
MATRIMONIAL FINANCE: SHAPING NEW LAW INTO SOLUTION
FOCUSED ADVICE FOR CLIENTS
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Difficult Enforcement Issues

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How do you seek to protect a client who is faced with a spouse who is:

- 1. Not employed by a UK company;**
- 2. Intending to take citizenship of his/he current partner's home country;
or**
- 3. Intending to walk away and allow the FMH to be repossessed by the lender...and/or go bankrupt.**

And other current enforcement issues... an update.

Lateral Thinking ...

- 1. What to do when the husband is not employed by a UK company:**
 - a. Jurisdiction – still governed by B2R(bis) at least until 23 June 2016?;
 - b. Once jurisdiction is found (domicile for instance if not habitual residence) the any orders may need to be *in personam* rather than *in rem*. IE. Enforceable against the spouse in the world at large. Build in contingencies if non-payment of maintenance orders if



spouse is abroad? - capital/lump sum/security contingencies if non payment...

- c. if UK citizen and will seek to return here (children?) orders may be more easily enforceable against him directly – ultimately against movement;

Bhura v Bhura [2012] EWHC 3363 (fam) Mostyn J

Mostyn J made, on the application of the wife, an injunction restraining the husband from leaving the jurisdiction and directing that his passport be held by the wife's solicitors. He commented, the appropriate form of order now, rather than the "*charming historical relic*" of the writ *ne exeat regno*. BUT this could not be used as a free standing method of enforcement, so injunction made on an interim basis only until either the hearing for the execution of the warrant or the payment of the outstanding judgment debt (deployed in *Young v Young*)... but see also

Prest v Prest below as to the importance proof to criminal standard in terms of non payment of debts

- d. Will the EU Maintenance Regulation apply? If a member state then ability to enforce any order in the other state as if here - seek equivalent to attachment of earnings/lump sums in other state?;

If spouse steals a march and seeks to obtain an order in other state, can a further maintenance order be made in this jurisdiction? The *Agbaje question*

See the Court of Appeal in **Ramadani v Ramadani [2015] EWCA Civ 1138** dismissed a husband's appeal in which he sought to rely on a on the outcome of proceedings in Slovenia (where there had been a "*partial withdrawal of the complaint*" such that "*the... claim for maintenance [was] stopped*"). The Court of Appeal held that the Slovenian court had not made a decision nor had there been a court settlement with respect to spousal maintenance and as such the court of England and Wales had jurisdiction to hear a spousal maintenance

application for the purposes of The Maintenance Regulation (the wife was and remained habitually resident in England and Wales). The court declined to determine what the position would have been if the Slovenian Court had made a maintenance decision...

- e. Does the company have UK offices - against which 3rd party disclosure orders could be sought? *Norwich Pharmacal* applications?

2. **Where the husband is intending to take citizenship in a foreign country?** *If the fear is future non compliance.*

- a. Again, primary jurisdiction determined first;
- b. Security? Including on costs/fees/maintenance? – seek undertakings as to engagement in the proceedings - as to acceptance of jurisdiction.
- c. Interim injunctions – against property/income/capital/investment? Is there enough to launch protective proceedings;
- d. Notices against property where there is any interest;
- e. Again, in terms of enforcement – orders *in personam*;
- f. Use of *Hadkinson orders* where non compliance/non payment – *pay to play orders*...
- g. Importance of course of early understanding of the applicable law in the foreign state – how will it deal with English orders? May inform whether interim applications under FPR part 20 are necessary.
- h. **Proactive case management powers** under FPR 2010 r 4. (3) – Use them early on - very broad.

3) Except where these rules provide otherwise, the court may –

(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

- (b) make such order for disclosure and inspection, including specific disclosure of documents, as it thinks fit;
 - (c) adjourn or bring forward a hearing;
 - (d) **require a party or a party's legal representative to attend the court;**
 - (e) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;
 - (f) direct that part of any proceedings be dealt with as separate proceedings;
 - (g) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
 - (h) consolidate proceedings;
 - (i) hear two or more applications on the same occasion;
 - (j) direct a separate hearing of any issue;
 - (k) decide the order in which issues are to be heard;
 - (l) exclude an issue from consideration;
 - (m) dismiss or give a decision on an application after a decision on a preliminary issue;
 - (n) direct any party to file and serve an estimate of costs; and
 - (o) **take any other step or make any other order for the purpose of managing the case** and furthering the overriding objective.
- (4) When the court makes an order, it may –
- (a) make it subject **to conditions, including a condition to pay a sum of money into court; and**
 - (b) **specify the consequence of failure** to comply with the order or a condition

3. **Intending to walk away and allow the FMH to be repossessed by the lender...and/or go bankrupt.**

- a. Always very difficult situation. Is it time to apply for interim sale?
Can we fend off the mortgagees?
 - i. First though practical solutions? Discuss with the

- mortgagees? Payment holidays – no steps to be taken during the proceedings;
- ii. Obviously Notices - but they will not protect against the TiB;
 - iii. Is the mortgage joint - taking over the mortgage and applying for interim maintenance - is it an option?
- b. Interim Sale? – is it the only way to protect what’s left.

