# Personal Insolvency Law Update

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## Legislation

*Insolvency Service Consultation Paper: Reforming Debtor Petition Bankruptcy and Early Discharge From Bankruptcy*

This Consultation was published on 13 November 2009. The consultation period will run for 12 weeks, and the closing date for responses is 8 February 2010. The proposals are designed to reduce the delay between the presentation of debtors' bankruptcy petitions and the bankruptcy order being made in order to free up court time and resources.
The main proposals are as follows:

*Debtor application for bankruptcy*

- Debtors seeking a bankruptcy order will be able to submit an application for bankruptcy electronically directly to a 'Decision Maker' (DM) who is specifically appointed by the Secretary of State to decide such applications and that person will, if appropriate, make a bankruptcy order;
- In order to encourage debtors to think about the seriousness of bankruptcy, applicants will be asked, in the application form, to confirm that they have read and understood the consequences of bankruptcy and that they still wish to proceed with their application.
- Applicants will be provided with information about bankruptcy and other debt relief mechanisms, both as part of the application form and through a telephone support line.
- The process will be entirely self-financing; costs incurred in processing an application will be met in full from the fee charged - there will be no fee remissions or exemptions.
- Bankruptcy application will not be deemed to have been made to the Decision Maker (and thus no order can be made) until a completed application form, a Statement of Affairs and full payment of both the application fee and the deposit have been received. This total amount is to be paid in full – there is to be no facility to pay in instalments.
- If full payment is not received within ten days of an application being submitted and electronically acknowledged, the application will automatically expire. An applicant will also be able to withdraw an application any time before a decision is made.
- The Decision Maker will have the power to make a bankruptcy order if satisfied on the balance of probability that that the applicant is insolvent, that the applicant's Centre of Main Interest is in England and Wales, and that there is no reason to reject or refuse to make an order.
- The Decision Maker will be under a duty to determine the application by either making a bankruptcy order or by refusing to do so and to give reasons for any decision to refuse.
- Applications must be considered and a decision made within two working days, following which the decision must be relayed to the debtor.
- If a debtor is not satisfied with the decision that has been made, he can, within 14 days, ask the Decision Maker to review that decision. There will be an ultimate right of appeal to the court.

*Early Discharge*

- The Enterprise Act 2002 reformed the Insolvency Act 1986 by reducing to one year the standard period of bankruptcy from, in most cases, three years. In addition scope was given to grant an even earlier discharge in less than one year in cases where all enquiries are completed satisfactorily by the Official Receiver (s 279(2) IA 1986).
- Evaluation of the personal insolvency provisions of the Enterprise Act 2002 in November 2007 found that the introduction of discharge from bankruptcy after one year was achieving real benefits and was supported by stakeholders. However the ability to discharge a bankrupt earlier than one year did not appear to have had any significant effect on reducing the stigma of bankruptcy or encouraging early rehabilitation, but the process under which early discharge

is granted carries administrative costs. It is therefore proposed to remove this discretionary ability to grant early discharge.

**Case Law**

*Bankruptcy debts*
*Casson and Wales v The Law Society* [2009] EWHC 1943 (Admin)

**Facts:** C and W were partners in a firm of solicitors. On 16 February 2005 they were adjudged bankrupt and ceased to practise. They were subsequently discharged on 16 February 2006. In October 2006 and May 2007 the Law Complaints Service (LCS) upheld two complaints that C and W provided inadequate professional services and ordered that they make compensation payments. C and W failed to comply. The Law Society (LS) brought proceedings in the Solicitors' Disciplinary Tribunal. C and W argued that, because the complaints related to services provided before bankruptcy, any debts or liabilities arising were 'bankruptcy debts' from which, by virtue of s 281(1) and 382(1) IA 1986, they had been released on discharge. The LS argued that the award of compensation payments was discretionary therefore a debt or liability arose only when the discretion was exercised.

**Decision:** Where a court or tribunal has discretion whether or not to make an award, any sum awarded in the exercise of that discretion does not exist as a debt or liability until the award is made (*Glenister v Rowe* [2000] Ch 76 applied). Accordingly, C and W's liability to pay the sums awarded had not arisen before their bankruptcies and had thus not been discharged upon their discharge from bankruptcy.

