Neutral Citation Number: [2019] EWCA Civ 656

Case No: A2/2018/2343

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
BUSINESS LIST (ChD)
His Honour Judge Davis-White QC (sitting as a Judge of the High Court)
[2018] EWHC 2169 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2019

Before:

LORD JUSTICE NEWEY
LORD JUSTICE SINGH
and
LORD JUSTICE BAKER

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Between:

SIMON MATTHEW GWINNUTT **(as the First Respondent's Trustee in Bankruptcy)**	**Appellant (Claimant)**
- and -	
(1) NICHOLAS FRANK RAYMOND GEORGE **(2) MICHAEL RYAN**	**Respondents (Defendants)**

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Mr Thomas Grant QC and Mr Stephen Hackett (instructed by **J H Powell & Co**) for the **Appellant**
Mr David Mohyuddin QC and Mr Ian Tucker (instructed by **Howes Percival LLP**) for the **Respondents**

Hearing date: 20 March 2019

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Approved Judgment

Lord Justice Newey:

1. It is now usual for barristers to enter into contracts with their instructing solicitors. However, that has been the case only since 2013, when "Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012" promulgated by the Bar Council took effect and the cab rank rule was modified to allow a barrister to decline to accept instructions other than on the new Standard Terms or other standard terms of work. Before that, there was normally no contractual relationship between barrister and solicitor and, until section 61 of the Courts and Legal Services Act 1991 abolished any such rule, it had long been established that a barrister could not enter into a contract for the provision of his services. In *Rondel v Worsley* [1969] 1 AC 191, Lord Upjohn explained (at 278-279) that the following points were common ground:

> "First, it is clear that counsel cannot sue for his fees. This has been established for nearly two hundred years and it is usually put upon the ground that a barrister is of too high an estate to condescend to the common arena to sue his client. Fees must be regarded as pure honoraria (see *Thornhill v. Evans*, per Lord Hardwicke, and *In re May*, per Kindersley V.-C.). It is true that Bayley J. in *Morris v. Hunt* put it on a more realistic though humdrum basis that counsel should ensure that he is paid before the case and the matter should not be left to chance afterwards, so that he cannot thereafter maintain an action; not a very good reason. Best J. in the same case really put the inability of counsel to sue upon the ground of public policy, namely, that counsel should not thereby have any temptation to endeavour to get a verdict. However, whatever reason may be ascribed it is clear that counsel cannot sue for his fees and this applies equally to fees for non-litigious work (see *Mostyn v. Mostyn*), though that was only a matter of admission, but in principle the admission was clearly right.
>
> Secondly, a barrister does not enter into a contract, express or implied, with his client or with the solicitor who in all matters pertaining to litigation necessarily stands between the barrister and the lay client except in the case of dock briefs. At one time it was left open whether a barrister could expressly or impliedly contract with his client in litigious matters though I have no doubt it would always have been regarded as a breach of professional etiquette for him to do so; but I regard it as settled by *Kennedy v. Broun* that in fact counsel is incapable of doing so…. To sum up the result of these two points, fees due to counsel create no debt: *Wells v. Wells*; *In re Sandiford (No. 2)*."

2. In one of the cases to which Lord Upjohn referred, *Kennedy v Broun* (1863) 13 CBNS 677, Erle CJ, giving the judgment of the Court of Common Pleas, justified the then law in trenchant terms (at 736-739):

> "The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is

> in close relation with the highest of human interests, viz. the administration of justice.
>
> … But, if the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract, for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness; and that the standard of duty throughout the whole class of advocates would be degraded. It may also well be that, if contracts for hire could be made by advocates, an interest in litigation might be created contrary to the policy of the law against maintenance; and the rights of attorneys might be materially sacrificed, and their duties be imperfectly performed by unscrupulous advocates: and these evils, and others which might be suggested, would be unredeemed by a single benefit that we can perceive."

