Trinity Term

[2015] UKSC 39

On appeal from: [2013] EWCA Civ 1513

JUDGMENT

BPE Solicitors and another (Respondents) v Gabriel (Appellant)

before

Lord Mance

Lord Sumption

Lord Carnwath

Lord Toulson

Lord Hodge

JUDGMENT GIVEN ON

17 June 2015

Heard on 20 April 2015

Appellant	Respondents
Adam Chichester-Clark	Roger Stewart QC
	Scott Allen
(Instructed by Ross & Co Solicitors LLP)	(Instructed by Beale & Company)

LORD SUMPTION: (with whom Lord Mance, Lord Carnwath, Lord Toulson and Lord Hodge agree)

Introduction

1.
This is an application for directions in a pending appeal for which permission was granted by this court on 25 March 2014.

2.
The appeal arises out of a transaction by which Mr Richard Gabriel, the claimant in the proceedings below, lent £200,000 to a company called Whiteshore Associates Ltd. The courts below have found that his solicitors, BPE Solicitors, were negligent in their handling of the transaction. For present purposes, all that need be said about the issues is that they relate mainly to damages. The trial judge

awarded the full amount that Mr Gabriel would have recovered under the facility agreement if Whiteshore had been good for the money. The Court of Appeal held that this loss was not within the scope of the solicitors' duty. They accordingly reduced the award to a nominal £2. They also held, in the alternative, that even if substantive damages had been awarded, they would have been reduced by 75% on account of Mr Gabriel's contributory negligence.

3.
The trial judge awarded the costs of the claim up to the conclusion of the trial to Mr Gabriel. The Court of Appeal set aside the judge's costs order and ordered Mr Gabriel to pay BPE's costs of the proceedings up to and including the appeal. The costs claimed by BPE under this head amount to £469,170.60. The Court of Appeal's order was pronounced on 22 November 2013. On 5 March 2014, Mr Gabriel was made bankrupt on his own petition by order of the Gloucester and Cheltenham County Court. On 25 March 2014, Mr Hughes-Holland was appointed as his trustee in bankruptcy. As a result, the right to pursue the appeal vests in the trustee. Mr Hughes-Holland has not yet decided whether to pursue it. The reason is the uncertainty, on the current state of the authorities, about the extent of his potential liability for costs if the appeal fails.

4.
The ordinary rule is that a trustee in bankruptcy is treated as party to any legal proceedings which he commences or adopts, and is personally liable for any costs which may be awarded to the other side, subject to a right of indemnity against the insolvent estate to the full extent of the assets. Accordingly, Mr Hughes-Holland accepts that he is personally at risk for BPE's costs of the appeal to the Supreme Court. But he contends that he is not personally at risk by virtue of having adopted the appeal as trustee in bankruptcy for BPE's costs of the proceedings below in the event that the Court of Appeal's order against Mr Gabriel should be affirmed. The italicised words are important. The present application is not concerned with costs that may be awarded against the trustee on any other ground. I shall return to this point below.

5.
The answer to this question has significant implications for the trustee's decision whether to adopt the current appeal. The evidence is that if the appeal is not pursued, unsecured creditors are likely to receive a modest dividend of between about 3p and 5p in the pound. If it is pursued and succeeds, that figure is expected to rise to between 23p and 25p in the pound. But if it is pursued and fails, the impact on creditors will depend on whether in that event the trustee would be personally liable only for the costs of the appeal, or for the costs of the proceedings below as well. If the trustee's liability for BPE's costs is limited to the costs of the appeal to this court, the dividend available to creditors will be reduced, subject to ATE insurance. But if the trustee's liability for costs extends to the costs below as well, they will exceed the entire assets of the estate. The creditors will receive no dividend and the trustee will be personally exposed for the balance subject to any indemnity which he is able to obtain from the creditors. It is far from clear that such an indemnity will be forthcoming. The largest creditor, accounting for about 60% by value of claims, is the Nautilus Trust, a discretionary settlement in which Mr Gabriel has a life interest. The evidence is that it has few assets other than debts owed to it by Mr Gabriel. In these circumstances, we were not surprised to learn from Mr Chichester-Clark, for the trustee, that if he is potentially liable for BPE's costs below, the appeal is unlikely to be pursued.

