

Take It All: The unhappy marriage of bankruptcy and financial remedies on divorce

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A. STATUTES

Section 279 Duration of Bankruptcy

- (1) A bankrupt is discharged from bankruptcy at the end of the period of one year beginning with the date on which the bankruptcy commences.
- (2) If before the end of that period the official receiver files with the court a notice stating that investigation of the conduct and affairs of the bankrupt under section 289 is unnecessary or concluded, the bankrupt is discharged when the notice is filed.
- (3) On the application of the official receiver or the trustee of a bankrupt's estate, the court may order that the period specified in subsection (1) shall cease to run until—
 - (a) the end of a specified period, or
 - (b) the fulfilment of a specified condition.
- (4) The court may make an order under subsection (3) only if satisfied that the bankrupt has failed or is failing to comply with an obligation under this Part.
- (5) In subsection (3)(b) "condition" includes a condition requiring that the court be satisfied of something.
- (6) In the case of an individual who is adjudged bankrupt on a petition under section 264(1)(d)—
 - (a) subsections (1) to (5) shall not apply, and
 - (b) the bankrupt is discharged from bankruptcy by an order of the court under section 280.
- (7) This section is without prejudice to any power of the court to annul a bankruptcy order

Section 282 Court's power to annul bankruptcy order.

- (1) The court may annul a bankruptcy order if it at any time appears to the court—
 - (a) that, on any grounds existing at the time the order was made, the order ought not to have been made, or
 - (b) that, to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court.
- (2) The court may annul a bankruptcy order made against an individual on a petition under paragraph (a), (b) or (c) of section 264(1) if it at any time appears to the court, on an application by the Official Petitioner—

- (a) that the petition was pending at a time when a criminal bankruptcy order was made against the individual or was presented after such an order was so made, and
- (b) no appeal is pending (within the meaning of section 277) against the individual's conviction of any offence by virtue of which the criminal bankruptcy order was made;

and the court shall annul a bankruptcy order made on a petition under section 264(1)(d) if it at any time appears to the court that the criminal bankruptcy order on which the petition was based has been rescinded in consequence of an appeal.

- (3) The court may annul a bankruptcy order whether or not the bankrupt has been discharged from the bankruptcy.
- (4) Where the court annuls a bankruptcy order (whether under this section or under section 261 in Part VIII)—
 - (a) any sale or other disposition of property, payment made or other thing duly done, under any provision in this Group of Parts, by or under the authority of the official receiver or a trustee of the bankrupt's estate or by the court is valid, but
 - (b) if any of the bankrupt's estate is then vested, under any such provision, in such a trustee, it shall vest in such person as the court may appoint or, in default of any such appointment, revert to the bankrupt on such terms (if any) as the court may direct;

and the court may include in its order such supplemental provisions as may be authorised by the rules.

Section 283 Definition of bankrupt's estate.

- (1) Subject as follows, a bankrupt's estate for the purposes of any of this Group of Parts comprises—
 - (a) all property belonging to or vested in the bankrupt at the commencement of the bankruptcy, and
 - (b) any property which by virtue of any of the following provisions of this Part is comprised in that estate or is treated as falling with the preceding paragraph.
- (2) Subsection (1) does not apply to—
 - (a) such tools, books, vehicles and other items of equipment as are necessary to the bankrupt for use personally by him in his employment, business or vocation;
 - (b) such clothing, bedding, furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his family.

This subsection is subject to section 308 in Chapter IV (certain excluded property reclaimable by trustee).

