

THE IMPACT OF INSOLVENCY AND CONFISCATION ORDERS ON THE APPLICATION FOR ANCILLARY RELIEF

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1.GENERAL

The Indebted Respondent

Warning Signs

Judgment against Respondent: judgment creditor is entitled to fruits of litigation.

Enforcement: bankruptcy proceedings, or:-

2.0 Charging Order:

CPR 73; Charging Orders Act 1979

Timing is all important: which comes first, petition or interim order?

Harmon v Glencross and the position of the family

Section 1(5) Charging Orders Act 1979 provides:-

"In deciding to make a charging order the court shall consider all the relevant circumstances of the case and, in particular, any evidence before it as to -

(a) the personal circumstances of the debtor, and

(b) whether any other creditor of the debtor would be likely to be unduly prejudiced by the making of the order"

Balancing exercise of court emphasised by Fox J in **Harmon v Glencross [1986] Fam 81 at 104:-**

"It seems to me the courtmust strike a balance between the normal expectations of the creditor and the hardship to the wife and children if an order is madeThe court should seek to provide such a degree of security for the wife and children as is consistent with fairness to the creditor"

However, if creditor has obtained a Final order prior to petition, Charging Order will not be set aside or varied under s3(5) COA in absence of special circumstances, eg lack of notice of interim order etc.

If petition pre-dates interim order, court should transfer CO application to A/R court (**Harman**, again)

Mesher-type conditions possible by virtue of s3(1) COA via **Harman v Glencross**; Waite J laid down some factors for consideration;-

- (a) no claim has automatic priority; balance is between expectation of creditor and hardship to spouse and children;
- (b) no minimum standard of accommodation to which wives and children are entitled;
- (c) affluence of creditor does not mean it should be penalised.

2.1 Application for Order for Sale

TLATA 1996, s14; anyone with an interest may apply sub-s (1).

"such order as the court thinks fit" (2)

Statutory checklist, s15(1)

- "(a) the intentions of the person or persons ..who created the trust,
- (b) the purposes for which the property subject to the trust is held,
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary."

Court must also consider the "circumstances and wishes of each of the beneficiaries...entitled to occupy the land..." (2);

Judicial shift from creditor to family? See **Mortgage Corporation v Shaire [2000] 1 FLR 973**

3. 0 The Bankrupt Spouse

Sources: Insolvency Act 1986; Insolvency Rules 1986.

General

Who is the petitioner? A creditor or himself?

On creditor's petition, "appears either to be unable to pay or to have no reasonable prospect of being able to pay" his debts - s267(2) IA 86

On debtor 's petition, "unable to pay debts" - s272(1) IA 86

Debtor's petition must be accompanied by a statement of affairs, giving details of his assets and debts - s272(2) IA 86. It must be verified by affidavit, IR 6.41. The Trustee has power to demand further information by affidavit from bankrupt IR6.7(2)

Bankruptcy order may include provision staying any action or proceeding against the bankrupt IR 6.45(3).

Duration: 1 year from order (s279(1) IA), unless discharged earlier (s279(2) IA). But, in event of non-co-operation, the discharge period can be ordered to cease to run on application of the Trustee in Bankruptcy.

3.1 Vesting

Upon bankruptcy all bankrupt's property automatically vests in trustee , s306 IA;

s283 (read with 278) defines a bankrupt's estate as comprising:

(a) all property belonging to or vested in the bankrupt at the date of the bankruptcy order; and

(b) any property which is treated by statute as forming part of the estate .

NOT:-

(c) tools of his trade;

(d) domestic essentials such as clothing, bedding, furniture etc.

(e) property held on trust for another person;

(f) Rent Act and other protected tenancies;

(g) property outside the jurisdiction which, by the terms of any applicable treaty (eg Brussels Convention) must be subject of litigation in the foreign court. But, an order for sale may be made in personam against the bankrupt, provided no question of foreign law and practice emerges.

For how long?

Duration of bankruptcy itself: 1 year from order (s279(1) IA), unless discharged earlier (s279(2) IA). But, in event of non-co-operation, the discharge period can be ordered to cease to run on application of the Trustee in Bankruptcy.

Once property vests in the trustee property does not divest until all creditors cleared.

Further, after-acquired property, whilst not subject to automatic vesting, will so vest upon trustee serving a notice under s307 IA 86.

