

29

BEDFORD ROW
CHAMBERS

WHITEPAPER CONFERENCE
MATRIMONIAL FINANCE
PROTECTING YOUR CLIENT IN
DIFFICULT FINANCIAL CIRCUMSTANCES

Alexis Campbell QC

May 2018

Table of contents

DISCOVERY – WHAT ARE THE ASSETS?

PROTECTION - PRESERVING ASSETS

IVA AND BANKRUPTCY

DISCOVERY – WHAT ARE THE ASSETS?

Inter party Disclosure

FPR 2010 Part 21 - Form E and Questionnaire

FPR 2010 r.4.1(3)(b) – Specific disclosure

PD20A para 2.4 – disclose classes of documents, search for documents and disclose documents produced from the search

- ❖ Applies to third parties who have been joined to the proceedings
- ❖ Allows for search of databases
- ❖ Party could be ordered to produce metadata of the search

Other powers:

Notice to admit facts - FPR 2010 r.22.15

Inspection of relevant property – FPR r 20.2(1)(c)(ii)

- ❖ *land;*

- ❖ *Computer database*

- ❖ *Art and chattels, boats etc*

Enter land to carry out inspection FPR 2010, r 20.2(1)(d)

Provide information about the location of relevant property or assets (which may be subject to a freezing order- FPR 2010, r 20.2(1)(g))

Other powers...

Search orders FPR 2010 Part 20.1(1)(h)

- ❖ the damage, potential or actual, must be very serious for the applicant; and
- ❖ there must be clear evidence that the respondents have in their possession relevant documents or things and that there is a real possibility that they may destroy such material before an on notice application can be made.

Now more likely to be sought and awarded

- ❖ *Imerman v Tchenguiz [2010] EWCA Civ 90*
- ❖ PD20A, paragraphs 6.1 – 6.9 and CPR PD 25A.

Other powers...

- ❖ Order to prepare and file accounts - FPR 2010, r 20.2(1)(1)
- ❖ *Astro Exito SA v Southland Enterprise Co Ltd [1983] 2 AC 787* the House of Lords held that there was no limitation upon the class of documents in relation to which the powers accorded by the section may be invoked or the purpose for which a document executed in accordance with the powers may be used

Disclosure against non-parties

- ❖ FPR 2010 r.21.2(3)
- ❖ Only where “necessary in order to dispose fairly of the proceedings or to save costs.”
- ❖ Must be based on an Act which provides for disclosure
 - The Bankers’ Books Evidence Act 1879, s. 7; or
 - The Senior Courts Act 1981, s. 34(2).
“likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim”
- ❖ Defence of oppression (see *Charman v Charman* [2006] 2 FLR 422)

Witness Summons

- ❖ To give evidence - FPR 2010 r.24.2(1)(a)
- ❖ To produce documents - FPR 2010 r.24.2(1)(b)
- ❖ Only documents which a witness could be required to produce at the hearing
- ❖ The witness must be is likely to be able to give material evidence or produce any document or thing likely to be material evidence in proceedings in the court...and it is in the interests of justice to do so...
- ❖ No permission needed if issued at least 7 days prior to the trial

Non-party out of the jurisdiction

- ❖ *Norwich Pharmacal v Customs & Excise Commissioners [1974] AC 133*
- ❖ Must have 'participated' or have become 'mixed up' in the wrongdoing or been involved in the furtherance of the transaction identified as the relevant wrongdoing
- ❖ Discretionary remedy – proportionate and necessary
- ❖ Requires reasonably friendly/accessible foreign court
- ❖ *M v M [2013] EWHC 2534 (Fam), [2014] 1 FLR 439*

Compelling a party to co-operate and or produce evidence

- ❖ Unless order – FPR 2010 r.4.1(3)
 - Where there has been failure to comply with a rule, practice direction or court order
- ❖ Judge to sign a letter of authority - S.39 of the Senior Courts Act 1981

Hadkinson orders

- ❖ Is the husband in contempt?
- ❖ Is there an impediment to the course of justice?
- ❖ Is there any other effective means of securing compliance with the court's orders?
- ❖ Should the court exercise its discretion to impose conditions having regard to the question?
- ❖ Is the contempt wilful, ie is it contumacious and continuing?
- ❖ If so what conditions would be proportionate?