Jurisdiction

6.

Mr Stewart QC, who appears for BPE, raises a preliminary issue about this court's jurisdiction to deal with this application. He submits that we have no jurisdiction to deal with the incidence of costs except (i) as a condition imposed at the time of granting permission to appeal, or (ii) as part of the ultimate disposition of the appeal.

7.
This point is in my view misconceived. Section 40(5) of the Constitutional Reform Act 2005 confers on this court the power "to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment". The Supreme Court Rules 2009 (SI 2009/1603 (L17)) provide:

"Orders for costs

46.- (1) The court may make such orders as it considers just in respect of the costs of any appeal, application for permission to appeal, or other application to or proceeding before the court.

(2) The court's powers to make orders for costs may be exercised either at the final determination of an appeal or application for permission to appeal or in the course of the proceedings."

The question which the trustee wishes to have decided is not among the substantive issues on the appeal, but it is a question which will have to be decided at some stage of the proceedings if the court is to perform its duty to determine the incidence of costs. If an order for costs may be made at any stage of the proceedings, it is clear that a decision on a question of principle arising in relation to costs may be made at any stage.

8.
This court would not normally decide an issue going to costs before the hearing of the substantive appeal. But that is because it is not normally just or even practical to do so. In the present case there is every reason for ruling on the trustee's potential liability now, and no reason for deferring it until after judgment. In the first place, the ruling which is presently sought is necessary in order to enable the trustee and the creditors to make an informed decision about whether to proceed with the appeal. A decision on the point after judgment will be of no use to them for that purpose. There is no interest of justice and no public interest which would be served by requiring the trustee and the creditors to make their decision in ignorance of the true position. Secondly, the trustee's application is, as I have pointed out, limited to the question whether a liability for BPE's costs below would follow as a matter of law from his adoption of the appeal. There are no discretionary considerations involved. In particular, nothing that we decide now (or indeed after judgment) will affect any issue which may arise about the propriety of any decision of the trustee to pursue the appeal, which is a matter for the High Court. This court is therefore in as good a position to deal with the matter now as it would be at any other time.

The question of principle

9.
A trustee in bankruptcy, unlike the liquidator of a company, is personally a party to legal proceedings which he has adopted. The reason is that the assets of the bankrupt at the time of the commencement of the bankruptcy vest in him personally, and the bankrupt has no further interest in them. The rule, which dates back to the beginning of bankruptcy jurisdiction in England, is currently embodied in section 306 of the Insolvency Act 1986. The trustee's position differs in this respect from that of a liquidator, for although a liquidator is a trustee for the proper administration and distribution of the

estate, the assets remain vested in the company and proceedings are brought by or against the company. It follows that with the exception of a limited (and for present purposes irrelevant) class of purely personal actions, a bankrupt claimant has no further interest in the cause of action asserted in the proceedings. Likewise, as Hoffmann LJ observed in Heath v Tang [1993] 1 WLR 1421, 1424, where the bankrupt is the defendant, he has no further interest in the defence, because the only assets out of which the claim can be satisfied will have vested in the trustee.

10.
None of this means that the trustee is bound to adopt the action. If the trustee does not adopt it, the action cannot proceed and will be stayed or dismissed if the bankrupt is the claimant: Heath v Tang [1993] 1 WLR 1421. If the bankrupt is the defendant, an action which the trustee does not adopt is liable to be stayed under section 285(1) and (2) of the Insolvency Act 1986. If, however, the trustee does adopt the action, he becomes the relevant party in place of the bankrupt. In the ordinary course, he will be substituted for the bankrupt under what is now CPR 19.2. But it is well established that he will be treated as the party if he has in fact adopted the proceedings by conducting the litigation, even if there has been no formal substitution: Trustee of the Property of Vickery (a bankrupt) v Modern Security Systems Ltd [1998] 1 BCLC 428. It follows that an order for costs in favour of the other side is made against the trustee personally in the same way as it would be made against any other unsuccessful litigant. The cost of satisfying the order is treated as an expense of performing his office, for which he assumes personal liability just as he does for any other expenses and liabilities incurred in the administration and distribution of the estate, but subject to a right of indemnity against the assets if the expenses and liabilities were properly incurred.

