Neutral Citation Number: [2016] EWCA Civ 1312

Case No: A2/2015/0686

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MRS JUSTICE ROSE
HC09C01992

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2017

Before :

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
MR JUSTICE MANN

- -

Between :

Mr Dragan Mikki	**Appellant**
- and -	
Mr William Duncan	
(as Trustee in Bankruptcy of Mr Dragan Mikki)	**Respondent**

- -
- -

Mr Dragan Mikki in person as Appellant
Mr Jonathan A Titmuss (instructed by **CMS Cameron McKenna LLP**) for the **Respondent**

Hearing date: 26th October 2016

- -

Approved Judgment

Mr Justice Mann:

Introduction

1. This is the judgment of the Court on an appeal from a decision of Rose J delivered on 18th June 2014. In that judgment she granted Mr Mikki permission to appeal from a decision of Deputy District Judge Adams (sitting in the Canterbury County Court) but then dismissed his appeals. He had appealed in relation to four matters arising in his bankruptcy; he now appeals to this court (with the permission of Lewison LJ) on two of them. In the course of this appeal the arguments and points developed along lines not fully in accordance with the arguments below, but where we could do so fairly, and bearing in mind that Mr Mikki is a litigant in person, we allowed the argument. Mr Jonathan Titmuss appeared on behalf of the respondent trustee in bankruptcy.

General background to the points under appeal

2. Mr Mikki is and was a photographer. One of his specialities is wedding photographs, though the information given to his original examiner was that he also did portraits. He was adjudicated bankrupt on an HMRC petition on 9th June 2010. At the time he had a car (a BMW) which he was acquiring on what has been agreed to be, for the purposes of these proceedings, a hire-purchase contract, though its express terms do not identify it as such as clearly as we would have expected. The finance company terminated the contract and in due course the car was sold in February 2011. There was a surplus of £2,652 over and above what was necessary to discharge the outstanding liabilities under the contract, and that sum was paid to the trustee. In 2013, but not before then, Mr Mikki claimed that the car was a tool necessary for his trade or business within section 283 of the Insolvency Act 1986, which therefore did not vest in the trustee, and made various claims in respect of it. That gives rise to the first area of appeal in a manner which will appear.

3. At the date of his bankruptcy Mr Mikki's current account at Barclays bank had a credit balance of £1,537.44. He was indebted to the bank on other accounts in a sum of over £23,000. He continued to operate his current account for a while, with various debits and credits, and when the account was closed on 5th July 2010 there was a credit balance of £1,142.73, which was paid to the Official Receiver (the trustee by then not having been appointed). It was common ground that that sum did not represent any part of the original £1,500 odd in the account at the date of the bankruptcy, because of the intervening credits and debits. The trustee, when appointed, procured payment of that sum to himself, and retained it in the Insolvency Services account (as he was obliged to do if he was to take custody of it at all) while he considered a right of set off. He considered that if it would otherwise be payable to Mr Mikki (as Mr Mikki claimed), he had, or might well have, a right to set it off against the sum of £1,500 odd standing to the credit of the account at the date of the bankruptcy order and which he said should have been paid to him. In the end he seems to have decided not to assert a claim to those moneys and paid them to Mr

Mikki some 3 years later, and offered the interest which had accrued on the money in the account which ran at the meagre rate of 0.5%. Mr Mikki claimed a greater entitlement to interest, namely 8%. The decisions below denied him that greater rate, and that gives rise to the second area of appeal.

4. Two other claims made in the proceedings were not the subject of this appeal.

The car

5. The judgment below records the short facts relevant to this part of the appeal. On Mr Mikki's bankruptcy the finance company terminated the HP agreement, as it was entitled to do, even though the payments were all up to date. By a letter of 5th July 2010 the finance company wrote to the Official Receiver ("OR") saying it had ended the agreement and requiring the return of the vehicle. However, if the OR wished to purchase the vehicle he could do so for £7,298. This was understood to be the shortfall on the agreement, assuming it ran for its full term and the option to purchase was exercised, or the amount necessary to pay it off. The OR replied on 13th July to the effect that he did not wish to adopt the contract and was content for the finance company to exercise its rights, paying any surplus on sale to the OR or proving for any shortfall. A file note of the OR dated 22nd July then records that the finance company reported that Mr Mikki had apparently tendered the £7,298 himself (having raised the money from third parties), but the OR's authorisation was required in order to allow that. The OR did not agree to that because he considered that the vehicle was worth about £12,000, so there was equity in the vehicle, which he apparently wished to claim. So Mr Mikki's attempt to purchase was thwarted. In due course the finance company repossessed the vehicle, sold it and accounted to the trustee for the surplus of £2,652, which the trustee now claims as part of the estate.

