MA MAXWELL ALVES
SOLICITORS

Case Watch September 2013

Conflict of Law – English Law or Scottish Law, Insolvency, English property forming part of sequestered estate in Scottish bankruptcy

Donald McKinnon (Trustee In Bankruptcy) v Richard David Graham [2013] EWHC 2870 (Ch)

Introduction

Mr Graham appealed against a district judge's decision to apply Scottish law under the Insolvency Act 1986 s.426(5) in proceedings brought by the trustee in bankruptcy for the possession and sale of a property located in England.

The fact

On 16th October 2008 an order for sequestration (bankruptcy) was made against Mr Graham in the Edinburgh Sheriff Court. Thus this is a Scottish bankruptcy. In answer to a bankruptcy questionnaire made in February 2009 Mr Graham gave his address as 4/6 Rodney Place, Edinburgh, a rented property. However he disclosed that he was the owner of the property which he had inherited from his mother.

In early 2011 the Trustee's solicitors instructed tracing agents to visit the property. They reported it as being "unoccupied except a few days a year". In August 2011 the Trustee's solicitors wrote to Mr Graham at 4/6/Rodney Place asking for proposals and threatening to issue proceedings. The letter was returned marked "addressee gone away".

The issue

The Trustee sought possession of the property and an order for sale over three years after the date of the bankruptcy. As this is a Scottish bankruptcy the application was made under section 426 Insolvency Act 1986. The principal defence raised was that as the application was made more than 3 years after the date of the sequestration order the property had ceased to be part of the sequestrated estate and had re-vested in Mr Graham.

It is common ground that both Scottish law and English law contain provisions relating to the revesting in the bankrupt of real property if no application is made to Court within 3 years of the date of the bankruptcy. However there are differences between the relevant Scottish and English law.

Under English law, s.283A of the 1986 Act property revested if it was the bankrupt's sole or principal residence. However, under the Bankruptcy (Scotland) Act 1985 s.39A the property would not revest if it was solely occupied by the bankrupt.

Mr Graham argued that English law applied because the property was in England. Having regard to the principle of modified universalism and the decision in HIH Casualty & General Insurance Ltd, Re [2008] UKHL 21, [2008] 1 W.L.R. 852, the judge concluded that there was a modest difference between the Scottish law and English law and there was no case for saying that the Scottish provision offended public policy or was manifestly unfair. As G was the sole occupier of the property it would not revest in him under s.39A of the 1985 Act.

Held

The court considered that the judge had carefully analysed the relevant law and correctly concluded that the principle of modified universalism required him to apply Scottish law unless (a) it would be manifestly unfair or would offend against insolvency proceedings already taking place in England or against the general principle underlying insolvency law of fair distribution of assets amongst creditors; (b) it was otherwise against public policy.

There was nothing to suggest that the principles of modified universalism should not apply to personal insolvencies and there was nothing in the authorities which suggested that it was so limited. The purpose of the legislation was to provide some limited protection to the bankrupt or his family in relation to his home in cases where the trustee had taken no action to enforce his rights for three years. The fact that Scottish law did this by reference to the "family home" rather than the English law reference to "the sole or principle residence of the bankrupt, the bankrupt's spouse or civil partner ... " did not come close to offending public policy or a fundamental principle of English insolvency law, nor did it create manifest unfairness.

The judge's decision was affirmed and the appeal dismissed

Remarks

An appellate court would only interfere with the s.426(5) discretion if (a) it was based on an error of law or (b) if it was a decision that no reasonable tribunal could have reached. This is a high hurdle, as demonstrated in the present case, to overcome.

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