Automatic vesting of joint tenancy severs the tenancy by operation of law. If death occurs before bankruptcy, beneficial title passes to survivor, thereby escaping trustee's grasp (**Re Palmer, decd. (A Debtor)** [1994] Ch 316 CA).

Discharge does not release bankrupt from liability under a confiscation order under Part 1,2 and 3 of the Proceeds of Crime Act 2002, s281(4A) IA.

Nor from liability for any bankruptcy debt arising from family proceedings, s281(5)(b) IA.

Discharge releases him from other debts, but functions of trustee remain operational, s281(1) IA.

3.2 Statutory Divesting

If trustee drags his feet, s283A(2) will re-vest family home back in bankrupt (3 year rule). However, trustee beats 3 year cut-off by applying for sale, s283A(3).

The days of the dilatory, fee-engorged trustee (well not quite) are numbered by virtue of s283A(2) IA 86, inserted by the Enterprise Act 2002. This section provides that where property comprises an interest in a dwelling house, which at the date of bankruptcy was the sole or principal residence of:

- (a) the bankrupt; or
- (b) his spouse or former spouse,

that interest will automatically re-vest in the bankrupt at the end of three years from the date of bankruptcy, or from the date upon which trustee is made aware of the existence of the interest (in the case where bankrupt fails to disclose it at the outset of the bankruptcy).

These provisions (s313 IA 86) appear to give the court wider powers, eg. in lieu of sale, placing charge on property for benefit of creditors.

To beat the three year cut-off, trustee must act by applying for sale or otherwise taking steps to realise interest (eg apply for a charging order).

A disposition of property during bankruptcy is void, s284(6); and it was held in **Re Flint** [1993] Ch 319 that a consent order in matrimonial proceedings under s24 MCA transferring FMH to W was void.

Court may stay any "action, execution or other legal process against the property or person of the debtor", s285(1) IA; further, any court in which proceedings are pending against any individual, on proof that a bankruptcy petition has been presented, either stay or allow proceedings to continue on "such terms as it sees fit ", s285(2) IA.

Also, by virtue of s285(3) after a bankruptcy order is made, no creditor in respect of a debt "provable in bankruptcy " shall have any remedy in respect of that debt against bankrupt, nor may they issue any proceedings against the bankrupt without leave of court. A lump sum is a debt "provable in bankruptcy", see **RE X** [1996] BPIR 494.

3.3 Application for Sale of FMH

On application for sale, s335A(2) provides that the court shall make such order as it thinks "just and reasonable", having regard to-

- (a) the interests of the bankrupt's creditors;
- (b)(i) the conduct of the spouse or former spouse, so far as contributing to the bankruptcy,
 - (ii) the needs and financial resources of the spouse or former spouse, and
 - (iii) the needs of any children; and
- (c) all the circumstances of the case other than the needs of the bankrupt

s335A(3) spells out that a sale should not, save in exceptional circumstances, be postponed beyond the end of 12 months beginning with the date of adjudication

However, one year on from initial vesting, it is assumed that creditors' interests shall outweigh all other considerations, s335A IA. Unless "exceptional circumstances":

- must be more than routine hardship, moving to new area, disruption of schooling, merely-

"...the melancholy consequences of debt and improvidence with which every civilised society has been familiar."

- ill health of spouse (schizophrenia aggravated by move) 1 further year, in **Re Raval** [1998] 2 FLR 718.
- see **Harrington v Bennett** [2000] BPIR 630 for guidelines.
- possibility of paying creditors in full or buying out trustee (see **Jackson v Bell** [2001] EWCA Civ 387)

3.4 What can spouse do?

3.41 Apply to annul the bankruptcy

Spouse can apply to be joined as a party to bankruptcy proceedings, CPR 19.3.

Application should be issued (or transferred) to High Court, then transfer to Family Division under IR 7.11, to be heard with A/R.

Power to annul bankruptcy: order "ought not to have been made" - s282(1) IA.
Any disposition of property by trustee valid but if still vested, shall revert to bankrupt, s282(4) IA.

Annulment by family courts?

