

Trustee in bankruptcy's duty to the bankrupt clarified

Oraki and Oraki v Bramston and Defty

[2015] EWHC 2046 (Ch)

On 15 July 2015 Mrs Justice Proudman sitting in the High Court, Chancery Division, handed down her judgment in this long awaited personal bankruptcy case where the bankrupts are suing their former trustees in bankruptcy

Background

Dr Oraki and her husband had been made bankrupt in 2005/2006. Many years later in January 2013 their bankruptcies were annulled pursuant to section 282(1) (a) of the Insolvency Act 1986 ("the Act") due to serious irregularities in relation to the judgment and the debt on which they had been made bankrupt. The judgment in favour of solicitors whom the Orakis had instructed was for damages to be assessed in what was an action for debt, there was no itemised bill, and no power under CPR 24 to order an interim payment.

The Orakis claimed that the first and second trustees in bankruptcy ("the Trustee") had failed expeditiously to bring their bankruptcies to an end and had mismanaged their properties causing them and their estates loss. In other words, they had not done their job properly.

Key legal issues

The principal legal issue which the Judge had to decide was whether the Trustee had a common law duty of care to the bankrupts and not just statutory duties under the Act for which the principal remedies are set out in sections 303 (*General control of trustee by the court*) and section 304 (*Liability of trustee*).

This issue arose since it was said that the estates were very solvent due to properties owned and mismanagement would adversely affect the interests of the Orakis, and not their creditors to whom they owed little or nothing as their debts were disputed.

Other particular legal issues which arose were whether damages for mental distress can be made in circumstances where a bankruptcy has been unnecessarily prolonged and the effect of release on a Trustee's liability for loss.

The main arguments put forward were that the Trustee had a duty to assist the Orakis to bring their bankruptcies to an end, and a duty to pursue any debts owed to the Orakis and maintain properties under his control and maximise income. And that failure to expedite the ending of

their bankruptcies had caused them substantial mental distress for which they should be compensated.

The Judge decided that while in some circumstances it might be open to a Trustee to go behind a judgement (e.g. *Re Menastar Finance Ltd* [2002] EWHC 2610) – in other words treat the judgment as invalid for the purposes of the bankruptcy due to a miscarriage of justice - there were in this case at the time apparently definitive judgments to the effect that the bankruptcy orders were properly made and it was not part of the Trustee's role to review the legitimacy of the judgment.

As to bringing an end to the bankruptcy expeditiously the Judge found that the Trustee had no readily available cash assets sufficient to discharge the bankruptcy debts and costs, that the position regarding their debts and assets was unclear, and while the Trustee sought to realise assets it was the Orakis who opposed such action and did not want the bankruptcies to be dealt with expeditiously except on their terms.

Delay in assigning the right of action to appeal the judgment on which the bankruptcy was founded and representations to the Court before a conditional annulment was finally obtained had no causative effect. The Trustee could not be faulted for failing to pursue debts or take proceedings to pursue rights of action and the Orakis failed to prove loss in relation to claims such as tenants' actions, re-mortgaging of properties or mental distress.

Moreover, personal loss to the Orakis, as opposed to loss to their estates recoverable under section 304, was discharged by the Trustee's release pursuant to section 299(5).

Implications for Trustees

The judgment is helpful in clarifying the law in relation to the trustee's duty to the bankrupt. Such a duty is statutory only. Proudman J rejected the argument that there is any common law duty of care.

The judgment is also helpful in reconfirming that the Trustee is empowered to use his discretion in administering the estate and the Court will be loath to interfere unless his actions are wholly unreasonable.

As to loss under the head of "mental distress", the Judge considered that there could be no such claim on the facts of this case but in any event a claim for £690,000 was too much for non-pecuniary loss (*Demarco v Perkins and Bulley Davey* [2006] EWCA Civ 188).

There are various practical lessons for Trustees in this case. First, in a claim for professional negligence the Court is likely to scrutinise the justification for his actions and strategy.



So, ensure good legal advice is obtained at all stages where necessary to back up the Trustee's own appraisal of the difficulties he is facing in administering the estate.

Secondly, apply for release as soon as practicable following resignation, removal or cessation of office. The effect of discharge from all potential liability other than loss to the estate itself is confirmed by the decision in the *Oraki* case.

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