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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

IN THE MATTER OF JOHN MARTIN (A BANKRUPT)

THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

On 12th day of December 2022

Mr Atchison for the trustee in bankruptcy (instructed by Cleaver Fulton & Rankin)

Mr Lyttle KC and Mr McEwen for the bankrupt (instructed by McNamee McDonnell & Duffy Solicitors)

MASTER KELLY

Introduction

[1] This application arises within the context of a personal injury action wherein the bankrupt obtained substantial damages some two years prior to his bankruptcy. By this application, the trustee seeks the court’s directions as to whether the damages, or any part thereof, constitute “property” forming part of the bankruptcy estate to be realised for the benefit of the bankrupt’s creditors.

[2] Mr Atchison appears for the trustee and Mr Lyttle KC appears with Mr McEwen for the bankrupt. I am grateful to all counsel for their helpful written and oral submissions.

The nature of the application

[3] This application is not strictly an adversarial one. It is brought pursuant to the provisions of articles 334(1) and 276 (2) of the Insolvency (Northern Ireland) Order 1989 (“the 1989 Order”) which together allow a trustee to apply to the court for guidance and directions on any issue arising in any bankruptcy. Respectively, the articles provide:

“334-(1) Every bankruptcy is under the general control of the High Court and, subject to the provisions in Parts VIII to X, the Court has full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy.”

and:

“276.-(2) the trustee of a bankrupt’s estate may apply to the High Court for directions in relation to any particular matter arising under the bankruptcy”.

[4] The bankrupt, while not actually a respondent to the application, clearly has a direct interest in its outcome. Thus, he is entitled to appear, give evidence, make submissions, and draw to the attention of the court any matters which appear to him to be relevant. Simply put, he contends that his personal injury claim was peculiarly personal to him and that any damages arising from it are excluded by law from his bankruptcy.

The purpose of the application

[5] The trustee brings the application to assist him in the discharge of his statutory function under article 278 (2) of the 1989 Order which provides:

“278.-(2) the function of the trustee is to get in, realise and distribute the bankrupt’s estate in accordance with the following provisions of this Chapter; and in the carrying out of that function and in the management of the bankrupt’s estate the trustee is entitled, subject to those provisions, to use his own discretion.”

It follows then that one of the trustee’s first duties upon appointment is to determine the extent of the bankrupt’s estate.

[6] The reason for the application is that article 2 (2) of the 1989 Order contains a very wide, non exhaustive definition of the term “property”. It provides:

“2.-(2) “property” includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;”

This definition, which includes tangible and intangible assets, clearly includes cash, money in bank accounts and choses in action (for example, a personal injury claim). Consequently, the trustee is of the view that the property referred to in his application

comes within that wide statutory definition of “property” and thus forms part of his bankruptcy estate to be realised for the benefit of his creditors.

The relief sought in the trustee’s application

[7] In his application, the trustee poses the following specific questions to the court:

“1. (i) whether the monies held in cash and bank accounts by the Bankrupt at the date of his adjudication constituted property which formed part of his estate at the commencement of the bankruptcy;

(ii) if the answer to 1(i) hereof is yes, whether those monies (property) vested in the Trustee in Bankruptcy;

(iii) if the answer to 1(i) and/or (ii) is yes, whether the Trustee in Bankruptcy ought properly to take steps to realise those monies (property) for the benefit of the Bankrupt’s estate;

(iv) whether the antecedent transactions conducted by the Bankrupt whereby he disbursed monies to family members (associates) and/or third party entities for their benefit within a “relevant time” prior to his adjudication are amenable to adjustment pursuant to Articles 312 and/or 313 and/or 367 of the Insolvency (Northern Ireland) Order 1989;

(v) if the answer to 1 (iv) hereof is yes, whether the Trustee in Bankruptcy ought to pursue such remedies and/or relief of the Bankrupt’s estate.”

