Judgments

*Raithatha (as Trustee in Bankruptcy of Michael Roy Williamson) v Williamson

[2012] EWHC 909 (Ch)

CHANCERY DIVISION

Bernard Livesey QC (Sitting as a Deputy Judge of the Chancery Division)

4 April 2012

Pension - Bankruptcy - Bankrupt's estate - Vesting in trustee - Trustee in bankruptcy claiming income payments order in respect of pension not yet claimed by bankrupt respondent - Whether trustee being entitled to payment under pension scheme - Whether pension being 'income' of bankrupt - Insolvency Act 1986, 310(7).

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

BERNARD LIVESEY QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION):

1. The principal issue in this case is whether an income payments order ('IPO') pursuant to s. 310 of the Insolvency Act 1986, may be made where the bankrupt has an entitlement to elect to draw a pension but has not, at the time of the application, exercised it.

2. A second issue is whether it was in all the circumstances appropriate for the applicant ["the Trustee"] to apply without notice for, and to obtain from Norris J on 27 September 2011, an injunction preventing the respondent from dealing with the rights, interests and entitlements under a pension scheme of which he is a member.

3. I will deal with the issues separately, starting first with the principal issue.

The Background Facts:

4. The Respondent was for many years one of two shareholders and directors of Phoenix Contracts (Leicester) Limited ["Phoenix"], a quasi-partnership company. The other director and shareholder was a Mr Martin Shepherd.

5. In late 2007 the relationship between the two broke down and in January 2009Mr Shepherd issued a Petition pursuant to s. 994 of the Companies Act 2006 complaining of unfair and prejudicial behaviour by the respondent towards him as a shareholder and seeking an order that the respondent should be ordered to purchase his shares in Phoenix.

6. On 24 September 2010 Proudman J gave judgment [2010] EWHC 2375 (Ch) for Mr Shepherd and ordered the respondent to purchase the shares at a valuation fixed at November 2007 and for the costs of the action to be paid by the respondent on an indemnity basis.

7. A bankruptcy petition was presented by Mr Shepherd in respect of those costs and on 9 November 2010 a bankruptcy order was made against the respondent in the Leicester County Court. On 10th November 2010 the applicant was appointed the Trustee in bankruptcy. The total indebtedness amounted to something in the order of £1,249,653. Of this, the major creditor was and is Mr Shepherd, whose claims have been admitted to proof in the sum of £1,215,043. The other creditors amounted in all to an additional sum in the region of £34,610.

8. The sums which the Trustee has been able to get in have not been sufficient to discharge the indebtedness. The respondent was discharged from his bankruptcy on 8 November 2011.

9. On 23 September 2011, that is to say some 6 weeks before the date of discharge, the Trustee applied to the Court for an IPO pursuant to s. 310 of the Insolvency Act 1986. The application was transferred to this Court the same day.

10. On 27 September 2011 the Trustee made a without notice application for an injunction to restrain the respondent "from taking any steps to activate, draw down, dispose of, or otherwise howsoever exercise or deal with any of his rights, interests or entitlements, whether to the payment of a lump sum and/or income, arising under any pension scheme of which he is a member or in which he has an interest".

11. On 27 September 2011 Norris J granted the injunction; it was later continued by consent until the hearing of this application by order of Floyd J dated 11 October 2011.

12. The substantive application arises out of the disclosure by the respondent in his Bankruptcy Questionnaire that he has various pension policies and other pension entitlements amounting to a fund estimated at that time at between £900,000 and £990,000; most of the policies are aggregated in a scheme run by the Berkeley Burke Private Pension Plan. The rules of this pension scheme provide that the minimum age at which the pension can be taken is 55 years of age. The respondent is now 59 years old; he will be 60 in July 2012. In response to enquiries, the trustees of the funds provided the information that the respondent's "fund" might provide both a tax free lump sum of £248,708 (i.e. at the maximum level of 25% of the overall funds) plus a pension from the residual fund, the value of which would depend upon the type of pension selected - but might be an annuity in the range from £23,000 to £43,000. There may well be disagreement about the accuracy of these figures and challenge to the basis on which they were given, but the precision of the figures does not affect the legal principle on which I am invited to rule.

13. The respondent has not exercised his right to elect to take a pension: he says that he is presently in work and has no intention to take his pension in the foreseeable future. He says that he has no obligation to take his pension now and ought not be compelled to do so. He resists the application and argues that there is no jurisdiction in the court to enable an IPO to be made for reasons I will come to in a moment.

14. S. 310 of the Insolvency Act 1986 provides, so far as material, the following:

> '(1) The court may make an order ("an income payments 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.
>
> (1A) an income payments order may be made only on an application instituted -

(a) by the trustee, and

(b) before the discharge of the bankrupt.

(2) The court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt when taken together with any payments to which subsection (8) applies below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family.

