Julian Dobson SOLICITORS

Insolvency Lawyers

NEWSLETTER

An Exceptional case in the Circumstances

Overview

A recent decision has exposed the difficult interaction between matrimonial proceedings and bankruptcy. Re Gudmundsson [2024] EWHC 759 was a bankruptcy case that was born out of contested divorce litigation.

Facts

During divorce proceedings, the husband was made bankrupt before the final property adjustment order was made dealing with the matrimonial home.

Following Mr Gudmundsson's bankruptcy his trustees in bankruptcy applied for an order for possession and sale of the matrimonial home. The bankrupt's wife ("Ms Lin") opposed the trustees' application on two grounds. Firstly, that the bankrupt had previously made a written disposition of his interest in the property in favour of his wife. Secondly, that it would not be "just and reasonable" to grant possession to the trustees under section 335A of the Insolvency Act 1986 ("IA 86").

The events giving rise to the second ground were that during the divorce proceedings the bankrupt had been served with a statutory demand and a bankruptcy petition which resulted in the bankruptcy order being made. The bankrupt had failed to disclose to the Family Court the events leading to the bankruptcy order. The final property adjustment order was handed down seven days after the bankruptcy order.

Sabotage

The practice of husbands declaring bankruptcy to sabotage divorce proceedings is not an uncommon occurrence. Previously it has been held that even if the intention was to "baulk the claim of [a] wife for a transfer of property order, that alone could not make the petition an abuse of process" (see **Re Holliday [1981] Ch 405**).

The effect of the bankruptcy order was to sabotage the property adjustment order in the matrimonial proceedings. The bankruptcy order meant that the husband's interest in the matrimonial home vested in the trustees in bankruptcy. There being no jurisdiction to make a property adjustment order post-bankruptcy in respect of the bankrupt's interest, meant that it was ineffective (**Re Holliday**).

Collusion

Prior to the trustees' application, the bankrupt's wife applied to annul the bankruptcy order on two grounds. The first was that there had been collusion between the bankrupt and the petitioning creditor and second that the bankrupt was technically solvent when the bankruptcy order was made. The application to annul the bankruptcy order failed, and the bankrupt's wife was ordered to pay the trustees' costs.

Written disposition of interest in the matrimonial home

Ms Lin claimed that the bankrupt had disposed of his interest in the home to her during the negotiations that took place between the parties in the divorce proceedings. *[cont.]*

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The court considered the decision in **Xydhias v Xydhias [1999] All ER 386** in which it was held that parties in divorce proceedings are left with an agreement that does not give rise to a contract enforceable in law. The agreement only becoming enforceable once converted into an order of the court. The decision effectively precluded any claim that the written exchanges satisfied both **s2 of the Law of Property (Miscellaneous Provisions) Act 1989 and s53(1) of the Law of Property Act 1925** to effect a disposition of the bankrupt's beneficial interest.

Exceptional circumstances under section 335A IA 86

S335A provides that where a trustee makes an application for an order for possession and sale the court shall make such order as it thinks just and reasonable having regard to various interests. Where the application is made after one year the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.

Ms Lin relied on two matters taken together to constitute exceptional circumstances;

a) the bankrupt's misconduct in failing to inform the Family Court of the statutory demand and bankruptcy petition and,

b) the present state of deterioration of her mental health and that of her son and the consequences of an immediate possession order.

The misconduct in this case was the failure of the bankrupt to disclose during the matrimonial proceedings that he had been served with a statutory demand and subsequently a bankruptcy petition, whilst emailing the family Court requesting that the handing down of judgement in the matrimonial proceedings be postponed. The bankrupt later admitting in an email that *"the reason for my bankruptcy was really to defeat my wife's claim for the house"*.

Deputy ICC Judge Frith held that the misconduct on the part of the bankrupt and its consequences took the case out of the ordinary and into the category of exceptional circumstances for the purposes of section 335A. Further, that the consequences of his behaviour must have had a significant effect on the mental health of his former wife and their son. As the circumstances were held to be exceptional within the meaning of section 335A, the order for possession and sale was deferred until 31st July 2032.

What constitutes exceptional circumstances has been considered in a long line of cases. The case of **Re Citro [1991] Ch 142** dealt with the relatively common scenario of a wife and young children being faced with eviction. Whilst recognising the inevitable problems over schooling, such circumstances were not considered to be exceptional. Such circumstances being *"the melancholy consequences of debt and improvidence"*.

Subsequent decisions have found that a spouse's terminal illness can constitute exceptional circumstances resulting in an undetermined period of suspension pending death see **Re Bremner (a bankrupt) [1999] BPIR 185**. A case involving a non-terminal illness saw the possession order being suspended for a period of 12 months, **See Re Raval [1998] BPIR 389**.

A rare example of an extended suspension of enforcement of a possession order was the case of **Martin-Sklan v White [2007] BPIR 76** in which exceptional circumstances merited a suspension of the possession order until 2013 when the youngest child reached the age of 16. *[cont.]*

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Game changer

Whilst section 335A does not specify any set period for which an order for possession and sale will be suspended, save in rare cases and those involving terminal illnesses, orders suspending enforcement rarely exceed 12 months. The decision in this case not only extends the categories of circumstances that may be considered to be exceptional to include misconduct and the impact on mental health, but also extends the period of time suspending enforcement.

This decision will have a significant effect on trustees' ability to administer bankruptcy estates in a timely manner. The delay will require the bankruptcy estate to be kept open for several years which will incur corresponding costs and reduce any return to creditors

A trustee considering taking an appointment under a bankruptcy order made during matrimonial proceedings should enquire further into the circumstances of the bankruptcy order, ideally before the appointment is accepted.

Julian Dobson SOLICITORS

Insolvency Lawyers

Author: Julian Dobson

1 Frederick Terrace, Frederick Place, Brighton BN1 1AX
Tel 01273 766 355 Fax 01273 766 350 **Email: info@juliandobson.com Web: www.juliandobson.com**