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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

Abdulla v Whelan [2017] EWHC 605 (Ch)

Effect of disclaimer on lease held in trust

Facts

This was an appeal by a Dr Abdulla against an earlier decision concerning the disclaimer, of an underlease. Dr. Abdulla was the husband of the bankrupt. The bankrupt was a joint tenant of an underlease of commercial premises with another party, a Mr. Elhilali.

Following the making of the bankruptcy order, the trustee in bankruptcy served a notice of disclaimer disclaiming *"all my/our interest in the Leasehold property under the terms of the underlease in respect of the Property"*.

There was a dispute as to the effect of the notice of disclaimer and as a consequence of that, the trustee applied to court for directions. The trustee's position was that the notice of disclaimer did not end the legal estate which was held on trust in the joint names of Mrs. Abdulla and Mr. Elhilali. As such the bankrupt remained liable for the payment of rent until the expiry of the term. Dr. Abdulla argued that the notice of disclaimer was effective disclaimer of all of the bankrupt's interest in the underlease, and that as such, the estate of the bankrupt was no longer liable for further rent after disclaimer.

S315(1) of the **Insolvency Act 1986** provides the trustee in bankruptcy may disclaim "onerous property". The expression "onerous property" is defined in **S315(2)** as:

> *"(a) any unprofitable contract, and*
>
> *(b) any other property comprised in the bankrupt's estate which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act."*

S283 sets out what is comprised in a bankrupt's estate. Property is defined in **s436(1)**. **S283(3)** sets out an exception and provides at (3):

> *"Sub-Section (1) does not apply to-*
>
> *(a) property held* [by the bankrupt] *on trust for any other person..."*

For Dr. Abdulla it was argued that the effect of the disclaimer was that the legal estate in the underlease had come to an end. For the trustee and the landlord it was argued that as the legal estate was jointly owned it was held on trust and therefore did not comprise property capable of vesting in the bankruptcy estate. Only the bankrupt's beneficial interest in the underlease was property comprised in the bankruptcy estate.

Decision

The Court agreed with the arguments advanced on behalf of the trustee and the landlord in so far as the legal estate in relation to the underlease was held on trust and therefore did not comprise property held under a the legal estate. As the underlease was not comprised within the bankruptcy estate, it could not be disclaimed. The lease therefore continued and therefore the landlord could continue to prove for rents falling due after service of the disclaimer.

Comment

- Dr. Abdulla sought to rely on the decision of the Court of Appeal in **Lee v Lee (A Bankrupt) [2000] BCC 500**. In that instance the lease was held in the sole name. Following the making of a bankruptcy order the trustee in bankruptcy disclaimed the lease which included the legal estate. This was notwithstanding the fact that Mrs. Lee subsequently claimed at a later stage, to be entitled to a one half share in the property. At the time of the disclaimer it was not clear as to whether Mrs. Lee had even intimated that she was entitled to claim any beneficial interest in the property which may have indicated that the property was held on trust.

Bankruptcy

Allen v Young [2017] BPIR 1116 (ChD)

Policy proceeds and the rule in Ex parte James

Facts

This was an application made by a trustee in bankruptcy to enforce an alleged agreement on the part of the bankrupt's representative that the respondent would deliver up her share of the proceeds of a life insurance policy in return for a payment of £15,000. The agreement was contained in an exchange of emails between the respondent's representative and the trustee in bankruptcy. The respondent did not sign the documentation to enable the agreement to be put into effect.

The Background can be seen from the following chronology:

01/01/1996	Mr. Young takes out life insurance plan for £1.3m on trust
2007	Mr. and Mrs. Young commence divorce proceedings
2010	Mr. Young is made bankrupt
2013	Award made in favour of Mrs. Young in matrimonial proceedings of over £20m
11/2014	Mrs. Young obtains order for creditors meeting to remove Mr. Young's trustee in bankruptcy
08/12/2014	Mr. Young died
20/07/2015	Mrs. Young made bankrupt on petition of Mr. Young's trustees – failure to pay sums ordered
13/08/2015	Zurich confirmed Mrs. Young's entitlement to 20% share of £1,385,700 policy proceeds.
20/08/2015	Mrs. Young makes claim for payment out of 20% policy proceeds
28/08/2015	Official Receiver informs Mrs. Young's trustee of policy proceeds

The trustee in bankruptcy having been informed about the life policy, began to make enquiries to determine whether or not any claim under it fell into the bankruptcy estate. In the meantime, Zurich agreed not to pay out the monies due to Mrs. Young without giving 28 days' prior notice.

In September 2015 Mrs. Young attended a meeting with another insolvency practitioner to assess her position. The meeting considered making a proposal that Mrs. Young's share of the life policy would vest in the trustee in bankruptcy in return for a payment back to her of her living expenses. There then followed an exchange of emails from the insolvency practitioner to the trustee, in which it was proposed that Mrs. Young's share of the policy proceeds would be paid over to the bankruptcy estate in return for the trustee allowing

Mrs. Young the sum of £15,000 to cover her basic living requirements. The trustee replied by email confirming acceptance of the offer and forwarding a draft settlement agreement. A further email followed from Mrs. Young's advisor in which it was stated that:

> "*.....She is happy to go ahead. I'll ask her to sign it and get it back to you*".

Mrs. Young did not sign or return the agreement. Mrs. Young then proceeded to instruct solicitors who stated that the insolvency practitioner who had put forward the proposal on behalf of Mrs. Young had no authority to do so, and as such there was no agreement. Notwithstanding that, they further claimed that the trustee had never been entitled to claim the insurance proceeds for the bankruptcy estate.

As a result of the failure to honour the agreement, the trustee in bankruptcy issued the application for a declaration that a valid agreement was reached, and that the policy proceeds should be paid to the bankruptcy estate.

For the trustee, reference was made to various authorities which dealt with offer and acceptance and the requirements that need to be satisfied in order to have a binding agreement between the parties. For the trustee it was argued that all the necessary elements were satisfied. Against this, it was argued that it was unclear as to the capacity in which Mrs. Young's offer was being made. Was she acting in her capacity as trustee of the trust, or as beneficiary, or both?

Decision

On the existence, or not, of a binding agreement, Chief Registrar Baister found that it mattered not as to which capacity Mrs. Young was contracting, be it as trustee or beneficiary. The exchange of emails contained an offer which was followed by acceptance. The suggestion of a formal settlement agreement "was no more than that" and was not a counter offer. He had little difficulty in concluding that it was a contractually binding agreement.

Notwithstanding the existence of the agreement, the court then considered whether or not the estate had ever been entitled to make a recovery against Mrs Young for her share of the policy proceeds, and in this respect, it was apparent that neither the trustee nor the bankruptcy estate had any entitlement to Mrs. Young's policy proceeds, which were trust assets. That being the case, the question then was whether the court should consider the rule in Ex parte James. The rule in Ex parte James arises out of the decision **In Re Condon ex parte James (1874) 9 Ch App 609**. The facts of that case were as follows:

> *"The sheriff took possession of goods belonging to Mr. Condon by way of execution of a writ of fieri facias on behalf of a Mr. Bradshaw. Mr. Condon was later adjudicated bankrupt and Mr. James was appointed as his trustee in bankruptcy. Mr. James threatened to bring proceedings against Mr. Bradshaw to recover the money he had received from the sheriff as a result of the execution. Mr. Bradshaw was advised he had no defence and paid the money to the trustee. Following a decision of the Court of Appeal made at almost exactly the same time it became clear that the trustee had not been entitled to the money, so Mr. Bradshaw applied to the court for the money to be refunded*

to him, and the registrar made an order to that effect. The court upheld the registrar's decision."

The court also considered the decision in **Re Clark (A Bankrupt) ex parte The Trustee v Texaco Ltd [1975] 1 WLR 559** where Walton J applied the rule to restrain a trustee from taking proceedings to recover sums paid to a third party even though he was entitled to do so saying :

> *"[T]he rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so."*

In **Re Clark** certain conditions were said to be required as follows:

(1) There must be enrichment of the assets of the bankruptcy of the person seeking to have the rule applied

(2) The claimant must not be in a position to submit an ordinary proof of debt

(3) Would an honest man be bound to admit *"It's not fair that I should keep the money; my claim has no merits."*

(4) It only applies to the extent necessary to nullify the enrichment of the estate.

Applying the principals of the authority referred to Chief Registrar Baister found as follows:

(a) The obligation of the office-holders is to get in and realise assets properly available to creditors not assets that were never properly available to the estate. It does not include what is essentially a windfall even if it flows from an alleged agreement;

(b) The trustee in bankruptcy would not be able to submit a proof of debt;

(c) The honest man formulation "It's not fair" condition is also satisfied;

(d) Applying the rule in Ex parte James in the current case nullified the enrichment.

The applicant, as a trustee in bankruptcy, is an officer of the court and should, in the interest of fairness, not insist on his strict legal rights.

In reaching his decision, the Chief Registrar made no finding as to whether or not the trustee in bankruptcy was aware that that estate did not have a genuine claim to the policy proceeds and that in any event the trustee should have encouraged Mrs. Young to seek independent legal advice before entering into the agreement.

The application was dismissed.

Comment

- This case demonstrates that the relatively informal nature of the communications between the parties in various emails was nevertheless sufficient to create a binding agreement. This was the case notwithstanding that there was as part of that discussion reference to the parties entering into a formal deed of settlement.

- A detailed examination of the terms of the life policy trust should have made it clear that the policy proceeds were trust assets, and therefore not comprised in the bankruptcy estate of either Mr. or Mrs. Young.

