

Case

Nationwide Building Society v Wright [2009] EWCA Civ 811

Synopsis

Allowing a judgment creditor to retain the benefit of a final charging order made between presentation of a bankruptcy petition and the making of a bankruptcy order against the judgment debtor.

Topics covered: **Procedure, Bankrupt's Estate**

The Facts

Procedurally, this was a second appeal against a decision of a district judge to whom a TiB had successfully applied under s.3(5) of the Charging Orders Act 1979 to discharge a charging order made prior to the bankruptcy order, the first appeal to the judge having been dismissed.

The sequence of events was : (i) interim charging order; (ii) bankruptcy petition; (iii) final charging order; and (iv) bankruptcy order. Crucially, at the hearing of the application for the final charging order, neither the court hearing that application nor the judgment creditor was aware of the pending bankruptcy proceedings.

The issue for decision by the CA was whether, and in what circumstances, the court should exercise its power under s.3(5) in a case where the debtor has been adjudged bankrupt, but the charging order has been made before the commencement of the bankruptcy. This, in turn, raised the question of the effect of s.346 IA 1986 which disentitles creditors to retain the benefit of execution; "unless the execution was completed...before the commencement of the bankruptcy."

Allowing the appeal, the CA found that the legislative intention which underlies s.346 is that a judgment creditor who has obtained a final charging order before the making of a bankruptcy order is not deprived of the benefit of his security by reason of the bankruptcy alone. Had the court known of the bankruptcy petition at the hearing of the application for the final charging order, the proper course would have been to adjourn the application until after the hearing of bankruptcy petition.

Comment

There are 3 aspects of this case which might be of interest to members :

1. In his judgment, Sir John Chadwick highlighted the fact that the 1986 legislation heralded a change for bankruptcy by the abolition of the doctrine of relation back, with the effect that the bankruptcy order itself now triggers the commencement of the bankruptcy under s.278 IA 1986. Under the new regime, dispositions between the presentation of petition and subsequent bankruptcy order in favour of persons acting in good faith for value and without notice are not avoided under s.284 IA 1986.
2. The position for companies is different and the temptation to assimilate the personal and corporate regimes on this point is misleading. The winding up is deemed to commence at the time of the presentation of the petition and dispositions thereafter are avoided by s.127, save to the extent that the court orders otherwise. As a result, s.183 IA 1986 (the equivalent for corporate insolvency of s.346) would not operate to save a charging order made final after the presentation of a winding up petition.

3. The decision itself highlights again the potentially different outcomes for creditors and debtors alike depending on the practice and procedure of a particular county court (as to which, see our bulletin on *Halabi v LBC Camden*; #148/2008). The CA made it clear that the creditor's position would have been different had the court known of the bankruptcy proceedings when asked to make the charging order final. Indeed, the implication from the following sentence in paragraph 6 of the judgment would suggest that the relevant county court had subsequently changed its practice (such that, in a future case in that particular court, the outcome would be different):

"It has not been suggested that, under the practice then prevailing in that court, [the District Judge] should have known of it."

A central, reliable, computerised system accessible by all courts for registering bankruptcy petitions (and the initiation of other insolvency processes) would appear to be desirable. A similar suggestion was noted in the Insolvency Service's summary of responses to its recent consultation on Encouraging Company Rescue (at paragraph 41 of its summary published in November 2009).
