Pending application to appeal is insufficient to prevent bankruptcy order being made (Barker v Baxendale-Walker)

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Restructuring & Insolvency analysis: A recent case regarding an employee benefit trust (EBT) scheme, designed to save inheritance and capital gains tax, resulted in a claim brought against the scheme's promoter for losses incurred by a disappointed client. Christopher Brockman, barrister at Enterprise Chambers (who acted for the successful supporting creditor), comments on what lessons can be learned from this case and considers the implications for insolvency practitioners.

Barker v Baxendale-Walker [2018] EWHC 1681 (Ch), [2018] All ER (D) 96 (Jul)

What are the practical implications of this case?

Rule 10.24(2) of the Insolvency (England and Wales) Rules 2016, SI 2016/1024 (IR 2016) provides:

'If the petition is brought in relation to a judgment debt, or a sum ordered by any court to be paid, the court may stay or dismiss the petition on the ground that an appeal is pending from the judgment or order, or that execution of the judgment has been stayed.'

This decision makes it clear that, in order to engage the rule, there has to be a pending appeal and an application for permission to appeal is not enough. It is, however, a factor the court can take into account when deciding whether to exercise its discretion in deciding to make a bankruptcy order. Following the decision, it is difficult to see when an application for permission to appeal will be sufficient to defend a bankruptcy petition based on a judgment debt.

What was the background?

The petitioner is a successful businessman who sought advice from Baxendale-Walker Solicitors, a firm of solicitors specialising in tax advice in which the debtor was the principal partner. A tax avoidance scheme based on the establishment of an EBT was advised in order to avoid liability to both capital gains tax and inheritance tax.

After entering into the EBT, HMRC challenged the scheme and raised assessments. The petitioner sought advice and entered into a settlement, which involved the payment of a substantial amount on account of tax and interest. The petitioner made a claim against the debtor for all the costs and professional fees incurred, including those of unravelling the arrangements which had been made. He also claimed the tax paid to HMRC on the basis that, if he had not entered into the EBT scheme, he would have entered into a different tax avoidance scheme which he had considered at the time and which, he contended, would have avoided the tax he had to pay.

The petitioner claimed that the debtor and the solicitors should have warned him that there was a risk HMRC would not agree with the interpretation they had given to a provision in the Inheritance Tax Act 1984, and failed in their duty of care to act with competence when advising on the proper construction of the provision. The claim was resisted, it being said that there had been no negligence. It was argued that the interpretation of the relevant statutory provision on which the EBT scheme was based had been correct and, it could not be said that any reasonably competent lawyer with appropriate expertise would have warned that there was an alternative interpretation such that the scheme devised and implemented by the debtor might not work.

At the first instance hearing before Mr Justice Roth, the court found that the debtor and solicitors had not been negligent. The petitioner appealed to the Court of Appeal. In a unanimous decision, the Court of Appeal overturned the first instance judgment and entered judgment against Mr Baxendale-Walker. The amount due by the time of the bankruptcy petition was in excess of £16m.

The debtor sought permission to appeal to the Supreme Court. The Court of Appeal refused permission. An application for permission to appeal had been made to the Supreme Court at the date of the hearing of the bankruptcy petition, but it had not been dealt with and a decision was awaited. Mr Baxendale-Walker opposed the bankruptcy petition on two grounds:

- first, there is a genuine and substantial cross-claim which equals the judgment debt
- second, the judgment debt is subject to the outstanding application for permission to appeal

What did the court decide?

Insolvency and Companies Court Judge Briggs (the Chief Registrar) dealt with the cross-claim in the usual way. The petitioner argued that the cross-claim was an abuse of process, alternatively it was not genuine and serious. Judge Briggs found that it was an abuse of process because it had neither been raised previously at first instance, nor in the Court of Appeal. It is an abuse of process to fail to bring the whole case, and a party runs a serious risk if it has in mind bringing different actions at the time of the original claim by not raising the matter in the first case—*Aldi Stores Ltd v WSP London Ltd* [2007] EWCA Civ 1260, [2007] All ER (D) 433 (Nov).

Judge Briggs found that the wording of IR 2016, SI 2016/1024, r 10.24(2), is focussed on providing the court with a discretion to stay if an appeal is pending. He found that there is no jurisdiction to stay the proceedings or dismiss under sub-rule (2) unless there is a pending appeal where permission has been given or no permission to appeal is required (an automatic right to appeal).

However, he did find that an application for permission to appeal was a factor the court could consider when exercising its discretion under IR 2016, SI 2016/1024, r 10.24(1) in deciding whether to make a bankruptcy order. In this case, however, he refused to do so. In making the order, Judge Briggs took into account these five factors:

- any appointed trustee could pursue the appeal
- Mr Baxendale-Walker had admitted that he was unable to pay the petition debt
- he had failed to co-operate with HMRC and interim receivers
- the evidence provided by HMRC that the debtor has strategically commenced legal action or made subject access requests under the Data Protection Act 1998 to stall or hinder progress of their claim, and the long list of court applications made by the debtor (some of which were withdrawn shortly before the hearing of the petition)
- the application for permission to appeal

Having considered all of these factors, he found there was nothing to displace the petitioning creditor's right to obtain a bankruptcy order as this was a duly presented bankruptcy petition where the liability of the debtor for the petition debt was clearly established. While a court hearing a bankruptcy petition has a discretion to adjourn the hearing of the bankruptcy petition for payment if, but only if, there is a reasonable prospect of the petition debt being paid in full within a reasonable time, that was not the case here.

As a result, a bankruptcy order was made.

Christopher Brockman is a barrister at Enterprise Chambers. He practises in all areas of personal and commercial insolvency. His practice areas include asset recovery on behalf of insolvency office

holders, opposing and obtaining administration orders, compulsory winding up, freezing orders, wrongful trading/breach of directors' duties claims, applications to examine directors and examination of directors, defending trustees against claims for negligence or breach of duty and bankruptcy restriction orders. He regularly acts for HMRC and other government departments.

Interviewed by David Bowden.

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