Draconian remedy

But useful for interim hearings, interim costs, requiring disclosure, and can be used to debar from claim

Passport Impoundment orders

- ❖ Senior Courts Act 1981, s.37(1) – restrain respondent from leaving jurisdiction supported by order for passport to be surrendered and held by the tipstaff

- ❖ Wilson J in *B v B (injunction: jurisdiction)* [1998] 1 WLR 329
 - in aid of interim remedies (eg a freezing or search order), where the party's attendance in this jurisdiction is required because otherwise the order is rendered nugatory;
 - when a hearing is about to take place, the efficacy of which would be frustrated if the party did not attend;
 - in principle, in aid of all the court's procedures leading to the disposal of the proceedings;
 - in limited circumstances, as an aid to the court's established procedures for enforcement.

Committal

- ❖ FPR 2010, r 37.4 and PD 37A
- ❖ For breach of interim orders (disclosure, compliance with directions, mps etc)
- ❖ Option of last resort *Ansah v Ansah [1977] Fam 138*
- ❖ Must be proportionate *Hammerton v Hammerton [2007] EWCA Civ 248*

PROTECTION - PRESERVING ASSETS

Restraining and freezing orders

- ❖ The Matrimonial Causes Act 1973 s.37(2)
 - intention of defeating the claim for financial relief
 - preventing or reducing relief, frustrating or impeding enforcement
 - can only be brought between the parties
 - any property in which either or both of the parties to the marriage has or had a beneficial interest (ie not company property – unless the company is joined and injuncted)

Restraining and freezing orders...

- ❖ The Senior Courts Act 1981 s.37 and FPR 2010, r 9.3(1);
 - There must be a subsisting cause of action sustainable in any division of the High Court;
 - *R v R [2013] EWHC 4244 (Fam)* – H acting in capacity as “*shadow director*” in breach of fiduciary duties

Restraining and freezing orders...

- ❖ Highly risky to rely upon the inherent jurisdiction
 - *L v K* [2014] 2 WLR 914 Mostyn J
 - *C v C* [2015] EWHC 2795 (Fam) Roberts J

- ❖ Per Mostyn J – test is the same as MCA (“...that there is a likelihood of the movement, or the dissipation, or the spiriting away, or the salting away, or the squirreling away, or the making of a disposition, or the transfer of assets, with the intention of defeating a claim...)

- ❖ *UL v BK (Freezing orders: Safeguards: Standard Examples)* [2013] EWHC 1735 (Fam) Mostyn J summarised the principles:

Restraining and freezing orders...

❖ *UL v BK (Freezing orders: Safeguards: Standard Examples) [2013] EWHC 1735 (Fam)* Mostyn J summarised the principles

- ...the applicant must show clear evidence of unjustified dealing with assets giving rise to the conclusion that there is a solid risk of dissipation of the assets to the applicant's prejudice.
- The evidence must set out clear facts and their source/basis.
- Ex parte application must be confined to cases of exceptional urgency. The respondent must be given short, informal notice unless it is essential he is not made aware of the application.
- Ex parte or short notice application impose on the applicant a high duty of candour. Breach of that duty will likely lead to the discharge of the order.
- All the safeguards must be applied on short/no notice applications. The applicant must draw the court's attention to any variation of the safeguards and justify them.

Restraining and freezing orders...

- ❖ Outside of the jurisdiction
- ❖ Obtain foreign advice
- ❖ EU Maintenance Regulation Article 14
 - Provisional, protective measures available in state where assets are located, even if that state is not seized with the substantive application
- ❖ Freezing orders on banks are often effective wherever they are served

Judicial encouragement for compliance

- ❖ Passport Impoundment order SCA s.37(1)
 - Pending compliance with directions to safeguard assets

- ❖ Payment into court – FPR 2010 .4.1(4)
 - An order may be subject to conditions including the direction to pay money into court (especially useful in cases with risk of bankruptcy)

- ❖ Security for costs- FPR 2010 r.20.6
 - Only available against applicants

Judicial encouragement for compliance...

- ❖ Payment of income into court – FPR 2010 r.20.2(1)(c)(vi)
 - eg. Rent, interest on a deposit account

- ❖ Interim order for sale of property - FPR 2010 r.20.2(1)(c)(v)
 - BR v VT (Financial Remedies: Interim) [2015] EWHC 2727 (Fam) – Mostyn J
 - WS V HS 2018] EWFC 11 – Cobb J

- ❖ Deliver up goods - FPR 2010 r.20.2(e)
 - eg. chattels, art, vehicles,

Protecting the family company

❖ Protection under s.37 SCA1981

- Need an underlying cause of action
- *R v R [2013] EWHC 4244* (fiduciary duties as a shadow director)

❖ Protection under s.37 MCA 1973

- need to show the intention to defeat – competing company is not sufficient)
- *C v C [2015] EWHC 2795 (Fam)*