3. The question raised by the present appeal is whether, where a bankruptcy order is made against a barrister, fees due to him pursuant to an honorarium rather than a contract vest in his trustee in bankruptcy. The first respondent, Mr Nicholas George, is a barrister who was adjudged bankrupt on 21 March 2012 and the appellant, Mr Simon Gwinnutt, has been his trustee in bankruptcy since 24 April 2012. Mr Gwinnutt contends that sums "owed" to Mr George when he became bankrupt vested in him as trustee in bankruptcy under section 306 of the Insolvency Act 1986 ("the 1986 Act"). However, His Honour Judge Davis-White QC, sitting as a Judge of the High Court, rejected that argument. In an impressive and erudite judgment now reported at [2019] Ch 52, he answered in the negative the following preliminary issue:

> "whether any expectation of the First Defendant to receive fees arising out of work carried out by him on a non-contractual basis before his bankruptcy ('Pre-Bankruptcy Work'), or any payment received by the First Defendant after the date of his bankruptcy in respect of Pre-Contractual Work, automatically vests in his trustee in bankruptcy pursuant to s.306 IA 86".

The Judge concluded in paragraph 102 of his judgment:

> "Any unpaid fees of Mr George as at the date of commencement of his bankruptcy which arise under a non-contractual, honorarium engagement do not, or have not, vested in his trustee in bankruptcy."

4. Mr Gwinnutt appeals against the judge's decision.

The statutory framework

5. Section 306 of the 1986 Act provides for "[t]he bankrupt's estate" to "vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee" without any conveyance, assignment or transfer.

By section 283(1), subject to exceptions relating to, for example, equipment necessary for the bankrupt's business and items satisfying basic domestic needs, a "bankrupt's estate" encompasses "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy". Section 436 states:

> "*'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".

6. Very similar, though not quite identical, explanations of "property" were to be found in predecessor legislation: the Bankruptcy Acts of 1914, 1883 and 1869. Section 4 of the 1869 Act stated:

> "*'Property'* shall mean and include money, goods, things in action, land, and every description of property, whether real or personal; also, obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined".

Unlike section 436 of the 1986 Act, therefore, section 4 of the 1869 Act said "shall mean and include" rather than "includes" and "whether real or personal" in place of "wherever situated". The only other respects in which it differed from the 1986 Act were in its references to "easements", "estate" and "profit".

7. Sections 307 and 310 of the 1986 Act deal respectively with after-acquired property and income. Section 307 allows a trustee in bankruptcy to claim for the estate any property that is acquired by, or devolves upon, a bankrupt after the commencement of the bankruptcy. A bankrupt's "income" can, however, be claimed for his estate only under section 310 (see section 307(5)). Under section 310(1), the Court may make an "income payments order" "claiming for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order". Section 310(2) imposes a limit on what may be ordered:

> "The court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt when taken together with any payments to which subsection (8) applies below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family."

8. An income payments order cannot last longer than three years, but can continue after the bankrupt has been discharged (see section 310(6) of the 1986 Act). In contrast, section 307 has no application to property acquired by a bankrupt after his discharge. Nowadays, a bankrupt is normally discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences (section 279(1) of the 1986 Act). Section 279(3) empowers the Court to extend the period, but "only if satisfied that the bankrupt has failed or is failing to comply with an obligation under this Part" (section 279(4)).

9. The 1869 Act, too, contained provisions concerned with income. Section 90, for instance, provided:

> "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the Court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the Court may direct."

As regards after-acquired property, section 15 stipulated that the "property of the bankrupt divisible among his creditors" comprised, among other things, "All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, *or may be acquired by or devolve on him during its continuance*" (emphasis added). There was thus no need for a separate section relating to after-acquired property. It vested automatically under section 15.

Some case law

10. The following can, I think, be derived from the case law in respect of the 1986 Act and its predecessors:

i) It is "legitimate and necessary to bear in mind the statutory objective" when interpreting the 1986 Act, albeit that "however desirable it may be to construe the Act in a way calculated to carry out the parliamentary purpose, it is not legitimate to distort the meaning of the words Parliament has chosen to use in order to achieve that result" (see *Bristol Airport plc v Powdrill* [1990] Ch 744, at 758-759, per Browne-Wilkinson V-C);

ii) "[T]he statutory objective of the provisions of the 1986 Act" is that, "subject to certain specific exceptions, all a debtor's property capable of realisation should be vested in the trustee for him to realise and distribute the proceeds among the creditors" (*Patel v Jones* [2001] EWCA Civ 779, [2001] Pens LR 217, at paragraph 39, per Mummery LJ). In a similar vein, Mummery LJ had noted in *Dear v Reeves* [2001] EWCA Civ 277, [2002] Ch 1 a couple of months earlier (at paragraph 39):