(3) An income payments order shall, in respect of any payment of income to which it is to apply, either -

(a) require the bankrupt to pay the trustee an amount equal to so much of that payment as is claimed by the order, or

(b) require the person making the payment to pay so much of it as is so claimed to the trustee, instead of to the bankrupt.

(5) Sums received by the trustee under an income payments order form part of the bankrupt's estate.

(6) An income payments order must specify the period during which it is to have effect; and the period -

(a) may end after the discharge of the bankrupt, but

(b) may not end after the period of three years beginning with the date on which the order is made.

(7) For the purposes of this section the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office of employment and (despite anything in s. 11 or 12 of the Welfare Reform and Pensions Act 1999) any payment under a pension scheme but excluding any payment to which subsection (8) applies."

15. The reference to s. 11 of the Welfare Reform and Pensions Act 1999 relates back to the decision of Ferris J. in *In re Landau (A Bankrupt)* [1998] Ch 223, in which he ruled that (a) a trustee in bankruptcy was entitled to receive all sums payable under a pension policy and (b) that the bundle of contractual rights under a pension policy constituted a chose in action, and was therefore "Property" within s. 436 of the Insolvency Act 1986: therefore the benefits of the policy vested automatically in the trustee on his appointment. It became the practice of trustees, following this decision, to lay claim to a bankrupt's rights in his pension and to exercise the rights of the bankrupt under the policy in any way he chose.

16. S. 11 of the 1999 Act provides that where a bankruptcy order is made against a person on a petition presented after the coming into force of the section, any rights of his under an approved pension arrangement are excluded from his estate.

17. The effect therefore of s. 11 was to reverse the effect of the decision in *In re Landau*. That means that the "bundle of contractual rights" and benefits of the respondent's pension policy does not vest in the trustee on his appointment and will not do so unless the court has the power to make and does make an order pursuant to an application by the trustee under s. 310, which was itself amended at the same time to permit the trustee to apply for an IPO in relation to such a pension.

18. The position now is that, where the bankrupt has, prior to the bankruptcy order, given notice to the pension fund of his election to take up his rights under the pension scheme, the operation of s.310 will present no problem. In the light of any lump sum or periodical payment paid or to be paid pursuant to that election, the sums remain the property of the bankrupt save to the extent that the trustee has applied for and obtained an order pursuant to s. 310. On such an application, before making an IPO, the court will evaluate what is fair and just between the competing interests of in particular the bankrupt and his creditors and make an order which is appropriate in all the circumstances of the case.

19. While dealing with the order which a court can make in these circumstances, the court's powers are set out in subsection (3) of s. 310 (subject of course to the limitation in subs. (6)(b)). It was suggested in argument that the court could make an order which was expressed in terms of only (a) or (b) and not both. To my mind the power to make an order under (a) is designed to cater for situations where a payment has already been made to the bankrupt prior to the making of the IPO; that under (b) where payment has not yet been made. I do not see why a court cannot make an order under both (a) and (b) where it decides to make an IPO in respect of both payments which have already been made and future payments which have not.

20. Where the bankrupt has not prior to his bankruptcy made an election the question is whether the court can compel him to do so or authorise the trustee to exercise that power for him. If the court does have the power, I would anticipate that the court would have to hear argument on what was an appropriate order, both in terms of any part of any lump sum and in relation to periodical payments, after the same exercise of evaluation of fairness and justice as I described in paragraph 18 above.

21. The principal issue is whether pension entitlements which a bankrupt is entitled to receive, but has not yet elected to receive, constitute a:

> "... payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled ..."

within the meaning of s 310(7) and therefore constitute income by reference to which the court is entitled to make an IPO.

THE ARGUMENTS OF THE RESPONDENT

22. Mr Alaric Watson, counsel for the respondent, argued as follows:

23. First, that amongst the "bundle of contractual rights" vested in the respondent was the right to decide when and how to exercise the various options under his pension arrangement concerning drawing down the pension, when to do so and what proportion to take as a lump sum as against an annuity, and so forth; these rights remain his property and the Trustee has no right to interfere with those rights at all;

24. Secondly, that in order to constitute "income" within the meaning of s. 310, the payments must either have been received by the bankrupt or at least he must have become entitled to receive them during the course of his bankruptcy; that there is no basis for the Trustee to assert his claim where the Bankrupt's entitlement to actual payment has not crystallised prior to his discharge.

25. Thirdly, that he does not have any entitlement to receive any payment until he has made his election. The respondent has not made an election and therefore has no entitlement to any payment. He supports this with an example, as follows:

> "... were I to issue court proceedings against my pension fund trustees now, for failure to pay me a lump sum now, they would rightly defend the claim (and most likely have the claim struck

out) on the basis that as I have not elected to draw it at present I have no entitlement to receive it."

