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IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

M. No.52/87

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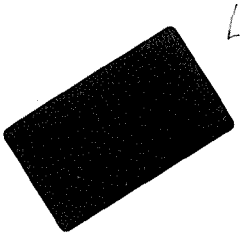
IN THE MATTER of the Insolvency Act 1967

LR 78



A N D

IN THE MATTER of the Estate of WILLIAM HOWDEN PIERCY Ex parte, RALPH NEVILLE BAYNES a Creditor

Hearing: 11 March 1988

Counsel: C. Ward for Creditor
R.G.R. Eagles for Estate of W.H. Piercy

Judgment: 11 March 1988

JUDGMENT OF TIPPING, J.

This is an application by a creditor for an order that an allegedly insolvent estate be administered under Part XVII of the Insolvency Act 1967.

The Applicant, Mr R.N. Baynes, advanced to the late W.H. Piercy the sum of $105,000 on 20 January 1983. Interest was payable at 18% per annum. The loan was unsecured.

Mr Piercy died on 20 August 1986 at which time the principal sum was outstanding, together with accrued interest totalling $12,608.58.

Following Mr Piercy's death his widow, Mrs M.M. Piercy, was appointed executrix and administrator of her late husband's estate.

On 19 June 1987 Mr Baynes, through his solicitors, made a request to Mrs Piercy that she make

application under Part XVII of the Insolvency Act; that request being made pursuant to s.155 of the Act.

As no such application was made by Mrs Piercy, Mr Baynes makes the present application as a creditor of the estate of the deceased, again in terms of s.155.

The jurisdiction of the Court in a matter of this kind is established by s.157 which, omitting a proviso which has no bearing on the present case, reads as follows:-

> "Jurisdiction of Court - (1) On the hearing of an application under this Part of this Act and, in the case of an application by a creditor, upon proof of the debt, the Court, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts of the deceased and that the creditors will not be prejudiced by the estate being administered in the usual way, may order that the estate be administered under this Part of this Act or (upon causing being shown) may dismiss the application with or without costs, and in either case may order costs to be paid by either party to the other, or out of the estate."

It seems to me that pursuant to this section a creditor has a prima facie right to an order under Part XVII unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of all the debts and that the creditors will not be prejudiced by the estate being administered in the usual way.

The jurisdiction is discretionary and it was in relation to the second aspect and to Court's underlying discretion that most of the argument was directed.

The correct approach to an application under s.157 was considered by the Court of Appeal in Moulder v. Fischer [1979] 2 N.Z.L.R. 662. The Court comprised Woodhouse, Cooke and Somers, JJ, the judgment being delivered by Somers, J. His Honour put the matter this way:-

> " The way in which the Court is to approach the exercise of the discretion to make or refuse an administration order is indicated by s.157(1). In the first place if the Court is satisfied that there is a reasonable probability that the estate will be sufficient for payment of debts and as well creditors will not be prejudiced by the usual administration the application will be dismissed. Unless both those matters are made out the Court may make the order 'or (upon cause being shown) may dismiss the application'.
> Where the creditor proves his debt and establishes that there are insufficient assets to pay creditors in full it is for those resisting the making of an order to establish grounds why it should not be made. It is essentially the same approach as is the case on a bankruptcy petition when the creditor has satisfied the Court of the truth of his allegations - see s.26(1) and (2) of the Act. The creditor has no absolute right to an order. But where the appropriate circumstances are made out, if an order is to be refused it is for the debtor to establish some ground. See, for example, Re Outram ex parte Ashworth (1893) 10 Morr 288, 293-294; Williams on Bankruptcy (18th ed, 1968) 65-66."

The evidence filed satisfies me, as indeed Mr Eagles acknowledged, that the liabilities of the deceased exceed his assets. Mr Eagles' acceptance that this was the position was an acceptance that such was the case "in the arithmetical sense" and Mr Eagles, by reference to a number of transactions in which the estate is involved, suggested that there may not ultimately be a deficiency.

