVA with creditors on 29 August 2012. The arrangement incorporated modifications from HMRC and the Standard Conditions issued by the Association of Business Recovery Professionals (November 2004).

The debtor was required to make five quarterly contributions of £20,900. The debtor fell into arrears. The debtor was summoned to a meeting at the Supervisor's office at which the extent of the arrears were put to her. She agreed to remedy the breaches by no later than 28 October 2014. The arrears remained unpaid.

The Supervisor convened a General Meeting of creditors for 25 November 2014 to consider resolutions for:

(1) a variation to extend the term of the IVA

(2) to issue a Certificate of Termination and present a petition for bankruptcy

The meeting of creditors was adjourned at the request of the debtor to enable her to raise funds. At the adjourned meeting on 9 December 2014 HMRC voted to reject the proposal to vary in favour of the issuing of the Certificate of Termination and presenting a petition for bankruptcy.

The Supervisor issued the Certificate of Termination on 23 December 2014 and on 20 January 2015 the Supervisor prepared his final report to creditors pursuant to **Rule 5.34** of the **Insolvency Rules 1986**. Following this the debtor raised the arrears from a third party and argued that there was no commercial sense in her being made bankrupt. It was following the debtor's approach to discharge the arrears due under the IVA that the Supervisor applied to court for directions.

For the debtor it was argued that the Supervisor had failed to issue a Notice of Breach under the terms of the IVA and therefore the Certificate of Termination was ineffective and the IVA continues. The Supervisor maintained the Certificate of Termination was valid in any event but sought directions. The relevant provisions within the proposal were contained at clause 23:

> *"The IVA shall continue in full force and effect until the Supervisor issues a certificate stating that:*
>
> .....
>
> *23.1.2 The Supervisor is of the opinion that there is no reasonable likelihood of the matter contemplated by the IVA being implemented or satisfied as there has been a breach of the IVA (a Certificate of Termination)*
>
> *23.2.1. If, at any time, it appears to the Supervisor that the Debtor is in breach of the IVA, then unless such breach is remedied forthwith, <u>he shall at his discretion</u> issue to the Debtor a notice (Notice of Breach) identifying the breach and requiring the Debtor within one month of sending the notice*
>
> *(a) to remedy the breach if it is capable of being remedied...*
>
> *23.2.2. If within the one month period referred to in Sub-clause(1), or such longer period not exceeding a further one month as the Supervisor shall reasonably allow, the Debtor... remedies the breach ... no further action shall be taken against the Debtor*
>
> *23.2.3 If the Debtor has not done those things specified in Sub-clause(2) by the time specified or allowed, the Supervisor shall as soon as practicable convene a meeting of Creditors to resolve whether or not to do the following things:*
>
> > *(1) issue a Certificate of Non Compliance terminating the IVA by reason of the Debtor's breach*
> >
> > *(2) present a petition for the Debtor's bankruptcy;*
> >
> > *(3) vary the terms of the IVA in accordance with this proposal;*
> >
> > *(4) take no action.*
>
> *23.3. The Supervisor shall be entitled to issue a Certificate of Non Compliance on the grounds of a breach of the IVA if in his opinion:*
>
> - *There is a material failure by me to comply with my obligations under the IVA*
>
> *23.5 The Supervisor shall retain sufficient funds to petition for my bankruptcy in the event that I fail to comply with my obligations under the IVA......"*

Under clause 23, the Supervisor had a "discretion" as to whether or not to issue a Notice of Breach. This differed from the provision contained in the Association of Business Recovery Professionals Standard Conditions at clause 71:

> *"71 Procedure following breach*
>
> *71(1) [Notice of Breach] If, at any time, it appears to the Supervisor that the Debtor is in breach of the Arrangement, then, unless such breach is remedied forthwith, he shall as soon as practicable issue to the Debtor a notice ("Notice of Breach") identifying the breach and requiring the Debtor within one month of sending the notice:*
>
> *(a) to remedy the breach if it is capable of being remedied, and, if he thinks fit*
>
> *(b) to give a full explanation of the breach.*

Clause 71 provides that the Supervisor "shall" issue a Notice of Breach. In the current case the proposal contained the usual provision that the terms of the proposal would prevail over the Standard Conditions.