- (3) Subsection (1) does not apply to—
 - (a) property held by the bankrupt on trust for any other person, or
 - (b) the right of nomination to a vacant ecclesiastical benefice.
- (3A) Subject to section 308A in Chapter IV, subsection (1) does not apply to—
 - (a) a tenancy which is an assured tenancy or an assured agricultural occupancy, within the meaning of Part I of the Housing Act 1988, and the terms of which inhibit an assignment as mentioned in section 127(5) of the Rent Act 1977, or
 - (b) a protected tenancy, within the meaning of the Rent Act 1977, in respect of which, by virtue of any provision of Part IX of that Act, no premium can lawfully be required as a condition of assignment, or
 - (c) a tenancy of a dwelling-house by virtue of which the bankrupt is, within the meaning of the Rent (Agriculture) Act 1976, a protected occupier of the dwelling-house, and the terms of which inhibit an assignment as mentioned in section 127(5) of the Rent Act 1977, or
 - (d) a secure tenancy, within the meaning of Part IV of the Housing Act 1985, which is not capable of being assigned, except in the cases mentioned in section 91(3) of that Act.
- (4) References in any of this Group of Parts to property, in relation to a bankrupt, include references to any power exercisable by him over or in respect of property except in so far as the power is exercisable over or in respect of property not for the time being comprised in the bankrupt's estate and—
 - (a) is so exercisable at a time after either the official receiver has had his release in respect of that estate under section 299(2) in chapter III or a meeting summoned by the trustee of that estate under section 331 in Chapter IV has been held, or
 - (b) cannot be so exercised for the benefit of the bankrupt;and a power exercisable over or in respect of property is deemed for the purposes of any of this Group of Parts to vest in the person entitled to exercise it at the time of the transaction or event by virtue of which it is exercisable by that person (whether or not it becomes so exercisable at that time).
- (5) For the purposes of any such provision in this Group of Parts, property comprised in a bankrupt's estate is so comprised subject to the rights of any person other than the bankrupt (whether as a secured creditor of the bankrupt or otherwise) in relation thereto, but disregarding—

- (a) any rights in relation to which a statement such as is required by section 269(1)(a) was made in the petition on which the bankrupt was adjudged bankrupt, and
 - (b) any rights which have been otherwise given up in accordance with the rules.
- (6) This section has effect subject to the provisions of any enactment not contained in this Act under which any property is to be excluded from a bankrupt's estate.

Section 310 Income payments orders.

- (1) The court may **F1**. . . make an order ("an income payments order") claiming for the bankrupt's estate so much of the income of the bankrupt during the period for which the order is in force as may be specified in the order.
- (1A) An income payments order may be made only on an application instituted—
- (a) by the trustee, and
 - (b) before the discharge of the bankrupt.]
- (2) The court shall not make an income payments order the effect of which would be to reduce the income of the bankrupt when taken together with any payments to which subsection (8) applies below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family.
- (3) An income payments order shall, in respect of any payment of income to which it is to apply, either—
- (a) require the bankrupt to pay the trustee an amount equal to so much of that payment as is claimed by the order, or
 - (b) require the person making the payment to pay so much of it as is so claimed to the trustee, instead of to the bankrupt.
- (4) Where the court makes an income payments order it may, if it thinks fit, discharge or vary any attachment of earnings order that is for the time being in force to secure payments by the bankrupt.
- (5) Sums received by the trustee under an income payments order form part of the bankrupt's estate.

- (6) An income payments order must specify the period during which it is to have effect; and that period—
- (a) may end after the discharge of the bankrupt, but
 - (b) may not end after the period of three years beginning with the date on which the order is made.
- (6A) An income payments order may (subject to subsection (6)(b)) be varied on the application of the trustee or the bankrupt (whether before or after discharge).
- (7) For the purposes of this section the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment and (despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999) any payment under a pension scheme but excluding any payment to which subsection (8) applies..
- (8) This subsection applies to—
- (a) payments by way of guaranteed minimum pension; and
 - (b) payments giving effect to the bankrupt's protected rights as a member of a pension scheme.
- (9) In this section, "guaranteed minimum pension" and "protected rights" have the same meaning as in the Pension Schemes Act 1993.

Section 339 Transactions at an undervalue.

- (1) Subject as follows in this section and sections 341 and 342, where an individual is adjudged bankrupt and he has at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the court for an order under this section.
- (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.
- (3) For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if—
- (a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,

- (b) he enters into a transaction with that person in consideration of marriage or the formation of a civil partnership, or
- (c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

Section 340 Preferences.