**Comment:** In this case, permission to apply for judicial review of the decision of the SDT had been refused but the case was reconsidered in light of the Court of Appeal overturning the decision of Sir Donald Rattee in *Day v Haine* [2008] ICR 1102. In that case it was held that a protective award made by an industrial tribunal against a company in liquidation was a contingent liability and, therefore, a provable debt. However, the reasoning of the Court was based upon the duty to give effect to EU law. It is clear from the decision in *Casson* that a discretionary award by the court will generally not be a contingent liability.

*R (on the application of Osinake Ayo Mohammed) v Southwark London Borough Council* [2009] EWHC 311 (Admin)

**Facts:** In June 2005, the Council obtained a liability order against M in the Magistrates' Court in respect of unpaid council tax for the period 1 April 2005 to 31 March 2006. On 25 November 2005, a bankruptcy order was made against M on the petition of the Council. On 18 August 2006, a further liability order was obtained against M for unpaid council tax totalling £1,243.47, made up of £297.35 for 25 November 2005 to 31 March 2006, £881.02 for 1 April 2006 to 31 March 2007, and £65 costs. The order covered periods that had already been the subject of the liability order in June 2005. M applied for a judicial review, seeking that the order be quashed on the grounds that it was unlawful, because at the time of the order he was an undischarged bankrupt. He argued that both sums were bankruptcy debts, which should be claimed in the bankruptcy proceedings and could not be enforced outside the bankruptcy regime.

**Decision:** As at 25 November 2005, the date of the bankruptcy order, M was under a legal obligation to pay council tax in respect of his future occupancy of the property. The liability to pay council tax for the rest of the financial year (i.e. 1 April 2005 to 31 March 2006) after the date of the bankruptcy order was contingent upon M continuing to occupy the property each day until the end of the financial year. However, the liability to make a payment on account of council tax (under the Council Tax (Administration and Enforcement) Regulations 1992) arises before any liability to pay the council tax itself arises under s 2 of the Local Government Finance Act. On any view, therefore, as at 25 November 2005 Mr Mohammed was already under a legal obligation to make a payment to the council of the full £297.35 in respect of the financial year ending on 31 March 2006. M's liability to pay council tax for 2005/6 was therefore a bankruptcy debt. The position in respect of the next financial year,

(i.e. 1 April 2006 to 31 March 2007) was different as neither the liability to pay council tax itself nor the liability to make a payment on account of council tax had arisen.

**Comment:** The second liability order was defective not only because it was for an excessive amount but also because it was obtained by taking proceedings without the permission of the court in breach of s 285(3)(b) of the Insolvency Act, at least part of the sum claimed was a bankruptcy debt and unenforceable outside the bankruptcy and it was duplicative because the council had already obtained a liability order in respect of that debt. In all the circumstances the preferable course was for the court to quash the second liability order.

*Bankruptcy – interim charging order*
*Nationwide Building Society v Wright* [2009] EWCA Civ 811; [2009] 2 BCLC 695

**Facts:** On 7 April 2006, N obtained a judgment against W in the sum of £10,000 in relation to credit card debts. N was granted an interim charging order on 5 May 2006. A bankruptcy petition was presented against W on 17 May 2006 by the supervisor of W's failed IVA. Before the bankruptcy petition was heard, N's interim charging order was made final on 26 June 2006. Neither N nor the judge was aware of the pending bankruptcy petition. W was adjudicated bankrupt on 12 July 2006. W's trustee in bankruptcy applied for an order under section 3(5) of the Charging Orders Act 1979 discharging the interim and final charging orders obtained by N, which was granted at first instance and upheld by the circuit judge on appeal. N appealed to the Court of Appeal relying on s 346(1) and (5) IA 1986, which provide that a creditor is not entitled to retain the benefit of a charging order unless its execution is completed before the commencement of bankruptcy.