- This case sets out the elements that need to be satisfied for the rule in Ex parte James to apply. A comprehensive consideration of the rule and the authority relating to it can be found in the decision of David Richard J, in **Lomas and Others (Joint Administrators of Lehman Brothers International (Europe) (In Administration)) v Burlington Loan Management Limited [2015] EWHC 2270 (Ch)** Para 174 onwards.

- The case also contains a reminder to office-holders to, where possible, inform and, if necessary, insist that the other party seek and obtain independent legal advice before an agreement or compromise is reached.

Bankruptcy

Armstrong v Onyearu [2017] EWCA Civ 268

Exoneration – developments from the Court of Appeal

For the first time since **Paget v Paget [1898] 1 Ch 470** the Court of Appeal has had to consider the equity of exoneration. The case of **Armstrong v Onyearu [2017] EWCA Civ 268** followed a number of earlier High Court decisions. In doing so it had to consider a novel point to determine whether or not an indirect benefit will be sufficient to deny a right of exoneration to a wife/co-habiting partner.

Facts

Mr. and Mrs. Onyearu were a married couple. Mr. Onyearu was a solicitor. The matrimonial home was registered in the sole name of Mr. Onyearu. Mr. Onyearu's practice got into financial difficulties and he obtained an overdraft facility from his bank secured under the all-monies charge originally granted to the bank to secure the loan used to purchase the property. Mr. Onyearu used the facility to pay debts of his practice totalling £131,642. The firm's finances worsened and eventually it closed. Mr. Onyearu was made bankrupt in March 2011.

Mr. Onyearu's trustee in bankruptcy applied for an order for the sale of the property. In the course of those proceedings, it was established that Mrs. Onyearu had a 50% beneficial interest in the property. At a subsequent directions hearing, the Deputy Registrar dismissed the application for an order for possession and sale on the grounds that Mrs. Onyearu was entitled to a charge on her husband's half-share in the property by way of exoneration in respect of the loan facility granted to Mr. Onyearu for his practice and that the charge exhausted Mr. Onyearu's beneficial half interest.

Exoneration – what is it?

The equity of exoneration has been variously described. Halsbury's laws contain a comprehensive definition of the equitable principle (which notably only refers to married women). The principle is more easily described by reference to an example. If a property is jointly owned by A and B and it is mortgaged to secure the debts of B only then A may be entitled to a charge over B's share of the property to the extent that B's debts are paid out of A's share.

The rights of women and others

Historically the equity of exoneration has been closely linked to the development of women's rights dating back to before the **Married Women's Property Act 1882**. This link has been reinforced by the fact that most of the decisions involving exoneration relate to the position of the wife, and more frequently in modern times, that of a co-habitee. Perhaps more fundamentally, the Court of Appeal recognised that the equity of exoneration is part of the law relating to sureties and whilst it is an incident of the relationship between surety and principal debtor it will also arise in a case where, although not an actual suretyship, the relationship is treated as one of suretyship. It therefore potentially applies in a number of different situations which include co-habiting couples, married or unmarried. It may also arise in the case of any joint owners of property.

In **Armstrong v Onyearu**, the Court of Appeal had to decide the question of the extent to which a co-owner may be denied the equity of exoneration where it is claimed that the co-owner received an indirect benefit from the debt secured on the property.

How the loan was used – an indirect benefit?

The trustee in bankruptcy argued that the equity of exoneration did not arise because although the loan facility was directly for the benefit of Mr. Onyearu only and was used to discharge his business debts, Mrs. Onyearu had obtained an indirect benefit as it enabled Mr. Onyearu to continue in practice and to apply his drawings in meeting the monthly interest payments on the original mortgage loan from the bank.

Following the dismissal of the trustee's application, the trustee appealed and that appeal was also dismissed. The trustee further appealed to the Court of Appeal on what was described as a novel point as to the application of the equity of exoneration. There being no previous English authority on the situation where a joint owner has received an indirect as opposed to a direct benefit.

Separate finances – shared living expenses

Mrs. Onyearu had her own employment which was nothing to do with her husband's practice. She paid for improvements to the property. They had separate bank accounts into which they paid their respective incomes. They both contributed to joint living expenses. Mr. Onyearu paid the interest payments on the mortgage whereas Mrs. Onyearu paid utility bills, Council Tax and all other household expenses.

The trustee's argument on appeal was that Mrs. Onyearu received a benefit from the loan to pay off her husband's business creditors because she and her husband operated as a "*family unit*" and the loan enabled Mr. Onyearu to continue in practice, and make payments under the mortgage loan.

In considering whether or not such an indirect benefit would be sufficient to deprive the co-owner of the equity of exoneration, the Court considered the earlier authorities.

Earlier authorities

In the case of **Paget v Paget [1898] 1Ch 470** the wife was described as "*a lady of fortune*". On two occasions the property was re-mortgaged to pay her husband's debts. Following separation, she sought a declaration that her husband was liable to indemnify her in respect of the mortgage under the equity of exoneration. In that case the Court held that the mortgage had been used to fund a prosperous life-style for both parties and maintain their position in society. As such her claim for exoneration failed.

In **Paget v Paget** the Court noted that the authorities on the doctrine of exoneration show that it is based on an inference to be drawn from the circumstances of each particular case, the prima facie inference being (in such a case as that supposed) that both parties intended that the wife's assistance should be limited to the necessity of the case only. In granting a charge over jointly owned property to secure the loan of the other party there is a presumption that the former is entitled to exoneration. This is an evidential presumption capable of rebuttal by evidence from which an action or inferred contrary intention can be drawn. It is, however, only a prima facie inference and the Court said that "*there may be circumstances which prevent any inference from arising*". In that case the Court concluded that the circumstances, namely that the parties intended to preserve her and his position in society, meant that that no prima facie inference could arise in favour of the wife and accordingly, there was no evidential presumption to rebut.

The best known authority on exoneration in modern times was the case of **Re Pittortou [1985] 1 WLR 58**. Mr. and Mrs. Pittortou ran a restaurant. They charged the matrimonial home to secure indebtedness to the bank for a loan which was to be used for purposes which included the business of the restaurant. The account into which the loan monies were paid was used by Mr. Pittortou for the restaurant business but also for paying household expenses, mortgage instalments utility bills, rates and other expenses. Towards the end of their relationship he also used monies in the account to support his new relationship. Mr. Pittortou subsequently went bankrupt and his trustee in bankruptcy was left arguing with Mrs. Pittortou as to the extent to which she was able to rely on the equity of exoneration in respect of the borrowings secured by the charge over the matrimonial home. In Re Pittortou, Scott J noted that the family "*acted as a family unit in its family and business affairs*". Mrs. Pittortou worked in the restaurant business on which the livelihood and support of the family depended. It was therefore impossible to impute to Mr. and Mrs. Pittortou the intention that payments out of his account "*for the benefit of the family*" should fall solely on his share of the property. As such it was held the equity of exoneration "*should be confined to payments out of the account which do not have the character of payments made for the joint benefit of the household*". As such Mrs. Pittortou was not able to claim exoneration in respect of mortgage payments, payments made for the purposes of occupation by the family or otherwise for the benefit of the joint household. She was however entitled to be exonerated in respect of payments made for the purposes of the restaurant business and in support of his second relationship.

Following Re Pittortou the position remained that the equity of exoneration applied to borrowings by one co-owner to fund his or her business even though the other co-owner might derive some indirect benefit from the business by way of contributions to joint living expenses from the business owner's income.

The Court of appeal then considered the more recent decision of **Re Chawda (in bankruptcy) [2014] BPIR 49**. In Re Chawda, the re-mortgage of the matrimonial home was used to purchase an investment property by the husband and his brother in which the wife had no involvement. Husband and wife enjoyed a prosperous life-style and Mrs. Chawda had worked in her husband's business. They did not have separate bank accounts but a joint account only. The monies originally borrowed under the charge used to purchase the investment property were not repaid on the sale of the investment property. In that case the Court concluded that the family operated as a "*family unit*" and enjoyed a prosperous life-style, accepting the ups and downs of the husband's business together. The circumstances of this particular case negated any inference that the equity of exoneration should apply in favour of Mrs. Chawda. A "family unit" and prosperous lifestyle equals "no exoneration".

Despite the decision in Re Chawda, the Court of Appeal did not consider that that case represented a turning point in the law. Any impression that Re Chawda had in any way eroded the equity of exoneration was quickly dispelled by the following case of **Day v Shaw [2014] EWHC 36 (Ch)**. In that case Mr. and Mrs. Shaw had granted a second charge over their jointly owned matrimonial home to secure a personal guarantee given by their daughter and Mr. Shaw in respect of a bank loan to a company (Avon). Their daughter and Mr. Shaw were shareholders and directors of Avon. Mrs. Shaw had no involvement in Avon although she may have held some shares.

Following the sale of their home the liability to the bank was discharged out of the proceeds. A creditor then subsequently brought proceedings against Mr. Shaw to enforce a charging order. The question then was whether Mrs. Shaw was entitled to the equity of exoneration against Mr. Shaw's share of the property. The outcome of that case was that Mrs. Shaw was entitled to be indemnified by Mr. Shaw following the argument that as mortgagors they were sub-sureties for Mr. Shaw and their daughter and as such she was entitled to be indemnified by Mr. Shaw. In that case although it was argued at first instance, there was no evidence that Mrs. Shaw received any direct or indirect benefit from the borrowing in question.