> "The purpose of divesting the bankrupt of his property, with certain express statutory exclusions, and vesting the bankrupt's title to it in the trustee is to enable the trustee to realise the bankrupt's estate for the benefit of the creditors and to distribute it among the bankrupt's creditors in accordance with the statutory scheme contained in Chapter IV of Part IX of the 1986 Act";

iii) That approach accords with the "principle of public policy" that:

> "in bankruptcy the entire property of the bankrupt, of whatever kind or nature it be, whether alienable or inalienable, subject to be taken in execution, legal or equitable, or not so subject,

> shall, with the exception of some compassionate allowances for his maintenance, be appropriated and made available for the payment of his creditors"
>
> (*Hollinshead v Hazleton* [1915] AC 428, at 436, per Lord Atkinson);

iv) In keeping with that policy, "in successive statutes dealing with bankruptcy and insolvency the definition of 'property' has been progressively extended" (*In re Celtic Extraction Ltd* [2001] Ch 475, at 486, per Morritt LJ);

v) The word "property" "is not a term of art but takes its meaning from its context" (*In re Celtic Extraction Ltd*, at 486, per Morritt LJ);

vi) The explanation of "property" given in section 436 "is not in truth a definition of the word 'property'" since the section "only sets out what is included" (*Ord v Upton* [2000] Ch 352, at 360, per Aldous LJ);

vii) Section 436 is very wide in its scope. In the *Bristol Airport* case, Browne-Wilkinson V-C observed (at 759), "It is hard to think of a wider definition of property";

viii) There are, however, limits. Thus, the fact that a possibility has a realisable value will not necessarily render it "property": "[t]he chance of receiving a legacy from a relative a man might sell before his bankruptcy, but still, if not sold by him, that chance would not pass to his assignees" (*Johnson v Smiley* (1853) 17 Beav 223, at 230, per Romilly MR). In *Ex parte Dever, In re Suse and Sibeth* (1887) 18 QBD 660, a "mere spes" was held not to have vested in a trustee in bankruptcy. A wife had taken out an insurance policy on the life of her husband on terms that entitled her to opt to withdraw money after ten years if the policy had not previously been terminated by lapse or death. The husband became bankrupt during the currency of the policy, but it was not until after he had obtained his discharge that the wife became able to exercise the right of withdrawal and did so. The Court of Appeal held that any interest that the husband might have in the money paid by the insurance company did not pass to his trustee in bankruptcy. Fry LJ, for example, said (at 670):

> "How could the interest of the husband be 'property,' when it was something which could only accrue in the event of the exercise of the wife's option on a double contingency, which had not happened at the time when he obtained his discharge? How could it be said that any 'property' was vested in him at the time of his discharge? It was the mere hope of a hope that something might come to him by reason of his surviving the ten years and of his wife's exercising her option in that particular manner. It was a mere spes, and there was nothing which could vest in the trustee in the bankruptcy."

In *Re Rae* [1995] BCC 102, Warner J said (at 113) that he was "not persuaded that one can, merely from a consideration of the purposes of the Insolvency Act and the non-exhaustive nature of the definition of 'property' in s. 436, reach the conclusion that any asset of the bankrupt which can be realised or

> turned to account is 'property' within the meaning of the Act". More recently, Chief Registrar Baister considered it "trite law that a beneficiary under a discretionary trust has no beneficial interest and nothing to which a trustee in bankruptcy can succeed under ss 283(1) and 306 Insolvency Act" (*Agarwal v Canara Bank* [2017] BPIR 842, at 864) even though such a beneficiary may be said to have "an interest of sorts" (*JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 WLR 160, at paragraph 13, per Lewison LJ) and "more than a mere spes" (*Gartside v Inland Revenue Commissioners* [1988] AC 553, at 618, per Lord Wilberforce).

Barristers' fees

11. Mr David Mohyuddin QC, who appeared with Mr Ian Tucker for Mr George, maintained that, where a barrister has no contractual right to a fee, he can have no more than an expectation that he will receive it and that cannot amount to "property" for the purposes of the 1986 Act. That was essentially also Judge Davis-White's view.

12. Arguing to the contrary, Mr Thomas Grant QC, who appeared for Mr Gwinnutt with Mr Stephen Hackett, stressed the breadth of "property" in the context of the 1986 Act and placed particular reliance on *Ex parte Huggins, In re Huggins* (1882) 21 Ch D 85. In that case, a Mr Huggins had been granted a pension on his retirement as Chief Justice of Sierra Leone but had subsequently become a partner in an unsuccessful business manufacturing bottle-washing machines as a result of which he had been adjudicated bankrupt. Pensions and allowances such as Mr Huggins' were, as a letter from the Colonial Office explained, "placed on the annual estimates of the colony, and voted annually by the Colonial Legislature, and are included under the appropriate general heading in the Annual Appropriation Ordinance of the colony" (see 86).