**Decision:** Pursuant to s 278 IA, the bankruptcy of an individual commences on the date on which the bankruptcy order is made. In contrast with the position in corporate insolvency, save to the extent permitted by s 284 (restrictions on dispositions of property), there was no relation back to a date before the making of the order and s 284 did not affect the rights of persons who received property from the bankrupt before commencement in good faith, for value and without notice of the presentation of the petition. Although section 3(5) COA gives the court a wide discretion to set aside a charging order, the legislative policy which underlies s 346 IA means that there must be something additional to the making of a bankruptcy order in order to entitle the court to set aside a charging order. On the facts, no such additional factor being present, the charging order should have been allowed to stand.

**Comment:** It should be noted that, for costs reasons, the trustee in bankruptcy was not represented on the appeal, and instead the court relied on the written arguments filed on behalf of the trustee in the courts below. It is interesting to note the contrast with the position in relation to corporate insolvency. In the case of compulsory liquidation, winding up is deemed to have commenced from the time of presentation of the petition (s 129 IA). Therefore, had W been a limited company then under s 183(1), which is in identical wording to s 346, the court would have been compelled to set aside the charging order. In light of the decision in *Poulton* (see below) it is arguable that W's trustee may have an action against the Court Service for breach of duty on the grounds that had they properly discharged their duty to send notice of the petition to the Chief Land Registrar pursuant to r 6.13 IR the charging order could not have been made final.

*Bankruptcy – notice to Chief Land Registrar*
*Trustee in Bankruptcy of St John Poulton v Ministry of Justice* [2009] EWHC 2123 (Ch)

**Facts:** A bankruptcy petition was presented against P on 21 January 2004 but the Court Service failed to send notice to the Chief Land Registrar with a request that such notice be filed in the register of pending actions as provided for by r 6.13 of the Insolvency Rules 1986. In March 2004 P sold real property and the proceeds of realisation of that property were dissipated. Such a disposition was in breach of the terms of s 284 of the Insolvency Act 1986 (restriction on dispositions of property after presentation of bankruptcy petition), but the property could not be recovered because of the absence of registered notice on the land register which meant that the purchaser acquired a good title under the terms of s 284(4). T commenced proceedings against the Ministry of Justice (which was responsible for the Court

Service) for breach of statutory duty and/or negligence arguing that had the bankruptcy court properly discharged its responsibilities the sale of estate property could not have happened and the resulting loss to the bankruptcy estate could have been avoided. The Ministry argued that no reasonable cause of action was disclosed as r 6.13 does not impose a statutory duty that is capable of being enforced by private law action. It also denied that the Court Service owed a duty of care to the creditors of the bankrupt for the purposes of a claim in negligence.

**Decision:** In view of the importance of the point of law raised in this case HHJ Marshall QC obtained authorisation to hear the case sitting as a judge of the High Court pursuant to her authority under s 9 of the Supreme Court Act 1981 (as it then was). She held that r 6.13 does impose a statutory duty, that it was within the scope of the Lord Chancellor's rule-making powers under s 412 IA to create actionable duties if necessary and that it can and should be inferred that this particular duty was intended to be actionable, because it would be unfair, and in fact even contrary to the very purpose of the Rules, if it were not.

It was not right to classify the Insolvency Rules as being merely 'regulatory'; they are much more in the nature of rules of procedure or a constitution and aspects of them are directly legislative per se. Rule 6.13 imposes a responsibility on the court to notify the Land Registry of a bankruptcy petition in order to enable the statutory scheme for the due distribution of the bankrupt's assets to be given proper effect. There is no alternative remedy or cause of action (whether public or private law) available to those who suffer as a result of the breach of that duty.

**Comment:** The Judge went on to consider the further question of common law negligence and concluded that no action could lie in common law negligence because there was no voluntary assumption of responsibility on the part of the Court Service. This decision is likely to provide a means for a trustee to recover assets which have wrongly been distributed from a bankrupt's estate prior to the bankruptcy because of an administrative error on the part of the court. The Ministry of Justice has lodged an appeal against this decision which is due to be heard be heard by the Court of Appeal on 23 or 24 February 2010.

Equity of exoneration
*Williams v Bateman* [2009] EWHC 1760 (Ch) (David Richards J.)