Decision

Registrar Briggs considered the terms of clause 23 of the proposal and those contained in the R3 Standard Conditions. Noting the discretion contained in clause 23 he held that the Supervisor was not required to issue a Notice of Breach prior to serving a Certificate of Termination.

The Supervisor only had to be concerned with the question of whether or not the breach was "material". The actual breaches were irregular, extensive and material.

As to the effects of serving a Certificate of Termination it was noted that the proposal as modified by the R3 Standard Conditions provided that the IVA shall terminate:

> *"upon the Supervisor issuing a Certificate of Termination under cl 71 (Standard Condition 11 R3 Conditions)."*

The Registrar further noted that clause 23 (7) of the IVA proposal provides:

> *"Upon the issue of a Certificate of Non-Compliance the IVA shall terminate and be of no further effect and any implied trust or other trust created by the Proposal will terminate save that the trust clause in this Proposal dealing with the Supervisor's fees and expenses will not terminate."*

The Registrar found that some provisions of the IVA survive the service of the CoT and he termed those provisions secondary provisions which were triggered once the primary contractual provisions were brought to an end by the CoT. The Registrar considered that there was potentially a fine distinction to be made between cessation and termination of the arrangement. He also noted that in the earlier case of **Re Brelec Installations Limited [2001] BCC 421** Blackburne J noted that a "failure" does not of itself cause the arrangement to terminate.

The arrangement contained provisions which required the Supervisor to give written notice of the issue of a Completion Certificate or Certificate of Non-Compliance to creditors, Secretary of State and the Court together with the Supervisor's Report under **Rule 5.29**. There was however no evidence that the Certificate of Termination had been sent to the Secretary of State or the Court or that the Supervisor had sent the **Rule 5.34** Certificate within 28 days of issuing the CoT. The effect of this was that the Registrar held that as the formal steps had not been fulfilled there had been no termination.

The effect of the issue of the CoT was that the IVA was suspended permitting creditors to take their own action, the debtor no longer having the benefit of the moratorium. Whilst the IVA was suspended, it was:

> *"not bereft of life because the secondary contractual provisions are triggered permitting the supervisor to carry out his functions."*

In order to end the IVA further steps needs to be taken after the issue of the CoT. In particular the Registrar noted that following the service of the CoT:

(1) the Supervisor retains powers under cl 27.4 to resolve such matters as may have arisen during the course of the IVA;

(2) he is given express power to continue carrying out his functions conferred by the approval of creditors (at the creditors' meeting);

(3) he has a statutory power to seek directions from the court

(4) those statutory powers are not limited to a time prior to the issue of a CoT;

(5) the debtor remains obligated under the terms of the IVA to provide reasonable assistance after the issue of a CoT;

(6) cl 31 permits the supervisor to convene a general meeting of creditors for the purpose of varying the IVA terms and

(7) there is no limitation as to the time when a supervisor may convene such a meeting: the power is not cut down by the service of the CoT as the language used is "at any time"."

Thus the termination of an IVA is a two stage process. The first stage is service of the Completion Certificate or CoT which ends the primary obligations. The second stage obligates the supervisor to carry out procedural and substantive tasks such as filing reports, distributing funds and petitioning for bankruptcy. On completion of these secondary obligations the IVA ends.

> *"The twilight period between service of a termination notice and, completion of the Supervisor's obligations, permits the office-holder to seek a variation of the IVA terms and to breathe life back into its contractual cells."*

It was held that as the formal steps had not been carried out, the IVA had not terminated and as such the Supervisor may and was ordered to convene a meeting of creditors to consider a further variation of the Arrangement.

Comment

- The R3 Standard Conditions (71(5)) only require the Certificate of Termination to be sent to the debtor and creditors, and not to the Secretary of State and court as provided in the current case.