6. Mr Mikki eventually (after almost three years) realised that he could (as he thought) claim that his car was a tool of his trade, which therefore did not vest in the trustee, and he required the return of his vehicle. This was a somewhat odd request because, as he must have known, it had been sold long ago. In the end he was offered £1,500 for a replacement vehicle, which he did not consider acceptable because an adequate vehicle could not be obtained for that price, particularly bearing in mind that it had to be sufficiently impressive for attendance at weddings. The offer was subsequently withdrawn.

7. Rose J considered an appeal based on a perversity attack. Before the Deputy District Judge, and before Rose J, Mr Mikki argued that the decision not to allow him to purchase the car from the finance company was perverse. His argument implicitly turned on the car being a tool of the trade within section 283 so that it was thereby excluded from the bankrupt's estate which vested in the trustee. It involved his

saying that if the trustee had thought that the car was valuable, and more than Mr Mikki needed, the trustee could have invoked section 308 of the Insolvency Act 1986, had the car sold and purchased a more appropriate replacement. By allowing the finance company to sell the car the trustee prevented himself from doing that, and wrongly deprived Mr Mikki of a car which was crucial to his business; without one he could not get to weddings in order to photograph them.

8. Rose J held that this argument failed. She accepted an argument that the car did not fall to be treated as a non-vesting tool of Mr Mikki's trade as argued by Mr Mikki as part of his perversity argument, because he never owned the car. What he owned was the benefit of the HP agreement. It is that that passed to the trustee, and the trustee had an obligation to do the best he could for the creditors which would not have been achieved if he allowed a £12,000 car to be sold to Mr Mikki for £7,000 odd. The trustee did not act perversely. She went on to indicate that it was her view that, if she had had to decide it, she would have found that the car itself was a tool of his trade and Mr Mikki's failure to assert that at the outset, or indeed for about 3 years thereafter, would not have been a bar on his maintaining that case now.

9. It seems that the reason that Rose J applied the test of perversity was because Mr Mikki's application to the court was treated as an application under section 303(1) of the 1986 Act and the question which the Deputy District Judge had considered was whether the trustee had acted perversely, for the purposes of that section, in not offering Mr Mikki the opportunity to acquire the car when he asked to do so. The Deputy District Judge decided that question against Mr Mikki (largely, it seems, because Mr Mikki did not claim the car as a tool of his trade at the outset and did not seek a replacement car until 2013), and it would seem that that is the question that was revisited on the appeal before Rose J.

10. However, before us the debate moved on somewhat. Lewison LJ gave permission to appeal in relation to the car on the footing that "the treatment of vehicles held under hire purchase arrangements also raises a point of principle". As the hearing before us developed it became apparent that the real question was whether the benefit of the HP contract vested in the trustee, or (putting it the other way) whether Mr Mikki could claim the benefit of it via the tool of the trade exemption. In other words, was the benefit of the HP contract to be treated as a tool of the trade for the purposes of section 283 and thus retained by Mr Mikki. If the benefit remained with the trustee then he was obliged to realise it to the best advantage of the creditors. If Mr Mikki was entitled to the benefit of it he would have been entitled to acquire the car on the terms offered by the finance company. In that event the trustee would have had no right to intervene.

11. That question therefore needs addressing first. It does not appear that it was a question which was debated before Rose J. Once it had been appreciated that Mr

Mikki did not own the car, it seems to have been assumed that all that he had (the benefit of the HP contract) vested in the trustee with an unstated assumption that that benefit could not qualify as a tool of the trade even if the car did. It is not clear that anyone submitted to the contrary. But the question having been identified, we are required to address it. If Mr Mikki is correct in saying that he retained the benefit of the contract, then the trustee had no business interfering in his pursuit of his right to purchase the car.