In **Cadlock v Dunn [2015] BPIR 739** the wife agreed to charge her half share of the matrimonial home in order to raise a loan to enable the husband to re-acquire his half share from his trustee in bankruptcy. In that case the wife received no financial benefit, the only benefit to her being that she would stay in the matrimonial home which was incapable of any financial valuation. In that case the Court held that the equity of exoneration did apply.

More recently was the case of **Graham-York v York [2015] EWCA Civ 72** which involved an unmarried co-habiting couple where he was the sole registered proprietor. He died and she sought to claim a beneficial interest in the property and that that interest should have priority over the registered legal charge secured over the property. At first instance the Court found that she had 25% beneficial interest over which the charge took priority. Although the equity of exoneration was not actually pleaded at trial, it was considered by the Court on appeal. It was noted that the Judge at the earlier hearing had found that the husband's business was responsible for generating almost all of the income and assets that the family unit enjoyed and that the business had "*provided us with the wherewithal to live on*". The Court held that the equity was not applicable where the family was wholly dependent upon Norton York's business venture for their income and assets.

No exoneration for joint account holders?

The Graham-York case also referred to a New Zealand Court of Appeal authority **Re Berry (a bankrupt) [1978] 2 NZLR 373** in the context of married couples and joint bank accounts. In that case a mortgage was secured over a jointly-owned house and the account was used for both the husband's business and for household purposes. Later the account became used largely for business purposes. Following the husband's bankruptcy it was held that the wife was not entitled to exoneration. The reason being that the account was a joint account and that the wife, as well as the husband, was liable to the bank as a primary debtor. In that case it was further held that, in the absence of any agreement between them that the husband should be the principal debtor, they were co-debtors to the bank and as such the wife could have no entitlement to seek exoneration against 'B' nor could there be any evidential presumption of such an entitlement.

Decision

In giving the leading judgment in the case of **Armstrong v Onyearu**, Lord Justice David Richards stated that the concept of operating as "*one family unit*" was not helpful, or even a usable test for the purposes of the equity of exoneration. He further held that any benefit that would disallow the equity of exoneration must be direct or closely connected to the secured indebtedness.

In **Armstrong v Onyearu** the indirect benefit was subject to a double contingency namely that the firm had to survive, and secondly it had to be profitable to enable payments to be made. For the equity of exoneration to apply, the intention of the parties must be inferred at the date of the transaction, at which point the indirect benefit that might accrue was "*wholly uncertain and incapable of any valuation*." The benefits must be capable of carrying a financial value. The possible indirect benefit to Mrs. Onyearu was too remote to provide the basis for inferring or presuming that her intention was to bear the burden of the loan equally with her husband as such. Further they did not operate as a single unit financially each having their own bank accounts. They did share family expenses. In that case the indirect benefit that was argued by Mr. Onyearu's trustee in bankruptcy was not sufficient to deny Mrs. Onyearu the equity of exoneration in respect of the secured borrowings.

Comment - Key Points

- Following the decision in **Re Chawda** the equity of exoneration appeared to be in decline. As a concept its place in the modern world was doubted as households increasingly operate as "family units" which may comprise married or unmarried couples.

- The decision in **Day v Shaw** quickly checked any trend that may have been initiated by **Re Chawda**.

- The decision in **Armstrong v Onyearu** represents a development of the decision in **Re Pittortou**. In the earlier case it was held that exoneration may apply either in whole or in part to monies secured by a charge. This means that an examination must be undertaken to identify exactly what sums the parties seeking to rely on the equity may have benefited from before the equity will cease to apply. The Court of Appeal have refined that process by confirming that only sums where the co-owner has received a benefit which is direct or closely connected to the secured indebtedness will be sufficient to disallow any claim for exoneration, as enunciated in Lord Justice David Richards' judgement in the Armstrong case.

Bankruptcy

Birdi v Price [2017] EWHC 1859 (Ch)

Trustee seeks civil restraint order against bankrupt

Facts

Mr. Birdi was made bankrupt on 21 March 2012, following which the joint trustees in bankruptcy were appointed to his estate. Although Mr. Birdi had later been discharged from his bankruptcy, he was made subject to a 9-year bankruptcy restriction order. Mr. Birdi and another issued various applications against the trustees in bankruptcy, officers of HMRC, an Assistant Official Receiver, and the solicitors and barristers involved in the bankruptcy. The claims made by Mr. Birdi and another, Mr. Senna alleged:

> *"Breach of Insolvency Act 1986 s283*
>
> *Misfeasance in public office*
>
> *Breach of duty*
>
> *Breach of Data [P]rotection Act*
>
> *Unlawful interference with property*
>
> *Trespass and co[n]version of property*
>
> *Frustration of trade, loss of revenue/earnings and loss of goodwill*
>
> *Defamation*
>
> *Harassment*
>
> *Alarm and distress*
>
> *Damages and loss*
>
> *Costs".*

They further alleged:

> *"cynical and flagrant"*

breaches of the Insolvency Act 1986 on the part of the trustees and others. A further claim alleged that the legal advisers to the trustees provided:

> *"corrupt legal advice"*

The defendants to the applications issued applications to strike out the claims and/or for summary judgment. The trustees applied for extended civil restraint orders against both Mr.

Birdi and Mr. Senna. Mr. Birdi and Mr. Senna issued further applications for the committal of the trustees and a claim for trespass conversion in respect of equipment which it was maintained did not vest in the trustee in bankruptcy. A further application was issued in which they sought the recusal of the Judge and that the solicitors representing the trustees should be disqualified from acting and that a:

> "*Declaration that HRA trumps Insolvency Act*".

By this stage there had been a number of hearings at which the claims against various parties were struck out on the grounds that they were without merit. This effectively left the claims remaining against the joint trustees in bankruptcy. During the course of the latest hearing, Mr. Birdi sought the assistance of Counsel having previously represented himself. He claimed that the trustees had disposed of equipment that constituted:

> "*tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation*".

as set out in **s283(2)(a)** of the **Insolvency Act 1986**. In particular, he claimed that the items that were sold by the on-line auction site which included four vehicle lifts, a brake tester, an exhaust gas analyser, a headlamp aligner, and a number of diagnostics testers, were tools of his trade, that being a master technician for Ferrari. The claim that the trustees had realised tools of Mr. Birdi's trade was not without its difficulties. Mr. Birdi had originally claimed in documents sent to the Court that he had:

> *"Equipment" worth £50,000, "Spare Parts & MOT Station" worth £550,000 and "Ferrari Testing Equip." worth £20,000.*

However once the bankruptcy order had been made, Mr. Birdi completed a preliminary information questionnaire stating that he had no:

> *"machinery, plant and equipment"*

It was also noted at his public examination Mr. Birdi had claimed he had ceased trading and that "*all the garages*" and the "*equipment*" had been leased to another company.

The Judge noted that under **s299** and **s304** of the **Insolvency Act 1986** for the trustee it was argued that the trustees could not be liable if they had reasonable grounds for believing they were entitled to seize and dispose of the items in question.

Decision

Mr. Justice Newey dismissed all of the bankrupt's claims save that in the case of his assertion that the trustees had disposed of tools of his trade, he concluded that it would be going too far to describe that claim as "fanciful" and that as such, he was unable to conclude that the claim had no realistic prospects of success. In saying this he noted that the claim would face "serious hurdles". For those reasons the Judge allowed Mr. Birdi's claim in respect of the equipment to continue.

Referring to Mr. Senna's claims in respect of items of equipment, Mr. Justice Newey concluded that Mr. Senna had no real prospect of proving that he had any material interest in the equipment at issue and therefore gave summary judgment against Mr. Senna and recorded that his claim was totally without merit.

Turning to the trustees' claim for civil restraint orders **Paragraph 3.1** of the **Practice Direction 3C** empowers the Court to make an ECRO where:

> "a party has persistently issued claims or made applications which are totally without merit".

The Judge concluded that that condition was satisfied as regards both Mr. Birdi and Mr. Senna and that previous hearings had recorded applications as being characterised as totally without merit.

Dealing with Mr. Senna first, it was noted that:

> "Mr. Senna seems to be someone who, as regards matters relating to Mr. Birdi's bankruptcy, refuses "to take 'no' for an answer".

As such it was appropriate to make an ECRO against Mr. Senna for a two-year period.

In the case of Mr. Birdi, it was noted that he had sought and taken Counsel's advice in relation to the most recent hearing, and it had been held that he should be permitted to proceed with one element of his claim. Accordingly, it was not appropriate to make an ECRO against Mr. Birdi. In making that decision, the Judge pointed out that it would be open to the trustees to renew their application for an ECRO if Mr. Birdi made any further applications that were totally without merit.

Comment

- This case demonstrates the circumstances in which a civil restraint order can be successfully obtained to restrict further applications without merit being made against trustees and others involved in a bankruptcy.
- Following the Court finding that Mr. Birdi would be permitted to pursue his claim in respect of the tools and equipment, the trustees sought an order that this finding be conditional upon Mr. Birdi paying the outstanding costs incurred to date. In response to that request, the Judge refused to order that the outstanding costs should be paid before the equipment claim could proceed further.

Bankruptcy

Davis v Jackson [2017] EWHC 698 (Ch)

Trustee in bankruptcy's claim for an occupational rent

Introduction

This case concerns equitable accounting and in particular the question of whether or not a trustee in bankruptcy can claim an occupation rent. This is an appeal against an earlier decision at which it was ordered that the trustee was entitled to a one-half share of the equity in the property and an order for sale.