- The proposal itself gave discretion to the Supervisor as to whether or not to issue a formal Notice of Breach. The R3 Conditions are mandatory in the requirement to serve a Notice of Breach.

- The decision in this case creates further confusion as to when an arrangement is finally at an end. It is likely that Supervisors will be placed under pressure to convene a further meeting of creditors to consider variations following the issue of a Certificate of Termination.

Individual Voluntary Arrangement

Golstein v Bishop and Barnett [2016] EWHC 2187 (Ch)

Debtor's failure to disclose SDT proceedings was a material irregularity

Chronology

31 May 2012	Creditors meeting at which IVA was approved
02 May 2013	Judgment in partnership proceedings
29 February 2016	Judgment given following finalisation of partnership accounts shortfall due to appellant £122,000

Facts

This was an appeal from an earlier decision of DJ Hart in the Central London County Court in which the applicant's appeal for a revocation of the approval of a voluntary arrangement was rejected by the court.

The appellant appealed against the court's earlier decision on two grounds:

> **Ground 1**
> There was a material irregularity at the creditors' meeting which approved the individual voluntary arrangement because the appellant's claim in other "partnership proceedings" was treated as an unliquidated claim and allowed to vote in the sum of £1 only.
>
> **Ground 2**
> That there was material non-disclosure by the debtor sufficient that the approval by creditors of the proposal should be revoked on the grounds that the failure to disclose it was a material irregularity.

Ground 1 arose out of the terms of the partnership agreement between the two solicitors. This provided for an annual guaranteed salary of £120,000, and that the debtor would indemnify his fellow partner for his guaranteed salary. Monthly drawings would be paid at the rate of £10,000 per partner. The appellant's claim under Ground 1 arose out of the alleged failure to pay the guaranteed salary. The appellant's claim against the debtor had also been the subject of separate proceedings in the High Court. In those proceedings as at the date on which the creditors approved the arrangement, the shortfall that had been established in the partnership proceedings had been due from the debtor to the appellant was £122,000.

The relevant provision for dealing with unliquidated or unascertained creditors' claims is contained in **Rule 5.21**. That provides at 5.21(3) that:

"A creditor may vote in respect of a debt for an unliquidated amount or any debt whose value is not ascertained, and for the purposes of voting (but not otherwise) his debt shall be valued at £1 unless the chairman agrees to put a higher value on it."

It is also worth considering **Rule 5.22(4)** which deals with voting subject to objection. That Rule provides:

"If the chairman is in doubt about whether a claim should be admitted or rejected, he shall mark it as objected to and allow votes to be cast in respect of it, subject to such votes being subsequently declared invalid if the objection to the claim is sustained."

Finally, under **Rule 5.22(5)** this provides that:

"....if, on appeal, the chairman's decision is reversed or varied. The court may then order another meeting to be summoned or make such other order as it thinks fit. But the court's power under this paragraph is exercisable only if it considers that the circumstances giving rise to the appeal are such as to give rise to unfair prejudice or material irregularity."

In considering the appeal, it was noted that the term "liquidated", "unliquidated" and "unascertained" are not defined within the insolvency legislation. Earlier authorities had held that a claim for damages and a contingent claim were unliquidated or unascertained claims. (*see* ***Re Cranley Mansions Ltd***).

There was also a discussion as to the nature of the guarantee/indemnities contained within the partnership agreement. The position being that following the dissolution of the partnership the appellant would have a claim in damages or for an account which gave rise only to an unliquidated claim unless and until quantified. Those accounts were dealt with through the court in the partnership proceedings and it was only on 29 February 2016 that a judgment was issued against the debtor ordering the payment of a significant sum to the appellant following finalisation of the partnership accounts. The key point being that the partnership accounts had not been finalised when the matter came before District Judge Hart and she was unaware of previous rulings in the partnership proceedings. The necessary account had not been concluded by the time the matter came before District Judge Hart.

