Neutral Citation Number: [2019] EWCA Civ 1289

Case No: A2/2018/2538

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
Mrs Justice Falk
CH-2018-000069

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 July 2019

Before:

LORD JUSTICE FLOYD
LORD JUSTICE SIMON
and
LORD JUSTICE DAVID RICHARDS

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Between:

IKECHUKWU OBIALO AZUONYE	**Appellant**
- and -	
IMOGEN KENT **(in her capacity as trustee of the bankrupt estate of the Appellant)**	**Respondent**

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Barnaby Hope (instructed by direct access) for the **Appellant**
Jon Colclough (instructed by **Blake-Turner LLP**) for the **Respondent**

Hearing date: 10 July 2019

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Approved Judgment

Lord Justice David Richards :

1. The issue of principle that arises on this second appeal is whether the liability of a debtor for future payments under an income payments order (IPO) made in the debtor's bankruptcy ranks as a provable debt in a later bankruptcy of the same debtor. The answer is provided by section 335 of the Insolvency Act 1986 (the Act) if the later bankruptcy order is made before the debtor is discharged from the earlier bankruptcy. In that case, the IPO becomes an asset of the later bankruptcy and is fully enforceable by the trustee in the later bankruptcy for the benefit of that bankruptcy. The liability for future payments under the IPO is not therefore a provable debt in the later bankruptcy. However, there is no express provision dealing with the position if, as in this case, the later bankruptcy order was made after the debtor was discharged from the earlier bankruptcy.

2. A bankruptcy order was made against the appellant on 28 April 2015. By virtue of section 279(1) of the Act, he was automatically discharged from his bankruptcy on 27 April 2016. On 26 April 2016, his trustee in bankruptcy (the respondent to this appeal) applied for an IPO against him. In November 2016, an IPO for the payment of £1,000 per month was made and the appellant was ordered to provide disclosure of his income and expenditure. The appellant failed to comply with the disclosure order. On 13 June 2017, at a hearing which the appellant did not attend, District Judge Coonan, sitting in the County Court at Croydon, increased the amount payable under the IPO to £2,500 per month. The appellant applied to vary or set aside the IPO but he again failed to comply with a disclosure order made in September 2017. In November 2017, the district judge re-issued the disclosure order with a penal notice attached.

3. On 4 December 2017 the appellant was again made bankrupt, on his own application. The respondent has since been appointed as his trustee in this second bankruptcy.

4. In correspondence with the court, the appellant asserted that the effect of the second bankruptcy was to discharge the IPO. DJ Coonan directed a hearing to determine this issue. Following a hearing on 16 January 2018, she made an order that the IPO "has not been discharged by the subsequent bankruptcy" of the appellant. Strictly speaking, the issue was not whether the IPO had been discharged but whether it remained fully enforceable against the appellant, notwithstanding his later bankruptcy. The intended effect of the order was that the IPO remained fully enforceable, and it has since been treated as having this effect. On the basis of further evidence obtained from the appellant's banks, the monthly amount payable under the IPO was increased to £3,000 by an order made on 20 March 2018.

5. With permission granted by Rose J (as she then was), the appellant appealed to the High Court against the order dated 16 January 2018. The appeal was heard and dismissed by Falk J. This second appeal is brought with permission granted by Lewison LJ.

6. The appellant appeared in person before the district judge and Falk J but, on this appeal, we have had the considerable advantage of submissions by counsel instructed by him. This has meant that the matter has been more fully argued than was the case in either of the courts below.

7. Before turning to the statutory provisions and principles of law directly in point on the issue before us, I will mention some basic features of bankruptcy which provide the relevant background.

8. In the very broadest of terms, the purpose of bankruptcy is to provide protection to the bankrupt against the claims of creditors in respect of debts and liabilities as at the commencement of the bankruptcy and to realise the property owned by the bankrupt as at that date and distribute the realised proceeds among those creditors.

9. On the appointment of a trustee in bankruptcy, the bankrupt's estate vests in the trustee: section 306 of the Act. The bankrupt's estate is defined by section 283 to comprise all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, subject to certain exceptions and additions not relevant to the present case. A bankruptcy commences on the making of the bankruptcy order: section 278. After the making of a bankruptcy order, no creditor of the bankrupt has, in respect of a debt provable in the bankruptcy, any remedy against the person or property of the bankrupt and may not commence proceedings against the bankrupt in respect of the debt save with the leave of the court: section 285(3).