In her affidavit Mrs Piercy deposes as follows:-

> "I accept that it is unlikely that the debt of Ralph Baynes would be paid in full but it is possible that it may be paid in part. As Trustee I am unable to make any more positive indication than that."

There is no basis upon which the Court could hold that there is a reasonable probability that the estate will be sufficient for the payment of all the debts of the deceased.

That being so it is clear that Mr Baynes' prima facie entitlement to an order has not been rebutted, irrespective of whether the creditors will or will not be prejudiced by the administration of the estate in the usual way.

Mr Ward submitted that the creditors would be prejudiced for reasons which will appear shortly.

This point is linked with the Court's ultimate discretion as to whether to make an order but I think Mr Baynes' prima facie right to an order should not be denied unless the Court is satisfied either that such order would not in any way assist him or that there are other factors in the case of sufficient force to justify the order being withheld.

Mr Baynes' purpose in seeking an order for administration under Part XVII is to endeavour to overcome the effect of charging orders obtained against the assets in the estate by Marac Merchant Bank (SE Asia) Ltd and Marac Corporation Ltd. Those two companies have obtained judgment against the estate in the sums of $72,979.35 and $124,330.54 respectively.

On 29 October 1986 a charging order nisi was made in respect of certain assets in the estate and on 4 May 1987 Sinclair, J. in Auckland gave judgment making absolute the charging order nisi.

On the making of an order for administration under Part XVII s.159 of the Act provides that:

> "The whole of the estate, at the date of the presentation of the application upon which the order is made, is hereby vested in the administrator, or the Official Assignee, or the Public Trustee, or such other person as aforesaid (hereinafter in this part of this Act referred to as the Appointee) as the Court by that

> order or any subsequent order directs; and the Appointee shall forthwith proceed to realise, administer, and distribute the estate in accordance with the law and practice for the time being in force with respect to the realisation, administration and distribution of the property of a bankrupt debtor, subject to the modifications made therein by this part of this Act."

Section 162(1)(g) provides:-

> "Notwithstanding the provisions of section 50 of this Act, an execution against the deceased debtor's estate, whether or not it was completed before the making of an order to administer under this Part of this Act, shall (except so far as it was completed more than three months before the date of that order) be voidable as against the person appointed under the order to administer the estate."

Mr Ward submitted that if Mr Baynes obtained an order for administration under Part XVII the charging order obtained by Marac would no longer prevail and no payments could subsequently be made to Marac out of the estate, other than on a pro rata basis.

He also argued that by reference to s.162(1)(g) any payments which might have been made to Marac within three months of the making of the order to administer under Part XVII would be voidable against the person appointed to administer.

As an alternative Mr Ward submitted that in any event a charging order, even if a complete form of execution on being made absolute, did not have effect after an order had been made for administration under Part XVII.

In essence Mr Ward's submission was that a charging order did not create a charge and did not provide any form of security in favour of the creditor.

Mr Ward's submission was that a charging order amounted to no more than a stop or a means of preventing

the debtor from dealing with the assets charged.

Mr Eagles argued that Marac having obtained a charging order absolute became a secured creditor in the estate in terms of the Insolvency Act 1967 and specifically s.90.

The issue between the parties and the question whether the Court should exercise its discretion for or against making an order for administration under Part XVII depends first therefore on whether Marac obtained security for its judgment debts by means of the charging order made absolute by Sinclair, J. on 4 May 1987. Mr Baynes' application was filed on 22 December 1987.

Mr Eagles accepted that if Marac was not a secured creditor then there would or might be some advantage to Mr Baynes in obtaining the order sought and Mrs Piercy would in that event not press her opposition.

That opposition is based mainly on the proposition that as Marac has security, by force of the charging order, there is no advantage to Mr Baynes in obtaining an order for administration under Part XVII and the disruption that such an order would involve by changing the administrator of the estate should be avoided.