26. Fourthly, the powers of the court under s. 310 are set out in sub-section (3): neither gives the court any power appropriate to the situation here, where there has not been an election and no entitlement to payment, and what would be necessary to effect payment would be a mandatory injunction to compel the respondent to make his election in a particular manner.

27. Fifthly, the exercise of such a power would represent a fundamental and wholly unwarranted interference with the respondent's property contrary to his rights under ECHR, in particular under Art, 1 of the First Protocol: in support of which he cited *Krasner v Dennison* [2001] Ch 223 at paragraph [68] et seq.

28. Sixthly, that any lump sum paid under a pension scheme does not constitute "a payment in the nature of income" for the purposes of s. 310 (7), since the payment would be a one-off payment and would not be made on a repeat or periodical basis.

THE ARGUMENT OF THE TRUSTEE:

29. Mr Brougham QC for the Trustee argued, in short, that the respondent is properly to be regarded as having an entitlement to payment under the pension scheme when, according to the rules of the scheme, he qualifies to draw payment and is entitled to receive it on demand, that is to say by simply asking for it to be made to him.

ANALYSIS AND RULING:

30. Dealing first with the last of the respondent's point first, because it is the most straightforward: I reject the submission that the payment of a "lump sum" does not constitute a "payment in the nature of income". The suggestion that it could not be income begs the question what it might be called if it were not income. I do not accept that the words "which is from time to time made to him" means that the payments must be periodical or regular to qualify as a payment in the nature of income. There is nothing to prevent a one-off payment, or a number of one-off payments on different occasions from different sources as a result of different entitlements, being regarded as payments in the nature of income from time to time made to him. This was the view of Evans-Lombe J in *Supperstone v Lloyd's Names Association Working Party* [1999] BPIR 832 [esp. at 840H to 841A] and it is clearly correct.

31. On the principal issue there is no authority and no analogous authority from which a clear guide can be found. The question depends on the proper interpretation of the words in the context of the statute: that means that I am required to deduce from the words in their context what was the intention of the legislature.

32. I do not accept that the first point made by the respondent has merit. It is true that the "bundle of contractual rights" including the right to make an election, remains vested in the bankrupt by virtue of s. 11 of the Welfare Reform and Pensions Act 1999. However, the exercise by the court of the power to make an IPO payment in respect of a pension entitlement is expressly to be made "despite anything in s. 11 or 12 of the Welfare Reform and Pensions Act 1999". [emphasis supplied] It is not in my judgment possible to interpret these words as though they read "despite anything except the right of the bankrupt to make an election...".

33. Nor do I accept the respondent's argument that if the court was to interpret the words of sub-section (7) as the Trustee proposes there would be an unjustifiable interference with his rights to property in breach of the ECHR and discrimination against him on the grounds of age. In my judgment, provided that it is proper to regard the legislature as intentionally applying s. 310 (7) to a pension entitlement which the bankrupt had not

yet elected to draw, the reasons expressed by Chadwick LJ for rejecting an analogous submission in relation to the effect of s. 310, are as equally apposite to the position here as they were in *In re Malcolm* [2005] 1 WLR 1238.

34. The submission that there is no entitlement to a payment because there has been no express election appeared initially to me to be an attractive argument. I can understand the validity of the technicality illustrated by the example given and which I have quoted at paragraph 25 above.

35. However, the question has to be asked, whether the intention of the legislature was to preserve the technical difference so that a person whose election had preceded his bankruptcy would be brought into the s. 310 regime, whereas the person who had not yet elected to take his pension, would not. I ask myself - "Why would the legislature want to do that?"

36. Why they should want to preserve the distinction puzzles me. The distinction would provide an anomaly which is difficult to justify. Why should it be that a person who elected on the day preceding his bankruptcy should be in a position where his entitlement to enjoy the fruits of his pension is liable to be subject to right of the Trustee to apply for it to go to his creditors under s. 310 whereas the person who had not yet done so is immune from the impact of the section and can enjoy the full fruits of his pension to the detriment of his creditors. By using the word "immune" I mean that, such a bankrupt could avoid losing any part of his pension simply by choosing - for whatever reason - not to issue an election until the date of his discharge. I can think of no reason of policy, nor has one been suggested to me in argument, why the legislature should have legislated in order to create such an anomaly. It cannot be to the benefit of the bankrupt's creditors; the creation of such an anomaly would be to discriminate in favour of a class of bankrupts, those who happened not to have made an election, without (so far as I can see) any reason or justification.

37. In these circumstances I am driven to the conclusion that the Trustee's contentions are correct. The proper interpretation in my judgment is that a bankrupt does have an entitlement to a payment under a pension scheme not merely where the scheme is in payment of benefit but also where, under the rules of the scheme, he would be entitled to payment merely by asking for payment.