- (1) Subject as follows in this and the next two sections, where an individual is adjudged bankrupt and he has at a relevant time (defined in section 341) given a preference to any person, the trustee of the bankrupt's estate may apply to the court for an order under this section.
- (2) The court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that preference.
- (3) For the purposes of this and the next two sections, an individual gives a preference to a person if—
 - (a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities, and
 - (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.
- (4) The court shall not make an order under this section in respect of a preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b) above.
- (5) An individual who has given a preference to a person who, at the time the preference was given, was an associate of his (otherwise than by reason only of being his employee) is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in subsection (4).
- (6) The fact that something has been done in pursuance of the order of a court does not, without more, prevent the doing or suffering of that thing from constituting the giving of a preference.

Section 341“Relevant time” under ss. 339, 340.

- (1) Subject as follows, the time at which an individual enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into or the preference given—
 - (a) in the case of a transaction at an undervalue, at a time in the period of 5 years ending with the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt,
 - (b) in the case of a preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), at a time in the period of 2 years ending with that day, and
 - (c) in any other case of a preference which is not a transaction at an undervalue, at a time in the period of 6 months ending with that day.
- (2) Where an individual enters into a transaction at an undervalue or gives a preference at a time mentioned in paragraph (a), (b) or (c) of subsection (1) (not being, in the case of a transaction at an undervalue, a time less than 2 years before the end of the period mentioned in paragraph (a)), that time is not a relevant time for the purposes of sections 339 and 340 unless the individual—
 - (a) is insolvent at that time, or
 - (b) becomes insolvent in consequence of the transaction or preference;but the requirements of this subsection are presumed to be satisfied, unless the contrary is shown, in relation to any transaction at an undervalue which is entered into by an individual with a person who is an associate of his (otherwise than by reason only of being his employee).
- (3) For the purposes of subsection (2), an individual is insolvent if—
 - (a) he is unable to pay his debts as they fall due, or
 - (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.
- (4) A transaction entered into or preference given by a person who is subsequently adjudged bankrupt on a petition under section 264(1)(d) (criminal bankruptcy) is to be treated as having been entered into or given at a relevant time for the purposes of sections 339 and 340 if it was entered into or given at any time on or after the date specified for the purposes of this subsection in the criminal bankruptcy order on which the petition was based.
- (5) No order shall be made under section 339 or 340 by virtue of subsection (4) of this section where an appeal is pending (within the meaning of section 277) against the individual's conviction of any offence by virtue of which the criminal bankruptcy order was made.

Section 342 Orders under ss. 339, 340.

- (1) Without prejudice to the generality of section 339(2) or 340(2), an order under either of those sections with respect to a transaction or preference entered into or given by an individual who is subsequently adjudged bankrupt may (subject as follows)—
 - (a) require any property transferred as part of the transaction, or in connection with the giving of the preference, to be vested in the trustee of the bankrupt's estate as part of that estate;
 - (b) require any property to be so vested if it represents in any person's hands the application either of the proceeds of sale of property so transferred or of money so transferred;
 - (c) release or discharge (in whole or in part) any security given by the individual;
 - (d) require any person to pay, in respect of benefits received by him from the individual, such sums to the trustee of his estate as the court may direct;
 - (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction or by the giving of the preference to be under such new or revived obligations to that person as the court thinks appropriate;
 - (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any property and for the security or charge to have the same priority as a security or charge released or discharged (in whole or in part) under the transaction or by the giving of the preference; and
 - (g) provide for the extent to which any person whose property is vested by the order in the trustee of the bankrupt's estate, or on whom obligations are imposed by the order, is to be able to prove in the bankruptcy for debts or other liabilities which arose from, or were released or discharged (in whole or in part) under or by, the transaction or the giving of the preference.

- (2) An order under section 339 or 340 may affect the property of, or impose any obligation on, any person whether or not he is the person with whom the individual in question entered into the transaction or, as the case may be the person to whom the preference was given; but such an order—
 - (a) shall not prejudice any interest in property which was acquired from a person other than that individual and was acquired in good faith and for value, or prejudice any interest deriving from such an interest, and
 - (b) shall not require a person who received a benefit from the transaction or preference in good faith and for value to pay a sum to the trustee of the bankrupt's estate except

where he was a party to the transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of that individual.

