

Liability of trustees in bankruptcy: important new Court of Appeal case

The liability of trustees in bankruptcy to bankrupts is a curiously under-developed area of law. There has been a lack of clarity the circumstances in which a trustee can be liable to a bankrupt personally (rather than liable for losses to the bankrupt's estate). However, this issue came before the Court of Appeal last month (judgment handed down 25 May 2017).

In *Oraki & Oraki v Bramston & Defty* [2017] EWCA Civ 403 the Court of Appeal described this question as involving “some novel and difficult issues of law on, first, the duties, if any, owed by a trustee in bankruptcy to the bankrupt personally, as opposed to the bankruptcy estate of which he is trustee, and, second, if such duties exist, on the effect of a release under section 299 of the [Insolvency] Act of a trustee who has ceased to hold office.”

In *Oraki*, the first instance judge (Proudman J) had held that a trustee's duty to a bankrupt were governed exclusively by s. 304 of the Insolvency Act 1986 and that no duties are owed at common law to bankrupts. She also decided that the effect of a release under s. 299 of the same Act was to preclude any claim save under s. 304.

S. 304 of the Insolvency Act 1986 provides that:

“(1) Where on an application under this section the court is satisfied-
(a) that the trustee of a bankrupt's estate has misapplied or retained, or became accountable for, any money or other property comprised in the bankrupt's estate, or
(b) that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee in the carrying out of his functions the court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property (together with interest at such rate as the court thinks just) or, as the case may require, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.

This is without prejudice to any liability arising apart from this section.

(2)leave of the court is required for the making of an application if it is to be made by the bankrupt or if it is to be made after the trustee has had his release under section 299.”

In *Oraki*, the Court of Appeal made the following observations:

- S. 304 is “concerned with, and confined to, acts or omissions on the part of the trustee that have caused loss or damage to the estate” (and not the bankrupt personally);
- S. 304 did not suggest that in “no circumstances can a trustee owe an enforceable duty to the bankrupt in respect of loss or damage caused not to the estate but to the bankrupt personally”;
- The words “without prejudice to any liability arising apart from this section” at the end of s. 304(1) are “apt to extend to any claim for any common law or other duty not falling within the express terms of section 304. They wisely accommodate future legal developments,

including developments in the common law, as well as providing for liabilities that could in 1986 have arisen” .

Because the appeal in *Oraki* failed on the facts, the Court of Appeal did not have to reach a conclusion on the legal question as to duty of care. But as set out above, it made a number of interesting observations that are likely to influence the outcome of future litigation over the liability of trustees in bankruptcy.

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