12. We deal with this point on the footing that the facts would have justified a finding that the car itself qualified as a tool of his trade because Mr Mikki needed one for his work as a wedding photographer. It is true that he made his claim late, that he did not claim it when first queried by an examiner and that the trustee had taken the point below that Mr Mikki did not make that claim in the initial stages of the bankruptcy, but the point was not revisited on the appeal before us. Mr Titmuss submitted that there had been no real determination of the point and, if it were relevant, it would have to be remitted to a district judge for determination. He did not accept that Rose J should be taken as deciding that factual point. She had indicated that she accepted on the facts that the car itself would have been a tool of the trade. It may be that that should not be taken as a finding on the point (we do not decide that one way or the other), and it does not appear that the Deputy District Judge made a finding about it, but for the purposes of considering the question which emerged as the central one we proceed on the footing that Rose J's expressed views were correct.

13. The property which vests in the trustee in bankruptcy is the bankrupt's estate, as defined in section 283 of the 1986 Act:

> "(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."

14. The next subsection derogates from that by taking certain things, including necessary tools, out of the estate which vests:

> "(2) Subsection (1) does not apply to -

> (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."

15. The provision which preceded section 283(1) (Bankruptcy Act 1914 section 38) made use of the expression "tools of the trade", and although section 283 does not use the same expression it will be convenient to use it to describe the relevant part of the exemption relied on by Mr Mikki on this appeal.

16. "Property" is defined in section 436(1):

> " 'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;"

17. The effect of those sections is that a vehicle owned by the bankrupt and which can be said to be a tool of his trade does not vest in the trustee in bankruptcy, and the bankrupt could retain it, subject to the provisions of section 308 (which allows the trustee to claim it, like any other tool of the trade, if its value exceeds the cost of a reasonable replacement).

18. Against that statutory background we turn to the emerging question - can the benefit of an HP contract for the hire purchase of something which would, of itself, be capable of being a tool of the trade, remain vested in the bankrupt via section 283(2), or does it vest in the trustee?

19. There appears to be no direct authority on the point. As far as we can tell, the leading works on consumer credit do not deal with the point at all; nor do the insolvency works. As a matter of literal construction, the answer would appear to be No. The benefit of the HP contract is a chose in action which falls within the definition of "property" under the Act, and which is distinct from the car itself. What vests in the trustee is "all property belonging to or vested in the bankrupt", and what is excluded by s283(2) is certain types of property, all of which are chattels. Thus the benefit of

the contract would prima facie vest in the trustee, and would not be taken out by subsection (2) because it is not the same thing as the vehicle. The bankrupt has no right of property in the vehicle itself which would be capable of remaining in him (except perhaps a right of possession, which does not help to decide the question which we have to decide).

20. There are, however, at least two matters which might be thought to give rise to a challenge to that literal interpretation. The first is the prevalence of HP (and leasing) contracts in business, and the fact that common household equipment (white goods) which fall within subsection (2)(b) are also commonly bought on hire purchase. That was probably the case in 1986, when the Act was passed, and it is certainly the case now. If the literal construction is followed so as to take such items (via their contracts) out of the exemption then it might be said that part of the apparent purpose and policy of the vesting exemptions would be frustrated. As against that, it might be said that, if HP was so common, Parliament ought to have been aware of it, and the failure to address it expressly in the legislation means that it did not intend the section 283(2) exemption to apply to it.

21. The second is the apparent view of the Insolvency Service, published in its Technical Manual for the guidance of its staff. Chapter 30 of that manual deals with exempt property, and paragraph 30.155 says:

> "**30.155 Exempt vehicle with outstanding finance**
>
> The exempt property provisions (see paragraph 30.121) apply to items acquired by the bankrupt whether for cash or with a finance agreement (including a hire-purchase or conditional sale agreement − see Chapter 31.2, Part 2). The provisions apply even if there is no equity in the agreement. The finance company should be notified if the official receiver accepts the bankrupt's claim that a vehicle be treated as exempt property. If the company is dissatisfied with the position, it may choose to exercise its rights to repossess the vehicle under the terms of the agreement (see paragraph 31.2.28)."

22. No authority is given for that proposition (though it is not the kind of work which gives authority - it gives practical guidance), and the provisions that are cross-referred to do not shed any light on the thinking behind it. Paragraph 30.155 appears in the current edition of the Manual, apparently published in July 2015, and paragraph 30.155 is in a section bearing the date January 2012.