13. The Court of Appeal granted a declaration that the pension "vests in the trustee subject to the provisions of sect. 90 [of the Bankruptcy Act 1869]" (see 94). A submission that the pension was not "property" of Mr Huggins was rejected. Jessel MR said (at 90-91):

> "It is true that the contract under which he accepted the office may not be enforceable in the Courts either of this country or of *Sierra Leone*. I think that is so. But that does not decide the question. There are many cases in which property arises from a contract, quite independently of the fact that no judicial tribunal can enforce it. Take the case of the bond of a foreign Government, which is a contract by the foreign Government to pay a sum of money. Such a contract is not enforceable in the Courts of this country, and probably it is not enforceable anywhere. The contract of a Government is not enforceable in the Courts of another country, because they have no jurisdiction over a foreign Government, and no sovereign power would allow itself to be sued in the Courts of its own country without its own consent. Still no one would say that the bond of a foreign country is not property.

> If a man died possessing nothing but French or Italian bonds no one would say that he had died without any property. Such bonds are not *choses in action* in the ordinary sense, and that cannot be the definition of property. The mere fact that you cannot sue for the thing does not make it not 'property.' I am not going to attempt to define 'property,' that would be too dangerous. But there can be no doubt that these foreign bonds, both in common language and in the language of lawyers, are 'property.' Nor can I doubt that if a man had a bond for £10,000 of the British Government it would be 'property.' The annuities which were granted by the kings of England in former days, charged on the tonnage and poundage dues, were always dealt with as property, and they formed the subject of numerous decisions of the Courts. But you would not sue the Crown for them, and they could not even be made the subject of a petition of right, because they were granted out of the voluntary bounty of the Crown. But still they were property and they were assignable. A Government pension for past services was certainly assignable in equity, if not at law. It is said that in the present case the pension cannot be obtained until it has been voted by the colonial Legislature. That is no answer. The voting by the Legislature is the mere form or mode of securing the payment. It is not as if the Appellant had been told when the office was offered to him, You will be entitled to a pension when you retire, accordingly as it is or is not voted by the Colonial Legislature. If he had been told that, he would probably not have accepted the office. The vote of the Legislature is merely the mode of ascertaining the annual sum which the colony has to pay. Just in the same way the salaries and pensions of servants of the Crown in this country cannot be paid until they are voted by Parliament, and yet no one would say that they are not the property of the persons who receive them. There are, no doubt, some salaries and pensions which are not assignable. But when this is so it is always referable to one of two grounds. It is said to be contrary to public policy that payments made to induce persons to keep themselves ready for the service of the Crown, as the half-pay of officers in the army or navy, or payments for actual service rendered to the crown, should be assigned. The other class of cases is that of pensions, like the retiring allowance of a beneficed clergyman, which are by statute expressly made not assignable. But still I think these are all property. The large definition of 'property' given in sect. 4 of the Bankruptcy Act goes far beyond *choses in action*."

14. Jessel MR went on to consider the impact of section 90 of the 1869 Act (quoted in paragraph 9 above). The "property", he said, "vests by virtue of sects. 15 and 17, but subject to the exceptions made by subsequent sections of the Act" (see 91). Having noted that section 89 "provides for the cases of officers in the army or navy, and officers or clerks in the civil service of the Crown", he said (at 92):

> "In such cases sect. 15 is controlled by sect. 89, and a person who holds such a position and who becomes a bankrupt, is not necessarily to be left to starve, however improvident he may have been, but a discretion is given to the Court to fix how much of his pay and salary is to be made available for the payment of his creditors. If this be so, why do not the cases which are dealt with by sect. 90 stand in a similar position? Sect. 90 applies to a bankrupt 'who is in the receipt of a salary or income other than as aforesaid.' The present Appellant's income is not a 'salary,' but it is 'income.' The word 'income' is as large a word as can be used. It is not the less 'income,' because it has to be voted every year by the Colonial Legislature. The Court is empowered to 'make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee.' That means that, though the salary or income would vest in the trustee by virtue of sects. 15 and 17, the Court may order that only a part of it shall be set aside for the benefit of the creditors. This is a specific provision which to that extent controls the operation of sects. 15 and 17."