11.
These principles are easy enough to apply in a case where substantially all the costs of the other side were incurred at a time when the litigation was being conducted by the trustee. But what is to happen if the proceedings were begun by or against a litigant who subsequently became bankrupt, and part of those costs was incurred by the other side before bankruptcy supervened?

12.
The only authority which deals directly with this question is Borneman v Wilson (1884) 28 Ch D 53, in which the Court of Appeal extended the personal liability of the trustee to cover costs incurred by the other side before his adoption of the proceedings. The facts were that the Wilsons, father and son, had acted as commercial agents of one Borneman. He began an action against them in the Chancery Division for an account of their dealings with his goods and obtained interlocutory relief on motion including an injunction and the appointment of a receiver. The Wilsons served a notice of appeal, but shortly afterwards a bankruptcy order was made against them. On 7 October 1884, a trustee in bankruptcy was appointed. On 18 October, the trustee was substituted as a defendant, apparently ex parte on the application of Borneman. On 31 October, he gave notice abandoning the appeal. He then entered an appearance in the substantive proceedings and called for a statement of claim. Borneman applied for an order against the trustee requiring him to pay the costs of the appeal which he had incurred before receipt of the notice of abandonment. The Court of Appeal (Bowen and Fry LJJ) made that order. Their reason was that notwithstanding the trustee’s prompt and express abandonment of the appeal, by appearing and calling for a statement of claim in the Chancery proceedings he had adopted the action, and that meant the entire action including the appeal. The trustee, said Bowen LJ, “cannot adopt part of the action and leave out the rest.” Fry LJ agreed. The trustee, he said, had put “himself into the place of the bankrupt as regards the action and cannot take one part of it and reject another.” On the face of it, Borneman v Wilson is authority for the proposition that the proceedings

must as a matter of law be adopted either in their entirety (including any discrete prior proceedings conducted by the bankrupt before his appointment), or not at all. The decision has not subsequently been applied in any reported case, although it was treated as correct by a strong Court of Appeal (Lord Esher MR and Lopes and Kay LLJJ) in School Board for London v Wall Brothers (1891) 8 Morr 202 and by Sir John Vinelott in Trustee of the Property of Vickery (a bankrupt) v Modern Security Systems, supra, at 434. However, in my opinion it is no longer good law.

13.
The Court of Appeal's rather cursory judgments give no reason for its all or nothing approach to the adoption of current legal proceedings. But their conclusion is nevertheless understandable in the light of the law as it then was, or at least as it was thought to be. At the time when Borneman v Wilson was decided, an order for costs could be made only against a party to the proceedings. The modern jurisdiction to make an order for costs against a non-party is conferred by section 51(3) of the Senior Courts Act 1981, which dates back to section 5 of the Supreme Court of Judicature Act 1890. Even after 1890 the existence of the power was not recognised by the courts until the decision of the House of Lords in Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965. It followed that once a party to subsisting legal proceedings had become bankrupt and the trustee had been substituted for him, there was no possibility of obtaining an order for costs against the bankrupt himself. Moreover, even if such an order had been possible (for example, because no formal substitution had occurred), it would have been pointless because a liability arising from a costs order made after the commencement of the bankruptcy would not have been provable against the estate. Although debts which were contingent at the commencement of the bankruptcy had in principle been provable since the Bankruptcy Act 1869, it was considered that the discretionary character of a costs order meant that it was not even a contingent liability until the order had actually been made: see In re Bluck, Ex p Bluck (1887) 57 LT 419, In re British Gold Fields of West Africa [1899] 2 Ch 7, In re A Debtor (No 68 of 1911) [1911] 2 KB 652, In re Pitchford [1924] 2 Ch 260, Glenister v Rowe [2000] Ch 76. These cases were overruled in In re Nortel GmbH (in administration); In re Lehman Brothers International (Europe) (in administration) [2014] AC 209: see paras 87-93 (Lord Neuberger), and 136 (Lord Sumption). This court held in that case that by participating in litigation, a party submitted himself to a liability to pay costs in accordance with rules of court, contingently upon an order for costs being made against him. It followed that where proceedings were begun by or against a company before it went into liquidation, a liability for costs under an order made after it went into liquidation was provable as a contingent debt. The position is the same in bankruptcy.