23. The answer to the question of what does and does not vest is one which must ultimately depend on the true interpretation of the statute. Mr Mikki needs to establish that on its true interpretation section 283(2), in referring to various chattels, also means the benefit of any HP (or other conditional purchase) contract where title to the chattel remains in the finance company. The literal wording is not a promising

start for him, but the words must be placed in the context of the rest of the statute and the personal insolvency scheme. One of the matters that has to be considered is how liabilities under the contract would or could be dealt with under the Act, because the scheme as a whole needs to be considered. Do they remain with the debtor, so that the finance company cannot prove in the bankruptcy for them, or does the debtor have the benefit of the contract, with the ability to realise any equity, while leaving the estate to bear any accrued liability? The latter possibility is not as odd as it might at first appear, because if the item in question had been bought on a standard loan arrangement the debtor would still be able to keep the tool and leave the estate bearing the liability; but one might have expected it to have been dealt with.

24. There are probably three possible results which have to be considered:

(a) The 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. On this footing the trustee has the benefit of the contract and the finance company can prove for any debt arising on the contract.

(b) 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.

(c) Neither the benefit nor the burden of the contract devolves on the estate. In this scenario the benefit of the contract stays with the bankrupt, as does the burden.

25. We think that (c) can be readily dismissed. There is nothing express in the Act which would prevent the finance company from proving. The liability under the contract is plainly a bankruptcy debt, as defined in section 382:

> “382 - ‘Bankruptcy debt, liability etc”
>
> (1) ‘Bankruptcy debt', in relation to a bankrupt, means (subject to the next subsection) any of the following –
>
> (a) any debt or liability to which he is subject at the commencement of the bankruptcy,
>
> (b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy…"

26. The liability is within that definition. Insolvency rule 12.3(1) provides that:

> "Subject as follows, in administration, winding up and bankruptcy, all claims by creditors are provable as debts against the company or, as the case may be, the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages."

And section 322 of the Act indicates the mechanism:

> "(1) Subject to this section and the next, the proof of any bankruptcy debt by a secured or unsecured creditor of the bankrupt and the admission or rejection of any proof shall take place in accordance with the rules."

27. 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. The Act does indicate some debts and liabilities which are not provable, so the question of non-provable debts has been addressed and nothing is said about the position of HP debts in respect of tools of the trade (or the other chattels within the exemption). To conclude that the debt owing to the finance company is not provable and falls outside the bankruptcy would require an implication which is simply not justified by the Act. If it matters, 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.

28. That leaves (a) and (b) as the alternatives which have to be considered further. (a) can be seen clearly to work within the scheme of the Act. The benefit of an HP contract vests in the trustee as part of the bankrupt's property. If there is no equity in the car, and the finance company seeks to repossess it (as is likely) then the trustee has no valuable interest at all. If there is equity in the car then the trustee can seek possession of it as trustee, and deal with the finance company so as to realise it. If there remain any liabilities to the finance company, then the finance company can prove in the winding up for those liabilities. If the finance company realises the car, and generates a surplus over the amounts necessary to satisfy the liabilities to the company (as happened in the present case), the trustee is entitled to the surplus by virtue of his being entitled to the benefit of the contract. The only thing that might be thought to stand in the way of this result is the policy point referred to above, if the policy has been correctly identified.

29. When it comes to (b), 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. Section 283(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. No particular difficulty would be encountered with the actual wording of the sections of the Act relating to liabilities. The liability would still be a bankruptcy debt and provable as such. As a matter of statutory mechanics, the proving provisions would still operate.

30. The only statutory provision which cannot be fitted neatly into this scheme which we have managed to identify is section 308, which allows a trustee in bankruptcy to claim a tool of the trade and substitute an appropriate but less valuable one, so as to allow him to claim the excess value. It reads (so far as material):

> "308 (1) … where -
>
> (a) Property is excluded by virtue of section 283(2) (tools of trade, household effects, etc.) from the bankrupt's estate, and
>
> (b) it appears to the trustee that the realisable value of the whole or any part of that property exceeds the cost of a reasonable replacement for that property or that part of it,
>
> the trustee may by notice in writing claim that property or, as the case may be, that part of it for the bankrupt's estate.
>
> ...
>
> (3) The trustee shall apply funds comprised in the estate to the purchase by or on behalf of the bankrupt of a reasonable replacement for any property vested in the trustee under this section; and the duty imposed by this subsection has priority over the obligation of the trustee to distribute the estate.
>
> (4) For the purposes of this section property is a reasonable replacement for other property if it is reasonably adequate for meeting the needs met by the other property."