15. Echoing that, Lindley LJ said (at 93-94):

> "All money, therefore, to which the bankrupt may become entitled in any manner during the continuance of the bankruptcy is within sect. 15. Then, looking a little further, we find a group of sections, sects. 87 to 95, which relate to 'property devolving on the trustee.' As I understand them, these sections are modifications and qualifications of sect. 15. The different kinds of property with which they deal vest in the trustee, but subject to the modifications and qualifications contained in this group of sections. Sects. 89 and 90 are the only ones which are material for the present purpose. Is this bankrupt 'in the receipt of a salary or income other than as aforesaid?' His pension is not a 'salary,' inasmuch as he is not bound to render any services in respect of it. But why is it not 'income?' Surely it is income in every sense of the word. It is not, as in *Ex parte Wicks*, a mere voluntary allowance, revocable at any time; it is not an arbitrary allowance which can be stopped at any time at the will of the person who pays it. In my opinion it is within the true meaning of the word 'income' in sect. 90."

16. In the light of *Huggins* and cases which followed it, Chadwick LJ explained as follows in *Krasner v Dennison* [2001] Ch 76 (at paragraph 64):

> "It may be said, therefore, that the position under the bankruptcy law in this country, as it stood up to the enactment of the new code in 1985, was that the 'income' of a bankrupt fell to be dealt with under section 51(2) of the Bankruptcy Act 1914 notwithstanding that it was income the right to receive which had vested in the trustee in bankruptcy under section 53

> of that Act. The reason, as explained by Jenkins LJ in *In re Tennant's Application* [1956] 1 WLR 874, 883, was that it had been held in *Ex p Huggins; In re Huggins* 21 ChD 85 that the section 'controlled and qualified the operation of the vesting provisions of the Act with respect to any income to which the section applied'."

17. Relying on the first sentence from the passage from Lindley LJ's judgment in *Huggins* set out in paragraph 15 above, Mr Mohyuddin was inclined to suggest that the property which the Court of Appeal held to vest in Mr Huggins' trustee was simply money: pension payments as they came to be made. As, however, is indicated by Chadwick LJ's comments in *Krasner v Dennison*, *Huggins* was taken to mean that "'income' of a bankrupt fell to be dealt with under section 51(2) of the Bankruptcy Act 1914 notwithstanding that it was *income the right to receive which had vested in the trustee in bankruptcy* under section 53 of that Act" (emphasis added). In other words, the Court of Appeal was seen as having held that the *right* to the pension had vested in Mr Huggins' trustee. That that was what the Court of Appeal had decided is, moreover, borne out by the judgments. Had Jessel MR been considering whether *actual* payments were property, much of what he said would have been unnecessary. It is evident that he was in fact looking at what the position was when payment had not yet been made. That will have been why, for instance, he noted that a bond is "property" and that the "mere fact that you cannot sue for the thing does not make it not 'property'".

18. Mr Grant argued that Mr George's right to outstanding fees was analogous to Mr Huggins' "right" to his pension and should similarly be considered to represent "property" and to have vested. Disputing that, Mr Mohyuddin queried how far *Huggins* is now of significance. When *Huggins* was decided, he pointed out, property acquired or devolving during the continuance of the bankruptcy would automatically vest in the trustee but could nevertheless be "salary or income" within the meaning of section 90 of the Act. Under the 1986 Act, in contrast, after-acquired property no longer vests automatically and, if "income", can be claimed only under section 310. I do not see, however, how these differences can affect the significance of the Court of Appeal's interpretation of "property" in *Huggins*. The changes to the insolvency regime embodied in the 1986 Act relate to what property vests, not what "property" is.

19. Mr Mohyuddin's more substantial argument was that, unlike Mr George, Mr Huggins had entered into a contract, even if an unenforceable one. In this connection, Mr Mohyuddin relied on the sentence in Jessel MR's judgment in which he said, "It is true that the contract under which [Mr Huggins] accepted the office may not be enforceable in the Courts either of this country or of *Sierra Leone*". It was on this basis that Judge Davis-White concluded that *Huggins* did not assist Mr Gwinnutt. He said at paragraph 99 of his judgment:

> "It seems that the pension was an entitlement under contract, albeit that the contract in question was not enforceable in the courts of law. Unlike the position in *In re Inkson's Trusts*, the pension was not a mere possibility or expectancy but an existing interest. In this case there is no contract at all. I do not accept Mr Hackett's submission that an engagement expressly

> on a non-contractual basis is the same thing as engagement pursuant to a contract which is not enforceable in the courts. Contracts may not be enforceable for a number of reasons (eg statute, see *Cooper v R* (1880) 14 Ch D 311 (pensions) or limitation), just as they may not be assignable (eg certain pensions by statute) but that of itself will not prevent them being property and it is a very different thing from a mere moral obligation."

