

Can a trustee in bankruptcy pursue a deceased bankrupt's spousal claims? (Robert v Woodall)

21/12/2016

Restructuring & Insolvency analysis: Robert v Woodall concerned the dismissal of an oral renewal by a trustee in bankruptcy (trustee) appealing the strike out of his claim under sections 23 and 24 of the Matrimonial Causes Act 1973 (MCA 1973). Caroline Hely Hutchinson, direct access family lawyer with litigation authorisation who represented the respondent wife in a family application brought in the bankruptcy court, examines the implications of the recent decision in Robert v Woodall.

Original news

Robert (as the Trustee in Bankruptcy of Elichaoiff) v Woodall [2016] EWHC 2987 (Ch)

What was the background to the renewed application for permission to appeal?

It was the oral renewal hearing of leave to appeal the strike out, by Mr Registrar Jones, of a claim by a trustee in bankruptcy under MCA 1973, ss 23 and 24, made in the shoes of a deceased, bankrupt spouse against his former wife. Despite clear judicial authority, and the guidance to the contrary in Chapters 31.9.63 and 30.119 of Insolvency Service's Technical Manual, the trustee claimed that the spousal claims of the bankrupt (in this case to make an application for a lump sum or property adjustment order) had vested in him in September 2009, as part of the bankrupt's estate, being 'property', as defined in section 436 of the Insolvency Act 1986 (IA 1986). He was making a claim under MCA 1973 for the sole benefit of the deceased bankrupt's creditors.

What were the issues before the deputy judge?

On the oral renewal, the deputy judge was considering if an appeal had a real prospect of success, or was it—as the respondent contended—of no merit whatsoever. The dispositive issue, and the reason given for refusal of leave on paper, was whether the intervening death of the bankrupt spouse terminated any MCA 1973 claim, as Morgan J's order had stated:

'Even if the appellant could demonstrate that the bankrupt's claim for ancillary relief came within the definition of 'property' in s 436(1)...The appellant could not be in any better position...than the bankrupt would have been. The authorities relied on by the Registrar support the conclusion that such a claim cannot be pursued following the death of the husband/bankrupt.'

However, the trustee's application made little of this objection, saying that if the claim had vested, it was unaffected by the bankrupt's subsequent death. Thus, he argued that the guidance given by the Insolvency Service was wrong and the longstanding judicial authority did not apply to a trustee. The innovative argument (as he described it) to be argued on appeal, was that the spousal claims were 'property' within IA 1986, s 436 and vested in the trustee and that right, having vested, the right to claim continued regardless of the bankrupt's death. He further did not accept Mr Registrar Jones' judgment (and consistent judicial authority) as to the clear terms of MCA 1973:

'...the true construction of MCA 1973, ss 23 and 24 or 31 create rights that can only be pursued by the spouses themselves. The rights do not extend beyond joint lives' (para [19]).

What did the deputy judge decide on the oral renewal, and why?

The deputy judge gave a reserved judgment refusing leave for the trustee to pursue an appeal. He said at para [12]:

'I confess to some initial surprise at the suggestion that a trustee in bankruptcy is entitled, after the death of the bankrupt, to apply for an order for financial relief against the surviving party to the marriage, for the benefit of the bankrupt's creditors, and that initial reaction was only reinforced during the course of Mr Pickering's submissions.'

Agreeing with Morgan J's reason for refusal on paper he said

'...whatever other problems may exist with such a claim, the authorities clearly establish that a claim under MCA 1973, ss 23 and 24 ceased to be possible following the death of the bankrupt.'

He went on to cite the relevant judicial dicta as approved by the Court of Appeal in *Harb v King Fahd* [2005] EWCA 1324, [2005] All ER (D) 110 (Nov), and earlier by Lord Brandon in the House of Lords decision of *Barder v Calouri* [1988] AC 20, [1987] 2 All ER 440.

Thus, the deputy judge could have disposed of permission to appeal on the sole basis that the death of the bankrupt was determinative of any possible claim. However, he took time to consider the nature of matrimonial proceedings and to address all the trustee's arguments and state beyond peradventure why, even if the bankrupt were alive, the trustee could not make a MCA 1973 claim on his behalf.

This included confirming the following:

- the wording of MCA 1973, ss 23 and 24 was not materially different to MCA 1973, s 27 in so far as it was clear that such claims could only be made by a party to the marriage (or child) for the benefit of a party or child. The deputy judge cited Dyson LJ in *Harb* that 'for present purposes, there is clearly no material distinction to be drawn between applications made under section 23 and those made under s 27 of the 1973 Act' and noted at para [15(3)] that both Thorpe LJ and Wall LJ similarly drew no distinction between MCA 1973, s 27 and MCA 1973, ss 23 and 24
- he rejected that a matrimonial claim could be brought for the sole benefit of a spouse's creditors (para [19]), supporting Mr Registrar Jones' judgment at para [19.4] that the purpose of the provisions is at odds with an application for the benefit of creditors
- he agreed with the respondent that it was a misreading of the Registrar's judgment to suggest that he had found the compromise of spousal claims to constitute property for the purpose of IA 1986, s 284 (dispositions of property by the bankrupt between petition and bankruptcy order are void)
- he rejected any distinction between what constituted a 'cause of action' for the purpose of vesting in a deceased's estate under section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 and a bankrupt's estate, for the purposes of IA 1986, s 436
- he cited the concurring guidance of the Technical Manual of the Insolvency Service and Muir Hunter on Personal Insolvency
- he rejected *Platt v Platt* [1976] 170 SJ 199 to be of any relevance, not least because in that case there was in existence a secured periodical payments order, not a mere right to make a spousal claim under MCA 1973
- as he clarified in para [26], this did not affect the law that a secured provision order can vest in the estate of the deceased and a Trustee may have recourse to monies actually received during the bankruptcy as after-acquired property under IA 1986, s 307

To what extent is the judgment helpful in clarifying the law in this area?