- **F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)** [1994] 1 FLR 359- Wife showed H deliberately failed to disclose European assets in his statement of affairs.
- **F v F (S Intervening)** [2003] 1 FLR 911- H falsely declaring liabilities of £350K when he had assets of £660K; bankruptcy annulled.
- **Convaras v Wolf** [2002] 2FLR 107

3.4.2 Application under s37 MCA 73 to prevent bankruptcy/ set it aside?

NO: Presentation of own petition does not amount to a disposition for purposes of s37 MCA 73 (**Woodley v Woodley** (No.2) [1994] 1 WLR 1167.

But, assets frozen prior to bankruptcy pursuant to s37 may be available to Wife as a secured creditor (**Re Mordant** [1996] 1 FLR 334)

3.4.3 Application under s37 MCA 73 to head off or set aside a reviewable disposition

Re Mordant: order in FD for H to pay W £275,000 into his solicitors' account, pursuant to s37. At A/R lump sum to W £385,000. £109,000 had been paid into court by H (borrowed from his mother!). Bankruptcy order. Nicholls V-C (ChD) held that the £275,000 and the £109,000 were held to the order of the court and so did not fall into the husband's estate on bankruptcy. It is not enough, however, that the money is frozen per se. It must be shown that the wife was to have a proprietary interest in the frozen asset.

3.4.4 Provide information to Trustee

Chapter VI of IA 86 deals with "Bankruptcy Offences", such as non-disclosure of assets, concealment of property, removal of property, failure to account etc. this is beyond the scope of this talk.

However, the suspicious or wronged spouse may wish to offer co-operation to the trustee to assist him with his enquiries, and in the process dredge up ill-concealed

assets that may become available in the A/R court.

3.4.5 In pending proceedings

1. consider application for sale of FMH under Married Women's Property Act 1973, s17 (this old statute may be utilized in a given case outwith or in tandem with A/R (**Wicks v Wicks [1999] Fam 65**)).
2. Issue proceedings under TLATA 96 for declaration of entitlement.

It is suggested that either or both applications could be pleaded on Form A.

3.4.6 Negotiate with Trustee

4. Application for Ancillary Relief

4.1 Property adjustment order

Between petition and before order: Void by virtue of s284 IA 86, prohibiting dispositions by the bankrupt unless sanctioned by the Bankruptcy Court.

Post-bankruptcy: not effective because H's interest vests in trustee pursuant to s306 IA 86.

Further, discharge from bankruptcy will not free up FMH until all debts paid.

Pre bankruptcy: if transfer under s24 MCA, bankrupt within six months of conveyance or transfer: liable to be set aside as a "preference" unless bankrupt can show that he was not influenced by a desire to make a preference.

By s340(3) preference is defined as favouring a creditor, or doing anything which has the effect of putting another person in a better position on bankruptcy than he or she would have been in if that thing had not been done.

It is presumed that he was so influenced, where the favoured person was an "associate" , s340(5); "Associate" includes Husband , wife and relative, s435(2) IA 86.

However, the period of 6 months is extended to 2 years in the case of associate,s341(1)(b). All the more reason to transfer post-decree absolute!

Orders of court not exempt, s340(6).

Transfer at an undervalue

Any order in A/R which has whiff of gift or lack of consideration is liable to be unpicked on application of trustee as a transaction at an undervalue. Period is five years prior to bankruptcy.

Thus, Wife's claim has a commercial value. Transfer of FMH to her will need a quid

pro quo, eg. a surrender of her right to periodical payments. **Re Abbott [1993] Ch 45.**

4.2 Claim for Lump Sum

By virtue of the Insolvency (Amendment) Rules 2005, it is now possible to prove in bankruptcy for matrimonial lump sums and costs orders.

IR 12.3, so far as material now reads:-

"(1) Subject as follows, in... bankruptcy, all claims by creditors are provable as debts against...the bankrupt, whether they are present or future, certain or contingent, ascertained or sounding only in damages .

92) The following are not provable-

(a) ...any obligation (other than an obligation to pay a lump sum or to pay costs) arising under an order made in family proceedings or any obligation under a maintenance calculation made under the Child Support Act 1991..."

"Family proceedings" includes A/R and Schedule 1 Children Act 1989.

The effect of s281(5)(b) is that despite discharge from bankruptcy, Wife can continue post discharge to pursue arrears of lump sum or costs.

4.3 Periodical Payments

An income payments order for the benefit of creditors under s310 of IA 86 takes precedence over a periodical payments order under MCA 73, s23.