The remainder of the application deals with more general issues including costs.

The bankrupt’s personal injury action and significant chronology

[8] On or about 24 July 2010, the bankrupt was involved in a serious road traffic accident in which he sustained life threatening and life changing injuries. Such was the gravity of the accident that the bankrupt was rendered permanently blind and, subsequently, also suffered the loss of an eye. He was 49 years old at the time of the accident. He is now 61 years of age.

[9] On 1 February 2013, the bankrupt commenced a personal injury action in respect of his injuries. In that action he sought both general and special damages. The general damages aspect of his claim requires no explanation. The special damages part of the claim related to the bankrupt’s past, present and future care costs. There was no claim for loss of earnings.

[10] On or about May 2016, the bankrupt received the sum of £719,009.26 in settlement of the personal injury claim. This sum appears to have been a global figure to include both general and special damages.

[11] On 7 February 2018, HMRC presented a bankruptcy petition against the bankrupt in respect of a significant tax liability. On 12 September 2018, a bankruptcy order was made.

[12] On 20 September 2018, the Official Receiver conducted a Preliminary Examination (“PE”) interview with the bankrupt. However, despite the PE being conducted under caution and under article 10 of the Perjury (Northern Ireland) Order 1979, the bankrupt did not disclose any information about the personal injury claim to the Official Receiver.

[13] On 21 September 2018, the Official Receiver appointed the applicant as trustee of the bankrupt’s estate.

[14] The trustee’s statutory investigations revealed the history of the personal injury claim and the damages obtained by the bankrupt. The investigations also revealed that as at the date of the bankruptcy (12 September 2018), the bankrupt had disbursed all but a nominal amount of the damages from his bank accounts, paying significant sums to close family members and (so the bankrupt claims) keeping an undisclosed sum in cash at his home.

The relevant legal principles

[15] While article 2(2) defines property *included* in a bankruptcy estate, article 11 (2) of the Order provides that certain property is *excluded* from the bankrupt’s estate. It states:

“11.-(1) Subject to the following provisions of this Article, a bankrupt’s estate for the purposes of Parts VIII to X comprises-

(a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy.....

.....

(2) Subject to Article 281 (certain excluded property reclaimable by the trustee), paragraph 1 does not apply to-

(a) such tools, books, vehicles or 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.”

In addition, long established case law has determined that certain causes of action are uniquely personal to the bankrupt and that damages which arise in such an action are excluded from a bankrupt’s estate. In *Beckham v Drake* (1849) 2 H.L. Cas 579, at 604 Erle J expressed the opinion that an action which is personal to the bankrupt is one in which:

“the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property.”

A distinction is thus drawn between those actions which are personal to the bankrupt and those which relate to or include his property.

[16] The position is less straightforward where the bankrupt receives damages in an action purely personal to him and then converts them into some other form of property. In those circumstances the converted property may (but not necessarily will) form part of the bankrupt’s estate (see: *Khan v Trident Safeguards Ltd* [2004] EWCA Civ 624, [2004] ICR 1521; *Grady v Prison Service* [2003] EWCA 527; [2003] ICR 753; [2003] 3 ALL ER 745, CA; *Wilson & Anor v United Counties Bank Ltd & Anor* [1920] A.C 102.

Consideration

[17] To answer the first question in the trustee’s application, the starting point must be the question of whether the bankrupt’s chose in action, be it past or present, was either a personal or a hybrid action.

[18] The term “hybrid action” finds its origin in the case of *Ord v Upton* [2000] Ch.352 CA. In that case, the bankrupt sued a doctor alleging negligent treatment received by him prior to bankruptcy. The bankrupt claimed damages for pain and suffering as well as damages for past and future earnings. The court held that such a claim was a hybrid claim as it was in part personal and in part relating to property. However, as there was only one thing in action, part personal to the bankrupt and part relating to property, the court held that the action vested solely in the bankrupt’s trustee with the trustee being entitled to retain damages awarded for past and future loss of earnings but would hold any damages for pain and suffering on constructive trust for the bankrupt (See also: Gowdy: ‘Individual Insolvency: The Law and Practice in Northern Ireland’ 8.14 to 8.18).