20. On the other hand, there is force in Mr Grant's comment that "unenforceable contract" has an "oxymoronic quality". If, Mr Grant asked, rhetorically, a contract is unenforceable from the outset, what *right* can there be to payment under the contract? In a contractual context, one would normally expect a "right" to connote an ability to mount a legal claim. The maxim "ubi ius ibi remedium" encapsulates the idea that, wherever there is a right, there is a remedy. Turning that round, one may wonder whether there can be a true legal right in the absence of a remedy.

21. In any event, Jessel MR's analysis in *Huggins* does not appear to have depended on the existence of a contract. He stressed that "property" "goes far beyond *choses in action*" and that the "mere fact that you cannot sue for the thing does not make it not 'property'". Annuities on tonnage and poundage dues were "property" even though "you would not sue the Crown for them, and they could not even be made the subject of a petition of right, because they were granted out of the voluntary bounty of the Crown". For good measure, it must be doubtful whether Mr Huggins was, or would have been considered to be, a party to an actual contract. In *Gilham v Ministry of Justice* [2017] EWCA Civ 2220, [2018] ICR 827, the Court of Appeal concluded that a District Judge's relationship with the Ministry of Justice was non-contractual. More relevantly, perhaps, when in 1956 Lord Goddard CJ said in *Inland Revenue Commissioners v Hambrook* [1956] 2 QB 641, at 654, that he considered that the employment of a civil servant "depends not on a contract with the Crown but on appointment by the Crown", he was reflecting a view that had had currency for many years (see e.g. *Dunn v The Queen* [1896] 1 QB 116).

22. Mr Grant's other key contention was that Mr George had more than a mere moral claim to his outstanding fees. I agree. In the first place, the practical reality was that, even before 2013, a solicitor would consider himself to be more than just morally obliged to pay a fee and, sooner or later, would nearly always do so. When *Rondel v Worsley* was in the Court of Appeal (see [1967] 1 QB 443, at 522), Salmon LJ remarked that he did "not think that, happily, there is any higher incidence of bad debts at the Bar than there is in any other profession". As a Disciplinary Tribunal of the Council of the Inns of Court said when hearing charges of misconduct against Mr George on 11 January 2017, "the great majority of the Bar's debts or the Bar's honoraria were paid to them. The Bar would hardly have survived otherwise."

23. Secondly, a solicitor's failure to pay a fee could potentially amount to professional misconduct. There was formerly an explicit rule making solicitors "personally liable as a matter of professional conduct for the payment of counsel's proper fees" (see "Guide to the Professional Conduct of Solicitors" (1999), at Principle 20.06). The rule was not carried forward into the Solicitors' Code of Conduct which replaced the "Guide to the Professional Conduct of Solicitors" in 2007, but "Core duties" for which the new Code of Conduct provided required a solicitor to "act with integrity" in

his dealings with other lawyers and "not behave in a way that is likely to diminish the trust the public places in you or the legal profession". A 2010 Bar Council consultation paper noted that, "in certain circumstances, the threat of a possible finding of misconduct by the Solicitors' Disciplinary Tribunal for breach of this rule may encourage payment", while noting that the Law Society had "ceased to accept complaints on the basis of non-payment of barristers' fees in 1998" (see paragraph 10). As regards the latter point, the Solicitors Regulation Authority stated in its response to the consultation paper:

> "Our current policy is not to investigate [allegations relating to non-payment of fees] unless particular matters have been reported by the Bar Council on the basis that an individual has failed to comply with a decision from the Joint Tribunal, or where an individual solicitor has become subject to the Bar's Withdrawal of Credit Scheme."