Albert v Albert [1997] 2 FLR 791

4.4 Pensions

Pension arrangements under occupational and statutory schemes are no longer treated as part of the bankrupt's estate, s11 WRPA 1999.

However, trustee may apply to court under s342A IA 86 to recoup any pension contribution which, at the time they were made, were either excessive, or calculated to avoid creditors.

4.5 Getting the A/R application off the ground

Bankruptcy court may stay any "action, execution or other legal process against the property or person of the debtor", s285(1) IA;

Further, any court in which proceedings are pending against any individual, on proof that a bankruptcy petition has been presented, either stay or allow proceedings to continue on "such terms as it sees fit", s285(2) IA.

How will Family Court exercise its power?

It is suggested that it will not order a stay where to do so might deprive the wife of the

opportunity of satisfying the judge that the bankruptcy should be annulled, s282.

Own experience is that PRFD quite relaxed and rarely even consider the stay provision.

Problem is, how likely is Wife to succeed: often she will allege assets/businesses transferred to family/nominees, H continuing to live lavishly, five star hotels, first class air travel etc.

Absence of hard evidence could be insuperable. However:-

application for disclosure from third parties: subpoena duces tecum. Must strictly show relevance. Must pay for person to come to court. Can only inspect documents within precincts of court.

M v M [2006] 2 FLR 1253, P Hughes QC:

- (1) How important is the information;
- (2) Has the applicant exhausted other remedies?
- (3) Is it a case where adverse inferences can be drawn rather than seeking further disclosure?
- (4) What is the relationship between the Respondent and the third party?
- (5) If disclosure is necessary, do the documents contain private information that can be protected by editing?

Article 8 right; necessary and proportionate.

Or, look at CPR 31.17 (disclosure against a non party where the documents are likely to support the applicant's case or damage the case of another party. In addition to ordering disclosure of specific documents or classes of documents, court may order third party to indicate what has happened to any document and specify a location for the inspection.

Inspection appointments

FPR 2.62(7) - any party may apply to the court for a witness order requiring any person (including a non-party) to attend an inspection appointment in advance of the main hearing, for the purpose of furnishing documents or a class of documents, the production of which is necessary for disposing fairly of the application for ancillary relief or for saving costs.

Application on notice, supported by affidavit (see **B v B (Production appointment: Procedure) [1995] 913**). Unsuccessful application is likely to lead to indemnity costs order (**Frery v Frery [1993] 2 FLR 696**).

Bankers Books Evidence Act 1879

Under this statute a bank official can be compelled to court or directed to attend an inspection appointment, for the purpose of producing the bank's ledgers in relation to a particular person. Very wide power, with privacy considerations. Sparring.

The rule in Norwich Pharmacal

A stranger becoming involved with the tortious acts of others, is under a duty to assist the person wronged by giving him full information and disclosure of the wrongdoers' identity. Such a person may be added as a party to existing proceedings for the purpose of disclosure only;: **Norwich Pharmacal Co v Customs and Excise Commissioners** [1974] AC 133.

Search Orders; RSC Ord 29,r2 and inherent jurisdiction of High Court. Husband likely to destroy or suppress evidence rather than give disclosure? Not generally indicated. Drawing inferences usually sufficient!

In any event, the legally aided Applicant is not likely to be able to conduct widescale searching using the above powers.

Also, Court must have regard to its **case management powers**, in light of the overriding objective:-

Overriding Objective: FPR 2.51B

- (1) ".....deal(ing) with cases justly
- (2)...(a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate-
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues;
 - (iv) to the financial position of each party;
 - (d)....expeditiously and fairly;
 - (e)appropriate share of the court's resources...
- (3) The court must seek to give effect to the overriding objective when it -
 - (a) exercises any power given to it by the ancillary relief rules; or

(b) interprets any rule".

Case Management Powers

FPR 2.61A

Note no express power to strike out.

(a)...

(b)....

(c) identifying the issues at an early date;

(d) regulating the extent of disclosure of documents.....so that they are proportionate to the issues in question

(e)....

(f).....

(g)....

(h)..

Confiscation Orders

Overview

Proceeds of Crime Act 2002

Inter-relation with Ancillary Relief :

CPS v Richards v Richards [2006] EWCA Civ 849: successful appeal by CPS against order made in A/R awarding Wife of drug dealer an amount equal to her beneficial interest in FMH; "tainted money".

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