Facts

The facts of this case were unusual in that at all relevant times the bankrupt was estranged from his wife, and they lived apart. In January 2003 Mrs Jackson re-mortgaged the property which she then owned and in which she lived with her four children. The mortgage funds were put towards the purchase of a second property ("the Property") the remainder of the purchase price was borrowed by her on an interest-only mortgage. The title to the Property and the mortgage were in Mrs Jackson's sole name and she moved to live in the Property with her children. Mr Jackson had never lived at the Property.

On 17 April 2003 Mrs. Jackson executed a declaration of trust ("Trust Deed") holding that the Property was held on trust for herself and Mr. Jackson in equal shares. A term of the Trust Deed was that Mr. Jackson would pay half the mortgage payments in consideration of being entitled to half of the equity of the property.

The purpose of the Trust Deed was not clear. Both before and after the Trust Deed was executed, Mrs. Jackson continued to pay the mortgage and all outgoings exclusively. Eventually, Mrs. Jackson experienced financial difficulties, and Mr. Jackson, who was a mortgage broker, arranged for the Property to be re-mortgaged. A condition of the new mortgage was that the Property be transferred into joint names. The TR1 that was entered into on 6 March 2007 contained a box in which an 'X' was placed confirming that the Property was held by them on trust for themselves as joint tenants. Mrs. Jackson continued to make all mortgage and other payments in respect of the Property.

In August 2013 Mr. Jackson was made bankrupt and a trustee in bankruptcy was appointed.

Eventually the trustee issued an application for a declaration as to the ownership of the Property and an order for sale. On 22 December 2015 DJ Cross granted the order declaring the trustee was entitled to one half of the equity, and granting an order for sale. Mrs. Jackson eventually instructed solicitors to put in evidence to the effect that Mr. Jackson had not complied with the terms of the Trust Deed in that he had failed to make any mortgage payments, and that had DJ Cross been aware of the Trust Deed, he would not have ordered a division of the sale proceeds in the manner that he did.

Previously Mrs. Jackson was refused permission to appeal on the grounds that the TR1 contained an express declaration of trust, and that notwithstanding Mr. Jackson's failure to make any mortgage payments, they held the Property for themselves as joint tenants in equity. In reaching that decision, the Court relied on the decisions in **Stack v Dowden [2007] 2 AC 432** and in particular the decision in **Goodman v Gallant [1986] Fam 106**.

At the earlier hearing Mr. Justice Snowden rejected Mrs. Jackson's appeal against the declaration but did vary the order for sale to provide that it should be subject to an equitable account to be taken between the trustee and Mrs. Jackson, and that the warrant for possession be suspended until finalisation of the account. It being envisaged that the parties would reach agreement for the purchase of the trustee's interest. He further made a direction that any issues in relation to the equitable account should be transferred to the High Court.

Valuations were obtained, which indicated that the Property was worth £450,000 with an outstanding mortgage of £203,619.

The mortgage on the Property was interest-only and Mrs. Jackson demonstrated that she had paid since the purchase of the Property up to the date of the hearing, a sum totalling £123,906 in interest payments.

At the hearing on 19 January 2017 the trustee submitted that the equitable account should start with an equal division of the net sale proceeds, and then a credit to Mrs. Jackson and to debit the trustee with one-half of all mortgage interest payments made until the date of Mr. Jackson's bankruptcy.

The trustee further claimed that Mrs. Jackson should not receive credit for any payments for the running and maintenance of the Property as there was no evidence of any increase in value. The trustee further contended that as it was never anticipated that Mr. Jackson should live in the Property the trustee would not seek an occupation rent up to the date of the bankruptcy order. However, from the bankruptcy order onwards it would have been equitable for Mrs. Jackson to have a credit for the mortgage interest payments made without paying an occupational rent to the trustee in bankruptcy as such post-bankruptcy, those two items would cancel each other out.

Equitable accounting

Equitable accounting was developed from the principles of equity to achieve a balance between co-owners of a property. Whilst equitable accounting is based in equity, statutory provisions dealing with equitable accounts were introduced by TOLATA which is the **Trusts of Land and Appointment of Trustees Act 1996** and in particular **s12-15**.

First, it was suggested that those provisions effectively replaced the doctrine of equitable accounting in respect of occupation rent. Notwithstanding TOLATA Mr. Justice Snowden started from the position that the general principle of equitable accounting continued to apply in certain circumstances.

Considering first of all payments made in respect of repairs and improvements, the Court referred to the decision in **Re Pavlou [1993] 1 WLR 1046**. In that case the wife was entitled as against the trustee in bankruptcy to a credit of one half of repairs and improvements carried out at the property, but only to the extent that such expenditure actually resulted in an increase in value. In the current case there was no evidence of any capital enhancement in respect of the outgoings paid by Mrs. Jackson.

The next element of equitable accounting considered by the Court was the payment of mortgage instalments. Referring in the decision in **Re Byford, Byford v Butler [2004] 1 FLR 56**, it was noted that there is no doubt that credit will normally be given for mortgage payments in respect of capital. ....sometimes credit will be given for the interest element.

Drawing support from the decision in **Re Gorman [1999] 1 WLR 616**, Mr. Justice Snowden accepted that Mrs. Jackson should be entitled to claim additional credit of one half of the payments of interest which she had made under the mortgages in respect of the Property, and that that entitlement should continue until such time as the Property is sold. It is the entitlement to credit post-bankruptcy that the trustee in bankruptcy took issue with, claiming that any such entitlement should be set-off against an occupation rent for the same period.

Occupation rent

In **Stack v Dowden** the question of an occupational rent was also considered. On this point Baroness Hale considered that the provisions of TOLATA s12-15 had replaced the old doctrines of equitable accounting. This would appear to indicate that TOLATA provides an exhaustive regime for dealing with equitable accounting matters. However, this is not the line taken in subsequent cases. Further, neither Stack v Dowden or the later decision in **Murphy v Gooch [2007] EWCA Civ 603**, were cases involving trustees in bankruptcy, and there followed a discussion as to why the provisions would not apply in a bankruptcy situation. The reasons included the fact that a bankrupt whose beneficial interest is vested in his trustee in bankruptcy would no longer fall within the provisions of TOLATA because the right to occupy under s`2 of TOLATA depended upon the person remaining beneficially entitled, similarly a trustee would also be defeated by that section as it states that a beneficiary does not have the right to occupy land if it is "*unsuitable for occupation by him*". The Court could not envisage a situation where it would be suitable for a trustee to take up occupation.

Having found that he was not bound to apply the statutory regime in TOLATA, Mr. Justice Snowden continued to consider the occupation rent issue under general equitable principles.

Decision

Having considered the authorities on occupation rent, Mr. Justice Snowden concluded that there is a broad equitable jurisdiction to do justice between owners on the facts of each case. The facts in this particular case were unusual. In particular the Property that was acquired was never intended to be a home for the bankrupt. Similarly, it was never envisaged that Mrs. Jackson would have to pay rent to anyone for her occupation of the Property.

Applying the above, the Court concluded that it would not be in accordance with equity or justice if the trustee who had simply acquired Mr. Jackson's interest automatically became entitled to claim an occupation rent from Mrs. Jackson. The trustee cannot be placed into a better position than the bankrupt was himself. Since the bankrupt never had a right to occupy the Property, there was no reason why the trustee in bankruptcy should acquire such a right by reason of the bankruptcy order only. As such the trustee was not entitled to an occupation rent. Mrs. Jackson had paid all the mortgage instalments and outgoings in respect of the Property. If Mrs. Jackson were to be charged an occupation rent so as to off-set the substantial mortgage payments that she had made, this would result in an unjust windfall for Mr. Jackson's creditors. The equitable account would commence by dividing the net sale proceeds equally between the trustee and Mrs. Jackson, and then Mrs. Jackson was given an additional credit for one-half of all payments that she had made under the mortgage from the date the Property was purchased to the date the Property was sold, and that there would be no credits in respect of any other payments made by Mrs. Jackson, and no debits in respect of her occupation of the Property.

Comment

- This case contains detailed analysis of the principles relating to both equitable accounting and occupation rent and reviews the key authorities.

- The facts of this case were particularly unusual as the bankrupt had never at any stage occupied the Property nor, as between the parties, have any rights to occupy.

- Notwithstanding the decision in this particular case, there will be cases where an occupation rent remains applicable and should be charged. It will, in many cases, be offset by the corresponding interest payments made by the remaining non-bankrupt occupier.

- This case does confirm that where a property is transferred into joint names under an express trust to be held as joint tenants in equity, that will be effective to give an entitlement to the bankrupt joint tenant, notwithstanding the fact that the bankrupt made no financia contribution whatsoever towards the property.

Bankruptcy

Frosdick v Fox [2017] EWHC 1737 (Ch)

Form of notice requiring trustee's decision re disclaimer under Section 316

Facts

The claimant Mr. Frosdick was a former bankrupt. He had been made bankrupt by his former solicitors on 25 May 2011. The defendant had been appointed his trustee in bankruptcy on 20 September 2011. This was an application made by the trustee to strike out the bankrupt's claim on the grounds that it was totally without merit.

The claimant had, since his bankruptcy, brought numerous claims and applications in various courts in relation to his bankruptcy. Whilst all those applications failed, and many were found to be totally without merit, there was a lack of records of earlier judgments given in the various courts involved.

The claimant's applications had also included claims against the Official Receiver, which were also struck out on the grounds that they were without merit and there were no reasonable grounds for bringing the claim.