**Facts:** The trustee in bankruptcy of W's 1st husband (T) obtained an order for possession and sale of the former matrimonial home where W still lived with her 3rd husband. At first instance the court fixed W's entitlement to the equity of exoneration at £37,295 but rejected W's attempt to rely on s 323 IA and set off such entitlement against the value of the beneficial interest that had vested in T.

**Decision:** On appeal David Richards J concluded W's case for set-off was based on a misconception as to the purpose and effect of s 323. Section 323 is solely concerned with determining the amount due to or from a bankrupt's estate in the context of mutual dealings. The present proceedings were not concerned with the ascertainment of net indebtedness between the estate and a creditor who is also a debtor. Rather, they were concerned with ascertaining the respective beneficial interests of the estate and W in the property.

While there was a contingent liability of the bankrupt to W (arising out of the inchoate right of indemnity recognised by the equity of exoneration), there was no liability due from W to the bankrupt. The notion of setting off the contingent liability to W against the bankrupt's beneficial interest had no place in s 323. It could only make sense if it could be said that there was a liability due from her, contingently or otherwise, in respect of his beneficial interest, but there was no such liability.

**Comment:** The precise operation of the equity of exoneration is much misunderstood despite several judicial attempts at clarification. This case emphasises, among other things, the need for proper (documentary) evidence of what was spent by whom and when.

*Quantification of beneficial interest in jointly owned property*
*Jones v. Kernott [2009] EWHC 1713 (Ch)*; [2009] BPIR 1420, ChD (Nicholas Strauss QC)

**Facts:** An unmarried couple (J & K) bought a property together in joint names, funded partly by J and the balance by an interest only mortgage supported by an endowment policy. A further loan was taken out for an extension which was built and paid for largely by K. Household bills, including the mortgage payments, were shared. After K moved out, J continued to meet the mortgage payments, endowment policy and all other payments required to maintain the property. She supported their children with little or no contribution from K and did not seek child support payments. Subsequently, K served a notice of severance. J brought a claim as regards the beneficial interest in the property. The main issue was whether, and if so to what extent, the beneficial interests in the property altered after K had left and, ceased to contribute to the mortgage and other outgoings. At trial, the Judge held that it was "fair and just" that J should be entitled to 90% of the value of the property. K appealed.

**Decision:** Appeal dismissed. It was held that whatever the beneficial interests might be at the time of acquisition, a trust might be "ambulatory" in that the parties' intentions as regards their interests in the property might change, or be taken to have changed, over time. There was evidence of conduct from which it was right to conclude that the parties intended their respective shares to alter following K's departure, but none to indicate how. The only available criterion by which to assess the extent of the alteration was what was objectively fair, and the only judge of that could be the court. K's capital contribution to the value of the property, taking into account the extension, represented nearly 50% of its value. His departure and acquisition of another property did not justify saying that he was to be taken as having entirely abandoned whatever stake he had in the previously shared property.

**Comment:** This decision contains a useful analysis of the extent to which the decision of the Court of Appeal in *Oxley v Hiscock* [2005] Fam 211 survives in light of the majority speeches in *Stack v Dowden* [2007] 2 AC 432. In this case there was no communication by either party to the other of any actual intention that their beneficial interests should be altered to take account of changes in the circumstances from how they stood at the time that they parted. In the absence of an express intention the court applied the objective test of what was just and fair. The attribution of 90% to J was justifiable as, by not contributing to the outgoings at the property after 1993, K was able to buy another property. It would be unfair to allow K to benefit from that but for J not to benefit by an increased interest in the property. Thus it was not reasonable for K to retain more than a small interest in the property and the 10% assessed by the trial judge was well within the range of what was fair.

