

DIFFICULT FINANCES

*The tax man's taken all my dough
And left me in my stately home
Lazing on a sunny afternoon
And I can't sail my yacht
He's taken everything I've got
All I've got's this sunny afternoon*

1. If all someone has is a sunny afternoon the outcome to the divorce will be easy: sunbeams may be shared but they are not a chose in action susceptible to property transfer. In order to be relevant this paper will be directed to cases where the finances are under pressure, but there might still be a stately home. Inevitably it will be necessary to refer to insolvency, but I am not a specialist in Insolvency Law. If insolvency arises advice must be sought from an insolvency lawyer.

Bankruptcy

2. A person may be bankrupt if his liabilities exceed assets (balance sheet insolvency). Assuming that there is no doubt about the nature and extent of the assets and liabilities the person is stony broke. There is no scope for immediate capital orders in favour of the wife, but this does not mean that all claims should be dismissed. The husband may have lost his money as a result of one transaction, eg a negligence claim or a failed tax avoidance scheme. If he has a high earning capacity, or prospects of inheritance it may be right to adjourn the wife's capital claims. An example is **Re G** [2004] EWHC 88 (Fam). In that case W retained the modest capital she put into the marriage. Her application for a lump sum was adjourned as the head of the G family had no children and it was likely that the G family estate would be sold on his death and the substantial proceeds divided amongst the wider family. After the adjournment but before the inheritance fell in H entered an IVA. H's inheritance was at least £2.1 net and the court awarded W £460,000 to clear debts and buy a modest property. If the bankrupt has a high earning capacity W's claim for periodical payments can be determined as bankruptcy does not exclude maintenance being paid. Whether an order is made will depend in part on whether an income payments order has been made against H in the bankruptcy and if so its quantum.

3. The second basis for bankruptcy is that the debtor is not able to meet his debts as and when they fall due (commercial insolvency). No doubt there are many who find themselves in this position from time to time and avoid bankruptcy by borrowing or “trading through” a lean period. The bankruptcy process is the same regardless of whether the bankrupt is balance sheet insolvent or commercially insolvent. The trustee in bankruptcy will gather in the assets and pay off liabilities, albeit in balance sheet insolvency at less than 100p in the £1. In commercial insolvency there will be a surplus which is returned to the former bankrupt. In these circumstances a claim for financial remedies can continue provided that the size of the surplus can be clearly identified and no payment is made until the surplus reverts in the respondent (**Hellyer v Hellyer** [1996] 2 FLR 579). There are a number of cases where the husband has presented his own bankruptcy petition to frustrate the wife’s claims or their enforcement. This does not mean that husbands should not seek the protection of bankruptcy if it is needed. This step was taken by the husband in **KSO v MJO and JMO (PSO Intervening** (“*the Bleak House Case*”) [2009] 1 FLR 1036 and Munby J (as he then was) expressed no criticism or surprise about the husband’s decision to have orderly management of his debts. No husband should think of presenting his own petition without taking advice from an insolvency practitioner, but in appropriate circumstances it may be a way of avoiding further indebtedness.

4. There have been cases in which wives have tried to annul bankruptcy orders so that they can obtain financial relief. In **F v F** [1994] 1 FLR 359, Thorpe J set aside the bankruptcy order and awarded the wife a lump sum. His decision to do so in the course of an application for ancillary relief caused insolvency lawyers some alarm. As a result, it is now accepted that this relief can only be granted if the application is made in the insolvency proceedings, though it may then be heard by a judge of the Family Division. In practice it is difficult to annul a bankruptcy order unless it is possible to identify specific non-disclosure in the bankruptcy. This was the case in **Paulin v Paulin** [2009] 2 FLR 354, but a wife should not seek annulment simply because the bankruptcy seems a bit dodgy. In **Whig v Whig** [2008] 1 FLR 453 the court held that if a person is unable to pay his debts as and when they fall due it does not matter that his bankruptcy petition may be motivated in part by the divorce proceedings. The costs consequences of a failed application to annul may be substantial.

IVA's

5. An Individual Voluntary Arrangement is the alternative to bankruptcy. It requires the majority support of the creditors. If this is available an IVA avoids some of the penalties of bankruptcy. Typically, the creditors will be looking for some benefit which would not be available in bankruptcy, such as an ex gratia payment into the bankrupt estate from a family member. Whilst an IVA may be something that a client with financial problems may look to achieve, the interaction with divorce proceedings is similar to the interaction with bankruptcy.

Contingent Liabilities

6. There are cases in which a liability, typically a tax liability may or may not become due and payable. If the potential liability is equivalent to say 10% of the net assets it will be easy to distribute most of the marital assets, with a retention from which the liability can be paid if it arises. If the potential liability is large this may prove more difficult. In **Judge v Judge** [2009] 1 FLR 1287 the gross assets were £29,650,000 and a potential tax liability was assessed to be £14,000,000. The wife wanted to avoid all exposure to this liability and accepted an award based on the "net" assets of £15,650,000 and an indemnity from the husband. Given that the liability could have been higher than £14,000,000 the wife's decision was intelligible, but proved disadvantageous when the liability was assessed at £600,000. She applied to set aside the original order, but her application was dismissed.