BR v VT [2015] EWHC 2727 (Fam).

The husband in financial remedies proceedings applied for an interim order for termination of the wife’s rights of occupation of the former matrimonial home¹, an order removing the wife’s home rights² and an order for vacant possession³.

Mostyn J explored three procedural routes by which conferred jurisdiction for an interim order for sale⁴ [2]:

- i. Section 17 of the Married Women’s Property Act 1882;
- ii. Sections 13 and 14 of the Trusts of Land and Appointment of Trustees Act 1996 (so long as both parties have a beneficial interest); and
- iii. FPR 2010, r. 20.2(1)(c)(v), the counterpart to CPR 1998, r. 25.1(1)(c)(v).

Mostyn J expressed a respectful difference [9] with the conclusion of Wilson LJ in **Miller-Smith v Miller-Smith [2010] 1 FLR 1402**

Mostyn J considered that “*there is no alternative but that the home must be sold as soon as possible, and for this purpose the wife’s home rights must be terminated. Only in this way can the pressing*

² Pursuant to paragraph 1 of schedule 4, Family Law Act 1996

³ The husband did not formally apply for an interim order for sale because the former matrimonial home was in his sole name.

⁴ Notably an order pursuant to section 24A, Matrimonial Causes Act 1973 is barred during the pendency of the proceedings save as an adjunct to a legal services payment order [3].

debts, most importantly to HMRC, be paid and the revenue deficit eliminated. The future housing of the parties will have to be in rented accommodation” [35]. He ordered the wife’s rights of occupation to be terminated and her home rights notice to be vacated. The “positive order for the sale of the home” was made pursuant to FPR 2010, r. 20.2(1)(c)(v) [36].

- c. **What if H has applied to make himself bankrupt during the proceedings?** Can the bankruptcy be fended of or even annulled?

Should the bankruptcy order ever have been made?

- i. The first question is whether the order should have been made in the first place. The relevant ground for a bankruptcy order under s.272(1) of the Insolvency Act is that the debtor is unable to pay his debts. Some clarification was provided by Lord Justice Wilson (as he then was) in *Paulin v Paulin* [2009] EWCA Civ 221 [2009] 2 FLR 354 at [41]. Wilson LJ explained that the relevant test is not balance sheet insolvency (whether the bankrupt’s liabilities outweighed his debts) **but rather commercial insolvency (whether he could meet his liabilities as they fell due)**. Wilson LJ went on to quote David Oliver QC sitting as a deputy High Court judge in *Re Coney (A Bankrupt)* [1998] BPIR 333 at 335-336:

“Inability to pay one’s debts, at least in the context of insolvency, has historically long been construed as an inability to pay one’s debts at the time they are due... it would not normally be right to annul a bankruptcy order unless at least it is shown that as at the date of the order the debtor was in fact able to pay his debts, or had some tangible and immediate prospect of being so able...”

- ii. Wilson LJ suggested that the burden of proof lies with the person seeking the annulment unless the bankrupt’s assets outweighed his liabilities at the date of the bankruptcy.
- iii. Even if it is found that the bankruptcy order should not have been made, the court still retains a discretion not to annul. In *Paulin v Paulin* [2009] EWCA Civ 221 [2009] 2 FLR 354,

Wilson LJ sought guidance from the words of Mr Justice

Walker in *Artman v Artman* [1996] BPIR 511:

“The statutes does not lay down any particular matters to be taken into account in the exercise of the court’s discretion, but the likely effect of any annulment order on the applicant, on the bankrupt where he is not the applicant, and on the bankrupt’s other creditors must, it seems to me, be among the most important matters to be taken into account. So must any element of abuse of process in the obtaining ...of the bankruptcy order.”

d. **What if H is made bankrupt after an FR order has been made?**

- what orders can still be made from what’s left?

i. **Property adjustment orders** confer an equitable interest from the time the order takes effect (making of Decree Absolute) – this is a manifestation of the maxim ‘equity treats that as done which ought to be done’ – which means the transferee is not affected by the transferor’s bankruptcy after this time whether or not the order has actually been implemented: *Hill v Haines* [2008] 1 FLR 1192 (CA) at [7]-[8] (although, interestingly, it was suggested in *Independent Trustee Services v GP Noble* [2012] EWCA Civ 195 [2012] 3 FCR 1 by Patten LJ at [43] that setting aside a final order does not automatically re-vest assets previously transferred by a party pursuant to that order, which appears not to be consistent with *Hill v Haines*);

ii. **Lump sums.** The beneficial interest in the money which one party is ordered to pay does not pass at the moment the order takes effect (*Burton v Burton* [1986] 2 FLR 419 per Butler-Sloss J (as she then was) at 425). Although in *Re Mordant; Mordant v Halls* [1996] 1 FLR 334 (Ch D) money which had been paid to the husband’s solicitors to satisfy a consent

order, but not yet paid to the wife, did not vest in the trustee in bankruptcy. Get it fast!