On Ground 1 Mr. Justice Warren concluded that as at the date on which District Judge Hart considered the original appeal it was correct that the appellant's claim was for an unliquidated and unascertained amount and that the chairman of the meeting was correct in placing a value of £1 on it.

Ground 2 was a challenge under **s 262** of the **Insolvency Act 1986**.

Section 262 provides:

"(1) Subject to this section, an application to the court may be made, by any of the persons specified below, on one or both of the following grounds, namely –

...

(b) that there has been some material irregularity at or in relation to such a meeting."

That provision provides that any such application must be made within 28 days of the chairman's report on the outcome of the meeting having been made to court or from the date on which the person became aware the meeting had taken place. Where an application under **s 262** is satisfied, the court may revoke or suspend the approval given by the creditors' meeting and give directions for the purpose of either summoning a further meeting to consider a revised proposal or to reconsider the original proposal.

There is no definition of the word "material" in the **Insolvency Act 1986**. The leading case on what constitutes a "material irregularity" is **Fender v Commissioners of Inland Revenue [2003] BPIR 1304** in which it was stated that a debtor who puts forward an IVA:

> *"must be not only honest, but should take care to put all relevant facts before creditors".*

The leading case on the issue of materiality was **Somji v Cadbury Schweppes plc [2001] 1 WLR 615**. In that case the court said that the correct approach for determining materiality is to consider:

> *"whether had the truth been told, it would be likely to have made a material difference to the way in which the creditors would have considered and assessed the terms of the proposed IVA".*

The test is an objective one and is to consider whether an objective creditor would have considered and assessed the matter differently depending on whether the truth had been revealed to him. The failure to disclose information to creditors arose out of solicitors disciplinary tribunal proceedings that had been commenced against the debtor. The allegation against him before the SDT were that the debtor had attempted to assist a client evade the terms of a restraint order made under the **Proceeds of Crime Act 2002** even though he had been served with a copy of the proceedings. The SDT proceedings upheld the complaint and subsequently the debtor was struck off the Roll. For the appellant it was argued that the failure to disclose the relevant information to creditors was material and the non-disclosure affected the outcome of the vote.

District Judge Hart was of the view that Mr. Bishop should have disclosed the existence of the disciplinary proceedings. District Judge Hart held that creditors would still have voted in favour of the proposal and therefore the non-disclosure was not material.

Decision

Ground 1 of the appeal was dismissed following a finding that the appellant's claim remained unliquidated and uncertain and as such was properly admitted to vote with a value of £1.

On Ground 2, Justice Warren analysed in detail the voting and in particular the likely outcome had creditors been made aware of the failure to disclose the SDT proceedings. He concluded that there was a material irregularity and the failure to disclose the SDT proceedings and that had the truth been told it would have made a material difference in the way in which creditors would have voted to the extent that:

> *"there would have been a substantial chance the proposal would have been rejected".*

On Ground 2 the appeal was allowed.

Mr. Justice Warren adjourned the proceedings to a further hearing at which consideration would be given to the appropriate remedy that should be applied. He referred to the possibility of suspending the approval of the original IVA proposal and directing a further meeting to re-consider the original proposal. This however would give rise to issues as to who qualified as creditors and in what amounts to vote particularly in view of further debt that had been established by the appellant. A possible alternative remedy would simply be to revoke the approval and leave the debtor and his creditors to invoke such insolvency processes as they considered appropriate.

Comment

- This case provides a detailed analysis as to what constitutes an unliquidated or unascertained debt for the purposes of voting. Whilst **Rule 5.21(3)** refers to the debt being valued at £1 in such circumstances it should be remembered that the Rule continues "unless the chairman agrees to put a higher value on it". In this particular case Mr. Justice Warren commented that (Para 55) he thought that there were arguments with real merit sufficient that the appellant's claim should have been valued at considerably more than £1 even though they remained unliquidated or unascertained.

- Non-disclosure of potentially relevant information by debtors in relation to their property can constitute a material irregularity. Debtors should be reminded to ensure that all relevant information is disclosed to creditors.