



17 June 2015

PRESS SUMMARY

BPE Solicitors and another (Respondents) v Gabriel (Appellant) [2015] UKSC 39 *On appeal from [2013] EWCA Civ 1513*

JUSTICES: Lord Mance, Lord Sumption, Lord Carnwath, Lord Toulson and Lord Hodge

BACKGROUND TO THE APPLICATION

This is an application for directions in a pending appeal. The appeal concerns a claim in negligence by Mr Gabriel (the Appellant) against his solicitors (the First Respondent). The trial judge awarded Mr Gabriel £200,000 in damages and ordered the solicitors to pay Mr Gabriel's costs. The Court of Appeal reduced the damages award to a nominal £2, set aside the judge's costs order, and ordered Mr Gabriel to pay the solicitors' costs of the proceedings up to and including the appeal. That order was made on 22 November 2013.

On 5 March 2014, Mr Gabriel was made bankrupt. On 25 March 2014, Mr Hughes-Holland was appointed as his trustee in bankruptcy. Also on 25 March 2014, permission was granted for the appeal to proceed to the Supreme Court. The right to pursue the appeal now rests with the trustee.

If a trustee in bankruptcy decides to adopt legal proceedings which were on foot at the time of the bankruptcy, the trustee personally becomes a party to those proceedings in place of the bankrupt, either by way of formal substitution or simply by virtue of being treated as if he has been substituted. An order for costs may therefore be made against the trustee personally if the proceedings are unsuccessful. The trustee then has a right of indemnity against the bankrupt's assets if the costs liability is properly incurred. Mr Hughes-Holland accepts that if he decides to pursue this appeal and loses he will be personally liable for the solicitors' costs before the Supreme Court. However, he says that he is not personally at risk by virtue of adopting the appeal as trustee in bankruptcy for the solicitors' costs of the proceedings before the trial judge and the Court of Appeal.

If Mr Hughes-Holland pursues the appeal and wins, then Mr Gabriel's creditors will receive between 23p and 25p in the pound instead of between 3p and 5p in the pound. But if Mr Hughes-Holland pursues the appeal and loses, and he is ordered to pay not only the costs of the appeal to the Supreme Court but also the costs of the hearings below, the costs liability will exceed the value of the estate and Mr Hughes-Holland will probably have to make up the difference from his own pocket. He therefore seeks confirmation as to the costs position so that he can decide whether to pursue the appeal. The solicitors argue that the Supreme Court does not have jurisdiction to make any order as to costs at this stage and in any event that Mr Hughes-Holland should be personally liable for the costs of the proceedings below if he loses the appeal.

JUDGMENT

The Supreme Court unanimously holds that if Mr Hughes-Holland decides to pursue the appeal he will not by virtue only of his office as Mr Gabriel's trustee in bankruptcy or of his adoption of the appeal be held personally liable for costs of the hearings before the trial judge and the Court of Appeal. Lord Sumption gives the only judgment, with which all other members of the Court agree.

REASONS FOR THE JUDGMENT

The Supreme Court has jurisdiction to deal with this application and it is proper to exercise it. Section 40(5) of the Constitutional Reform Act 2005 empowers the Court “to determine any question necessary to be determined for the purposes of doing justice in an appeal to it under any enactment”. Rule 46 of the Supreme Court Rules 2009 further provides that the court may make such costs orders as it considers just, and that it may do so either at final determination of an appeal, or application for permission to appeal, or in the course of proceedings. It is not usual for the court to decide an issue going to costs before the hearing of the substantive appeal. However, the ruling is necessary now to enable the trustee to decide whether to proceed, and the court is in as good a position to decide this issue now as it would be later: the application does not raise any discretionary considerations, nor does it affect the propriety of any decision of the trustee to pursue the appeal. [6-8]

The Court of Appeal authority *Borneman v Wilson* (1884) 28 Ch D 53 suggests that a trustee in bankruptcy must either adopt proceedings in their entirety or not at all, even where there are discrete prior proceedings conducted by the bankrupt before his appointment. At that time, the court did not have jurisdiction to award costs against a non-party, which would have included the bankrupt where the trustee had been substituted for the bankrupt; moreover, liability under such an order would not have been provable against the estate because of a line of case-law which said that such liability was not contingent at the time of bankruptcy. The jurisdiction to award costs against a non-party was recognised by the House of Lords in 1986 and the possibility of proving liability under a costs order against a company in liquidation, and consequently also against a bankrupt’s estate, was recognised by the Supreme Court in 2014. The reasons behind the Court of Appeal’s conclusion in *Borneman* are therefore no longer relevant and it is possible to revisit the issue as a matter of principle. [11-14]

It may be appropriate as a matter of discretion to order a trustee in bankruptcy to pay the other side’s costs of legal proceedings including those incurred before the trustee became a party, but there is no longer any absolute rule to that effect. [15] But the issue in this application does not concern that discretionary assessment. A trial and the successive appeals from the order made at trial are distinct proceedings in the same action and a distinct order for costs is made in respect of each stage. [16] Mr Gabriel was responsible for the entire conduct of the trial and the appeal to the Court of Appeal, and the costs order which was made against him by the Court of Appeal is a provable debt in his bankruptcy. It would be contrary to principle for Mr Hughes-Holland to be held liable for costs in the proceedings below, as this would merely give the solicitors an unwarranted priority for their claim under the Court of Appeal’s costs order. [17]

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.shtml>