24. Thirdly, a barrister was not without any remedy where a fee was not paid. Although he could not bring legal proceedings, he could invoke the Bar Council's "Withdrawal of Credit Scheme", mentioned in the previous paragraph. The Bar Council's 2010 consultation paper explained the scheme in these terms (in footnote 5):

> "In outline, the Withdrawal of Credit Scheme works as follows: the list produced under the scheme contains the names of solicitors in respect of whom complaints of unpaid fees have been upheld. Thereafter, in essence, barristers are only able to accept work from such solicitors if payment is made with the brief or instructions, or if the work is covered by full publicly funded certificates. The threat of having their names entered on the list is often sufficient to encourage solicitors to pay outstanding fees. Where there is a genuine dispute on the question of fees, a complaint under the scheme can lead to the appointment of a Joint Tribunal, with the Law Society and the Bar Council each nominating one member, to adjudicate on the dispute between barrister and solicitor."

25. A fourth point arises from this sentence in Salmon LJ's judgment in *Rondel v Worsley* ([1967] 1 QB 443, at 521-522):

> "If counsel has not been paid in advance and the solicitor has not been put in funds and the lay client refuses to pay, it is true that counsel cannot sue; *but the solicitor can*" (emphasis added).

26. "[E]very agent has a right against his principal to be reimbursed all expenses and to be indemnified against all losses and liabilities incurred by him in the execution of his authority" (Bowstead & Reynolds on Agency, 21st ed., at paragraph 7-057). A solicitor who has paid counsel's fees with his client's authority can invoke this principle to claim reimbursement. Where, however, fees are as yet unpaid and there is no contract between solicitor and barrister, the absence of contractual liability to the barrister might be thought to mean that the client can revoke the solicitor's authority to pay the fees and deny any liability in respect of them. Yet that would not appear to

have been Salmon LJ's understanding and, in my view, is not the case. The decision of the Divisional Court in *Rhodes v Fielder, Jones and Harrison* (1919) 89 LJKB 15 is relevant here. In that case, a country solicitor purported to revoke his London agents' authority to pay counsel's fees, but it was held that he was not entitled to do so. Lush J, with whom Sankey J agreed, said:

> "After the case had been heard in the House of Lords, and after consultations with counsel had been asked for and held, the plaintiff [i.e. the country solicitor] revoked the authority to the defendants [i.e. the London agents] to pay these fees, and it was argued that when country solicitors instruct London agents to brief counsel and, in the usual way, the agents have consultations with counsel and incur obligations towards counsel in respect of them which are fully recognized, the country solicitors can revoke their authority to their London agents to pay the counsel's fees. I can only say that to my mind such a proposition is absolutely unsustainable. It is, of course, the fact that the London agents could not be sued for these fees by counsel, but that does not dispose of the question. If they did not pay the fees they would be behaving in a way which would unquestionably place them in a serious position. I think it is right to say this, that a solicitor who has undertaken to pay fees to counsel and refuses to pay them is guilty of misconduct, and therefore it is impossible to say that it was open to the country solicitors in this case to revoke their authority…. The defendants did what they did at the request of the plaintiff, and made themselves responsible as honourable members of their profession for the payment of these fees."

Bowstead & Reynolds on Agency cites this case as authority for the proposition that an agent's right to reimbursement extends to "cases where the agent makes a payment which could not have been enforced but which there is a strong and legitimate pressure to make" (paragraph 7-059). It also says this (at paragraph 10-010):

> "Where in the execution of his authority the agent incurs a personal liability to a third party, such that he would be entitled to reimbursement or indemnity in respect of it, the principal cannot, by purporting to revoke the agent's authority to discharge it, destroy that right. Thus where in the pursuance of his authority the agent incurs contractual liability to pay money to a third party, he is entitled to reimbursement in respect of payments which he makes even though the principal has subsequently forbidden them. The principle applies also where the agent incurs a liability in respect of an authorised transaction which it is proper for him to discharge even though it could not be legally enforced, e.g. a liability to pay wagering debts, or barrister's fees."

27. Mr Mohyuddin pointed out that *Rhodes v Fielder, Jones and Harrison* involved a dispute between solicitors rather than one between solicitor and client, but I do not think that matters. The reasoning would have been just as applicable had the question

been whether a lay client could revoke his solicitor's authority to pay counsel's fees. Mr Mohyuddin also stressed the fact that the decision pre-dated the loss in 2007 of the specific rule making a solicitor "personally liable as a matter of professional conduct for the payment of counsel's proper fees", but I do not see that as significant, either. It will, in my view, have remained the case that a lay client could not revoke his solicitor's authority to pay counsel's fees and that the solicitor could claim reimbursement in that respect. It was still "proper for [a solicitor] to discharge [a barrister's fee] even though it could not be legally enforced" (to use words from Bowstead & Reynolds), and there continued to be imperatives requiring him to do so.