There was no ambiguity in the law, not least following the House of Lords decision of *Barder v Calouri* [1987] 2 FLR 480, so that the death of the bankrupt was always a decisive obstacle to the trustee's claim. Further, as is apparent from the deputy judge's judgment there was clear and longstanding judicial authority for the proposition that the matrimonial claims for financial relief on divorce were not 'causes of action' but statutory rights to ask for relief, personal to the parties to the marriage (and children)—as they were clearly 'personal' they do not vest in a trustee. The Insolvency Services' Technical Manual Chapters 31.9.63 and 30.119 also clearly stated this.

There were also a huge number of clear practical or logical impediments to the claim, which should have acted as a reality check for the trustee.

The trustee claimed to stand in the shoes of the bankrupt, yet there is clear authority that the bankrupt continues to occupy these shoes himself. There are many cases in which the bankrupt continues to take or more usually respond to financial proceedings on divorce (such as *Albert v Albert* [1997] 2 FLR 791 and *Hellyer v Hellyer* [1996] 2 FLR 579)

The trustee was calling in aid of the discretionary powers of MCA 1973, yet the MCA 1973, s 25 considerations for the exercise of such discretion does not consider the interests of creditors. Mr Registrar Jones had been acute to point to cases that confirm that the court cannot exercise its MCA 1973 jurisdiction to make a payment in favour of the creditor of a spouse (*Burton v Burton* [1986] 2FLR 419 and *Milne v Milne* [1981] 2 FLR 286).

If the matrimonial courts could exercise the MCA 1973 discretion in favour of a trustee, it would obviate the need to make any Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996) claim to establish the strict property rights of a bankrupt.

It would put the non-bankrupt spouse in the double jeopardy of being pursued by the bankrupt in his personal capacity and the trustee on behalf of the creditors.

The trustee was seeking to exploit the personal rights of a spouse while taking no reciprocal spousal obligations to the wife or daughter.

As MCA 1973, ss 23 and 24 rights only arise within divorce, Mr Registrar Jones had wondered rhetorically if the trustee would say that he was also able to file for divorce on behalf of a bankrupt, in order to trigger the jurisdiction to make his claim.

The Family Court has exclusive jurisdiction for MCA 1973 claims and the procedure for such a claim is by way of Form A in the divorce proceedings—had the trustee sought to initiate the claim according to the rules of court, or even entitled his originating application ‘in the matter of MCA 1973’, the insuperable obstacles might have become evident at an earlier and less costly stage.

Nonetheless, the deputy judge’s judgment was very helpful in specifically applying existing dicta to the case of insolvent estates and thus avoiding the possibility of another claim on the grounds, as in this case, that there is no authority holding whether a trustee can or cannot make an MCA 1973 claim. The judgment gives further guidance to family and/or insolvency practitioners on the nature of matrimonial claims within insolvency situations.

There is a body of precedent that sheds light on the nature of matrimonial orders within the concepts of property law and insolvency:

- *Treharne and Sand v Forrester* [2003] EWHC 2784 (Ch)—a property transfer or lump sum order under MCA 1973 is capable of being a disposition of property and is one by the bankrupt (not the court) for the purposes of MCA 1973, ss 284 or 339 and 340
- In *Re Singh Sands (as trustee in bankruptcy of Singh) v Singh and others* [2016] EWHC 636 (Ch), [2016] All ER (D) 209 (Mar), Newey J expanded on the dicta of *Hill & Anor v Haines* [2007] EWHC 1012 that spousal claims under MCA 1973 have a real value for the purpose of IA 1986, s 339 (transactions at an undervalue (TUV)), and that orders of the family court in resolution of financial proceedings on divorce are unlikely to constitute a TUV unless there is some vitiating factor rendering the value of the compromise significantly less than the consideration provided by the bankrupt
- Chief Registrar Baister in *Re Jones (A Bankrupt)* [2008] 2 FLR 1969 confirmed that although compromise of spousal claims under MCA 1973 constituted valuable consideration, it did not make the claimant spouse a ‘creditor’ (for the purposes of MCA 1973, s 340)

The deputy judge’s confirmation that the compromise of spousal claims was not a disposal of ‘property’ for the purposes of IA 1986, s 284 was a helpful clarification and it was logically consistent with the decision of Chief Registrar Baister.

The judge confirmed that his findings did not affect the position where a spouse’s claim had been satisfied by an order of the court creating an enforceable right, or resulted in the transfer of property which then could become after-acquired property within IA 1986, s 307.

What practical lessons can be learned from this litigation?

Insolvency and matrimonial practitioners cannot afford to ring fence their areas of practice—they need to recognise and understand the overlap of strict law and matrimonial jurisdiction so that erroneous claims are identified early, rather than pursued in a manner that results in considerable financial and/or emotional costs to the parties. There needs to be constructive communication between the lawyers from an early stage.

Interviewed by Alex Heshmaty.

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