

## Evaluating the effect of restraint orders on bankruptcy (Re Whyte, Brittain and another v Whyte and another)

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**Restructuring & Insolvency analysis:** In light of the ruling in *Re Whyte, Brittain and another v Whyte and another*, Marcia Shekerdemian QC, barrister at Wilberforce Chambers, who acted for the applicants, discusses the main legal issues and arguments before the court, and what trustees in bankruptcy would be prudent to take away from this decision.

### Original news

*Re Whyte, Brittain and another v Whyte and another* [2016] Lexis Citation 545, [2016] All ER (D) 03 (Sep)

*The applicant trustees in bankruptcy sought directions in a case where both a restraint order under the Proceeds of Crime Act 2002 (POCA 2002) and a subsequent bankruptcy order had been made against a bankrupt party, W. The High Court held that, on the proper construction of section 306A of the Insolvency Act 1986 (IA 1986) and POCA 2002, s 417, all and any property which was or might become the subject of the restraint order and which would—but for the restraint order, be vested or be capable of vesting in the trustees, including any property acquired by or devolving upon W at any time between the commencement of his bankruptcy and the date of its discharge—would vest in the trustees as part of W's bankruptcy estate immediately upon the discharge of the restraint order.*

### What was the background to the case?

Louise Brittain and Keith Stevens, as joint trustees in bankruptcy (TIB) of Mr Whyte (W), sought declarations as to the construction of IA 1986, s 306A and its interface with the restraint order (RO) provisions in POCA 2002

W is the subject of criminal proceedings in Scotland. On 11 September 2015 (and before W was made bankrupt), the Crown Office and Procurator Fiscal Service obtained an RO in respect of all W's realisable property under POCA 2002, s 120 (POCA 2002, s 41 in England and Wales). The effect of an RO is to prevent a defendant from dealing with his realisable property. It does not divest him of title to his property.

On 29 October 2015, W was made bankrupt. POCA 2002, s 417(2)(a) excludes from a bankrupt's estate any property which is 'for the time being' the subject of an RO made under POCA 2002, ss 120 or 41 before the bankruptcy order was made. Under POCA 2002, s 120(2)(b), a RO can apply to realisable property acquired by a defendant after an RO has been made. Pursuant to IA 1986, s 306A(2), property which has been excluded from the bankrupt's estate under POCA 2002, s 417(2)(a) will vest in the TIB as part of the estate when the RO is discharged.

As stated, an RO can extend to realisable property acquired by a defendant after the RO has been made. In W's case, the TIB did not know exactly what the RO covered, and whether it covered after acquired property as the Crown had refused to provide them with a copy of the order. All they knew was that the RO covered 'all' of W's property.

Given that there was only a period of seven weeks between the making of the RO and the making of the bankruptcy order, it was entirely possible that assets might have been acquired by W after the RO was made, which would at least notionally be caught by the RO (depending on its terms), notwithstanding that they might also happen to have been acquired post-bankruptcy.

The court was prepared to proceed on the basis that the RO covered both property acquired by W before the making of the bankruptcy order, and any property acquired by him post-bankruptcy.

### What were the issues before the court?

The application concerned:

- property which would, but for POCA 2002, s 417(2)(a), have vested in the TIB under IA 1986, ss 306 and 283 (ie property already belonging to W at the commencement of the bankruptcy), and

- property acquired by W post-bankruptcy, if and to the extent that such property was covered by the terms of the RO

The main issues were:

- whether on the proper construction of IA 1986, s 306A(2), upon the discharge of the RO, assets which were subject to it automatically and seamlessly, vested in the TIB as part of the estate—notwithstanding that they were excluded assets and had never formed part of the estate in the first place
- whether this automatic vesting would apply equally to after-acquired property, and
- if the automatic vesting did not extend to after-acquired property, whether the TIB could or should serve an after-acquired property notice on W under IA 1986, s 307

### What were the main legal arguments put forward?

On behalf of the TIB it was argued that:

- the language of IA 1986, s 306A(2) was clear—upon the discharge of the RO, any property excluded from the estate by virtue of POCA 2002, s 417(2)(a) automatically and seamlessly vested in the TIB as part of the estate, notwithstanding that it had never previously formed part of it. There was no material difference between the language of IA 1986, ss 306A(2) and 306(1)
- property which has been excluded from the estate as a consequence of POCA 2002, s 417 is not sui generis property, which having been excluded from the usual statutory vesting under POCA 2002, s 306, thereafter assumes the character of after acquired property before the vesting under POCA 2002, s 306A(2) takes effect
- there is no difficulty with property which would (but for the RO) have vested in the TIB immediately upon their appointment (ie property belonging to W at the commencement of the bankruptcy and forming part of his estate within the definition in IA 1986, s 283), such property would automatically vest
- however, in the case of post-RO and post-bankruptcy order after-acquired property, it could be that the arguments were more nuanced. There were two possibilities:
  - first, as a matter of construction, the after-acquired property was part of the property which would automatically vest in the TIB under IA 1986, s 306A(2) upon the discharge of the RO
  - second and alternatively, such property would have to be the subject of an after-acquired property notice under IA 1986, s 307
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- while the second possibility remained an option for the court to direct (as would be sought in any event), the first possibility was to be preferred
- the only temporal limitation imposed by POCA 2002, s 417(2) was that for the statutory exclusion of assets from the estate to bite, the RO had to pre-date the bankruptcy order—thereafter, any assets ‘for the time being’ subject to the RO would be excluded from the estate. Depending on the terms of the RO (and the exercise by the criminal court of its powers under POCA 2002, s 120(2)(b) before the commencement of the bankruptcy), those assets ‘for the time being’ subject to the RO could well include property acquired post-bankruptcy
- those after-acquired assets arguably cannot be claimed for the estate by the TIB via an IA 1986, s 307 notice, if as a consequence of the operation of POCA 2002, ss 120(2)(b) and 417(2)(a), they would immediately be excluded from the estate and therefore could not:
  - vest in the TIB under IA 1986, s 307(3), and
  - be treated at that point as forming part of the bankrupt’s estate for the purposes of IA 1986, s 283(1)(b)
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- that being the case, the vesting under IA 1986, s 306A(2) will apply equally to all assets ‘for the time being’ covered by the RO, including those acquired by W after the making of the bankruptcy order

### What did Chief Registrar Baister decide, and why?

The Chief Registrar accepted all the submissions summarised above as correct. He held (among other things) that the effect of the construction for which the TIB principally contended, was that upon the discharge of the RO, they would be in

the position they would have been in but for the existence of the RO, and that were the position otherwise, this could result in serious prejudice to creditors.

As for after-acquired property, if and to the extent that the above finding could be construed as an attempt to circumvent the proper mechanism for claiming after acquired property under IA 1986, s 307, he:

- ordered W to provide information as to any property acquired by or devolving upon him post-bankruptcy
- permitted the TIBs to serve an after-acquired notice(s), and
- extended the time for them to do so

### **To what extent is the judgment helpful in clarifying the law in this area?**

This is thought to be the first judgment which considers (in depth or at all) the interface between the above provisions in POCA 2002, IA 1986, and the extent to which property which is the subject of a pre-bankruptcy RO, can be claimed by or vest in the TIB as part of the estate following the discharge of the RO, and how such property vests.

It has always been clear and readily understood that an RO will 'trump' the TIB, if it pre-dates the bankruptcy. However, no consideration had previously been given as to the mechanics of the vesting process upon the discharge of the RO and, importantly, as to the effect of a pre-bankruptcy RO on post-bankruptcy after-acquired property, and whether and if so how, such property can be claimed for and then vest in the bankruptcy estate.

### **What practical lessons can those advising take away from this case?**

A TIB should be aware that where a court has exercised its powers under POCA 2002, s 120, pre-bankruptcy (by contrast with POCA 2002, s 418), a RO seems prima facie to be capable of attaching to assets acquired post-bankruptcy, depending on the terms of the order.

While a TIB has the comfort of knowing that there will be an automatic vesting upon discharge of the RO, this nonetheless remains a complex area. Where there is any possibility of after-acquired property falling under the RO, a TIB should nonetheless still serve a notice under IA 1986, s 307.

*Marcia Shekerdemian QC acted for the applicants in this case. She was instructed by Michelmores LLP.*

*Interviewed by Jo Edwards.*

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