THE INJUNCTION ISSUE:

38. The injunction which had been obtained was a prohibitory injunction to prevent the respondent from exercising his rights and, as I have indicated, was made in a without notice application. The Trustee offered on 27 September 2011, and continues to offer, an undertaking in damages, but as before invites the Court to limit his liability under the undertaking to the sums in his control as Trustee in the bankruptcy - which I am told are in the region of £113,791.

39. The Trustee contended before Norris J (and has repeated the contention before me) that there was a perceived risk that the respondent would take steps to frustrate the Trustee's application for an IPO.

40. The respondent argued to the contrary that the injunction was perverse and should be discharged; that it ought never to have been granted in the first place; that there were no grounds for making an application; that the Trustee and counsel instructed were in breach of their duties to the court. That is because there was in truth no urgency at all and no risk of dissipation. In a statement served in this application, the respondent stated that he would, if asked, have provided a letter of authority to the pension providers to alert the Trustee in the event that the respondent did try to exercise his rights in such a way as to thwart the s. 310 application or otherwise.

41. This last sentence encouraged me to think that there was room for agreement on the terms of a suitable undertaking to carry us through until the final determination of the principal issue in the case, without the

need for a determination by me of the issue. However, the respondent urged me to determine the issue as, he said, it was necessary on a number of grounds, including that it would assist him in any claim he might wish to make for an order for payment of a significant proportion of those costs which have been incurred on the issue to date. Accordingly, I invited the parties to submit points of argument and to draw to my attention any relevant underlying evidence.

42. Having considered the matter with care, I can deal with the issue fairly shortly. There is in my judgment evidence of a risk of dissipation of some part of the pension rights, by some act of ingenuity on the part of the respondent, of sufficient seriousness to justify the making of the application. I do not accept the validity of the criticisms made against the Trustee and counsel nor do they otherwise justify the Order being set aside.

43. The evidence on which the Trustee relied was shortly as follows:

> a. First, I was referred to the judgment of Proudman J in the s. 994 proceedings which was handed down on 24 September 2010. She made adverse findings against the respondent on issues of credibility and on substantive issues arising in the case. She found that he had resolved to get rid of Mr Shepherd at all costs; had contrived an illegitimate procedure to get rid of him; had used his solicitors to stall as long as possible the payment of a bonus due to Mr Shepherd; had made untrue statements during a hearing before an Employment Tribunal in proceedings brought by Mr Shepherd; and made a false statement to the Leicester County Court in order to set aside a judgment obtained in that court on the basis of the Tribunal's award [which, unusually, I note, included an order for payment of aggravated damages in favour of Mr Shepherd], thereby preventing execution of the judgment, prior to putting the company into administration. I note that Proudman J made an order for costs against the respondent on the indemnity basis.
>
> b. I do not of course have the evidence of the respondent on oath and therefore can make no findings of fact of my own. The above findings of Proudman J are however just a part of what I regard as fairly compelling evidence that the respondent has formed an *animus* against Mr Shepherd and is attempting to do his very best to secure that he will get no benefit from the Judgment he obtained. It seems to me that it is no accident that Mr Shepherd is the only substantial creditor.
>
> c. In addition to the points arising from the judgment of Proudman J, the Trustee has noted that the respondent appears to have disposed of the legal interest in a number of assets which he held jointly with his wife, either arranging his affairs so that the Trustee cannot easily get possession of them or declaring that the joint assets belong beneficially to his wife alone pursuant to a declaration of trust made at the start of their marriage. Thus, while awaiting judgment, after the end of the trial of the s. 994 proceedings, he and his wife sold their matrimonial home to a Mr Ball in a private sale and leaseback arrangement, with the net proceeds of sale being paid to Mrs Williamson alone. Also the respondent and his wife have some 12 bank accounts containing balances on terms, the respondent contends, that any credit balance was held on trust for his wife pursuant to an express oral declaration of trust made at the commencement of their married life some 33 years ago.

44. Although the respondent rejects the implication of a sinister motive for the above behaviour, there are just too many pieces of evidence and too many unusual transactions and explanations to restore an appearance of normality.

45. As regards the absence of urgency: the Trustee points out that he had reason to think that the above behaviour was devious and contrived; he had reason to fear that the respondent might in some manner, that he could not easily predict, seek to put a significant part of the pension funds out of his reach, perhaps by secur-

ing early payment to himself (or another) of a substantial lump sum, and making off with it, or by making an election which might (for example) wholly forfeit his entitlement to a lump sum.

46. In my judgment the above grounds were more than sufficient (against the background of what had gone before) to justify an application to the court without notice for an injunction to be granted. I have considered the material put before Norris J and do not see any merit in the complaints made. For my part, I am satisfied that it is appropriate for the injunction to be continued in the present case and I propose to order that it continue in force until these proceedings are finally determined, unless a satisfactory undertaking can be agreed between the parties.