Conclusion

28. Non-contractual barristers' fees were unique in nature. A barrister had more than a mere moral claim to such fees and more than just a hope (or "spes") that he would receive them. If needs be, the barrister could invoke the Bar Council's "Withdrawal of Credit Scheme", and a solicitor's failure to pay a fee could potentially amount to professional misconduct. The highly unusual character of a barrister's fee is also manifest in the client's inability to revoke his solicitor's authority to pay counsel and the solicitor's right to reimbursement. The law recognised that, notwithstanding the absence of a contract, payment of an outstanding fee was not to be regarded as voluntary. In practice, a barrister would normally be paid.

29. In the circumstances, it seems to me that a barrister's fees, even when non-contractual, are "property" for the purposes of the 1986 Act and so vest in a trustee in bankruptcy. "Property" is explained in the widest of terms in section 436, but even that "definition" is inclusive rather than comprehensive. The *Huggins* case illustrates the breadth of "property" and provides an analogy to the present case. It would, moreover, be entirely anomalous if barristers' fees were not viewed as "property". Were any other professional to become bankrupt, his aged debt would vest in his trustee, and so should a barrister's. The statutory objective, reflecting the principle of public policy recognised in *Hollinshead v Hazleton*, is that "subject to certain specific exceptions, all a debtor's property capable of realisation should be vested in the trustee for him to realise and distribute the proceeds among the creditors" (in the words of Mummery LJ). Unpaid fees, regardless of whether they are contractual, are capable of realisation. The fact that something can be realised or turned to account does not invariably make it "property", but it seems to me to point in that direction and, here, the expectation of payment is not founded on mere hope or morality but reflects the unique nature of non-contractual barristers' fees. As I say, payment of such a fee was not to be regarded as voluntary.

30. I respectfully take a different view from Judge Davis-White. I would allow the appeal and answer the preliminary issue in the affirmative.

Lord Justice Singh:

31. I agree that this appeal should be allowed for the reasons given by Newey LJ. I would like to add a few words of my own because it seems to me that this case raises a potentially important issue of human rights law.

32. Article 1 of the First Protocol to the European Convention on Human Rights, which is one of the Convention rights set out in Sch. 1 to the Human Rights Act 1998

("HRA"), guarantees the right to peaceful enjoyment of possessions. Nothing turns on the fact that this provision refers to "possessions" rather than "property." In substance it protects the right to private property; indeed the word "property" appears later in the provision, where it refers to the control of "the use of property". Like many Convention rights, this is not an absolute right but interference with it must be justified and in particular must comply with the principle of proportionality.

33. It is clear that the right protected by Article 1 of the First Protocol is to be read broadly: see Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights (4th ed., 2018), p.850, where it is said that its essential characteristic is "the acquired economic value of the individual interest". It is also clear that the right protects not only property rights in the conventional sense but "legitimate expectations." The leading case in which the European Court of Human Rights summarised the relevant principles is *Kopecký v Slovakia* (2005) 41 EHRR 43, at paras. 35 and 45-52. A more recent summary of the principles can be found at paras. 58-60 of *Tibet Menteş v Turkey* (2018) 67 EHRR 13.

34. At the hearing before this Court Mr Mohyuddin suggested that the concepts of property in the law of bankruptcy and in human rights law should be kept apart and not confused. However, the HRA is not an ordinary statute; it is a constitutional statute and permeates the entirety of the legal system. Of particular importance is section 3 of the HRA, which requires all legislation to be read and given effect, so far as possible, in a way which is compatible with the Convention rights. There is thus no dichotomy between insolvency law and human rights law: the strong obligation of interpretation which is to be found in section 3 applies to all legislation, including the Insolvency Act. Moreover, it does not require there to be any ambiguity before the strong obligation of interpretation arises.

35. It seems to me at least strongly arguable that a barrister's aged debts before 2013 should be regarded as legitimate expectations even if there was strictly no legal right to them. The proposition can be tested in this way. Suppose the state had attempted before 2013 to deprive a barrister of his or her aged debts without compensation. I find it hard to believe that that would not raise a serious issue, to say the least, under the HRA.

36. However, since we did not hear full argument on the human rights aspect of this case, I will say no more about it here.

Lord Justice Baker:

37. For the reasons set out in the judgment delivered by Newey LJ, I agree that this appeal should be allowed.