

Unpaid fees at commencement of barrister's bankruptcy did not vest in trustee (Gwinnutt (as the First Defendant's Trustee in Bankruptcy) v George and another)

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Restructuring & Insolvency analysis: **Iain Pester**, barrister at Wilberforce Chambers, advises that the judgment in the case is a timely reminder that not everything of economic value will necessarily vest in a trustee in bankruptcy pursuant to section 306 of the Insolvency Act 1986 (IA 1986).

Gwinnutt (as the First Defendant's Trustee in Bankruptcy) v George and another [\[2018\] EWHC 2169 \(Ch\)](#), [\[2018\] All ER \(D\) 86 \(Aug\)](#)

What are the practical implications of the case?

This is a timely reminder that not everything of economic value will necessarily vest in a trustee in bankruptcy pursuant to [IA 1986, s 306](#). The case concerned outstanding fees for work done by a barrister who had been made bankrupt, and therefore also required the court to determine the nature of a barrister's 'expectation of payment' under a non-contractual arrangement.

However, even where the non-contractual fees do not vest in a trustee in bankruptcy (trustee), it is open to the trustee to seek to claim them for the bankrupt's estate by relying on [IA 1986, s 307](#) (after-acquired property) or [IA 1986, s 310](#) (income payments order).

What was the background?

Mr George, the first defendant, is a barrister, practising from a Chambers in Leicester. The second defendant is the practice manager of the Chambers where Mr George was in practice.

Mr George had been made bankrupt in 2012. In a statement made to the official receiver (by way of preliminary information questionnaire) Mr George confirmed that he had fees outstanding of just over some £76,000—the overwhelming majority of which were expressly carried out on a non-contractual basis (including some conditional fee agreements).

In the proceedings, the trustee sought over £29,000 which the barrister had received in respect of those non-contractual arrangements. The issue was whether the barrister's expectation to receive fees arising in respect of work he had carried out on a non-contractual basis before his bankruptcy vested in the trustee as 'property' within the meaning of [IA 1986, s 436](#).

Mr George argued that his services had been provided on an 'honorary basis' and that such a 'moral' right to the outstanding fees, without any legal entitlement to the same, was not 'property'. The trustee argued that even where a barrister's fees were subject to a non-contractual, 'honorary' arrangement and could not be enforced by action at law, such fees were nonetheless 'realisable' property.

What did the court decide?

His Honour Judge Davis-White QC formulated the issue that he had to decide as follows:

'whether any expectation of the first defendant to receive fees arising in respect of work carried out by him on a non-contractual basis before his bankruptcy vests in his trustee in bankruptcy.'

The judge began by considering the nature of the relationship between barrister and solicitor, in an erudite survey of the law beginning with Blackstone's *Commentaries on the Laws of England*. Historically, payments to barristers were not considered fees, but were paid by way of gift. The judge concluded his survey of the evolving legal position by

stating that in modern times—and certainly since the 1990s—the position regarding barristers instructed by solicitors is as decided in *Singh v Sinel* [\[2014\] EWHC 3058 \(Ch\)](#), [\[2014\] All ER \(D\) 190 \(Sep\)](#):

- if terms of engagement are expressly agreed to be on a non-contractual basis, there is no legal right in the barrister to claim his fee which is, in effect, payable as an honorarium as was tradition prior to 1991
- if a contract is reached, then the barrister has the usual contractual remedies including damages or in debt
- if no contract is reached, and there is not express concord that the engagement is to be on non-contractually binding terms, there is no reason why restitutionary remedies should not be available in the usual way

Having considered the basis on which a barrister's unpaid fees, arising under the honorarium or non-contractual regime, fall due, the judge turned to the insolvency legislation. The essential question argued before the judge was whether a 'moral' right or a right 'in honour', to fees, without any legal entitlement to the same (either contractual or restitutionary), amounted to 'property' under [IA 1986, s 436](#).

Despite the width of the statutory definition, the judge concluded that it was wrong to say that something that was not enforceable in the court of law, but which was marketable and capable of being turned into money, could be 'property' for the purposes of [IA 1986, s 436](#). An engagement expressly on a non-contractual basis was not the same as engagement pursuant to a contract which was not enforceable in the courts. Contracts might be unenforceable for a number of reasons (such as statutory provisions, or by reason of limitation), just as they might not be assignable (such as pensions by statute), but that of itself would not prevent them from being property, and it was a very different thing from a mere moral obligation (at para [99] of the judgment).

Even if it was accepted that a barrister's unpaid fees arising from a non-contractual engagement were 'realisable', that did not necessarily make them the 'property' of the bankrupt as at the date of his bankruptcy.

The judge therefore concluded that any unpaid fees as at the date of the commencement of the barrister's bankruptcy which had arisen under a non-contractual, honorarium engagement did not vest in the trustee (at para [102] of the judgment).

Iain Pester's practice covers all aspects of corporate and personal insolvency, as well as general commercial work, civil fraud and asset recovery, company, shareholder and partnership litigation, and jurisdictional disputes. Iain is described in the legal directories as an experienced and impressive junior, who is a particularly able courtroom advocate.

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