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Case Comment

Bankruptcy and hybrid claims

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Ord v Upton [2000] Ch. 352 (CA (Civ Div))

***L.Q.R. 46** SECTION 306 of the Insolvency Act 1986 provides that a bankrupt's estate vests automatically in the trustee in bankruptcy the moment the trustee's appointment takes effect without further formality. Section 283 provides that a "bankrupt's estate" comprises "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy" and, by virtue of s.436, "property" includes "things in action". At first blush, all the bankrupt's rights of action will vest by way of deemed assignment (s.311(4)) in the trustee. However, it has long been settled that rights of action *personal* to the bankrupt do not form part of the estate or vest in his trustee. These include claims 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" (*Beckham v Drake* (1849) 2 H.L. Cas. 579 at 603-604), such as defamation and assault. Accordingly, there is a distinction between claims referable to the bankrupt's personal inconvenience, which remain vested in him, and claims relating to property, such as contractual rights to receive money, which vest in the trustee.

One problem is how to treat claims that give rise to various forms of relief, only some of which are classifiable as relating to property. A classic example of such so-called hybrid claims is an action for negligently inflicted personal injury where the claimant seeks general damages to ***L.Q.R. 47** reflect pain and suffering and damages for past/future loss of earnings. One approach is to treat hybrid claims as divisible property of which only the relevant parts vest in the trustee: *Wilson v United Counties Bank Ltd* [1920] A.C. 102. However, in *Ord v Upton* [2000] Ch. 352 the Court of Appeal held that a claim in which the bankrupt sought damages for pain and suffering and loss of earnings was a single, indivisible claim that vested wholly in the trustee, even though the damages for pain and suffering were personal. The trustee would be liable to account to the bankrupt in respect of any element of personal relief as constructive trustee: [2000] Ch. 352 at 369-370, 371. The virtue of this approach is that it puts the trustee, on behalf of the creditors, firmly in control of assets that may have value to the estate.

The recent decision in *Arfan Khan v Trident Safeguards Ltd* [2004] EWCA Civ 624 muddies the already clouded waters further. The question was whether a bankrupt had standing to appeal the Employment Tribunal's rejection of claims against his former employer for discrimination and victimisation under the Race Relations Act 1976 (RRA) and unfair dismissal. It was accepted that the bankrupt was entitled to pursue the appeal relating to the unfair dismissal claim in light of *Grady v HM Prison Service* [2003] 3 All E.R. 745. Argument therefore centred on whether the RRA claims had vested in the bankrupt's trustee. Where such claims are established, the RRA confers power on the Employment Tribunal to grant, *inter alia*, declaratory relief and monetary compensation, including compensation for injury to feelings. The court held unanimously that the RRA claims were, in principle, hybrid for the purposes of *Ord v Upton*: Wall L.J. was persuaded that the RRA claims were closely analogous to claims under the Disability Discrimination Act 1995 which the claimant in *Grady* had conceded were, in substance, money claims that vested in her trustee. Arden and Buxton L.JJ. agreed, although the latter seems to have had greater difficulty with the point (at [103]-[104]). Thereafter, the court divided. Although the effect of *Ord* is that hybrid claims vest in the trustee, the majority (Arden and Buxton L.JJ.) held that the issue of standing could be resolved by amendment (at

[88], [105]-[106]): the bankrupt could be permitted to limit his claim to a declaration and compensation for injury to feelings, whereupon it would cease to be hybrid. Accordingly, the key question was whether the bankrupt *should* be permitted to amend. Wall L.J. does not seem to deny that permission to sever the personal elements of the claim *could* be given (see especially at [66], [71] and [76]) but did not regard such permission as appropriate given the dubious merits of the appeals (the Employment Tribunal had treated the bankrupt as a vexatious litigant and imposed costs orders on which his bankruptcy was premised). In Wall L.J.'s view, the use of a merits cross-check did not deny the bankrupt access to justice; he could seek a re-assignment of the cause of action by compulsion if necessary. The key factor that influenced the **L.Q.R. 48* majority was the social significance and emotiveness of race discrimination and consequent public interest in the full investigation of such claims: see, in particular, at [88], [108].

Although the rationale for the outcome in *Khan* is clearly compelling, the majority's solution raises technical difficulties. It is not clear what happens to a hybrid claim that is on foot before bankruptcy (as in *Khan*) between the commencement of bankruptcy and the severing amendment. *Prima facie*, if the claim in the statement of case can be classified as hybrid, then under *Ord* (which was binding in *Khan*), it must be taken to have vested in the trustee. The problem could be cured by back-dating the amendment to before bankruptcy, in which case *Khan* effectively gives the court hearing the claim (and not merely the bankruptcy court) the power to reconstitute the bankruptcy estate retrospectively. Even if *Khan* does suggest such a power, there remains the problem of the bankrupt's standing to seek the amendment: if *Ord* vests the claim in the trustee, on what footing can the bankrupt come before the court? One answer could be a special *locus* based on the bankrupt's substantial (if not legal) interest in any personal relief arising by virtue of the *Ord* constructive trust.

On a general note, *Khan* exposes the instability of the *Ord* solution, especially its emphasis on the singular nature of causes of action. The alternative--to recognise that hybrid claims are simply bundles of divisible rights--while more realistic, still leaves us needing to identify which rights vest in the trustee. As things stand, the bankrupt will usually be best advised to seek a re-assignment.

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