**INDIVIDUAL VOLUNTARY
ARRANGEMENT
AND
BANKRUPTCY**

Genuine insolvency

- ❖ An individual is insolvent when their liabilities exceed their assets, or they are unable to pay debts as they fall due
- ❖ A bankruptcy petition may be issued by the **debtor** [s. 272, Insolvency Act 1986 (“IA 1986”)] who is unable to pay his debts or his **creditors** who are owed more than £750 as a result of the debtor’s failure to comply with either a court order or a statutory demand [s. 267, IA 1986].
- ❖ Once a bankruptcy order is made, the bankrupt’s assets vest in the official receiver and, on their appointment, a trustee in bankruptcy who will administer the bankrupt’s estate to satisfy the provable debts of the creditors as best as they are able to do so until the bankrupt is discharged from bankruptcy [ss. 305 and 306, IA 1986].

Distributions from the bankrupt's estate

- ❖ Insolvency Act 1986 s.328
- ❖ the costs and expenses of the insolvency;
- ❖ preferential creditors (eg remuneration to employees);
- ❖ secured creditors (except a spouse);
- ❖ remaining creditors who have proved in the bankruptcy (ranking equally and paid in proportion);
- ❖ any surplus is returned to the bankrupt.

Provable debts

- ❖ Foreign matrimonial orders, (*Cadwell v Jackson* [2001] BPIR 966)
- ❖ Lump sum orders
- ❖ Costs orders
- ❖ Separation agreements, (*Victor v Victor* [1912] 1 KB 247) [1912] 1 KB 247)

But not

- ❖ Maintenance orders
- ❖ MPS
- ❖ Arrears of periodical payments
- ❖ Maintenance assessment under the Child Support Act 1991

Provable debts...

- ❖ Debts which are not provable in the bankruptcy remain unaffected by the bankruptcy;
- ❖ the bankrupt is not released from those debts by the bankruptcy and those debts are still enforced through the normal channels
- ❖ *(Woodley v Woodley (no.2) [1944] 1 WLR 1167 at 1177)*
- ❖ Whilst provable, may be better to defer application until after the bankruptcy is discharged

What forms part of the bankrupt's estate?

- ❖ Property which either belonged to the bankrupt or the bankrupt had an interest in at the date the bankruptcy order was made [s. 283, IA 1986].
- ❖ “Property” for these purposes is widely drawn [s. 436, IA 1986], and includes: *“money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property”*.
- ❖ Property does **not** include, tools of the trade (which might include vehicles), necessary personal property of a domestic nature and (generally) the bankrupt's undrawn pension

Discharge from bankruptcy

- ❖ Usually after a period of one year from the commencement of bankruptcy [s. 279(1), IA 1986]
- ❖ Upon discharge the bankrupt is not liable for the balance of their debts [s. 281, IA 1986].
- ❖ The fees of the trustee in bankruptcy are paid from the bankrupt's estate [r. 6.138, Insolvency Rules 1986].

Prior to the bankruptcy petition

❖ Speed is of the essence

- Orders obtained before presentation of a bankruptcy petition are unlikely to be reversed by a bankruptcy court, see *Haines v Hill* [2008] 1 FLR 1192 at [35] (see below)

❖ Expedited hearings - *S v S (Ancillary Relief)* [2008] EWHC2038

- ...shorten time for compliance with any rule, (r.4.1(3)(a));
- ...bring forward a hearing, (r.4.1(3)(c));
- hold a hearing and receive evidence by telephone or...any other method of direct oral communication, (r.4.1(3)(e));
- exclude an issue from consideration, (r.4.1(3)(l))
- take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, (r.4.1(3)(o)); and
- make orders of its own initiative (r.4.3)

Prior to the bankruptcy petition...

- ❖ Obtain information
- ❖ The Individual Insolvency Register may be searched online at www.gov.uk/search-bankruptcy-insolvency-register
- ❖ The Land Charges Department provides data on bankruptcy proceedings and a search for bankruptcy petitions, bankruptcy orders and deeds of arrangement can be undertaken
- ❖ Land Registry for office copy entries

Prior to the bankruptcy petition...