It was argued that the current application was an attempt to re-litigate the matters that were the subject of the earlier failed applications.

The claimant had been involved in a car accident in 2007 in which he sustained personal injuries. He instructed solicitors Cobbetts to pursue a personal injury claim on a CFA.

Later it appeared that the claimant had a further claim which he had requested Cobbetts to pursue as part of the personal injury claim. This was a claim for €782,000 being losses incurred in relation to a poker software business. In addition Mr. Frosdick sought to claim a further sum estimated at €18m being a claim for future losses.

In June 2009 Cobbetts indicated that they would no longer handle the claim on behalf of Mr. Frosdick and they terminated the CFA. Mr. Frosdick alleged professional negligence against Cobbetts.

Later in 2011 Cobbetts presented a bankruptcy petition against Mr. Frosdick which resulted in a bankruptcy order being made on 25 May 2011. On 18 August 2011 the claimant wrote to the Official Receiver asking him to litigate or to assign back to the claimant the alleged causes of action against Cobbetts for breach of contract arising from their professional negligence. The letter concluded by saying there were third party funds available to purchase the claim from the Official Receiver for £75,000.

Following the trustee being appointed, the claimant wrote on 9 January 2012 to the trustee seeking to acquire, in exchange for:

> *"substantial third party funds"*

the cause of action against Cobbetts. On 19 May 2012 the trustee disclaimed any rights of action and claims against Cobbetts for defamation or any other matter.

Further applications followed from Mr. Frosdick all of which were dismissed. From the further applications it became apparent that Mr. Frosdick was contending that the effect of his two letters dated 18 August 2011 and 9 January 2012 (the "Letters") was to give notice to the trustee under **s316(1**) of the **Insolvency Act 1986** to the effect that the period of 28 days began on the date the notice was given which required the trustee to elect whether or not to disclaim the claim against Cobbetts. As no disclaimer took place in that period the property was treated as having been affirmed.

Section 316(1) provides:

> *"Notice of disclaimer shall not be given if*
>
> *(a) a person interested in the property has applied in writing to the trustee or one of his predecessors as trustee requiring the trustee or that predecessor to decide whether he will disclaim or not, and*
>
> *(b) the period of 28 days beginning with the day on which that application was made has expired without a notice of disclaimer having been given under section 315 in respect of that property."*

During the course of making various applications, an Extended Civil Restraint Order was made against the claimant in respect of any claims or applications in any County Court. That was expressed to remain effective until 26 August 2017. Further attempts were made to issue applications but they were refused because of the existence of the ECRO.

The current application was made in the High Court.

In the course of submissions, it was noted that the Letters were not in the form prescribed under the Insolvency Rules for a notice under **s316** of the **Insolvency Act 1986**. It was however argued that in the case of the Official Receiver having received such a letter, he should have responded by identifying the correct form and requesting the party to complete it.

At an earlier hearing the Court had also considered the question of what constitutes onerous property. The definition of **s315(2)** is described as:

> *"(a) any unprofitable contract, and*
>
> *(b) any other property comprised in the bankrupt's estate which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act."*

At an earlier hearing the Judge declared:

> *"I cannot see how the potential claim against Cobbetts can constitute, "onerous property"."*

Following argument, Mr. Justice Birss stated that a cause of action is a good example of something which may give rise to a liability to pay money, since a claimant who brings a claim may incur their own legal costs in doing so and risks being ordered to pay their opponent's costs if the claim fails. As such it is capable of constituting onerous property. The Court also considered whether or not the bankrupt constituted a "person interested" and was therefore able to serve notice under **s316**. It was noted that examples of an interested person would include a landlord or maybe a spouse or guarantor. This would not necessarily include a bankrupt, particularly where any interest belonging to the bankrupt had already vested in the trustee under **s306** of the **Insolvency Act 1986**.

It was also argued that even if the disclaimer was formally flawed, that would not necessarily mean it was ineffective and that Mr. Frosdick's remedy would be to apply for a vesting order. Responding to that point, Mr. Frosdick explained he did not make an application to re-vest the claim as it was statute barred.

It was further argued that the act of disclaimer was an exercise at the trustee's discretion and that the Court would not give permission lightly under **s304(2)** of the **Insolvency Act 1986** to pursue the claim for compensation against the trustee.

Mr. Frosdick further argued that the offer of £75,000 was not communicated to creditors and was therefore a fraud on creditors.

Decision

Mr. Justice Birss firstly considered whether the Letters were sufficient to give notice under **s316**. On this point he stated:

> *"it would be clear to a reasonable reader of those letters that at least one thing Mr Frosdick was seeking to do was to give notice under s316 in order to seek to trigger the 28 day period which applied under the Insolvency Act 1986."*

Whilst recognising that the Letters were not in proper form, he was reluctant to decide the case merely based on the forms.

The correct interpretation of **s316** is that the bankrupt himself cannot make a valid application under that section in relation to property.

> *"The "interest" referred to cannot be mere intellectual curiosity, it must be some sort of interest recognised in law".*

The effect of **s306** of the Act is to vest any interest that the bankrupt had in the property in the trustee.

The bankrupt, Mr. Frosdick, is not a person interested in the property at all as a result of the automatic vesting.

The net result being that neither of the Letters were effective to start the 28 day period running.

Had Mr. Frosdick sought to challenge the trustee's discretion the Judge was satisfied that there were no proper grounds that would get over the requirement to get permission under **s304(2)** of **the Insolvency Act**.

This action had no reasonable prospect of success and it was therefore struck out.

The Judge was unwilling to state however that it was totally without merit. Particularly as there was a lack of reasons presented to the Court for early decisions. If Mr. Frosdick sought to make any further applications then a further civil restraint order would be appropriate.

Comment

- This case clarifies the position of a bankrupt insofar as they cannot be a person "interested" in the property in respect of which a notice can be given under **s316.**
- The court was unwilling to hold that the Letters, because they were not in proper form, were insufficient to trigger **s316**.
- Following the introduction of the **Insolvency (England and Wales) Rules 2016**, and the abolition of prescribed forms, it is now more important than ever that careful consideration be given to any correspondence received in respect of property comprised in the bankruptcy estate and consideration given as to whether or not it constitutes a notice under **s316** thereby triggering the 28 day period.

Bankruptcy

Mikki v Duncan [2017] EWCA Civ 57

HP contract of vehicle and tools of trade

Facts

This was an appeal made by the bankrupt to the Court of Appeal having been previously unsuccessful in his applications against his trustee in bankruptcy.

The bankrupt was a photographer specialising in weddings. He was made bankrupt on 9 June 2010. He had a BMW car which was subject to a hire-purchase agreement (HP). The hire-purchase company terminated the contract and the car was sold in February 2011. There was a surplus of £2,652 left, which was paid to the trustee. Some 3-years later in 2013 the bankrupt claimed that the car was a tool necessary for his trade within the provisions of **s283** of the **IA 1986**.

The bankrupt also claimed that monies held by the trustee which were eventually shown to belong to the bankrupt were returned to him with interest at the rate of 0.5% as paid by the Insolvency Services Account (ISA). The bankrupt contended that his entitled interest was at a rate of 8%.

The BMW car subject to HP

When the finance company terminated the agreement it asked the OR if he wished to purchase the vehicle and if so, he could do so for £7,298. Believing that there was likely to be a shortfall the OR replied that he did not wish to adopt the contract and was content for the finance company to sell the vehicle and pay over the surplus to the OR. At around the same time the bankrupt had tried to buy the car for £7,298 using third party funds. However the OR refused to authorise that as his view was that the vehicle was worth about £12,000 which would create equity in the vehicle.

After 3 years he decided to claim the car was a tool of his trade, even though it had been sold, and was offered £1,500 for a replacement vehicle by the OR. The bankrupt did not accept the offer as he thought that he was entitled to a more impressive vehicle for attendance at weddings. That offer was then withdrawn.

At an earlier hearing, even though she did not have to decide the point, Rose J indicated that she would have found that the car itself was a tool of his trade.

The Court of Appeal identified the real question as being whether the benefit of the HP contract vested in the trustee, or whether the bankrupt could claim the benefit of the HP contract via the tool of the trade exemption. If the bankrupt was able to successfully claim that the benefit of the HP contract was to be treated as a tool of the trade, then it would be retained by him together with any benefit flowing from it.

S283 of IA 1986 sets out the property which vests in the trustee in bankruptcy and is comprised in the bankrupt's estate. Subsection (2) excludes certain items as follows:

"(2) Subsection (1) does not apply to -

(a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;

(b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family."

"Property" is defined in **s436(1)** and includes all manner of items including things in action. The Court observed that the benefit of an HP contract would constitute property which vested in the trustee as it is a chose in action. The exemption which deals with tools, details certain types of property, all of which are chattels. The Court was referred to the Insolvency Services technical manual and in particular **para 30.155 Exempt vehicle with outstanding finance** which states:

"The exempt property provisions .... apply to items acquired by the bankrupt whether for cash or with a finance agreement." ....

The guidance of the Insolvency Service technical manual appearing to be at odds with the facts of this case.

The Court also considered the provisions of **s308** which allows the trustee to claim tool of the trade, and to substitute an appropriate but less valuable one so as to allow the bankruptcy estate to claim the excess value. It reads (so far as material):

"308 (1) ... where –

(a) Property is excluded by virtue of section 283(2) (tools of trade, household effects, etc.) from the bankrupt's estate, and

(b) it appears to the trustee that the realisable value of the whole or any part of that property exceeds the cost of a reasonable replacement for that property or that part of it,

the trustee may by notice in writing claim that property or, as the case may be, that part of it for the bankrupt's estate.