The essential questions which I must resolve are accordingly firstly, whether a charging order gives to the creditor security for its debt and secondly, whether such security enures for the creditor's advantage in the insolvency context.

Section 90 of the Insolvency Act 1967 provides for proof of debts by secured creditors. If a secured

creditor realises his security he may prove for the balance due after deducting the amount realised.

If a secured creditor surrenders his security to the Official Assignee for the general benefit of the creditors he may prove for the whole of his debt.

The expression "secured creditor" is defined in s.2 as meaning:-

> "A person holding a mortgage, charge, lien, or security on the property of the debtor, or any part thereof, as a security for the debt due to him from the debtor, whether given directly or indirectly through another person as security for a debt due to the creditor."

The question what, if any, security a person has who holds a charging order over the assets of a bankrupt or over assets in an insolvent estate, can be looked at either in terms of the law relating to the rights of secured creditors on insolvency or in relation to s.159 which provides that the whole of the estate of the deceased person is, upon the making of a Part XVII order, vested in the appointee to be administered in terms of the law relating to bankrupt debtors.

The word "estate" in this context is defined by s.153 as meaning in relation to any deceased debtor that part of the deceased debtor's estate which is available for distribution under paragraph (b) of subsection (1) of s.162 of the Act. That paragraph sets out the priorities and the order in which payments are to be made.

I agree with the learned author of Spratt & McKenzie's Law of Insolvency 2nd edition (1972) who says as regards s.159 and the meaning of the word "estate":-

> It is submitted that the property which passes to the Appointee under the subsection is the property to which the deceased was entitled at the date of the presentation of the application subject to any liens,

charges or other equities binding on the estate."

Reference is made to the following passage in the judgment of Chitty, L.J. in Hasluck v. Clark [1899] 1 Q.B. 699 at 707:-

> ".....I think it is clear that the subject matter dealt with by the 125th section is the estate of the deceased debtor in the sense in which that term is invariably used, namely, the property to which he was entitled at the time of his death so far as it has not been lawfully dealt with since his death, before the order of administration is made and subject to all liens, charges and rights subsisting in other persons ..... The term 'property of the debtor'.....is obviously employed in the same sense as estate."

The same view was taken by Dixon, J. of the corresponding Australian provision in Vacuum Oil Co Pty Ltd v. Wiltshire (1945) 72 C.L.R. 319, 336.

In other words if at the date of the making of the order to administer under Part XVII the property of the deceased debtor is subject to some charge, lien or other right subsisting in another person, that property vests subject to the charge, lien or right.

An order made for administration under Part XVII does not divest rights over property subsisting in others; it vests the property of the deceased debtor subject to rights and interests then existing.

Marac's charging order must obviously ante date the making of any order on the present application and in so far as it creates a charge, the estate of the late Mr Piercy would, on the making of an order for administration under Part XVII, vest in the appointee subject to that charge but subject also to such other material provisions of the Insolvency Act 1967 as may apply to the circumstances. The same consequences

will flow as if one approaches the matter on the basis of Marac being a secured creditor.

Chitty, L.J. spoke of "rights subsisting in other persons". I think His Lordship was there referring to rights in the nature of interests in the property concerned, rather than a bare right to prevent property being sold, i.e. the stop order construction of a charging order urged upon me by Mr Ward.

If therefore that is all a charging order achieves, then I do not think that it would create a right subsisting in Marac within the ambit of Chitty, L.J.'s formulation. If, however, the charging order charges the property concerned, in the sense of creating a security in favour of the creditor, then clearly such charge falls within Chitty, L.J.'s words.

Rule 548 of the High Court Rules describes the effect of a charging order under the Rules as follows:-

> "Effect of charging order - (1) A charging order shall charge the estate, right, title or interest of the person against whom it is issued in the property described in the order with payment of the amount for which the person issuing the order may obtain or has obtained judgment, as the case may be."