- ❖ If there is a consent order, expedite Decree Absolute
 - Property adjustment orders take effect from DA (even if not implemented) and are not void transactions
 - *Mountney v Treharne [2002] 2 FLR 930*

- ❖ Seek payment into court, payment to solicitors, or hold money to the order of the court under s.37(2)(a)
 - The applicant becomes a secured creditor
 - funds in court may not vest in the trustee (so long as this is not just a device to avoid creditors)
 - *Graham, Re Mordant and Independent Trustee Services Ltd v GP Noble Trustees [2011] 2 FLR 174*

- ❖ Interim order for capital to be set aside to meet lump sum – may qualify on the same basis

Agreements may not be void prior to petition

- ❖ A legally enforceable agreement, including payment of a lump sum, may not be void
- ❖ Must be a complete and binding agreement (*Xydhias*)
- ❖ *Warwick (formerly Yarwood) v Trustee in Bankruptcy of Yarwood [2010] EWHC 2272* – failure to agree a pension sharing annex proved fatal

Take care with drafting consent orders or separation agreements

- ❖ Mesher orders will not prevent the trustee in bankruptcy applying for a sale
 - *Avis v Turner* [2007] EWCA Civ 748,

- ❖ Is there an alternative order which will give the same relief?
 - Transfer of property with deferred lump sum?
 - Recital as to solvency
 - Schedule of assets and liabilities confirming solvency

After bankruptcy petition but before appointment of trustee

GENERAL RULE:

- ❖ Any disposition of property is void unless made with the consent of the (bankruptcy) court or ratified by the court subsequently [s.284]
- ❖ Any transfers are held by the recipient on trust for the bankruptcy trustee

After bankruptcy petition but before appointment of trustee...LUMP SUMS

- ❖ Lump sum orders will be appropriated by the trustee
- ❖ Unless it was received before the making of the bankruptcy order in good faith, for value and without notice that the petition had been presented, or it was made with the consent of the bankruptcy court or subsequently ratified by the bankruptcy court, [IA 1986, s.284(1) and (4)(a) and Re Flint (a bankrupt) [1993] 1 FLR 763].
- ❖ The court can make a lump sum order against an undischarged bankrupt, even though his assets are vested in his trustee in bankruptcy, provided the court has a clear picture of the assets and the liabilities of the bankrupt and the expenses of the bankruptcy to be able to conclude that the bankrupt will have assets in the foreseeable future, see Hellyer v Hellyer [1997] 1 FCR 340 and Young v Young [2014] 2 FLR 786

After bankruptcy petition but before appointment of trustee...PROPERTY ADJUSTMENT

- ❖ Property adjustment orders only take effect from DA, but once the order has taken effect, the beneficial interest passes, and the property no longer forms part of the bankrupt's estate, see *Mountney v Treharne [2002] 2 FLR 930*.
- ❖ *DW and another v CG (Financial Provision) (Conditional Order for Sale: Equitable Interest) [2017] 4 WLR 80* a consent order was made in 2009 which provided for H to pay W a lump sum in instalments and, if H defaulted, for sale of property held in H's sole H failed to satisfy the lump sums. The order was never implemented. H was later made bankrupt. The court ultimately found that the 2009 order gave W an equitable interest in H's properties prior to his bankruptcy, that that interest had not been affected by H's bankruptcy, and the final instalment of the lump sum due under the consent order would be paid to W from the net proceeds of sale.
- ❖ May still be vulnerable to challenge as undervalue/preferential transactions (see below)

After bankruptcy petition but before appointment of trustee...SETTLEMENT OF PROPERTY

- ❖ As with transfer of property orders, settlement of property orders have the effect of changing the beneficial interests in the property immediately on the order becoming *effective*.
- ❖ Harper v O'Reilly and another [1997] 2 FLR 816 H and W entered into a consent order. The consent order provided inter alia for a deferred sale of the FMH with W to receive 100% of the net proceeds of sale. The consent order did not state which part of the MCA 1973 applied. Prior to the sale of the FMH, H was declared bankrupt. It was held that the consent order constituted a variation of a settlement order made pursuant to s. 24(1)(c), MCA 1973. Therefore, H's beneficial interest in the FMH had passed to W on the making of the consent order
- ❖ Any settlement of property order that takes effect after the bankruptcy petition/application is therefore void and, conversely, any that become effective beforehand are not void.

After bankruptcy petition but before appointment of trustee...PERIODICAL PAYMENTS

- ❖ The court has the power to make periodical payments orders after the presentation of the bankruptcy petition/the bankruptcy application, and during the bankruptcy itself
- ❖ But after the bankruptcy order is made the trustee in bankruptcy may apply for an income payments order (“IPO”) which will affect the quantum of income available against which a periodical payments order can be made.
- ❖ Any periodical payments orders will be made taking into account the reduced income available to the bankrupt (see Albert v Albert [1997] 2 FLR 791)

After bankruptcy petition but before appointment of trustee...PENSIONS

- ❖ Pension rights do not vest in the trustee in bankruptcy, as set out above. Therefore, the implementation of pension sharing orders is not affected by the making of a bankruptcy petition/application or, as discussed below, bankruptcy order.
- ❖ In *Horton v Henry* [2016] EWCA Civ 989 The Court of Appeal upheld the first instance decision that uncrystallised pension rights do not fall to be included as income in bankruptcy (cf. pension policies that are in payment can be subject to an IPO). This means that trustees in bankruptcy cannot compel a bankrupt