31. The thrust of that section suggests that it is dealing with physical property and provides that one item of physical property should be replaced with a similar item of physical property. It does not work so clearly if one anticipates a claim to the benefit of an HP agreement and its replacement.

32. In the light of that analysis there is nothing in the Act itself which would support an extended reading of section 283. By the same token there is little in the express wording of other sections, or in the inherent working of the Act, which is inconsistent with it.

33. The question on this appeal therefore comes down to whether it is clear enough that the policy of the Act requires the extended interpretation. We consider that it would have to be clear that the policy or mischief requires the extended interpretation rather than that it might. We have come to the conclusion that the ascertainable policy or mischief does not require that extension.

34. The policy behind the tools of the trade exemption can be taken to be usefully summarised in the report which preceded the 1986 Act, namely the Cork Report (1982, Cmnd 8558). Since that Report carried out the fundamental review and made recommendations which led to the Act it is useful to consider what it says about exempted property, provision for which had already been made by section 38 of the Bankruptcy Act 1914 (and its predecessors). Section 38 provided (as amended by the Insolvency Act 1976):

> "38. The property of the bankrupt divisible amongst his description of creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars …
>
> (2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding [£250] in the whole".

35. At paragraph 1096 the Report refers to the policy:

> "1096. A further aim of the bankruptcy code is to enable the individual debtor to achieve his rehabilitation as a useful and

> productive member of society. Certain assets necessary for this purpose are accordingly exempted from vesting in his trustee and are allowed, on the contrary, to be retained by the debtor...."

36. It refers to section 38 and goes on to observe that it describes the property in narrow terms, and comments on the limited value. Paragraph 1098 says:

> "The stringency of its provisions has however been mitigated over the years by judicial interpretation and humane custom. We believe that these exemptions should now be re-stated to accord with the considerable changes that have occurred, especially in the last three decades, in the general standard of living and in particular with present opinion as to the level below which no member of the community should be expected to live …"

37. In the following paragraphs the committee recommended the extension of the categories of tools and equipment which should be covered, to include "in exceptional circumstances" motor vehicles. It also recommended that the absolute exemption of items within the description should be replaced by a right to retain only such items as the trustee and the committee considered would fall within the description. That same qualified retention right was also recommended to apply to necessary household chattels and equipment. That modification to the absolute vesting regime was not enacted in the end, and the exemption remains an absolute one under both heads. The categories have, however, been extended and there is now an express reference to vehicles under the "tools" exemption.

38. If the Cork Report is significant it is because of an omission. Throughout the relevant section it is apparently assumed that the debtor is the owner of the tools (or household chattels) and there is no reference to any form of conditional sale agreement even though such agreements were not uncommon at that time. The assumption seems to have been that the debtor would have to be the owner of the goods which were under consideration. Nowhere is there a reference to the possibility that he would not be the owner because of a conditional sale arrangement. This is despite the fact that the report refers to modern conditions, and those modern conditions included a greater prevalence of HP. This makes it likely that the committee did not think that the exemption should apply to goods held under such an agreement (or, more accurately, to the benefit of the contract). There is, of course, an element of speculation about such a conclusion, but it can certainly be said that the Report gives no support at all to the view that the benefit of the contract would be capable of being left outside the bankruptcy while the liabilities would be provable. In other words, it does not support the view that policy requires a wide interpretation of the statutory phrase.

39. There are no other pointers to or indications of a policy that would require the wider interpretation. In all the circumstances we do not think that there is a justification for the wider interpretation. It may be that the reason that the Cork committee did not suggest it, or give any indications that it should be applied, was because of the narrow set of circumstances in which it could be foreseen that it would fulfil the policy of the Act. Most HP agreements (predictably) have a termination on bankruptcy provision (as in the present case) which the finance company would be likely to implement. In very many cases that will lead to the repossession of the car. That of itself removes its status as a tool of the trade, so the purpose of the exemption is frustrated by that very likely turn of events. If there is equity in the car after the sale, the policy of the Act, which is to allow the bankrupt to use his tools to continue to earn his livelihood, is not served by his having the equity (as opposed to the car), which is unlikely to be great enough to allow for the purchase of a full replacement, so there is no reason why the trustee should not have it. It is 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 (as in the present case), and if the bankrupt can raise the funds from outside resources to carry out that purchase (he will not have any money to do it himself), that the policy of the Act might be said to require that the benefit of the contract remain in the bankrupt. We do not think that that limited set of circumstances is likely to have been thought usefully to underpin the application of the exemption to HP contracts.