(2A) Where a person has acquired an interest in property from a person other than the individual in question, or has received a benefit from the transaction or preference, and at the time of that acquisition or receipt—

(a) he had notice of the relevant surrounding circumstances and of the relevant proceedings,
or

(b) he was an associate of, or was connected with, either the individual in question or the person with whom that individual entered into the transaction or to whom that individual gave the preference,

then, unless the contrary is shown, it shall be presumed for the purposes of paragraph (a) or (as the case may be) paragraph (b) of subsection (2) that the interest was acquired or the benefit was received otherwise than in good faith.

(3) Any sums required to be paid to the trustee in accordance with an order under section 339 or 340 shall be comprised in the bankrupt's estate.

(4) For the purposes of subsection (2A)(a), the relevant surrounding circumstances are (as the case may require)—

(a) the fact that the individual in question entered into the transaction at an undervalue; or

(b) the circumstances which amounted to the giving of the preference by the individual in question.

(5) For the purposes of subsection (2A)(a), a person has notice of the relevant proceedings if he has notice—

(a) of the fact that the petition on which the individual in question is adjudged bankrupt has been presented; or

(b) of the fact that the individual in question has been adjudged bankrupt.

(6) Section 249 in Part VII of this Act shall apply for the purposes of subsection (2A)(b) as it applies for the purposes of the first Group of Parts.

Section 284 Restrictions on dispositions of property.

- (1) Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court.
- (2) Subsection (1) applies to a payment (whether in cash or otherwise) as it applies to a disposition of property and, accordingly, where any payment is void by virtue of that subsection, the person paid shall hold the sum paid for the bankrupt as part of his estate.
- (3) This section applies to the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting, under Chapter IV of this Part, of the bankrupt's estate in a trustee.
- (4) The preceding provisions of this section do not give a remedy against any person—
 - (a) in respect of any property or payment which he received before the commencement of the bankruptcy in good faith, for value and without notice that the petition had been presented, or
 - (b) in respect of any interest in property which derives from an interest in respect of which there is, by virtue of this subsection, no remedy.
- (5) Where after the commencement of his bankruptcy the bankrupt has incurred a debt to a banker or other person by reason of the making of a payment which is void under this section, that debt is deemed for the purposes of any of this Group of Parts to have been incurred before the commencement of the bankruptcy unless—
 - (a) that banker or person had notice of the bankruptcy before the debt was incurred, or
 - (b) it is not reasonably practicable for the amount of the payment to be recovered from the person to whom it was made.
- (6) A disposition of property is void under this section notwithstanding that the property is not or, as the case may be, would not be comprised in the bankrupt's estate; but nothing in this section affects any disposition made by a person of property held by him on trust for any other person.

B. ANALYSIS

Section 339 IA 1986 – Transaction at an undervalue

Where a bankrupt person has made a transaction at an undervalue, the trustee can seek an order that the court deems appropriate to restore the original position prior to the transaction (section 339(2)).

A bankrupt person makes a transaction at an undervalue, if:

- a. He makes a gift to a person or otherwise enters into a transaction with a person on terms which mean that he receives no consideration (s339(3)(a))
- b. He enters into a transaction with that person in consideration of marriage or the formation of a civil partnership (s339(3)(b))
- c. He enters into a transaction with another for consideration that is significantly less, in monetary terms, than the consideration provided by himself (s339(3)(c)).

Key issue is consideration.

What constitutes good or valuable consideration?

Re Abbott (a bankrupt No. 8 of 1980) 1983 Ch 45

Hills v. Haines [2007] EWCA Civ 1284

Re Jones (a bankrupt) 2008 BPIR 1051

Was the transaction made within the relevant time?

The transaction at an undervalue must have been made within 5 years prior to the day on which the bankruptcy petition which prompted the order is presented (s341(1)(a))

Where enters into a transaction at an undervalue under s341(1)(a), not being a time less than 2 years before the end of the period in s341(1)(a), will not be relevant unless:

- a. The person is insolvent at that time; or
- b. Becomes insolvent in consequence of that transaction

Section 340 IA 1986 – Preferences

If a bankrupt person makes a preference within the relevant time, the trustee can seek an order that the court deems appropriate to restore the original position prior to the transaction (section 340(2)).

- (3) For the purposes of this and the next two sections, an individual gives a preference to a person if—
- (a) that person is one of the individual's creditors or a surety or guarantor for any of his debts or other liabilities, and
 - (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.
- (4) The court shall not make an order under this section in respect of a preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in subsection (3)(b) above.