After bankruptcy Order – TRANSACTIONS AT UNDERVALUE

- ❖ Transaction made at an undervalue [s. 339, IA 1986] may be set aside
- ❖ Consent orders are not now assumed to be undervalue – the settlement is consideration
Haines v Hill [2007] EWCA 1284
- ❖ Court retains a discretion not to set aside, even if at undervalue (*see Singla v Brown [2008] 2 FLR 125 – H retained only a nominal interest of 1%*)

After bankruptcy Order – PREFERENTIAL TRANSACTIONS

- ❖ Preferences constitute almost any act by the bankrupt spouse which places a creditor, surety or guarantor in a better position than other creditors, sureties or guarantors upon his bankruptcy, unless he is able to show that that was not his intention.
- ❖ If the transaction concerned is the transfer of the family home to a spouse, it is presumed that the bankrupt had the intention of preferring that spouse, unless he can show to the contrary, because a spouse is an 'associate', (as are civil partners and other family members).

After bankruptcy Order – TIME LIMITS TO SET ASIDE

- where the making of a bankruptcy application or the presentation of the bankruptcy petition occurs within **two years** of the transfer and where the transaction is a transaction at an undervalue or a preference, if (in the case of a preference only) the bankrupt was insolvent at the date of the preference or became insolvent as a result; or

After bankruptcy Order – TIME LIMITS TO SET ASIDE...

- Where the making of a bankruptcy application or the presentation of the bankruptcy petition occurs within **five years** of the transfer and where the transaction was a transaction at an undervalue (not a preference), if the bankrupt was insolvent at the date of the transfer or became insolvent as a result; or

After bankruptcy Order – TIME LIMITS TO SET ASIDE...

- Where the making of a bankruptcy application or the presentation of the bankruptcy petition occurs beyond the five years time limit and where the transaction was at an undervalue (not a preference), if it can be shown that the bankrupt intended to put his assets beyond the reach of claimants or potential claimants. A claim for relief from a transaction entered into at an undervalue must show that entry into the transaction was to prejudice the interests of the claimant. Whether a person was a victim at the date of such a transaction turns on the actual or potential prejudice suffered.

Challenging the trustee

- ❖ Applications for declarations of beneficial interest (MWPA and TLATA)
 - Equitable accounting
 - *Stack v Dowden* [2007] 1 FLR 1858 and *Jones v Kernott* [2011] UKSC 53.

- ❖ Equity of exoneration
 - *Cadlock v Dunn* [2015] EWHC 1318 (Ch) (a second charge obtained by H would be deducted form his share of the proceeds of sale of jointly held property)

Challenge the mortgagee

- ❖ mortgage was improperly obtained against a spouse who was induced to enter into it by fraud, misrepresentation or undue influence and should be set aside,
- ❖ *Royal Bank of Scotland v Etridge (No 2) [2001] 2 FLR 1364*

Annul the bankruptcy

- ❖ The court can annul a bankruptcy order at any time if it appears that the bankruptcy order ought not to have been made under s. 282, IA 1986.
- ❖ Prudent to make any application to annul quickly - trustee's fees ordinarily payable even if an application to annul is successful, (*Mekarska v Ruiz [2011] EWHC 913 (Fam) at [75] – [76]*)
- ❖ *Paulin v Paulin [2009] 2 FLR 354.*
 - test for commercial insolvency (i.e. whether the bankrupt could meet his liabilities as and when they fell due)

Annul the bankruptcy...

❖ Hidden assets abroad, not disclosed to the trustee, presented a false picture and was set aside as an abuse of process

- *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order) [1994] 1 FLR 359*

❖ Fraudulent arrangements by a bankrupt, such as permitting a new partner or his companies to petition for bankruptcy, may be a sham and will be set aside

- *Couvaras v Wolf [2002] 2 FLR 107.*

Negotiate with the trustee

- ❖ If the non-bankrupt spouse has some funds, negotiate a deal with the trustee
- ❖ A trustee may be willing to sell the bankrupt's share in the fmh
- ❖ Do not delay - as after 1 year from the estate vesting in the trustee, the interests of creditors will outweigh all other considerations on application for a sale – 335A(1)-(3), IA 1986.

Summary

Remember:

- ❖ Information is crucial;
- ❖ Consider where legal and beneficial interests lie;
- ❖ Speed;
- ❖ There is always gin.

ALEXIS CAMPBELL QC

29 BEDFORD ROW

23 MAY 2018