This rule is new and there was no exact equivalent under the former Code of Civil Procedure.

Leave is required to issue a charging order against land before judgment but after judgment the judgment creditor may take out an order absolute in the first instance as of right (Rule 573).

Similarly, after judgment a charging order against all property, other than land, may be taken out as of

right but it is only an order nisi in the first instance.

The effect of an order nisi is provided for in Rule 581 and it is basically a restraint upon the person served from doing various things that would be prejudicial to the judgment creditor. After judgment the creditor may in terms of Rule 585 apply to the Court to have a charging order nisi made absolute.

Rule 548, which specifies the effect of a charging order, does not make any distinction between orders absolute and orders nisi.

The wording of Rule 548 is simple and direct. It is that a charging order shall charge the estate, right, title or interest of the person against whom it is issued in the property described. The property is charged with payment of the amount for which the person issuing an order may obtain or has obtained judgment.

The very wording of the Rule, describing as it does the effect of the charging order, strongly suggests that the property against which the order is issued is thenceforth subject to a charge in the nature of a security.

I note that the learned author of McGechan on Procedure in his commentary to Rule 548 says this:-

> "Unlike a writ of sale or possession, a charging order is not a direct mode of enforcing a judgment. It does not enable the creditor immediately to recover the fruits of his judgment. Rather, its aim is to provide the creditor with security in whole or in part over the property of the debtor."

These observations also of course clearly support the proposition that a charging order gives some measure of security to the creditor.

Counsel referred me to several cases which I must now consider.

The first is Blaikie v. Malcolmson (1886) 4 N.Z.L.R. 408 in which Gillies, J. said:-

> "A charging order under our code, does not, in my opinion, form a 'charge' on the debtor's estate within the meaning of s.61 subsection 4. It is merely a stop order preventing the disposition of the property until the creditor has an opportunity of making his judgment effectual by seizure and sale."

Coming closer to the present day the matter was also considered by Quilliam, J. in Brdjanovic v. Ellis Hardie Symington Ltd [1974] 2 N.Z.L.R. 542.

That case involved a contest between a lien holder and a judgment creditor who had registered a charging order. The lien had been registered later than the charging order and the case was one of determining priorities.

Quilliam, J. said:-

> "It must be recognised that a charging order is something which is altogether different in character from a lien or other security. This was referred to as long ago as 1886 in the judgment of Blaikie v. Malcolmson ....."

His Honour then went on to refer to the passage from the judgment of Gillies, J., which I have set out above, and continued:-

> "This view of a charging order seems to be borne out by the provisions of Rule 319 of the Code of Civil Procedure which stipulates that 'such order shall cease to bind the land effected thereby, unless some different form of conveyancing or instrument of transfer upon a writ of sale is registered within six months after such order has been sealed....."

There is a corresponding provision in the High Court Rules. Rule 578 is to the same effect as the

previous Rule except that the life of the charging order is now two years rather than six months.

Quilliam, J. held that the lien had priority over the charging order because at the time when the charging order was taken out the lien already existed. The right to claim a lien existed by virtue of the Statute as soon as the relevant work had been done.

His Honour held that the effect of registration of the lien after the charging order was not to take away some prior right but simply to give notification that the lien holder had already in existence an interest in the land by virtue of the statutory lien.

Towards the end of his judgment Quilliam, J. said of the judgment creditor:-

> "His charging order merely gave him a charge over whatever interest the judgment debtor had in the property at the date of its registration. The extent of that interest was to be determined by reference to encumbrances already registered against the property and to existing equities."

With respect that seems to recognise that at least following registration the charging order does give the creditor a charge over the judgment debtor's land, subject of course to pre-existing emcumbrances and equities.

The essential question is whether that charge is sufficient to constitute the creditor a secured creditor for the purposes of the Insolvency Act or to constitute the creditor a charge holder within the meaning of Chitty, L.J.'s words in Hasluck v. Clark.