Court will not make an order *unless* the bankrupt's preference was *influenced* by the desire to put that person in a better position than they would have been in (s340(3)(b))

Dominant intention v. a present influence

Re MC Bacon Ltd (No. 1) 1990 BCLC 324

Re DKG Contractors Ltd 1990 BCC 903

When should the influence be present?

At the time of the decision v. at the time of the transaction?

Re Fairway Magazines Ltd 1993 BCLC 643

Knowledge of the bankrupt person's insolvency?

Known to self or foreseen?

Katz v. McNally [1999] BCC 291

Advising W of a now bankrupt H

One of the most challenging situations

W comes to you before there is a bankruptcy order

It is a very small money case

FPR 2010 Page 1169:

'Transfers of property and settlements may be challenged by trustees in bankruptcy (see s39 MCA 1973). A property transfer pursuant to s24 gives consideration for the purpose of s339 IA 1986: *Hill v. Haines [2008] 1 FLR 1192*, followed in *Paulin v. Paulin [2009] 2 FLR 354*, where the CA said that there is very little risk that ancillary relief award to a wife would be set aside at an undervalue in any subsequent bankruptcy proceedings.'

FPR 2010 Page 1207:

'After contested proceedings, it may be difficult for the trustee in bankruptcy to set aside a transfer of property which flows from the court exercising its mandatory duties under s25.'

BUT small money cases and contested final hearings!?

Aim it always to settle by consent

BUT how vulnerable is W to s339 and s340 IA 1986 where H becomes bankrupt after a consent order has been agreed?

C. WORKED CASE EXAMPLE

The Facts

The parties married in 1974.

In 1980, H set up his own business: 'H Ltd'

In 1996 the parties purchased St. John's Farmhouse as joint tenants. The property was a derelict listed Farmhouse that needed renovation. They completed the first part of renovation works in 1997 from a £150,000 mortgage. H began to run H Ltd from the Farmhouse. (The company did not pay the parties rent for this).

In 2000, W ceased her own paid employment and instead began to work for H in H Ltd.

In 2005, H wanted to begin the second part of the renovation works. This required the mortgage to be increased to £200,000.

In 2010, Nationwide retracted H Ltd's overdraft limit with immediate effect.

In 2011 H came clean to W about his financial difficulties. By this time he has a large director's loan account as well as personal loans and debts.

As financial situation became clear, the parties relationship deteriorated.

In 2012 the parties sold St. John's Farmhouse. What was left of the proceeds was put into W's name:

- a. She bought a house in her sole name (Saunders House);
- b. Kept the rest in a HSBC account in her sole name.

The parties agreed this would remain the position until the end of the divorce proceedings.

Got Decree Nisi in 2013.

The parties then agreed the following financial settlement to be drawn up into a consent order:

- a. Saunders House to stay in W's sole name;
- b. W to transfer £50,000 from the HSBC account to H;
- c. W to retain rest of funds including joint account;
- d. H to keep his pensions;
- e. Clean break.

Consent order was received by Truro County Court on 10 April 2013.

On 13 April 2013, H petitioned himself for bankruptcy and an order for bankruptcy was issued on the same day. T was appointed as H's trustee in bankruptcy.

Truro County Court did not approve and stamp the parties' consent order until 14 April 2013....

What happened next...

W was ordered to pay £50,000 to T rather than to H

W received a letter from T, seeking 50% of the sale proceeds of St. John's Farmhouse. T made clear this was only likely to be achieved by the sale of W's new property Saunders House.

W seeks advice on her position...