...

(3) The trustee shall apply funds comprised in the estate to the purchase by or on behalf of the bankrupt of a reasonable replacement for any property vested in the trustee under this section; and the duty imposed by this subsection has priority over the obligation of the trustee to distribute the estate.

(4) For the purposes of this section property is a reasonable replacement for other property if it is reasonably adequate for meeting the needs met by the other property."

The Court of appeal noted that the thrust of that section suggests that it is dealing with physical property only.

The claim for a higher rate of interest

At the time of the bankruptcy order, the bankrupt had a balance of £1,537 in his bank account. He continued to operate the account until it was closed, when there was a credit balance of £1,142 which was paid to the OR. It was accepted that initially the OR/trustee considered whether or not there would be any set-off in respect of the credit parts at the date of the bankruptcy order of the monies now received from the account afterwards. Eventually it was considered that the trustee did not have any right to assert any claim to those monies at the date on which the account was closed, it having been established that that represented a deposit for a wedding that had been received after the bankruptcy order. Eventually, the trustee repaid the monies to the bankrupt together with interest at the rate of 0.5% being the amount that had accrued on the funds as held in the Insolvency Services Account. The bankrupt claimed that he was entitled to 8%.

The Court of Appeal considered that the claim for a greater level of interest was effectively a challenge as to the trustee's discretion, and that the accepted test in such cases, is that set out by Registrar Baister in **Osborn v Cole [1999] BPIR 251**:

> *"It follows that it can only be right for the court to interfere with the decision the official receiver has taken if it can be shown that he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way."*

Decision

The Court considered the exemption for tools and other related items and noted that to include the benefit of the HP contract which is a chose in action, would be to extend the interpretation of that provision from mere chattels to chattels and other types of property. Notwithstanding the technical guidance in the Insolvency Service manual, the Court concluded that there was no justification for extending that interpretation and that as such, the HP contract did not remain vested in the bankrupt. That being the case, the trustee could not be criticised for taking steps to ensure that that benefit accrued to the estate, and as such the bankrupt's appeal failed.

In relation to the claim for interest, on the second appeal, whilst recognising that the monies could have been returned sooner, the Court was unwilling to uphold the bankrupt's appeal.

Comment

- Reference was made to the fact that the bankrupt had been extremely late in raising his claim that an item was exempt as a tool of his trade. On this point it was noted that even if the claim was late that would not, if the claim were made out, prevent the bankrupt from making such a claim.

- This decision provides clarity in that the exemption for tools and other related items only relates to chattels and does not include the benefit of finance or other such similar agreements or property.

Bankruptcy

Patterson v Spencer [2017] EWCA Civ 140

The granting of relief from sanction[s] in bankruptcy litigation

Facts

The question the Court of Appeal had to decide in this case was whether the judge at an earlier hearing had been right to dismiss an application for relief from sanctions brought by the now appellant.

The Appeal arose out of bankruptcy proceedings brought by the trustee in bankruptcy of George Spencer. Mr. Spencer had transferred a jointly owned property to his four children, which included the appellant, on 13 June 2007. The trustee issued proceedings seeking a declaration that the transfer was a transaction defrauding creditors contrary to **s423** of **IA 1986** and/or a transaction at an undervalue in contravention of **s339** of the **Act**.

The trustee's application had a complex history, which resulted in an order being granted on 29 October 2013, ('the October 2013 Order') which:

> *"(a) ordered that the Bankrupt, Winston Spencer and the Appellant be debarred from defending the Trustee's application;*
>
> *(b) granted the declaration sought by the Trustee;*
>
> *(c) declared that the Property was held by the legal owners on trust for the Trustee alone; and*
>
> *(d) made orders for the sale of the Property, with vacant possession to be delivered by 28 January 2014."*

There had been numerous procedural applications and orders made in the course of the proceedings, including orders debarring two of the other defendants, and ordering that a medical report as to the mental capacity of the bankrupt be obtained. The trustee complained that the time-table in the litigation had not been complied with, and applied to vary earlier orders as a result of non-compliance that eventually resulted in the October 2013 Order.

The hearing was listed for 29 October 2013. On the evening of 28 October 2013 the court received a letter from the appellant stating that she had a serious operation and that she had been advised not to be in public places for at least a year. She requested that the proceedings be adjourned.

The appellant had been very seriously ill, and had had a kidney transplant operation which had resulted in complications which required the appellant to return to hospital before the hearing on 29 October 2013.

At the hearing on 29 October 2013 only the trustee was represented. In dismissing the application for an adjournment, the District Judge noted that claims as to the bankrupt's mental capacity had been raised by the appellant, but not by the bankrupt himself. Previously the bankrupt had told the court that he was too unwell to travel to London, however shortly afterwards, he went on holiday to Jamaica. In granting the order, the District Judge stated that she had already given the appellant "*quite a few indulgences*".

Having eliminated all opposition to the trustee's application, the District Judge granted the October 2013 Order as sought by the trustee.

Approximately one month later the appellant issued an application to set-aside the October 2013 Order on various grounds. That application was also dismissed and the appellant advised that she should consider making an appeal to the High Court. On 20 December 2013 the appellant filed an appeal in the High Court in consequence of which a stay was granted. An order was made requiring an appeal bundle to be lodged including a transcript of the October 2013 Judgment. On 14 February 2014 an appeal bundle was lodged but did not include a transcript of the October 2013 Judgment. As a result of that failure an unless order was made. The appellant failed to file the necessary transcript and the unless order took effect and her appeal was struck-out.

After that, the only way in which the appellant could hope to re-instate her appeal was by making an application for relief from sanctions pursuant to CPR rule 3.8. This she did by application dated 12 May 2014. She argued that she had not had sufficient time to comply with the provisions of the earlier unless order. Her evidence was that the order from the court had been posted to a neighbour's property and that she had only received it some time later. The application for relief came on for hearing on 4 June 2014. The Deputy Judge referred to the leading case at that time on relief from sanctions, **Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537**. At the time of the hearing the subsequent and now leading decision on relief from sanctions, **Denton v T H White Ltd [2014] EWCA Civ 906**, had not yet handed down its judgment. The Deputy Judge, following Mitchell, dismissed the appellant's application for relief from sanctions.

Relief from sanctions: the guiding principles

CPR rule 3.9 provides:

"*Relief from sanctions*

> *(1) On an application for relief from any sanctions imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –*
>
> > *(a) for litigation to be conducted efficiently and at proportionate cost; and*
> >
> > *(b) to enforce compliance with rules, practice directions and orders.*
>
> *(2) An application for relief must be supported by evidence*."

Following the decision in **Denton**, the approach that should now be applied is as follows:

An application for relief from sanctions should be considered in three stages:

(a) the first stage is to assess the seriousness and significance of the breach/failure;

(b) the second stage is to consider why the default occurred; and

(c) the third stage is to consider all the circumstances of the case to enable the court to deal justly with the application.

Decision

Applying the test in **Denton** to the failure to lodge the transcript of judgment in the appeal, Lord Justice Henderson was of the view that it cannot be characterised as "unserious or insignificant".

On the second question as to why the default occurred, taking the appellant's evidence that the correspondence had been sent to her neighbour, if accepted at face value, she clearly had a good reason for failing to comply with the unless order. As such the appellant had a good reason for her failure to comply with the unless order.

As to the third stage of the Denton test, to consider all the circumstances so as to enable the court to deal justly with the application, it was noted that no prejudice had been caused to the trustee from the relatively short delay in filing the transcript of the judgment. An interesting aspect of this third requirement "to consider all the circumstances" is the passage in the judgement:

> *"Given the very serious ill health from which she (the Appellant) suffered at the time, and in particular from September 2013 onwards, this breach was in my view at the lower end of the scale of seriousness"*

and that in order to deal justly with the application relief from sanctions should be granted.

Comment

- This case is another example of how bankruptcy litigation can become unduly protracted necessitating numerous hearings and orders being made. The position was exacerbated in this case because the parties were litigants in person at many of the key stages.

- The decision contains useful guidance as to the principles applicable in determining any application for relief from sanctions and how the relevant tests are to be applied in practical situations.

Bankruptcy

Safier v Wardell [2017] EWHC 20 (Ch)

Third party monies and Secretary of State fees

Facts

Mr Safier was made subject to a bankruptcy order for unpaid council tax on 20 June 2013. The bankruptcy estate included a house valued at £200,000. None of the assets in the estate had been realised when the bankrupt applied to annul the bankruptcy order based on the payment of the debts and expenses in full under **s282(1)(b) IA 1986.** Payment of the debts and expenses was made by Mr. Safier's brother, a third party.

The trustees' solicitors received the sum of £44,624 from the bankrupt's brother's two companies. After deducting legal costs, the trustees paid the balance of £34,693 into the ISA requesting that the funds be placed into a suspense account so they would not attract a Secretary of State ('SofS')fee. The trustees informed the OR that a sum sufficient to pay all the debts and expenses had been received on the basis that no SofS fee would be payable. The fee in question was £7,372. Subsequently, further sums were provided to ensure that even if the SofS fee were payable, sufficient funds were in hand.