Annulment of bankruptcy order
*Official Receiver v McKay* [2009] EWCA Civ 467; (Mummery & Lloyd LJJ; Sir Paul Kennedy)

**Facts:** M was involved in minor car accident in 1994 for which she was undoubtedly liable. She disputed the claimed repair costs and judgment was ultimately entered against her for £800 odd. An unsuccessful appeal by M (based on alleged fraud of judgment) served to increase her liability for costs to approximately £17,000. The debt remained unpaid so a statutory demand was served in respect of the judgment debt and costs and, when not complied with, a bankruptcy petition was presented. After the making of the bankruptcy order, the creditor (in substance the other driver's insurer) lost interest and withdrew its proof (the only proof lodged in the bankruptcy) and paid the trustee's costs. The bankruptcy was subsequently annulled on the O.R.'s application. On appeal the sole question for determination was whether s 282(1)(b) IA and r 6.211 IR required payment of the debt which had been the subject of the proof since it was withdrawn.

**Decision**: Distinguishing authority under earlier legislation (*In re Keet* [1905] 2 KB 666, a decision on a provision in the Bankruptcy Act 1883), it was held that there was no reason why the requirement to pay in full all proved debts under IA 1986 should be understood as requiring payment in full of a debt which once had been proved but where the proof of debt has been either withdrawn by agreement between the creditor and the trustee under r 6.107 IR or expunged by the court, for whatever reason, under r 6.107 IR. Where the underlying debt still existed (notwithstanding withdrawal of proof) the court could refuse to exercise its

discretion to annul if there was a prospect that the creditor might seek to recover the debt by other means.

**Comment:** This decision, whilst making obvious good sense on the facts, does not mean that courts will not be alive to abuses of the annulment procedure. This may particularly be the case where the debtor seeks to negotiate direct with creditors without reference to his trustee, seeking to persuade them to accept something less than the full amount of their debts without making full disclosure of what the creditors could expect by way of dividend in the bankruptcy: A payment of anything less than 100p in the £1 could "open the door to arrangements with creditors under which the Court, in ignorance of the true facts, might in the exercise of its discretion order annulment of a bankruptcy which the Court, if it had known the circumstances under which the releases were obtained, would have refused to annul": *Keet* at p 674 per Vaughan Williams LJ.

Unliquidated debt

*Truex v Toll* [2009] EWHC 396 (Ch); [2009] 1 WLR 2121 (Proudman J)

**Facts:** A solicitor presented a bankruptcy petition against a former client based on an unsatisfied statutory demand which itself was based on unpaid invoices for professional fees. The solicitor had not sought to recover the fees in conventional proceedings and accordingly did not have the benefit of any judgment.

**Decision:** As a matter of principle a claim for solicitors' fees not as yet judicially assessed or determined is not a claim for a liquidated sum which can be the subject of a bankruptcy petition under s 267 IA, even if the period for challenge under the Solicitors Act 1974 has expired.

Such an unliquidated claim may, however, be converted into a liquidated debt capable of founding a petition if it is the subject of an admission, acknowledgement or agreement from which the client has bound himself not to resile. That requires the creditor to show an agreement for consideration (that is to say, an agreement as to a fixed amount, or an agreement as to hourly rates and time spent for future services so that the proper amount of the bill can be established by a purely arithmetical process), a compromise agreement, or conduct giving rise to an estoppel.

Insofar as public policy required a client to be able to seek an assessment of the relevant bill even after having reached an otherwise binding agreement as to the amount, it was merely a reason why the court might exercise its discretion against making a bankruptcy order.

**Comment:** A solicitor or other professional pursuing payment of fees by bankruptcy petition adopts a risky strategy in the absence of an agreement to pay or admission of liability by the debtor.

Transactions at an undervalue

*Paul Delaney v Can Chen and An Xiang Du* [2010] EWHC 6 (Ch) (HHJ Purle QC)

**Facts:** This case arose out of the sale and leaseback of a residential property owned by C and D. Immediately before the relevant transactions the evidence established that the property had an unencumbered freehold value of £275,000. On 8 May 2008 C and D sold the property to a Mr Delaney (a property investor and long standing acquaintance of C and D) for £210,000. On 1 May 2008, in anticipation of the transfer, Mr Delaney had granted a tenancy of the relevant property to C and D expressed to commence on 8 May 2008 and to expire on 9 May 2029. The relevant tenancy was said to be exclusive to C and D and to be non-assignable. The intention was, therefore, that C and D would continue to live at the property notwithstanding the transfer to Mr Delaney. Judgment creditors of C and D, challenged the sale of the property under s423 IA as a transaction at an undervalue with the substantial purpose of putting assets beyond their reach or otherwise harming their interest as judgment creditors. At first instance the district judge held that the transaction was one at an undervalue and entered into with the requite prohibited purpose. In approaching the question of undervalue, the district judge noted that s423 required a comparison to be made between the