Claims made by the trustee in bankruptcy

T sought 50% of the sale proceeds from St. John's Farmhouse from W by three different routes:

1. The consent order was a transaction at an undervalue contrary to s339(3)(c) of the Insolvency Act 1986;
2. The consent order was a preference contrary to s340(3)(b) of the Insolvency Act 1986;
3. The consent order is void under s284 of the Insolvency Act 1986

1. Is the consent order a transaction at an undervalue under s339 IA 1986?

The Law

s339(3)(c) IA 1986

Transaction with another for consideration that is significantly less, in monetary terms, than the consideration provided by the bankrupt individual

Valuable consideration

Re Abbott (Bankrupt No.8 of 1980) 1983 Ch 45

The widening of what constitutes good consideration

Hill v. Haines 2007 EWCA Civ 1284

Consent order itself will not be taken as an undervalued transaction

Only when the consent order is considered dishonest or collusive

Re Jones (a bankrupt) 2008 BPIR 1051

Hill v. Haines, Rix LJ:

'... in the ordinary case, where there is no dishonest collusion, and where a court approves or determines the sum or property to be transferred, it would be entirely foreign to the concept of a 'clean break' if the husband's creditors could thereafter seek to recover, in bankruptcy, the property transferred or its value...'

An undervalue transaction must be made within the 'relevant time'

s341(2)(a) IA 1986

Application

Was W a purchaser for valuable consideration?

Yes – in exchange for her greater share in the matrimonial assets she agreed to:

- a. Forfeit her spousal maintenance

- b. Accept a clean break
- c. Seek not order in relation to H's pensions

W clear no intention in the consent order to avoid paying H's creditors.

Conclusion

W has a strong chance of defending any claim for transaction at undervalue.

2. Is the consent order a preference?

The Law

s340(3)(b) IA 1986

s340(4) IA 1986

Court shall not make an order, unless the bankrupt's preference was influenced b the desire to put that person in a better position than they otherwise would have been in.

Does not have to be the dominant intention, just an influence on the decision made by the now bankrupt person.

Re MC Bacon Ltd (No. 1) (1990) BCLC 324

Re DKG Contractors Ltd [1990] BCC 903

The influence to put themselves in a better position must be present at the time of the decision

Re Fairway Magazines Ltd 1993 BCLC 643

Not necessary at the time of the preference to have known or foreseen the bankruptcy

Katz v. McNally [1999] BCC 291; 295G-296B

Application

No indication on the papers that W or H intended to avoid paying H's creditors

Seek confirmation that there was no dishonest desire to prevent such recovery

The perils of an honest answer?

Conclusion

Strong chance of any preference claim brought

3. Is the consent order void under s284 of the Insolvency Act 1986?

s284 IA 1986

s284 prevents a bankrupt person from making any disposition of property following a bankruptcy order unless he has first obtained permission of the court, or that disposition is subsequently ratified by the court.

Patterns of events in this case: Bankruptcy order prior to the stamped consent order. W cannot rely on the existence of the consent order itself to defend her against this claim.

Mountney v. Treherne [2002] EWCA Civ 1174

Therefore are two potential arguments that W can make:

3.1 The agreement to purchase Saunders House was a separate agreement to the financial settlement under the consent order

An agreement separate to the financial remedy proceedings

Xydhias v. Xydhias [1999] 1 FLR 683

'Ordinary contractual principles did not apply, because an agreement for the compromise of an ancillary relief application did not give rise to a contract enforceable in law'

Soulsbury v. Soulsbury [2007] EWCA Civ EWCA Civ 969

'an agreement containing financial arrangements made between spouses or former spouses with the intention of creating legal relations between them was enforceable in the civil courts, even if it had not been approved by the court provided it did not compromise a pending application for ancillary relief'

N v. N [2014] EWHC 3435 (Moylan J)

Conclusion

Reasonable, but perhaps not as strong as 3.2 below

3.2 Ratification of the consent order under s284(1) Insolvency Act 1986

S284(1) - Disposition by a bankrupt person can be ratified by the court

Ratification as a matter for the court's discretion

Circumstances in which ratification will likely be granted are limited

Re Flint [1993] 1 FLR 763

Treharne v. Foster [2003] EWHC 2784 (ch)

Court shall consider what is fair and reasonable in all the circumstances

Look at the situation in the round

Treharne v. Foster [2003] EWHC 2784 (ch)

Application

W has always acted in good faith with honest intention

Unclear from fact whether this is true of H

Any suspicion from the timing of H's Debtor's petition?

What is fair and reasonable in the round, demanding 50% from W in all the circumstances appears unfair

Further instructions as far as possible on H's suggested motivation

Or perhaps the court might instead view this as a series of unfortunate events and a misunderstanding no more?

Conclusion

Reasonable prospects of success from this argument

Stronger than 3.1 above

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