14.
Against this background, it is easy to understand why late Victorian judges should have been unwilling to allow the trustee to adopt an action for his own account without assuming the liabilities for what had gone before. The result would have been to allow the action to proceed while leaving the other side with no remedy in costs in respect of earlier stages of the proceedings, irrespective of the outcome. Freed of the baggage of earlier misconceptions, however, it is possible to revisit the issue as a matter of principle.

15.
Where an action in progress at the time of the trustee's appointment is adopted by the trustee, one issue now open for reconsideration is whether there is any reason in principle why the trustee should necessarily be required, simply by virtue of his adoption of the action, to pay the other side's costs of legal proceedings including those incurred at a time when he was not a party and the action was being conducted by the bankrupt for his own account. Although this issue was not as such addressed

by the parties' submissions, I think that there can no longer be any absolute rule to that effect. The most that can be said is that it may be appropriate as a matter of discretion to make such an order. The trustee will have conducted the action for the benefit of the estate. The expenditure of costs on both sides will have been directed to achieving the desired outcome, and it may well be reasonable for that outcome to determine the incidence of costs whether they were expended before or after the trustee's adoption of the action. Equally, it will be for the court, in the exercise of its discretion, to decide whether a non-party order should be made against the bankrupt himself in respect of some part of the costs incurred while he was conducting the litigation before bankruptcy supervened. If this was the issue in the present case, it could not be right to pre-empt the discretion in advance on an application like this one.

16.
But it is not the issue in the present case, because a trial and the successive appeals from the order made at trial are distinct proceedings for the purposes of costs, albeit distinct proceedings in the same action. A distinct order for costs will be made in respect of each of them. Costs incurred in generating material for the trial will be recoverable, if at all, under the costs order made in respect of the trial. It will not be recoverable as part of the costs of a subsequent appeal even if the material is reused on the appeal: Wright v Bennett [1948] 1 KB 601 (CA).

17.
Mr Gabriel was responsible for the entire conduct of the trial and the appeal to the Court of Appeal. The Court of Appeal has disposed of that appeal, and has ordered Mr Gabriel to pay BPE's costs at both stages. All of this happened before Mr Gabriel became bankrupt. His liability under the costs order of the Court of Appeal is a provable debt. Indeed, a proof has been lodged. If this court were in due course to dismiss the appeal, it would normally make no order of its own in relation to the costs below other than to affirm (or possibly to vary) the order which had already been made by the Court of Appeal. That order would continue to represent a liability of Mr Gabriel and not of the trustee. The mere fact that the trustee has adopted the appeal could not possibly justify this court in ordering the trustee to pay the costs which the Court of Appeal has ordered to be paid by Mr Gabriel. The trustee is entitled to adopt the appeal to this court without adopting the distinct proceedings below. Indeed, the adoption of proceedings below would be contrary to principle. In a case where the proceedings below had been conducted to their conclusion before the bankruptcy by the bankrupt himself, to order the trustee to pay them personally would in effect enable BPE to obtain an unwarranted priority for its claim under the Court of Appeal's costs order. The trustee would recover an indemnity from the estate in respect of a provable debt to the full extent of the assets before any distribution fell to be made to other creditors.

18.
I would expect the result to be the same if the bankrupt had succeeded in the courts below and failed in this court, so that an order for costs in respect of the proceedings below was made in favour of the other side for the first time in this court. It is difficult to see any principled distinction between the two situations. But the position would be procedurally more complicated, because it would involve making a non-party order against the bankrupt so that the resultant liability could be proved against the estate as a contingent debt. For that reason other questions may arise which are best left to a case where they are relevant.

19.
I would declare that in the event that the Trustee adopts the appeal to the Supreme Court he will not be held personally liable for any costs incurred by the respondent in relation to this action up to and

including the order of the Court of Appeal dated 22 November 2013, by virtue only of the fact of his office as Trustee of Mr Gabriel’s estate in bankruptcy or of his adoption of the appeal.