Another case mentioned by counsel where the matter arose in the context of an argument over priorities, was

Nicholl v. Official Assignee [1966] N.Z.L.R. 779.

In that case Tompkins, J. held that an equitable interest in land, which had arisen between the date of the sealing of a charging order and the date of its registration, prevailed over the charging order. This was in terms of a line of cases which all held that the equities in this sort of situation are reckoned from the date of registration of a charging order and not from the date it is taken out.

There is no reference by Tompkins, J. in his judgment to Blaikie v. Malcolmson which was presumably not cited to him. At page 781 His Honour says:-

> "It seems to me that, notwithstanding the terms of the charging order absolute when sealed by the Supreme Court, it does not effectively bind the land of the judgment debtor until registered against that land. I do not think the issue of a charging order creates any equity in the judgment creditor in the land described in the order and that it does not effectively charge the land until it be registered against that land. I think this view is strengthened by the terms of R.320 which gives power to the Court, on the application of any person prejudicially affected, to apply to the Court to have the registration of such order cancelled."

One of the cases to which reference is made by Tompkins, J. is BNZ v. Farrier-Waimak Ltd [1964] N.Z.L.R. 9 at page 20.

Judgment was delivered in Nicholl's case on 5 May 1966. Judgment was delivered in the Farrier-Waimak case in the Privy Council on 5 October 1964.

In the passage referred to by Tompkins, J. in Nicholl, Turner, J. delivering the Court of Appeal judgment in Farrier-Waimak said this:-

> "The position of the Contractor, in our opinion, is in this case not unlike that of a judgment creditor having a charging order. Registration of the charging order

> prior to the registration of a mortgage earlier in date gives the judgment creditor no priority over the earlier-created mortgage, for in the nature of things the order affects only the beneficial estate of the judgment debtor - see, for instance, In re Mutual Benefit Building and Investment Society, ex parte Baynes (1887) N.Z.L.R. 5 S.C. 293 per Johnston J.; In re Beattie (1887) N.Z.L.R. 5 S.C. 342 per Williams J.; Outler v. Nicol [1923] N.Z.L.R. 1339 per Stringer J., subsequently re-reported sub nom Nicol v. Raven [1925] N.Z.L.R. 155; [1924] G.L.R. 186. In all these cases an order was made directing the removal of a charging order from the register so as to enable an earlier-executed transfer or mortgage to be registered in its equitable priority. The decisions were based upon the fact that a charging order gives a charge inferior to an earlier-executed transfer or mortgage, even if the latter has not been registered."

Lord Upjohn delivering the judgment of their Lordships when Farrier-Waimak was heard by the Judicial Committee, said this in relation to the Court of Appeal's analogy between a lien holder and a judgment creditor holding a charging order [1965] N.Z.L.R. 426 443:-

> "In the Court of Appeal a close analogy was drawn between a lien holder and a judgment creditor having a charging order and their Lordships have been referred to a number of authorities on charging orders. Their Lordships however think the analogy is unsound, first of all, because all those cases were decided under R.320 of the Code of Civil Procedure which corresponds closely to s.44 of the Liens Act already set out, but counsel for the respondent bank disclaimed any reliance upon s.44 before their Lordships. But secondly it seems to their Lordships that consideration of the interest of a judgment creditor under a charging order bears no analogy to the interests of those entitled to liens under the Liens Act. In the former case the judgment creditor is entitled to obtain a charging order over the estate of the judgment debtor as one method of levying execution on the property of the debtor and it would be most unjust to hold that a judgment creditor was entitled to overreach a prior mortgage executed by the judgment debtor, in order to enforce his judgment. But the situation is quite different under the Liens Act where the Assembly has quite deliberately given a statutory lien to those who do work on the land or chattels of the employer and there is then no reason why the statute should not dictate the priorities which should obtain in liens over that land or those chattels."