10. "Bankruptcy debt" is defined by section 382(1) to include "any debt or liability to which [the bankrupt] is subject at the commencement of the bankruptcy" and "any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy". It is immaterial whether "the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion": section 382(3). "Liability" is defined as "a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution": section 382(4). The breadth of these provisions is reflected in the definition of "provable debts" in rule 14.2(1) of the Insolvency Rules 2016: "All claims by creditors except as provided by this rule are provable as debts against the company or bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages".

11. The very broad reach of the definition of provable debts was emphasised by the Supreme Court in *Re Nortel GmbH (in administration)* [2013] UKSC 52, [2014] 1 AC 209. Lord Neuberger quoted the *Report of the Review Committee on Insolvency Law and Practice* (1982) (the Cork Report) which at para 1289 stated that it was a "basic principle of the law of insolvency that every debt or liability capable of being expressed in money terms should be eligible for proof…so that the insolvency administration should deal comprehensively with, and in one way or another discharge, all such debts and liabilities". Lord Neuberger continued at [93]: "The notion that all possible liabilities within reason should be provable helps achieve equal justice to all creditors and potential creditors in any insolvency, and, in bankruptcy proceedings, helps ensure that the former bankrupt can in due course start afresh".

12. This approach informed the decision of the Supreme Court that the possible exposure of a company in administration to the future imposition of a liability to contribute to a pension scheme fund by the service of a contribution notice by the Pensions Regulator

pursuant to statutory powers was a provable debt. This was so, notwithstanding that the decision to serve a contribution notice and the amount of the liability imposed by it were both decisions to be taken by the Regulator in the exercise of discretionary powers. In reaching this decision, the Supreme Court overruled the decision of this court in *Glenister v Rowe* [2000] Ch 76 that a claim for costs in litigation against a bankrupt incurred before the bankruptcy, but not the subject of an order by the court before the bankruptcy, was not a provable debt because no liability to pay such costs arose until the court exercised its discretionary power to make an order for costs.

13. Some very limited exceptions to the broad category of provable debts are made in the legislation on policy grounds. Specific exceptions are set out in rule 14.2(2). In addition, rule 14.2(5) provides that: "Nothing in this rule prejudices any enactment or rule of law under which a particular kind of debt is not provable, whether on grounds of public policy or otherwise". As will be seen, the respondent places reliance on this sub-rule.

14. A bankruptcy order prevents the enforcement of any provable debt (section 285(3)), and effectively limits any means of recovery of such a debt to proof in the bankruptcy, but the bankrupt is not released from the provable debts, or any other bankruptcy debts, until discharge under sections 279-280 of the Act. Normally, as in the case of the appellant's first bankruptcy, a bankrupt is discharged after one year. Section 281(1) provides that the discharge releases the bankrupt from all bankruptcy debts, but it does not affect creditors' rights of proof. There are some specific bankruptcy debts, including some provable debts, which are not released by the bankrupt's discharge but none is relevant to the facts of the present case.

15. Because income accrued after the commencement of bankruptcy does not form part of the bankrupt's estate, not being the bankrupt's property at the commencement of the bankruptcy, section 310 makes provision for the making of IPOs. It is defined as "an order claiming for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order": section 310(1). An IPO can only be made on the application of the trustee and before the discharge of the bankrupt. The period of the order may end after the discharge of the bankrupt, but the period may not exceed three years from the making of the order: section 310(6). An IPO may require either the bankrupt to make the payments or require a person, such as an employer, to make the payments to the trustee, instead of to the bankrupt: section 310(3). Sums received by the trustee under an IPO form part of the bankrupt's estate: section 310(5). An IPO may be varied on the application of the trustee or the bankrupt, whether before or after discharge: section 310(6A).

16. The problem arises in the present case because the appellant was made bankrupt for a second time, before the expiry of the IPO made in the first bankruptcy. The issue is whether the IPO nonetheless continues in force and continues to be enforceable for the benefit of the estate in the first bankruptcy, as the respondent submits and the courts below have held, or whether the claim for payments falling due after commencement of the second bankruptcy is a provable debt in the second bankruptcy, as the appellant submits.

17. As I mentioned earlier, the position would be clear, and different from either of those alternatives, if the appellant's second bankruptcy had commenced while he was still

undischarged from the first bankruptcy. Sections 334-335 of the Act make provision in this event.