40. 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. It follows that Mr Mikki's appeal under this head fails.

The claim to interest

41. The facts relating to this point largely appear above. As explained above, the trustee retained the sum of £1,142.73 to be set off against a claim for the credit balance on Mr Mikki's current account as at the date of bankruptcy. In the end he seems to have accepted that he was not entitled to a set-off, and the reasons for that (and whether he was right or wrong) were not debated on this appeal and do not fall for decision. The question for us is whether the decisions below as to the rate of interest which the trustee offered and paid were correct.

42. One fact not appearing above is the amount at stake. The trustee paid £17.64. Mr Mikki sought interest at 8%, believing he was entitled to Judgment Act interest. That would have yielded just over £282. This part of the appeal is therefore worth, on his claim, just over £250. In fact a more legitimate target would have been half that or less, because Mr Mikki did not have a judgment. That would have reduced interest

his claim to just over £141 at most, meaning that no more than £125 was really at stake. Litigation of this type and kind should not really be pursued through 3 levels of the courts over sums of that order (at least in the absence of a separate justification in terms of the need to establish principle or the like), and the fact that we entertained the appeal on this point (because it had arrived before us) should not be taken to be any encouragement to litigants to do the same in the future.

43. At first instance the Deputy District Judge considered that *Bramston v Haut* [2016] 1 WLR 1637, [2012] EWCA Civ 1637 applied and that since the trustee's decision was reasonable it could not be challenged. He observed, somewhat elliptically, that "Interest is in the discretion of the judge", even though he was not exercising his own discretion and it is not clear under what provision he could do so. Rose J rejected the appeal on this point, stating that she did not consider that the decision to pay interest at 0.5% was perverse or that the district judge was wrong to dismiss the challenge under section 303. Mr Mikki had averred that a higher rate of interest than 0.5% was necessary in order to deter trustees from keeping money that was not theirs for a long period. Rose J said there were other ways in which disapproval could be successfully conveyed and an award of interest at a penal rate would fall on the creditors and not the trustee anyway.

44. Both judges below treated the claim to interest as a challenge to the trustee's discretion. In *Bramston v Haut* Kitchin LJ considered the right test to apply if there was such a challenge. He accepted the test of Registrar Baister in *Osborn v Cole* [1999] BPIR 251:

> "It follows that it can only be right for the court to interfere with the decision the official receiver has taken if it can be shown that he has acted in bad faith or so perversely that no trustee properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way."

45. If the correct approach to the decision to pay 0.5% interest is a review of a discretion, then that test is correct. Rose J referred to that as the test applicable to a challenge under section 303 and she was obviously right to do so. She did not err in principle in reaching her conclusion, and neither did the district judge at first instance. The only observation that might be made about her findings is that it was not inevitable that any interest would be borne by the creditors and not by the trustee, because the creditors might have been able to argue that the trustee ought to have given in sooner and not risked burdening the estate with interest greater than he was able to earn (or at least not for the entirety of the period), but that point is unlikely to have been run hard by them bearing in mind the amounts involved, and on the facts of this case Rose J's observation is justified. This was not a case where the trustee can be seen to have

acted so wrongly that his own decision was perverse, or so misplaced as to require the court's intervention.

46. At that point in the reasoning, therefore, the appeal fails. During the course of the hearing there was a certain amount of debate as to whether there were any other claims to interest which might have been made other than a challenge to the decision of the trustee as to what to pay. It does not appear to us that there is, in the present circumstances. Section 35A of the Supreme Court Act 1981 would not apply, because it applies only where there is a claim to an unpaid debt or damages as at the date of issue. It does not apply where the debt has been paid before proceedings are commenced. *Sempra Metals Ltd v HMRC* [2008] 1 AC 561 recognises the existence of a common law right to claim interest as damages or in restitution, in certain circumstances, but that 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. Nor is it readily apparent that it would lead to a greater recovery of interest than the 0.5% which the trustee received and disgorged, and the amount at stake would make the whole exercise disproportionate.

47. Accordingly, in our view this aspect of the appeal also fails.

Conclusion

48. The result, therefore, is that both of Mr Mikki's grounds of appeal fail and the appeal falls to be dismissed.