value obtained by C and D and the value of consideration provided by C and D, and concluded that the difference between the unencumbered freehold value (£275,000) and the amount paid to C and D (£210,000) gave rise to an undervalue of £65,000 which she held was sufficiently significant for the purposes of the section. Mr Delaney appealed.

**Decision:** Allowing the appeal, Judge Purle QC agreed with the reasoning in *Redstone Mortgages Plc v Welch* (2009) 36 EG 98 CC, to the effect that a registered purchaser under a sale and lease back transaction acquired nothing more than the freehold reversion. From the evidence adduced on behalf of Mr Delaney of comparable transactions, it was clear that the price paid for the freehold reversion was a fair one.
Although C and D did have an unencumbered freehold down to the point of sale to D, and could have sold the property to anyone else at its full unencumbered value, notwithstanding the tenancy agreement between the parties, there were many instances where a transaction could be entered into which depleted the transferor's assets and that was not enough to stigmatise the transaction as being at an undervalue (e.g. a debtor facing bankruptcy purchasing for full value food, drink and other aspects of high living). Had C and D sold the property to Mr Delaney for £275,000 and then taken a long lease at a low rent of a comparable property paying a market premium of £65,000, the payment of that premium would not be a transaction at an undervalue. It would make no difference that the tenancy once granted would not be assignable. The result could be no different in the case, as in the instant, of a sale and lease back where the premium value of the tenancy made up for any shortfall in the purchase price. In those circumstances, the sale at £210,000 was the equivalent of a sale at £275,000 with a lease back at a premium of £65,000.

There was nothing precarious about the tenancy, so the legal burden was on the judgment creditors to establish that the transaction was at an undervalue, which they was unable to do (*Phillips v Brewin Dolphin Bell Lawrie Ltd* (2001) UKHL 2 distinguished).

**Comment:** Although, in light of the conclusion as to absence of significant undervalue, it was not necessary to consider whether the requisite statutory purpose under s423 was established, the Judge stated that the evidence before the court justified the conclusion that the the purpose of C and D was to harm the interests of creditors generally by placing the property beyond their reach. This decision will be welcomed by the growing number of organisations who purchase properties from home owners at a reduced price upon terms requiring the buyer to grant a tenancy or other interest back to the original home owners. Provided that the discount given reflects the market value of the leasehold interest it would seem that these transactions cannot be impeached as transactions at an undervalue.

<u>Abuse of Process</u>
*Pickthall v Hill Dickinson LLP* [2009] EWCA Civ 543

**Facts:** HD had acted for P in the sale of his shareholding in a company, TPP, in February 2001. In March 2001 TPP entered administration. Various claims brought against P for breach of fiduciary duty and transaction avoidance as a result of the share transfer were upheld and he was ordered to pay £642,082 plus interest to the administrators. On 6 October 2001 a bankruptcy order was made against P. On 6 April 2006, P's trustee in bankruptcy was released from office whereupon the bankruptcy estate vested in the OR. P was discharged from bankruptcy on 22 August 2006.

P believed he had a claim in negligence against HD but had failed to tell the trustee about it; P did not know that it had vested in the trustee and thought that he could pursue it himself once he was discharged. In early 2007 P was advised by counsel that the cause of action was vested in the OR and it was, accordingly, necessary for P to obtain an assignment. That was requested but not finalised before the expiry of the limitation period (6 February 2007). P therefore issued proceedings on 5 February 2007 at a time at which, to his knowledge, he did not have the cause of action vested in him. The assignment was eventually made on 20 June 2007. The question for the Court of Appeal was whether it was an abuse of process for P to have commenced proceedings and whether an amendment should be allowed to plead the assignment.