18. Section 335 applies where a bankruptcy order is made against an undischarged bankrupt: section 334(1). In such a case, section 335 has five principal effects. First, any money which has been paid under an IPO to the trustee in the earlier bankruptcy and is comprised in the earlier bankruptcy estate at the commencement of the later bankruptcy "is to be treated as comprised in the bankrupt's estate for the purpose of the later bankruptcy": section 335(1). Second, any sums payable under the IPO after the commencement of the later bankruptcy form part of the estate in the later bankruptcy: section 335(2). The effect of these provisions is therefore that the IPO ceases to be for the benefit of the earlier bankruptcy and its creditors and becomes an asset in the later bankruptcy. Third, the creditors in the earlier bankruptcy are not creditors in the later bankruptcy in respect of the same debts: section 310(5). This provision is necessary because their debts are not released until the bankrupt has been discharged from the earlier bankruptcy and, were it not for this provision, they would be entitled to prove in the later bankruptcy in respect of those debts. Fourth, in place of their proofs, the trustee in the earlier bankruptcy may prove for the unsatisfied balance of provable debts in the earlier bankruptcy, together with interest on that balance and any unpaid expenses of the earlier bankruptcy: section 310(5). However, and fifth, the trustee's provable debt is subordinated to all the other provable debts in the later bankruptcy: section 335(6).

19. There is no equivalent to section 335 addressing the position as regards an IPO if a later bankruptcy commences after the debtor has been discharged from the earlier bankruptcy.

20. The respondent accepts, and it is common ground, that arrears due under the IPO at the commencement of the appellant's second bankruptcy are provable in the second bankruptcy and cannot be recovered by other means. This is the effect of a decision of HH Judge Hodge QC, sitting in the High Court, in *Booth v Mond* [2010] EWHC 1576 (Ch), [2010] BPIR 1111 and it is not suggested that the decision was wrong. In my view, Judge Hodge was clearly right.

21. The respondent also accepts that, particularly in the light of the reasoning in *Re Nortel*, payments under the IPO falling due after the commencement of the appellant's second bankruptcy (future IPO payments) would, in the absence of contrary provision, be a provable debt in his second bankruptcy. In consequence, the liability to make the payments would cease to be enforceable against the appellant himself.

22. The respondent submits that, for the reasons advanced to Falk J and accepted by her, there are two alternative grounds for concluding that future IPO payments are not provable and remain enforceable against the appellant.

23. The first ground turns on the language of section 335(2): "Any sums which in pursuance of an income payments order under section 310 *are payable after the commencement of the later bankruptcy to the existing trustee* shall form part of the bankrupt's estate for the purpose of the later bankruptcy" (emphasis added). The respondent submits that the italicised words pre-suppose that, but for section 335(2), the future IPO payments would continue to be payable to and enforceable by the first

trustee and would not be provable in or affected by the later bankruptcy. It follows that, in a case to which section 335 does not apply, the future IPO payments remain payable to and enforceable by the first trustee. Just as in a case to which section 335 applies, where the IPO is kept alive and fully enforceable, albeit for the benefit of the later bankruptcy, so, in other cases, the IPO is kept alive and fully enforceable, for the benefit of the earlier bankruptcy estate and its creditors (for whose benefit the IPO was of course made). Otherwise, a debtor could avoid an IPO by becoming bankrupt again and Falk J agreed at [25] of her judgment that this would be "a strange result". I would observe that the same might be said of many liabilities which become subject to the insolvency regime, including those that were in issue in *Re Nortel*. For reasons which I give later, I do not accept that a bankrupt can so easily avoid an IPO.

24. I do not accept that the words in section 335(2) on which the respondent relies have the effect for which she contends.

25. First, and crucially, it involves a misinterpretation of "payable after the commencement of the later bankruptcy". Until released from debts by discharge in the later bankruptcy, the bankrupt remains liable to pay such debts, but they are not enforceable against the bankrupt nor can legal proceedings be taken against the bankrupt by reason of section 281. The debts are properly described as "payable" by the bankrupt until they are released by the bankrupt's discharge.

26. Second, given the wide scope of provable debts and the policy considerations to which Lord Neuberger referred in *Re Nortel*, and the express provisions in the Act and elsewhere which create exceptions in highly prescriptive terms, it is very surprising that no such provision was included in respect of future IPO payments in a bankruptcy commencing against a discharged bankrupt, if it was indeed the intention to make an exception for such payments. This is all the more surprising when such trouble has been taken with future IPO payments in a bankruptcy commencing against an undischarged bankrupt. Alternatively, future IPO payments could have been included in the small category of bankruptcy debts in section 281 which, though provable, are not released by the bankrupt's discharge.