In so far as all these cases dealt with charging orders they were decisions under the previous Codes of Civil Procedure.

As has already been mentioned, Rule 548 of the present High Court Rules is new and was presumably enacted against the bakground of the cases to which I have referred.

It would be strange, if it was intended simply to continue the law as it had earlier been declared to be, that the new Rule so clearly states that a charging order shall charge the estate, right, title or interest of the person concerned in the property described in the order.

In his commentary to Rule 573 of the High Court Rules the learned author of McGechan refers to Brdjanovic's case deciding as it did that a charging order does not form "a charge on the land but operates only as a stop order."

There is no cross reference to the proposition in the commentary to Rule 548 that a charging order provides the creditor with security.

Mr Ward submitted that if the Court held, contrary to the earlier authorities, that Rule 548 did indeed give a judgment creditor who had taken out a charging order some measure of security, this would be undesirable because certain creditors who moved swifter than others would get priority should the debtor ultimately be adjudicated bankrupt. I am not sure that such consequence is as undesirable as Mr Ward submitted.

I have also considered Mr Ward's point that further steps are necessary before a charging order can be converted into satisfaction of the judgment. Mr Ward sought to contrast this with a mortgage or a lien.

I do not consider the distinction to be as significant as was submitted. To convert a lien into satisfaction of the debt further steps such as sale are normally required.

With a mortgage, although the power to sell is usually contained within the body of the mortgage document, that is no more than making express what is implicit in the execution rules when one reads those relating to charging orders alongside those relating to writs of sale.

Mr Eagles submitted that de facto a charging order must be regarded as creating an effective charge because the judgment debtor cannot deal with the property, the subject of the charging order, without procuring a release.

Some assistance can I think be derived from the recent decision of the House of Lords in Roberts Petroleum Ltd v. Bernard Kenny Ltd [1983] 1 All E.R. 564.

In that case a charging order nisi had been obtained by a creditor over property owned by a company which subsequently went into liquidation. The question which arose was whether the order nisi should be made absolute, in spite of the intervention of the winding up.

Lord Brightman delivered the leading speech and at page 572 said:-

> " The basic question, therefore, which confronts the court when it is faced with an application by an execution creditor to convert an order nisi into an order absolute in a case such as the present is whether

> the asset in question should fall outside the statutory scheme which, by virtue of the liquidation, is then in existence or should be subject to that scheme. In the absence of persuasive authority to the contrary, and it will of course be necessary to consider the authorities, I would myself have thought that the court should exercise its discretion so that the asset falls within the statutory scheme. The purpose of the further consideration of the order nisi is to enable the court to review the position inter partes. At the date of the order nisi the court has made no irrevocable decision. If therefore the statutory scheme for dealing with the assets of the company has been irrevocably imposed on the company, by resolution or winding-up order, before the court has irrevocably determined to give the creditor the benefit of a charging order, I would have thought that the statutory scheme should prevail. Unquestionably that would be the position if the winding-up order or resolution had preceded the order nisi; see s.228 of the Companies Act 1948 (compulsory liquidation) and Westbury v. Twigg & Co Ltd [1892] 1 Q.B. 77 (voluntary liquidation). To my mind the position should be the same if liquidation commences after the order nisi but before the court has committed itself to a final order. I do not see why a creditor should gain an advantage merely because he has a revocable order for security at the time when the statutory scheme comes into existence."

Lord Brightman's reference to a charging order nisi as being "a revocable order for security" is a clear indication of the fact that his Lordship regarded a charging order as constituting some measure of security either revocable or absolute.

I have carefully considered Mr Ward's submission that Rule 548, albeit a new rule, nevertheless amounts to no more than a stop order.

The submission was that a charging order does not create any equitable estate or interest in the property charged in favour of the judgment creditor and does not diminish the equity of the judgment debtor in his property.