The relevant statutory provisions governing the fees was the **Insolvency Proceedings (Fees) Order 2004 (SI 2004/593).**

That sets out a fee scale for the performance of the SofS's general duties under insolvency legislation at the rate of:

0% of the first £2,000

100%of the next £1,700

75% of the next £1.500

15% of the next £396,000

1% of the remainder, subject to a maximum of £80,000

The Insolvency Regulations 1994 (SI 1994/2507) provide at regulation 21 that:

> *"The trustee shall pay all money received by him in the course of carrying out his functions as such without any deduction into the Insolvency Services Account kept by the Secretary of State with the Bank of England......"*

In considering the application to annul and the question of the applicability of SofS fees to third party monies, the court referred to **Dear IP Letter October 1997** which had previously set out guidance in relation to payment of SofS fees where a bankruptcy order is annulled using third party monies. It did not however distinguish between a position where there were assets in the bankruptcy that could be realised to discharge the debts and expenses instead of using third party monies, and the cases where there were no assets in the bankruptcy estate.

It was noted that there was no statutory basis for the practice of setting up a suspense account where it was claimed that monies were third party monies and did not attract a SofS fee. Further monies received from a third party would not be received in the course of a trustee exercising his functions in that capacity.

Judge Behrens commented that the court is faced with a stark question of whether the monies paid by third parties are payable into the ISA whether or not there are assets in the estate.

He concluded that the receipt of third party funds is not part of a trustee's function and the monies are not payable into the ISA account. It therefore follows that no SofS fee is payable in respect of them.

Comment

- The fee regime that existed in this case has since been abolished on 21 July 2016 by the **Insolvency Proceedings (Fees) Order 2016 (SI 2016/692)**. Bankruptcy petitions presented after this date will be subject to new provisions. Under the new regime some fees appear to be payable from "*chargeable receipts*" paid into the ISA such as the new 15% of chargeable receipts fee from chargeable receipts realised by the OR in the capacity of trustee in bankruptcy. Other fees such as the new general fee of £6,000 are payable without reference to chargeable receipts.

- Since this decision guidance has been issued in the form of a revised **Dear IP June 2017 Issue 77 Chapter 5**. This guidance now states that it is up to the trustee to determine whether or not the regulations apply and therefore whether the money should be paid to the ISA. If there is a genuine doubt as to the status of the monies received, then they should be paid into the ISA. Practitioners should make a full record of the reasons for paying the monies into the ISA and must provide a written explanation of the reasons when requesting a suspense account to be opened.

- Where a trustee receives third party funds to pay creditors, those funds will not form part of the trustee's receipts and payments and the trustee cannot charge remuneration in their capacity as trustee on the receipt and handling of those funds, although remuneration may be charged by separate agreement with the third party.

- **Dear IP June 2017 Issue 77 Chapter 15** also contains guidance as to fees that will be payable on annulment of the bankruptcy order. That confirms that the OR will continue to charge its costs on a time basis in cases where annulment is sought under the '*ought not to have been made*' ground. In such cases the OR will not seek payment of the general fee of £6,000.

- In other cases the general fee for annulment based on the payment of the debts and expenses in full, or where the annulment follows the approval of an IVA, the general and administration fees will be payable.

- When dealing with bankruptcy annulment situations where payment is to be made by a third party, due diligence should be carried out in relation to the third party funds and their source with reference to the **Money Laundering Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations (MLR) 2017**, following their introduction on 26 June 2017.

Bankruptcy

Weir v Hilsdon [2017] EWHC 983 (Ch) Court of Appeal

Suspension of discharge – purpose of discharge

Facts

Mrs. Hilsdon was made subject to a bankruptcy order on 20 February 2015. She had started a business with her husband through a limited company called Chariots and Cherry Pie Ltd. That business failed and as a result of personal guarantees the creditor petitioned for her bankruptcy. A bankruptcy order was made. Following this the bankrupt sought to put forward an IVA proposal which was unsuccessful. On 1 July 2015 a trustee was appointed. There was an exchange of correspondence between the trustee and Ms. Hilsdon in which she was requested to complete an income and expenditure form. The trustee then sent a more formal letter raising a number of specific enquiries. Although Mrs. Hilsdon replied, the trustee was not satisfied with the answers that had been given and therefore the trustee applied on 19 January 2016 for an order suspending Mrs. Hilsdon's discharge from bankruptcy shortly before the anniversary of the bankruptcy order. There had been a considerable amount of correspondence passing between the bankrupt and the trustee.

On 9 February 2016 District Judge Payne noted that Mrs. Hilsdon accepted that there were things that the trustee still did not know, and that she should not be discharged at the end of the 12 month period. The District Judge therefore made an order as follows:

> *"The relevant period for the purposes of s 279 Insolvency Act 1986 and Schedule 19 to the Enterprise Act 2002 shall cease to run until such time as the Trustee in Bankruptcy confirms to the court by filing a report that the bankrupt has complied with his duties and obligations or until the court orders otherwise."*

The relevant statutory provisions are contained in **s278** and **s279** of the **Insolvency Act 1986**.("the Act"):

> *"279 Duration*
>
> *(1) A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences.*
>
> ....
>
> *(3) On the application of the official receiver or the trustee of a bankrupt's estate, the court may order that the period specified in subsection (1) shall cease to run until-*
>
> *(a) the end of a specified period, or*
>
> *(b) the fulfilment of a specified condition.*
>
> *(4) The court may make an order under subsection (3) only if satisfied that the bankrupt has failed or is failing to comply with an obligation under this Part.*

> (5) *In subsection (3)(b) "condition" includes a condition requiring that the court be satisfied of something……"*

The bankrupt appealed against the terms of that order on 8 separate grounds including the

ground that the form of the order was contrary to **s279(3)** of the Act.

During the course of submissions Mr. Justice Nugee noted that discharge removes the disabilities of bankruptcy. Those disabilities being restrictions on being a director of a company, on obtaining credit, on carrying on a business and on holding certain public offices. It was also noted that an undischarged bankrupt is subject to a number of criminal sanctions which do not apply after discharge, and can be required to attend a public examination. In addition to the legal implications there are significant practical disadvantages for a bankrupt. Discharge can have a serious impact on the debtor's ability to work, incur credit and carry out his ordinary activities.

In considering an application, the court must be satisfied that the bankrupt has failed, or is failing to comply with a relevant obligation. (This first element being the threshold question). Once the threshold question has been satisfied the court must then consider how to exercise its discretion. In considering non-compliance, mere suspicion is not enough. There must be clear evidence of either failure having taken place or failure continuing to occur.

Under the Insolvency Rules as was, **Rule 6.215** required the trustee to make an application to court and for him to file evidence in support which must be served on the bankrupt at least 21 days before the date fixed for the hearing. (**Rule 10.142 Insolvency (England and Wales) Rules 2016**). It was noted, although the point was not taken, that the trustee had served the evidence late. The outstanding items of information the trustee was seeking were:

(1) Mrs. Hilsdon's explanation for 2 payments of £10,000 on 24 February 2015 and £10,027 on 10 March 2015.

(2) Copies of invoices delivered by her (as Candoo PR) to a client called Nominet, and of her contract with Nominet.

(3) Copy Statements for a bank account in the name of her mother which Mrs. Hilsdon was using.

(4) Copy statements for a Post office cash card.

(5) An updated income and expenditure form.

(6) Mrs. Hilsdon's explanation of why she had not been paid for services provided to a company called What's Ticking Today Ltd.

By the time of the hearing, some of the information had been supplied.

The grounds of appeal relied upon by the bankrupt included an allegation that the trustee's real purpose in applying for a suspension of discharge was to apply for an income payments order ("IPO"). In support of her assertion she relied upon the case of **Chadwick v Nash [2012] BPIR 70, ChD** and in particular the observations of Registrar Nicholls in which he observed that the real issue underlying the matter in that case had been the pursuit by the trustee of an income payments order and that that should be the subject of an application for an income payments order and not an application for suspension of automatic discharge.

Decision

Mr. Justice Nugee accepted that the purpose of the application was not to obtain an income payments order and that if the bankrupt fails to provide information when asked, the trustee may be unable to assess whether or not it is appropriate to apply for an IP0. In such a case the trustee should not be criticised for failing to apply for an IPO within the year and that suspension of the discharge ought not to be refused because the practical effect will be to extend the time for making of the IPO application.

On the form of the order, it was submitted that the terms of the order were for an indefinite suspension. It was noted that in previous decisions in the cases of **Mawer v Bland [2013] EWHC 3122 (Ch), [2015] BPIR 66 and Wilson v Williams [2015] EWHC 1841 (Ch), [2015] BPIR 1319**, the court had made similar orders and that the bankrupt was adequately protected by the ability to apply to court in the event that they considered that they had complied with the terms of the order.

The terms of the order made by DJ Payne were not wrong in principle the question was whether it was the appropriate form of order in response to the bankrupt's failure to co-operate in this particular case. Further, such an order would not necessarily be appropriate in all cases. The task of the court in considering what type of order to make is one of balancing the competing considerations.

Having reviewed the order of DJ Payne Justice Nugee found that the District Judge did not take into account the range of other possible orders that could have been made, and as such the order would be set aside.

Comment

- Consideration should be given as to whether a specific duration should be sought for compliance or the fulfilment of a specified condition i.e, responses to specified enquiries.

- A trustee considering making an application for a suspension of discharge should give careful consideration as to the terms of the order sought. A general form of order, which effectively provides for an indefinite suspension, may still be appropriate in certain circumstances.

- Applications for suspension should be made at the earliest opportunity to avoid timing issues.

