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Bankrupt's car on hire purchase is not protected tools of his trade

Dragan Mikki v. William Duncan (Trustee in bankruptcy of Dragan Mikki) [2016] EWCA Civ 1312

Article by David Bowden

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The Court of Appeal on a 2nd appeal has decided a novel point under the Insolvency Act 1986. This related to a car financed on hire purchase and how s283 which sets out a 'tools of the trade' exemption should be interpreted. At the point of insolvency neither the bankrupt nor the Official Receiver had considered the car to be a tool of the debtor's trade. The bankrupt said he needed a car to be able to carry on his wedding photography business. Unusually there was a surplus following the sale of the repossessed car which the finance company paid to the trustee in bankruptcy for the benefit of all creditors. The trustee's offer of £1500 to the bankrupt to buy a more modest car was rejected. Of 3 possible constructions of IA s283, Mann J giving the judgment of the Court of Appeal ruled that it had to be given a literal interpretation. This means that benefit of the HP contract does not remain vested in the bankrupt but rather it passes to the trustee in bankruptcy. A claim for interest on the surplus proceeds of more than 0.5% paid by the trustee was also rejected.

Dragan Mikki v. William Duncan (Trustee in bankruptcy of Dragan Mikki)
[2016] EWCA Civ 1312 3 February 2017
Court of Appeal (Patten LJ, David Richards LJ and Mann J)

What are the facts?

Mr Mikki is a wedding photographer. He had a BMW car on hire purchase. He ran into financial difficulties and in June 2010 he was adjudicated bankrupt as he had not paid tax demanded by HMRC. On his bankruptcy, the finance company terminated the hire purchase agreement. The sum outstanding to settle the HP finance was £7298. Mr Mikki tried to buy the car using money from friends and family but the Official Receiver refused to allow it because the car was worth over £12,000. The car was repossessed and sold leaving a surplus of £2652 which the finance company paid to the trustee in bankruptcy for the benefit of the estate. Three years later Mr Mikki claimed that the car was protected because it was a tool of his trade. The trustee offered him £1500 to buy a car but Mr Mikki rejected this claiming he needed a prestigious car to attend weddings.

There was a small surplus in the bankruptcy and the trustee paid Mr Mikki £17.64 interest on this based on a rate of 0.5%. Mr Mikki challenged this too saying that the Judgments Act rate of 8% was the appropriate rate.

What did the judge in the County Court rule?

Deputy District Judge Adams in Canterbury County Court dismissed the bankrupt's challenge to the tools of the trade point saying it was made too late and also dismissed the interest rate challenge.

What ruling did Mrs Justice Rose make on the 1st appeal?

Whilst Rose J granted Mr Mikki permission to appeal she dismissed his appeal on all points too. There were 4 issues before Rose J but only 2 were pursued in the Court of Appeal.

What were the issues the Court of Appeal had to decide?

Lord Justice Lewison on 22 May 2015 granted permission to appeal in relation to the car on the ground that '*the treatment of vehicles held under hire purchase arrangements also raises a point of principle*'. At the hearing in the Court of Appeal, Mann J decided that the '*real question was whether the benefit of the HP contract vested in the trustee*' or whether '*Mr Mikki could claim the benefit of it via the tool of trade exemption*'.

Are there any prior authorities on this point?

No. Mann J giving the judgement of the Court of Appeal notes that '*there appears to be no direct authority on the point*' and that both the leading works on consumer credit and insolvency '*do not deal with this point at all*'.

What does IA s283 say?

Section 283 of the IA 1986 provides as follows:

- '(1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises-
 - (a) all property belonging to or vested in the bankruptcy at the commencement of the bankruptcy, and
 - (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling within the preceding paragraph.'
- (2) Subsection (1) does not apply to-

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- (a) *such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;*
- (b) *such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic need of the bankrupt and his family.'*

What were the 3 possible constructions of section 283 of the Insolvency Act 1986?

The Court of Appeal decided there were 3 possible constructions to IA s283 which sets out the tools of trade exemption. These were:

- Neither the **benefit nor the burden** of the contract devolves on the estate,
- The **benefit** of the contract remains in the bankrupt as one of the tools of his trade, but accrued liabilities are liabilities in respect of which the finance company can prove, or
- a **literal wording** of the section applies and the bankrupt is not entitled to the benefit of the contract because that is not one of the tools of his trade.

What did the Court of Appeal rule on whether neither the benefit nor burden of the hire purchase agreement devolved on the bankrupt's estate?

Mann J was quite short on this saying it thought such a construction could '*be readily dismissed*'. He added that the '*claims of the finance company would fall fairly and squarely within all these provisions and there is nothing express which provides, or even suggests, otherwise*'. To reinforce this he noted that '*we cannot see any policy considerations which would require that result. In fact, fairness would appear obviously to require that the finance company be allowed to prove.*'

What did the Court of Appeal rule on whether the benefit of the hire purchase agreement remained with the bankrupt?

On this Mann J ruled that 'in order to make it work there would have to be an extended interpretation of section 283 and a qualification or expansion of the definition of the exempt items which do not vest in the trustee'. However he noted the problem with this interpretation was that IA s283(2) '*would have to be interpreted beyond its obvious and natural meaning. Its natural meaning is one which refers to physical property. It does not refer to choses in action. However, if it were extended, the remainder of section 283 would work*'

What did the Court of Appeal rule on the literal wording of IA s283?

Mann J referred to the Cork Report **Cmnd 8558** which set out the findings on the committee which led to the enactment of IA 1986. Cork recommended that the previously more stringent provisions on this in s38 of the Bankruptcy Act 1914 be amended so that it covered '*tools and equipment*' and '*in exceptional circumstances motor vehicles*'. Mann J noted that the Cork proposal was not enacted in the end. However Mann J ruled that Cork was significant '*because of an omission*' which was there was '*no reference to any form of conditional sale agreement even though such agreements were not uncommon at that time*'. For this reason Mann J decided that there were '*no other pointers to or indications of a policy that would require the wider interpretation*'.

Mann J correctly noted that it was '*only if there is equity in the car, and the terms of the agreement allow the purchase of the car for less than the amount of the equity*' that the policy of the IA 1986 '*might be said to require that the benefit of the contract remain in the bankrupt*'. Concluding on this Mann J ruled that:

'Accordingly, the benefit of the HP contract did not remain vested in the bankrupt. It passed to the trustee. That being the case, he cannot be criticised for taking steps to get that benefit in for the estate; indeed, he could be criticised if he had not done so.'

What was the ruling on interest?

The Deputy District Judge and Rose J treated this as 'challenge to the trustee's discretion' and dismissed Mr Mikki's claim for more interest. The Court of Appeal agreed with this approach saying that Rose J '*was obviously right to do so*'. At the hearing, reference was made to the House of Lords decision in *Sempra Metals Ltd v. HMRC [2008] 1 AC 561* which recognised the existence of a common law right to claim interest as damages or in restitution. However Mann J ruled that the *Sempra* point '*was not run in the present case and it would not be right to allow it to be opened on a second appeal, not least because its application in the present case would not be at all straightforward*'. Mann J also observed that it was not '*readily apparent that it would lead to a*

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greater recovery of interest than the 0.5%' and that the 'the amount at stake would make the whole exercise disproportionate'.

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