27. The respondent's submission, if accepted, would produce a curious situation whereby diametrically opposed results would follow for future IPO payments, depending on whether the bankrupt was a discharged or an undischarged bankrupt at the commencement of the later bankruptcy. Where the bankrupt is undischarged, section 335 applies and the earlier bankruptcy estate loses all benefit from the IPO except that the trustee has a subordinated claim in the later bankruptcy. On the other hand, where the bankrupt is discharged, the later estate obtains no benefit from the IPO or the sums paid or payable under it, all of which are retained for the benefit of the estate in the earlier bankruptcy. In effect, the roles would be reversed. It is not clear what policy reasons there might be for such different results.

28. The provisions of section 335 which give priority to the creditors of the later bankruptcy in respect of after-acquired property and IPOs give effect to the recommendations of the Blagden Committee (*Report of the Committee on Bankruptcy Law and Deeds of Arrangement Law Amendment*, 1957, Cmnd 221) and the Cork Report that this produces a more equitable and practical result than the alternatives. The view taken in those Reports was that in most cases the acquisition of assets by the bankrupt since the earlier bankruptcy will have been funded by creditors in the later

bankruptcy. Neither Report expressly addressed the priority to be given to sums due under IPOs but they are treated in the same way as after-acquired assets. The priority conferred by section 335 applies only if the bankrupt was undischarged from the earlier bankruptcy at the time of the later bankruptcy. But, I can see nothing in the policy behind section 335 which would suggest that, where the bankrupt has at that time been discharged from the earlier bankruptcy, an IPO should continue in force unaffected by the later bankruptcy. As I have said, that would be contrary to the policy as regards provable debts, as repeated and explained in *Re Nortel*.

29. In my judgment, the respondent cannot extract from section 335(2) an exception, for future IPO payments in a case such as the present, to the general rule as regards provable debts.

30. The alternative submission on behalf of the respondent was that there existed a rule of law which rendered future IPO payments non-provable and accordingly they fell within the exception provided by rule 14.2(5) which I have earlier quoted.

31. It is submitted that it is established by authority binding on this court that future liabilities arising under orders of the court that are variable by the court are incapable of proof. The amount payable under an IPO remains subject to review by the court under section 310(6A).

32. The authority said to be binding on us is the decision of this court in *Cartwright v Cartwright* [2002] EWCA Civ 931, [2002] 2 FLR 610, [2002] BPIR 895. The question in that case was whether a bankruptcy order could properly be made on a petition based on sums due under the terms of an order of a Hong Kong court for arrears of periodical maintenance payments. It was common ground that only in exceptional circumstances would the court make a bankruptcy order on a petition which was not based on a provable debt. The issue was whether the petition debt was provable. It was assumed that Hong Kong law was the same as English law and that therefore the court had power to vary the amount of the payments due.

33. It was held that the maintenance payments were not provable on the grounds that "at common law a foreign maintenance order which was variable could not be enforced in England because it was not final and conclusive" (see [17] and [28]). This applied the well-established rule that a foreign judgment of any kind will not be enforced if it is not final and conclusive: see *Dicey, Morris and Collins on the Conflict of Laws* (15th ed. 2012) paras 14-023 and 18-244. It is also well established that, if an order of a foreign court is not enforceable in England, any amount payable under it cannot be the subject of proof in bankruptcy. The critical point in *Cartwright* is that the claim arose under the order of a foreign court. It does not establish that an amount payable under an order of the English court which may be varied by the court is either not enforceable or not provable. It has no application to the present case.

34. The respondent also relied on the first instance decision of Rimer J in *Re Bradley-Hole (A Bankrupt)* [1995] 1 WLR 1097. One of the many issues in that case was whether periodical payments under an order made in matrimonial proceedings falling due for payment after the commencement of bankruptcy were capable of proof. Rimer J said at p.1117:

> "Payments of this nature have always been regarded as of a personal and inalienable nature. Further the court has always retained a jurisdiction to vary, discharge or suspend such orders or to remit the payment of any arrears: see sections 31 and 32 of the Matrimonial Causes Act 1973. The special nature of such payments has resulted in their special treatment in the case of the bankruptcy of the party ordered to pay them."