- See also **Harris v The Official Receiver [2017] BPIR 444**. In that case the Official Receiver obtained an order suspending the bankruptcy discharge until a specific date. The bankrupt having failed to co-operate with the trustee, the Official Receiver applied before the expiry of the original order suspending discharge for a further indefinite suspension of the bankruptcy discharge. The bankrupt appealed but was unsuccessful. The court holding that **s279** did not expressly provide for one application only, and where there were good reasons for making a further order and there had been a change of circumstances, a further order could be made. Where the original suspension for a fixed period has expired before any further application is made, then it is likely to be more difficult to obtain a further suspension of discharge than in this case where the application was made before expiry of the existing order.

Individual Voluntary Arrangement

Green v Wright [2017] EWCA Civ 111 Court of Appeal

Effect of completion of arrangement on property trusts

Facts

Mr. Wright entered into an individual voluntary arrangement (IVA) which was approved at a meeting of creditors in October 2007. The arrangement was subject to a number of modifications and incorporated Standard Conditions (version 2 November 2004) of the Association of Business Recovery Professionals (R3).

The debtor complied with his obligations under the IVA and in January 2013 the supervisor issued a certificate of completion. In September and October 2013 the supervisor received two payments totalling £24,500 from two banks in settlement of PPI policy mis-selling claims. The claims related to policies taken out before August 2007 i.e, before the arrangement was entered into. It was accepted that the claims were property which was subject to the terms of the IVA and the trust created over the debtor's assets by the arrangement.

The question the Court of Appeal had to consider was whether the trust in favour of creditors as set out in the arrangement survived the issue of a certificate of completion of the IVA. The terms of the arrangement provided that the debtor's assets as at the date of the commencement of the IVA other than his car and his interest in the matrimonial home were held on trust for the purposes of the IVA. Paragraph 26 provided that property other than Excluded Property belonging to or vested in the debtor at the date of the commencement of the IVA:

> *"which would form part of the Debtor's estate in a bankruptcy shall be subject to the Arrangement and be an asset thereof."*

Paragraph 28 provided that all property subject to the IVA was held on trust by the debtor or the supervisor, as the case may be:

> *"for the purposes of the Arrangement."*

Upon the expiration of the IVA'S duration, if the debtor had complied with his obligations, the supervisor would issue a certificate of completion.

Under Paragraph 9(2) of the Standard Conditions, upon the issue by the supervisor of a completion certificate:

> *"the debtor shall be released from all Debts which are subject to the Arrangement."*

It was noted that the IVA contained provisions for the termination of the arrangement and that at Clause 28(3) it provided:

> ***"28(3) [Effect upon Trusts of termination of Arrangement]***
>
> > *Upon termination of the arrangement within the meaning of paragraph 11 the trusts referred to in subparagraphs (1) and (2) shall cease save that assets*

> *already realised shall after provision for the supervisor's fees and disbursements be distributed to arrangement creditors."*

There being no similar provision where the arrangement was successfully completed.

The supervisor's position was that the sums received in respect of the PPI claims was property to which the IVA applied and was subject to the trust. In support of that argument he relied upon the decision of the Court of Appeal in **Re N T Gallagher & Son Ltd [2002] EWCA Civ 404**. In the Gallagher case the question was whether a trust for the company's assets constituted under a company voluntary arrangement (CVA) for creditors survived liquidation. In that case the Court held that the trust did survive liquidation and therefore the sums recovered after the commencement of a liquidation in proceedings to enforce a claim which was under the terms of the CVA property subject to the trust, were held on the terms of the trust and did not form part of the assets available in the liquidation.

Previously, at an earlier hearing, the Court rejected the supervisor's appeal and in so doing stated that Gallagher was of no assistance because the Court of appeal was:

> "*considering the position on failure of the arrangement, and not upon its completion*".

For the debtor it had been argued that release applies for all purposes of the arrangement and brings an end to the trusts affecting the arrangement assets.

Decision

The Court of Appeal in reaching its decision first of all compared the position with bankruptcy where it was noted that the mis-selling claims would have remained part of the bankruptcy estate until realised and distributed amongst its creditors. That position would not be affected by the debtor's discharge from bankruptcy.

Whilst the IVA contained express provisions terminating the trust on termination of the arrangement, the arrangement did not terminate but was successfully completed. The Court of Appeal then considered the possibility that upon issue of the certificate of completion, there may no longer be beneficiaries and therefore there could no longer be a trust. On this point the Court concluded that the debts, notwithstanding the issue of the completion certificate, continued to exist.

The Court considered that in the case of bankruptcy the debts continued to exist notwithstanding the debtor's discharge and the debts ceasing to be the debtor's personal obligation. In the Court's view the position was likewise in relation to the IVA. The debts continued to exist and the trusts did not come to an end. The supervisor's appeal was allowed.

Comment

- Whilst the decision gives helpful guidance as to how to deal with PPI claim recoveries in relation to completed IVA's, this decision and other cases will depend heavily on the actual terms and conditions of the arrangement itself.
- This case confirms that there is a clear distinction between the effect on IVA trusts where there is a termination of the IVA as opposed to the successful conclusion by the issue of a completion certificate

General

Magiera v Magiera [2017] BPIR 472

Order for sale of property in a Member State

Facts

This case was about a property purchased by a husband and wife in joint names situated in London. The parties divorced and the former husband appealed to the Court of Appeal against an earlier decision concerning the jurisdiction of the UK courts to make an order for sale of the property. The husband arguing that the English courts did not have jurisdiction to deal with the property.

Previously Bodey J had dismissed the husband's application and had ordered that the outstanding costs be charged on the husband's share of the property.

The appeal concerned the jurisdiction provisions of the **Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition of Enforcement of Judgements in Civil and Commercial Matters (Brussels I)**. The wife's application had been brought under the **Trusts of Land and Appointment of Trustees Act 1996 ('TOLATA')**. At the earlier hearing it had been held that the English court had jurisdiction under the grounds set out in Brussels I and there was jurisdiction under **Article 22** on the basis that **TOLATA** proceedings had as their object rights to *rem* in immovable property situated here.

Article 22 provides at para 15:

> *"The following courts shall have exclusive jurisdiction, regardless of domicile*
>
> *1 in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated;"*

It was noted that interpretation of Article 22 is dependent upon interpretation of European authorities and not domestic ones. This is because the **Court of Justice of the European Union ('CJEU')**:

> *"….. has made it clear in order to ensure that the rights and obligations arising from the Regulation for member states and for individuals are as equal and as uniform as possible, an independent definition must be given in EU law to the wording…."*

The Court first of all referred to the European authorities of which the most recent decision was the case of **Komu v Komu [2016] 4 WLR 26**. That case concerned three claimants and two defendants who co-owned a house in Spain, three having a 25% share, the other two having a 12.5% share. Four of the parties also co-owned a Spanish apartment. The claimants wanted to realise their interest in both properties. Initially the matter was dealt with by the Finnish courts which held that it had jurisdiction and allowed the claim, eventually reaching the Appeal Courts in Finland where the Finnish Supreme Court referred to the **CJEU** for a preliminary ruling on the question of whether or not such an action was within **Article 22(1)**. The Finnish action was categorised by the **CJEU** as an action:

"between co-owners of immovable property situated in Spain concerning the termination, by way of sale, of the co-ownership in undivided shares in that property".

In **Komu v Komu** the Court concluded that **Article 22(1)** applied and that the application for termination of co-ownership in undivided shares of immovable property by way of sale fell within the category of proceedings which have as their object rights in rem in immovable property and therefore are subject to the exclusive jurisdiction of the member state in which the property is situated.

Having considered the European authorities, the Court then turned to the English authorities, which included the bankruptcy case of **Ashurst v Pollard [2001] BPIR 131**. In that case the husband and wife jointly owned a villa in Portugal and a bankruptcy order was made against the husband in England. His interest in the villa vested in his trustee in bankruptcy and the trustee obtained an order for sale of the villa with vacant possession. The husband and wife appealed arguing that the Portuguese court had exclusive jurisdiction. The Court of Appeal rejected that argument holding that the issues raised in the proceedings were personal issues between the trustee and the spouse as to the beneficial interests in the villa, and did not have as their object rights in rem. This meant that the Portuguese courts did not have jurisdiction in that case.

In reaching its decision in **Ashurst v Pollard**, it was noted that the Court's conclusion seems to have been driven by the fact that the proceedings did not seek to assert any property right against any third parties or strangers.

Decision

The wife's proceedings in the case under **TOLATA** have as their objects rights in rem in immovable property and therefore fall within **Article 22**. That confers exclusive jurisdiction on the Courts of England.

The decision following the European CJEU decision in **Komu v Komu**.

The husband's Appeal was dismissed.

On the second element of the husband's claim, he contended that the judge's order that un-assessed costs be a charge over the property was upheld on the grounds that un-assessed costs could not form the basis of what effectively was a charging order.

The husband succeeded on the second element of his claim that Bodey J in his judgement, should not have ordered that, at his former wife's election, the outstanding costs of those proceedings might be charged on the husband's share of the house.

The Court decided that a "*sum for costs which had not been assessed was not within the Charging Orders Act 1979*" and discharged the charging order.

Comment

- This case casts a serious doubt on the decision in **Ashurst v Pollard**. In that case the approach was to obtain a judgment here and then enforce in the Member State where the property was situated. A Trustee seeking to realise an interest in a property held in another Member State may no longer be able to follow the **Ashurst v Pollard** route in circumstances where **Article 22** applies, and exclusive jurisdiction is given to the Member State in which the property is situated.

- There are also questions over whether the enforcement of rights under a trust may be distinguished from the enforcement of rights in *rem* as detailed in **Article 22.**