**Decision:** P was the wrong person to assert the cause of action when the claim was issued and knew that he was. It was done in an attempt to beat the limitation period which would have barred the claim if P had waited until he was in a proper position to sue; the prospects of getting in the cause of action made no difference. There was therefore an abuse of process. Whilst it was possible for permission to amend to be given to plead a later assignment where a limitation period expired after an earlier failed assignment, it would be wrong to give permission here because P knew that he did not have the cause of action when he started proceedings.

**Comment:** As a matter of law, a bankrupt has no entitlement to an assignment of causes of action vested in the trustee in bankruptcy on discharge from bankruptcy. In practice such an assignment will be a matter for negotiation. Mann J, giving the judgment of the Court distinguished the position in *Smith v Henniker-Major* [2002] EWCA Civ 762, in which it was held that permission could be given where a limitation period expires after a failed assignment, as in that case the claimant did not know that he did not have a cause of action when he started proceedings. Trustees in bankruptcy will therefore be placed in a strong bargaining position where a discharged bankrupt is seeking an assignment of a cause of action close to the expiry of the limitation period.

Duties of Trustees in Bankruptcy

*Miller (Trustee in Bankruptcy of Bayliss) v Bayliss* [2009] EWHC 2063 (Ch) (Alison Foster QC)

**Facts:** B, her husband and another family (P) were the shareholders of a family company. Shortly before being declared bankrupt B's husband transferred 187 shares in the company to B for no consideration. M was appointed trustee of B's husband's estate and the bankrupt's remaining 300 shares vested in him. M treated the 187 shares as a transaction at an undervalue and, as such, part of the bankrupt's estate. M entered into negotiations to sell the 487 shares by offering them to B and P. Various sums were offered by B and P culminating with an offer by B to purchase the shares for £30,500.00. B was informed that M was prepared to progress with the offer but that formal acceptance would only occur when cleared funds were received. B, who subsequently issued a petition under the Companies Act 1985 s.459 alleging a series of defalcations against P, failed to pay any funds despite promises to do so. P subsequently made an offer of £20,000, and provided the funds, which M accepted. B alleged that M had entered into a binding contract to transfer absolute title to all of the shares to her for the sum of £30,500.00 and that M had acted in an improper and unfair way so as to justify the intervention of the court under s 303 IA.

**Held:** No binding agreement had ever been reached with B. M was at all times inviting offers from potential purchasers of the shares which he might, but was not obliged to, accept. Objectively judged, M's opening letter was an invitation to both B and P to make offers and his actions were not such as to induce a reasonable person to believe that he intended to be bound by the first offer that he received. There was no unconditional agreement that M was bound to sell to B.

The court will be slow to intervene to upset a decision taken by a trustee. Applying the test articulated in *Osborn v Cole* [1999] BPIR 251, it can only be right for the Court to interfere with the decision of a trustee if it can be shown that he has acted in bad faith or so perversely that no trustee that no trustee properly advised could have so acted. There was nothing in the authorities that suggested any different or more onerous duty fell on a trustee who sought to contract with a third party. To impose special duties in such circumstances would impair the trustee's obligation to act in the interests of the creditors.

M was clearly seeking to maximise such value as he held on behalf of the creditors in the shares of a small family company. Had M waited for the hearing of the s.459 petition he ran the risk that he might have lost the opportunity to sell the shares at any meaningful value at all. Not only were M's actions reasonable they were professional, prudent and well-judged; there was no evidence of any impropriety or dishonourable behaviour at all. B therefore remained obliged to transfer to M the 187 transferred into her name by her husband.

**Comment:** This decision clearly affirms the principle that in the absence of fraud the court should not interfere in the day-to-day administration of a bankrupt's estate, otherwise that administration would be rendered impossible. Although it was not necessary to do so, the Judge considered whether B had standing to bring a claim under s 303 IA. Following *Port v Auger* [1994] 1 WLR 862, for a person to assert that they are 'dissatisfied' under s 303 they are required to show a substantial interest that has been adversely affected by what is claimed of. As there was no contract, and B had no other interest in the bankruptcy, she did not have standing. Her position as a mere shareholder was insufficient to give her a substantial interest.

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