7. **Judge** shows the importance of advising a client carefully if there is a large contingent liability; one which could significantly affect her financial position if she had to meet half of the maximum liability. The husband will have no reason to underplay the risk when presenting his case in the divorce, but he will have common cause with the wife in minimising liability after the divorce if they have agreed to share the liability. Before giving advice the best possible statistical analysis of risk should be carried out. This may show that the worst case scenario is no more than 1% as it would depend on, say, three issues of fact and one point of law being found in favour of the creditor.

Liquidity

8. Whatever the scale of the resources there may be an imbalance between capital value and liquid assets. Borrowing will be the first port of call. The obligation is on the husband to show that he has carried out all reasonable enquiries into his borrowing capacity (**Newton v Newton** [1990] 1 FLR 33). That said borrowing may require the wife's cooperation. For example, she may be retaining some shares in the family business as part of her award and borrowing against the company assets will reduce the value of the shares and increase the risk of the company failing. There will always be a balance to be struck, but the starting point is likely to be potential cooperation.

9. A sale of the company, the farm or the estate is an obvious way of releasing liquidity. I remind myself that the title to this paper is Difficult Finances. For the finances to be difficult the asset to be sold cannot be truly profitable. A factor which may make a sale more realistic than extended borrowing. At this point it may be important whether the asset is a pre-acquired asset of the husband's or an asset built up during the marriage. If the estate has been in the family for five generations the court will not want to force a sale; but if the main house is in disrepair, the family has been living on a series of assets sales and money is needed to house the wife and children, a sale may be inevitable. If the asset is a family company built up during the marriage but now valued on its net assets due to lack of profit in recent years, a sale may be the only way to give the wife her full share of the marital assets.

Good Times Coming

10. There are cases where expert advice anticipates that a difficult financial position will improve over the next few years. An example would be the effect of recent investment within a business, funded by borrowed money coming good. In extreme circumstances the wife's financial claims may be adjourned to discover what progress is made, but, absent agreement, it is unlikely that the court would approve a lengthy adjournment. If one of the parties wants to resolve the financial issues on the evidence as it is, however unclear, the court would see the importance of allowing that party to conclude the application without further delay and, potentially continuing suspicion and acrimony. A better option may be to allow the wife to keep a shareholding in the company. In a case I did some years ago, reported on a different point, the wife kept a shareholding in a company which appeared to be worthless at the final hearing but had a clear business plan. Some years later the wife sold the

shares for some millions of pounds. She was good enough to send a case of champagne to my opponent as thanks for his insistence that keeping the shares had to be part of the outcome.

Extending Time

11. By FPR 4.1 (3) (a) the court has a general power to extend time for compliance with a court order. The question is whether this power includes a power to extend time for payment of a lump sum if, for example, the husband can show that an anticipated receipt has not arrived within the period the court assumed to be the case. Under the earlier procedural rules **Mansfield v Alexander** [1995] 1 FLR 100 decided that the time for payment could be extended and **Knibb v Knibb** [1989] 2 FLR 396 decided that such an extension would be an impermissible variation of the order. They are both Court of Appeal decisions, but **Mansfield** was not cited in **Knibb**. No doubt the problem could be avoided by giving express liberty to apply to vary the time for payment. Absent such an express provision I suggest that **Mansfield** would be preferred.

12. A lump sum in instalments is always variable, certainly so far as time for payment is concerned. Whenever there is a real question over the husband's ability to pay the instalments as and when they fall due the court should order a lump sum in instalments and reject the relatively recent argument that the capital should be paid in a series of non-variable lump sums. In my opinion the option of a lump sum in instalments is principally designed to cover cases where there is difficulty in guaranteeing payment of capital by a specified date.

Stockpiling

13. **Fields v Fields** [2016] 1 FLR 1186 and **AB v FC** [2016] EWHC 3285 (Fam) are both cases where a division of the capital would not meet the wife's need, but the husband had high earnings; in the first case as a corporate lawyer and in the second as a footballer. In both decisions, the court resolved this difficulty by inflating the order for periodical payments to enable the wife to accumulate the capital she needed.

14. **Waggott v Waggott** [2018] EWCA Civ 727 was primarily concerned with compensation and a division of income after the capital division met the wife's needs. Despite that, in para 73 of his judgment Moylan LJ approved the Court of Appeal decision in **McFarlane v McFarlane; Parlour v Parlour** [2004] 2 FLR 893. In those conjoined cases the Court of Appeal made high orders for periodical payments with a view to facilitating a clean break. In Moylan LJ's view, the different outcome in the House of Lords in **McFarlane** does not, for all purposes, override make the rationale in the Court of Appeal. All the more so the rationale in **Parlour**, another footballer case, which was not appealed beyond the Court of Appeal. Whilst the point is still open for argument in the Court of Appeal it seems likely that stockpiling would be approved in the appropriate case.

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