

## Enquiry of the Month

### **Successfully objecting to a bankruptcy petition on grounds of unreasonable refusal to accept a voluntary charge for council tax**

We received an enquiry from the Community Advice and Law Service (CALS) in Leicester regarding a client who had been served with a bankruptcy petition from the local authority (LA) for council tax arrears relating to two properties which the client had inherited. He owed £6,119 at the property where he was living and £5,713 at the second tenanted property at which the LA had already secured arrears of £4,863 via a charging order.

The client was unemployed and vulnerable due to very severe health problems and other than rental income was in receipt of solely state benefits. As a result of these problems, he had struggled to manage the arrears or arrange to sell the second property. He had unsuccessfully applied for a Discretionary Hardship Payment and discretionary reduction of his liability under s13A Local Government Finance Act 1992. He had also tried to agree a payment arrangement, deferred for a period pending recovery from illness and his securing employment.

The client offered a voluntary charge to secure the council tax arrears and if necessary, would not oppose an order for sale to avoid being adjudged bankrupt. However, the LA refused the offer, insisting bankruptcy was the only viable option.

#### **ADVICE:**

#### **The Local Government Ombudsman**

We referred CALS to the previous decisions of the Local Government Ombudsman (LGO - now the Local Government and Social Care Ombudsman) *Wolverhampton City Council*, 06/B/16600 and *Camden London Borough Council*, 07/A/12661 and the subsequent report discussing them - '*Can't Pay? Won't pay? - Using bankruptcy for council tax debt*'.

Paragraph 91 of the *Wolverhampton* case was particularly relevant to the client's case.

*“...First, I am not persuaded that applying for a charging order or a subsequent order for sale, imposes significant administrative burdens on the Council, over and above those imposed by other collection methods. While I recognise the Council may bear additional administrative burdens in the event of an order for sale, these are costs it can recover against the value of any equity in the property.*

*... while I appreciate the Council will incur costs enforcing subsequent debt, this will be the case should any further liability arise whatever collection method is used. These were not good reasons for a charging order being ignored as an alternative to bankruptcy in Mr Ford’s case.”*

Paragraph 93 also commented that LAs must consider the proportionality of the choice to pursue bankruptcy in terms of impact on the debtor. The dire consequences of bankruptcy resulting in the debt being multiplied many times over as a result of trustee fees and legal costs must be considered before concluding that the “last resort” of bankruptcy is appropriate.

The LGO report also states on page 8 -9

*“Given the draconian consequences for individuals, we are likely to find maladministration if a Debt Recovery Policy does not require’:*

- assessing that there is no realistic prospect of recovering the debt by other means in a reasonable timescale.”*

We advised that the client had a strong complaint against the LA for maladministration because they had failed to properly consider the viable alternative to bankruptcy of accepting a voluntary charge for the arrears and if necessary, enforcing this via an order for sale. This would result in the client incurring substantially less in the way of costs and would ensure he kept one property to live in.

Unfortunately, however, the LGO has previously concluded that they cannot consider a complaint regarding the use of bankruptcy to recover council tax arrears once a petition

is issued, only applications to annul (*Complaint against Newham London Borough Council*, 08019113).

The client's only option therefore was to persuade the court to dismiss the bankruptcy order.

### **Objecting to the bankruptcy order**

We assisted CALS to draft objections on behalf of the client to be filed and served in accordance with [r10.18 of the Insolvency Rules \(England and Wales\) 2016](#) using [Form Bank 6: Give notice of opposition to a bankruptcy order](#).

The first hearing was adjourned to allow both parties to file further evidence. The second hearing for which the petitioners instructed a barrister was listed for one hour. The CALS debt adviser who dealt with the case represented the client as a lay advocate.

There were several grounds of objection upon which the client relied, but the key arguments were as follows:

- The LA argued they could not accept a voluntary charge to secure council tax arrears against a property in respect of which the arrears had not accrued because the property was not a 'relevant dwelling' under [Reg 50 the Council Tax \(Administration and Enforcement Regulations\) 1992](#). They would therefore have to secure separate charges on each property which they considered too onerous. We argued this was wrong a voluntary charge would not be made under council tax regulations but instead the [s 2 Law of Property \(Miscellaneous Provisions\) Act 1989](#).
- [S266 \(3\) of the Insolvency Act 1986](#) (IA1986) provides that the court can dismiss or stay a bankruptcy petition where there has been a contravention of the rules or for any other reason. *Re Micklethwaite and others* [2002] EWHC 1123 (Ch) held was unfettered and would be exercised in favour of a debtor if the making of the bankruptcy order would cause injustice. Also [Camden London Borough Council v Martin](#) [2009] EWHC 2040 (Ch) held 'the court will not make a bankruptcy order

*where to do so would not be fair and just'* (See *Halsbury's Law of England Bankruptcy and Individual Insolvency* (vol 5 2020 para .198) and paragraph 30 of that judgment). We asserted that the same arguments discussed above which would comprise a maladministration complaint to the LGO (i.e. that bankruptcy when disproportionate when a viable alternative existed), could be used to argue that a bankruptcy order in these circumstances would cause injustice to the debtor.

- [S271 \(3\) IA1986](#) provides that a court may dismiss a petition if a creditor has unreasonably refused an offer made by the debtor to secure or compound the petition debt which would satisfy it. In paragraph 23 of *Re Garwood HMRC v Garwood* [2012] Lexis Citation 130 [2012] BPIR 575 the High Court summarised 10 principles for the exercise of this discretion. The first is key '*(1) the starting point is to ask whether a reasonable hypothetical creditor in the position of the petitioning creditor would accept or refuse the offer, bearing in mind, however, that there could be a range of reasonable positions which such a creditor could adopt.*' We argued that in the client's case the court must consider how a reasonable hypothetical LA recovering council tax would behave when faced with the same decision. The starting position of the LA should be to follow the standard of reasonable conduct expressed by the LGO on this specific issue in the LGO decisions discussed above. I.E. that where the alternative of a charging order (or in this case a voluntary charge) is a viable option it should be properly considered as an alternative to the last resort of bankruptcy. resort of bankruptcy.

## **Success!**

The judge accepted these arguments, particularly that it was not reasonable for the LA to refuse the offer of a voluntary charge. He dismissed the petition, commenting that if the voluntary charge was not secured within 6 months the LA could apply to enforce their charging order. No costs were awarded.

This outcome will have undoubtedly saved the client a very significant amount in trustee fees and legal costs which he would have otherwise incurred if adjudged bankrupt. The

legal costs in the *Wolverhampton* LGO complaint in 2008 were £38,000 but one more recent example (albeit with more protracted proceedings) resulted in trustee costs of over £75,000 and over £90,000 (plus VAT) solicitors fees for petition debts of £16,662. ([\*Singh v Hicken \(trustee in bankruptcy of Singh\)\* \[2018\] EWHC 3277 \(Ch\).](#))