I find that hard to reconcile with the very words of Rule 548. As already set out the definition of a

secured creditor in the Insolvency Act is:-

> "A person holding a.....charge.....on the property of the debtor.....as a security for the debt due to him from the debtor whether given directly or indirectly....."

It seems to me that a judgment creditor who has taken out a charging order can be said in terms of Rule 548 to be holding a charge on the property of the debtor. It may be a little more difficult to say that such charge has been "given", but irrespective of that, if such were thought to prevent a charging order constituting a charge under the definition of secured creditor nevertheless, the property subject to the charging order would in my view vest in the appointee under s.159 subject to the charge in terms of Chitty, L.J.'s formulation in Hasluck v. Clark.

Although I am of the view that a charging order under Rule 548 does create a charge or security over the property concerned in favour of the judgment creditor, that does not of itself mean that such security prevails following adjudication in bankruptcy or an order being made for administration under Part XVII.

The point is that although a charging order amounts to a form of security it is also one of the forms of execution of a judgment - see Rule 547. Thus consideration must be given to the effect of ss.50 and 162(1)(g). The latter has already been set out.

Section 50 provides, so far as is material for present purposes:-

> "Rights of execution creditor and duties of Sheriff - (1) Notwithstanding the provisions of section 42 of this Act, but subject to subsections (3), (4), and (8) of this section and to section 56 of this Act, where a creditor has issued execution against the goods or lands

> of a debtor, or has attached any debt due to him, he shall be entitled to retain the benefit of the execution or attachment (including any proceeds thereof) if he has completed the execution or attachment before the debtor is adjudged bankrupt, and before notice of the filing of any bankruptcy petition against the debtor or of the commission of any available act of bankruptcy by the debtor other than any act of bankruptcy which may be committed by virtue of the said execution or attachment, but otherwise shall not be entitled to retain the benefit thereof.
> (2) For the purposes of subsection (1) of this section and of subsection (1) of section 49 of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by sale or, in the case of an equitable interest, by the appointment of a receiver.
> (3) .....
> (4) .....
> (5) No execution, attachment, or other process in respect of the debtor's property or person shall be commenced or continued after the bankruptcy is advertised, or notice is given to the creditor by the Assignee, in respect of any debt provable in the bankruptcy, and no distress for rent due by the bankrupt shall thereafter be levied, but if previously levied may be proceeded with.
> (6) .....
> (7) .....
> (8) ....."

In so far as a charging order is a form of execution it does not prevail unless execution has been completed before adjudication or receipt of any relevant notice by the creditor.

Similarly under s.162(1)(g) execution, whether or not it has been completed before the making of the order to administer under Part XVII, shall be voidable against the appointee except in so far as execution may have been completed more than three months before the date of the order.

It therefore seems to me to be the case, or at least to be distinctly arguable, that the measure of security provided by a charging order can be defeated on adjudication or the making of an order to administer under Part

XVII and that there can be some retrospective attack on steps taken within three months of the Part XVII order.

Some support for this view is to be found in the joint judgment of Goulding and Fox, JJ in the Chancery Division in England in ex parte Okill & Another v. Gething & Another [1977] 3 All E.R. 489.

The Court held that a petitioning creditor who had a charging order on the debtor's property in support of his debt was a secured creditor within the relevant definition in the United Kingdom Act, but if at the date of the presentation of the petition execution of the judgment debt had not been completed he effectively lost his security, either wholly or to the extent that execution had not been completed. In other words the charge or security constituted by the charging order became unenforceable in the bankruptcy and the creditor would therefore not rank in the bankruptcy as a secured creditor.