[19] In the present case, for the bankrupt’s personal injuries action to be a hybrid action, in my judgment that part of his claim in respect of care costs must be a claim relating to his rights of property.

[20] The court has been provided with a great deal of evidence in this application including: (i), the pleadings for the personal injury action; (ii), the relevant medical evidence; and (iii), the forensic accountancy report relied on by the bankrupt in support of his claim for care costs. The evidence clearly shows that his ability to care

for himself on a day-to-day basis is extremely limited and that he will require daily and constant care for the rest of his life. Consequently, the bankrupt argues that his care costs must provide for his care needs for the rest of his life. In my judgment, this is the purpose of the care costs. Furthermore, the evidence also shows that the bankrupt's care is primarily and currently being provided by close family members, including those alluded to at 1.(iv) of the trustee's application.

[21] Taking all matters into consideration, I am unable to accept that that part of the bankrupt's claim in respect of care costs could be described as a claim relating to his rights of property. In the circumstances, I am led to conclude that the bankrupt's personal injury claim was a personal rather than a hybrid action. Having reached that conclusion, I am also driven to conclude that the damages flowing from that claim are personal to the bankrupt and thus excluded from his bankruptcy estate unless they have since been converted into some other form of property in which he has a clear interest. However, in my view the words "monies held in cash and bank accounts by the Bankrupt" as far as they refer to the subject damages, denote that the damages retain the same character as in the chose in action and have thus not been converted into other property.

[22] It seems to me that this case has echoes of the case of *Re Wilson Ex parte Vine* [1878] 8 Ch.D.364. In that case, the bankrupt brought an action for slander in which the court awarded him damages in the sum of £250.00. That was a considerable amount of money at that time. The trustee took no issue with the fact that the right of action had been personal to the bankrupt but argued that as the bankrupt had already received the damages, they had become his property and thus passed to the trustee. The court in that case refused to order that the trustee was entitled to obtain the damages, stating:

"if the bankrupt had accumulated the money and had invested it in some property, that property might be reached by the trustee. But the fact that he could do that does not enable the trustee to intercept the damages before they reach the bankrupt's hands, or to prevent him, if he has got them, from spending them on the maintenance of himself and his family."

Although it is unclear as to how much of the damages is attributable to care costs, I nonetheless consider that in the unique circumstances of this case the care costs in any event come within the statutory exemption contained within article 11(2) - namely, "provisions necessary to satisfy the basic domestic needs of the bankrupt and his family".

Conclusion

[23] For the reasons set out above and elsewhere in this judgment, I am led to conclude that the answer to question 1.(i) in the trustee's application is: no. For the same reasons, I conclude that the answer to question 1.(iv) is also no because the bankrupt was in my judgment free to make payments or financial gifts to third parties from his

damages as those monies were personal to him within the context of the 1989 Order, and property excluded by it.

[24] As to the issue of costs, while I am prepared to hear the parties on this issue, I am minded making no order as to costs save that the trustee be entitled to his costs from the bankruptcy estate. I am of the view that because of the level of damages involved, and the unusual factual and chronological background of the case, it was inevitable that the trustee would avail of the provisions of articles 334(1) and 279(2) and request that the court make the determination on this discrete issue. Indeed, I think any responsible bankruptcy trustee would have acted likewise when faced with such an important legal issue. In addition, the issue of the bankrupt having concealed the existence of the damages not only meant that he provided information on his property and affairs to the Official Receiver which was materially inaccurate, but in doing so he also obstructed the Official Receiver in and about the discharge of his statutory duty to investigate the bankrupt's affairs, and I would not in the circumstances consider it appropriate to award him costs.