- iii. **Pension rights** do not vest in the trustee in bankruptcy and therefore the implementation of **pension sharing** orders is unaffected by the making of bankruptcy orders.
- iv. **Periodical payments** remain payable by a bankrupt, but the assessment of quantum is not binding on the bankruptcy court which will make an income payments order leaving the bankrupt with such amount as it considers he reasonably needs to provide for himself and his family.

Other Current Enforcement Issues

4. NB See The Law Commission '*Enforcement of Family Financial Orders*'. Consultation on this project closed on 31 July 2015. The Law Commission aim to publish a report with their recommendations to government within 18 months to two years from the close of consultation.

Judgment Summons?

5. ***Prest v Prest [2015] EWCA Civ 714*** involved an appeal by a husband against a judgment summons imposed against him pursuant to section 5 of the Debtors Act 1869 which had been granted in respect of his non-payment of maintenance arrears. Moylan J imposed a penalty of 4 weeks imprisonment, but suspended that term provided that the husband paid the arrears within 3 months.
 - a. The husband appealed unsuccessfully, the Court of Appeal holding that the 4 week prison sentence was not excessive when viewed against the backdrop of a default in payment of £320,000. McFarlane LJ considered that **Zuk v Zuk**, **Bhura v Bhura** and **Mohan v Mohan** should be treated with a substantial degree of caution. He continued: "*my reason for advising caution concerning*



this set of observations is that they each suggest that, in the course of the criminal process that is the hearing of a judgment summons, it is simply sufficient to rely upon findings as to the wealth made on the civil standard of proof in the original proceedings and that those findings, coupled with proof of non-payment, is sufficient to establish a 'burden' on the respondent which can only be discharged if he or she enters the witness box and proffers a credible explanation” [55].

- b. He held that the court must be satisfied of the following requirements [55]:
 - (a) The fact that the respondent has or has had, since the date of the order or judgment, the means to pay the sum due must be proved to the criminal standard of proof;
 - (b) The fact that the respondent has refused or neglected, or refuses or neglects, to pay the sum due must also be proved to the criminal standard;
 - (c) The burden of proof is at all times on the applicant; and
 - (d) The respondent cannot be compelled to give evidence.
- c. **See also importantly what McF had to say on the inability to claim set off for supposed payment of Ws bills rather than pay PP order.**

Enforcement by such method as the court may consider appropriate?

- 6. **Mann v Mann [2015] 2 FLR 1116** concerned a consent order sealed in April 1999 providing for a husband to pay a wife £24,000 per annum by way of periodical payments. In due course both parties cross-applied to vary and in 2005
 - a. Charles J capitalised the periodical payments in the sum of £1.3 million and the husband was ordered to pay arrears of £75,000.
 - b. In April 2010 the wife issued a statutory demand for circa £2 million to include interest, a claim which was compromised in

November 2011 upon a binding agreement to mediate with payments in the meantime.

- c. When mediation failed the wife issued an application seeking such method of enforcement as the court may consider appropriate.
- d. In February 2014 Mostyn J considered that the financial arrangements in the November 2011 constituted a maintenance agreement. In May 2014 Mostyn J ordered the husband to pay to the wife interim periodical payments and arrears, and directed the husband to appear before him in June 2014 to be examined as to his means and show cause why he should not be committed to prison. At the hearing in June 2014.
- e. Mostyn J ordered that the husband only be allowed to make payment to his solicitors if he paid a corresponding amount on each occasion to the wife, in partial discharge of his debt to her.
- f. Upon the husband's appeal the Court of Appeal held that there was no order capable of variation per section 31(7B)(c) of the Matrimonial Causes Act 1973, rejecting the wife's argument that the court should reinterpret the 2005 order to insert a provision that the order for periodical payments would be discharged only upon payment of the lump sum. The jurisdiction of the court to make further orders ceased with the order of Charles J in 2005 and **so the husband's appeal was allowed.** In terms of the order of June 2014, the mechanics of payment constituted an ultra vires order and as such the husband's appeal was allowed – BEWARE.

Third Party Debt Orders

7. In *Kaur (aka Singh) v Randhawa & Randhawa [2015] EWHC 1592 (Fam)* a final third party debt order was made against the husband's brother. The background facts are that an order from 2013 provided that the husband was to pay the wife £80,000 within 4 months. In default of payment, a property left to the husband in his parents' will would be sold.

- a. Upon the husband's failure to pay the wife sought a third party debt order of almost £109,000 against sums held in an account in the name of his brother. The husband claimed he met the wife and paid her £40,000 in cash in full satisfaction of the lump sum order, evidence rejected as implausible in the extreme. It was found that the husband and his brother sold the property and the proceeds had been deposited in the brother's bank account. The brother was either a nominee or a bare trustee for the husband. Significant sums had been transferred to the husband and the money had disappeared;
- b. A third party debt order was made for approximately £109,000 and an indemnity costs order was made against the husband;
- c. The judgment was to be sent to the DPP on the basis that perjury proceedings should be considered in relation to the husband and the brother. BEWARE.

With very grateful thanks to Henry Clayton of 4pb for his work on bankruptcy and FR proceedings - see Family Law Week, "Divorcing a Bankrupt parts I and II", June 2015 for 2 excellent articles.

Correct as at 9.03.16

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