35. Rimer J referred to provisions dealing with provable debts under the Bankruptcy Act 1914 and its predecessor, and said:

> "It was, however, clear law under those latter Acts that no proof could be made in the bankruptcy in respect of (a) arrears of any periodical payments at the date of the receiving order or (b) future payments due to be made after the date of the receiving order: see, for example, *Linton v Linton* (1885) 15 QBD 239; *In re Hawkins; Ex parte Hawkins* [1894] 1 QB 25; *Kerr v Kerr* [1897] 2 QB 439; *James v James* [1964] P 303 and *Woodley v Woodley (No 2)* [1994] 1 WLR 1167, 1178. The reasoning underlying these decisions was that neither the arrears nor the future periodical payments were capable of valuation or estimation, since it was within the discretion of the court as to how far arrears might be enforced and the court could also vary its order as to any future payments. The inability to prove for these payments in the bankruptcy did not, of course, mean that their beneficiary was remediless. They simply remained personal liabilities from which the bankrupt was not discharged by his bankruptcy and the intended beneficiary could continue to look to enforce payment of them out of his personal earnings."

36. Importantly, Rimer J continued:

> "The new insolvency regime introduced in 1986 has preserved these principles, although it deals with the matter differently. I consider that, on a natural reading of the definition of a "bankruptcy debt" in section 382, it can be said to include indebtedness under periodical payments orders, a construction which appears to be supported by section 281(5), which is concerned with the effect of discharge from bankruptcy. That subsection reads:
>
> > "Discharge does not, except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which
> >
> > …
> >
> > (b) arises under any order made in family proceedings…"

> However, what is in any event clear is that no proof can be made in bankruptcy for any obligations arising under, inter alia, a periodical payments order, and I have already referred to rule 12.3(2) which so provides."

37. *Re Bradley-Hope* was concerned with a variable order for periodical payments made in matrimonial proceedings and all the cases to which he referred also concerned such orders made in matrimonial proceedings. The special nature of these payments, including that such orders were not treated as creating debts at law and were enforceable by way of committal proceedings against the party ordered to make the payments, had, as Rimer J observed, resulted in their special treatment in bankruptcy. However, whatever the position before the Act, the new insolvency regime approached the matter differently. Debts arising under orders made in family proceedings are expressly and specifically excluded from the wide definitions of bankruptcy debt and provable debt, which would otherwise cover them.

38. Far from providing support for the respondent's submission, Rimer J's analysis supports the conclusion that future periodical payments due under a variable court order, save those made in family proceedings, are provable debts. In any event, the respondent's submission cannot in my judgment be reconciled with the decision and reasoning of the Supreme Court in *Re Nortel*.

39. Mr Colclough for the respondent also relied on *obiter* comments in the judgement of Judge Hodge QC in *Booth v Mond*. Judge Hodge correctly analysed the decisions in *Cartwright v Cartwright* and similar earlier cases as confined to the orders of foreign courts. He went on at [22] to say: "it is not the fact of review that makes a debt non-provable in a bankruptcy; it is the fact of uncertainty and the absence of finality and conclusiveness which underlies the conclusion that the debt is non-provable". With respect to Judge Hodge, I am unable to accept this statement, for the reasons which I have sought to develop in this judgment.

40. On the respondent's second submission, I conclude that the authorities do not establish the rule of law for which she argued and that the exception in rule 14.2(5) of the Insolvency Rules does not apply to future IPO payments.

41. I therefore conclude that neither of the respondent's submissions is well-founded and that future IPO payments are provable debts in a later bankruptcy commencing after the bankrupt has been discharged from the earlier bankruptcy. It follows that future IPO payments are not enforceable by the trustee in the earlier bankruptcy against the bankrupt and that recovery of future IPO payments is restricted to proof in the later bankruptcy.

42. I earlier said that this does not mean that the bankrupt could simply avoid an IPO by becoming bankrupt again. First, if the bankrupt was not in fact insolvent and the evidence of insolvency on which the later bankruptcy order was made is false, whether deliberately or otherwise, the court may annul the bankruptcy order under section 282(1)(a). Applications for annulment in these circumstances are not rare, particularly in the context of family proceedings: see *Paulin v Paulin* [2009] EWCA Civ 221, [2010] 1 WLR 1057 and the authorities there cited. Second, money and other assets derived from income earned after the commencement of the earlier bankruptcy and held at the commencement of the later bankruptcy will be assets forming part of

the estate in the later bankruptcy. Third, both arrears and future payments under the IPO will be provable debts in the later bankruptcy. Fourth, the trustee in the later bankruptcy will be entitled to apply for a new IPO against the bankrupt. Other remedies may be available depending on the circumstances.

43. For the reasons given above, I would allow the appeal and invite counsel to seek to agree the terms of an appropriate order.

Lord Justice Simon:

44. I agree.

Lord Justice Floyd:

45. I also agree.