Goulding, J. giving the judgment of the Court, put the matter in this way:-

> " The first submission relied on by the petitioning creditors is that the judge was wrong in holding them to have been secured creditors within the meaning of s.4(2) of the 1914 Act. The argument that they were secured creditors has the merit of simplicity. The charging order imposed a charge on the land: see the language of s.4(2) of the County Courts Act 1959 and of the charging order itself. By s.167, the interpretation section of the 1914 Act, 'Secured creditor' means a person holding a mortgage charge or lien on the property of the debtor ... as a security for a debt due to him from the debtor' unless the context otherwise requires. Therefore, the argument runs, a judgment creditor holding a charging order is a secured creditor for the purposes of the 1914 Act and must comply with the requirements of s.4(2).
>
> That however is not the end of the matter. For bankruptcy purposes, a charging order is not merely an instrument imposing a charge. It is also, for the purposes of s.40 of the 1914 Act, a form of execution, and the execution is not completed until the judgment

creditor obtains the appointment of a receiver. If that is not done before (among other alternatives) the creditor has notice of the presentation of a bankruptcy petition, he is, by the operation of s.40, not entitled to retain the benefit of the charge against the trustee in bankruptcy. In other words he cannot rank as a secured creditor in the administration of the bankrupt's estate. That follows from the decision of the majority of the Court of Appeal in Re Overseas Aviation Engineering (GB) Ltd [1962] 3 All E.R. 12 [1963] Ch 24, a case under the corresponding provisions of the Companies Act 1948; see also Burston Finance Ltd v. Godfrey [1976] 2 All E.R. 976, [1976] 1 W.L.R. 719. Buckley LJ in Rainbow v. Moorgate Properties Ltd [1975] 2 All E.R. 821 at 825, [1975] 1 W.L.R. 786 at 792 put the point succinctly as follows:

> "The effect of the petition having been presented ... is that eventually a winding-up order is made, the plaintiffs will be unable to insist on their charging orders, but if no winding-up order is ever made, and if the charging orders remain in force, the plaintiffs will remain secured creditors of the company.'"

In Moulder v. Fischer, to which I have already referred, Somers, J. giving the judgment of the Court of Appeal said this:-

> "The Judge in saying he could find no grounds upon which an order should be made has inadvertently put a burden on the appellant which the law does not require her to discharge. The inquiry, upon the appellant's proof, was as to the existence of cause not to make an order. There are some matters mentioned however which are capable of being such cause and two in particular were relied upon by Mr Donovan, counsel for the respondent. They are the reference to delay and the finding that nothing would be gained by an order."

In the state of the law in relation to the present circumstances as I have discussed it, I cannot hold that there would be no utility from Mr Baynes' point of view in making an order to administer under Part XVII.

Marac has not been before the Court on this application and I cannot therefore make any definitive ruling as to what the position will be between Marac and the estate following the making of an order to administer under Part XVII.

On one view of the matter Marac's charging order gives it no effective security and thus it will rank simply pari passu in any event. If, as I am inclined to think, Marac does have security per force of its charging order, then Mr Baynes will be able to contend following a Part XVII order that to the extent that execution of the charging order has not been completed three months before the making of the order to administer the charging order should be avoided. He will also be able to contend that the order, to the extent of non execution, does not prevail against the bankrupt estate in any event. Marac will no doubt be able to argue to the contrary.

I cannot possibly hold, on the state of the authorities and the law as I see it, that Mr Baynes has no reasonable prospect of success. His prima facie entitlement to an order for administration under Part XVII is thus not displaced and there is no other basis for exercising the Court's residual discretion against him.

Accordingly I make an order pursuant to s.157 of the Insolvency Act 1967 that the estate of William Howden Piercy be administered under Part XVII of the Insolvency Act 1967.

Under s.158 the Court, if it is of the opinion that the estate is likely to be better administered by someone other than the present administrator, may make the appropriate appointment.

In all the circumstances I think that the Official Assignee ought to administer the estate and I therefore make a further order to the effect that Mrs Marlene Muriel Piercy shall cease to administer the estate

and that the estate shall henceforth be administered under Part XVII by the Official Assignee.

Mr Baynes having succeeded on his application is entitled to costs out of the estate which I fix at $750.00 plus disbursements as may be agreed or in the case of disagreement fixed by the Registrar.

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