A YEAR IN PERSONAL INSOLVENCY

Paul French, Guildhall Chambers

1. Assets

- Pensions

  Raithatha (as Trustee in Bankruptcy of Williamson) v Williamson [2012] EWHC 909 (Ch); [2012] BPIR 621

- Payment protection insurance mis-selling claims

  Ward v Official Receiver [2012] BPIR 1073

2. Liabilities

- Secured creditors

  Re Linfoot (A Debtor); Linfoot v (1) Adamson (2) Bank of Scotland plc (3) National Westminster Bank plc [2012] EW Misc 16 (CC); [2012] BPIR 1033

3. Antecedent transactions

- Insolvency

  Re Calder (In Bankruptcy); Salter v Wetton [2011] EWHC 3192 (Ch); [2012] BPIR 63

- Purpose

  Rubin (Trustee of Dweck) v Dweck and Another [2012] BPIR 854

  Williams (Trustee in Bankruptcy of Taylor) v (1) Taylor (2) Raines [2012] EWCA Civ 1443; [2013] BPIR Issue 1

4. Discharge

- Suspension of discharge

  Hafiz v Ingram (Trustee in Bankruptcy of Hafiz) [2012] EWHC 274 (Ch); [2012] BPIR 1116

  Bramston v Haut [2012] EWCA Civ 1637; [2013] BPIR Issue 1

- Effect of discharge

  Hayes v Hayes [2012] EWHC 1240 (Ch); [2012] BPIR 739

  McRoberts v McRoberts [2012] EWHC 2966 (Ch); [2013] BPIR Issue 1

RAITHATHA (AS TRUSTEE IN BANKRUPTCY OF WILLIAMSON) v WILLIAMSON **[2012] EWHC 909 (Ch)**
[2012] BPIR 621
Chancery Division
Bernard Livesey QC (sitting as a deputy High Court judge)
4 April 2012

Bankruptcy — Income payment order — Pension rights — Bankrupt choosing not to draw down pension rights — Whether trustee entitled to income payments order in such circumstances

In the wake of unfair prejudice proceedings brought by S against W under s 994 of the Companies Act 2006, a share buyout order with indemnity costs was made against W by Proudman J on 24 September 2010. W, having failed to satisfy this judgment, was then made subject to a bankruptcy order on 9 November 2010 on the petition of S and the applicant R was appointed as trustee in bankruptcy of W on 10 November 2010. S was by far the major creditor of W. As W's assets were insufficient to satisfy the debts of nearly £1.25m, some 6 weeks before W was due to be discharged from bankruptcy on 23 September 2011, R applied to the court for an income payments order (IPO) under s 310 of the Insolvency Act 1986 (the 1986 Act). R sought the IPO against W in respect of a pension entitlement of W at a time when W had not elected to draw such an entitlement. This entitlement was estimated to be worth at least £900,000 in total and was capable of generating a lump sum of £248,000, with an annual pension of between £23,000–43,000. On 27 September 2011, R, without notice to W, also applied to restrain W from taking any action in respect of these pension rights, and an injunction to that effect was granted on the same day by Norris J. The trustee offered a limited undertaking in damages. W was discharged from his bankruptcy on 8 November 2011.

W opposed the application for an IPO on the grounds that he did not wish to draw down his pension at present. He argued that, as a result of s 11 of the Welfare Reform and Pensions Act 1999, his rights under the pension scheme were excluded from the estate and that therefore he could not be forced to deal with them in a way that was contrary to his wishes. The issue therefore was whether any future payment in respect of the pension fell within the definition of 'income' as laid down in s 310(7) of the 1986 Act.

Held – ruling accordingly –

(1) The arguments put forward by the trustee were upheld. Section 310(7) of the 1986 Act made it clear that an IPO could be made despite anything in ss 11 and 12 of the Welfare Reform and Pensions Act 1999.

(2) The one-off payment of a lump sum could qualify as income for these purposes.

(3) Although the right to elect remained vested in the bankrupt, that did not prevent the court from exercising its jurisdiction to make an IPO. The legislature could not have intended that the court could not grant an IPO in circumstances such as the present. To permit the court to grant an IPO in such circumstances would not involve the breach of any property rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

(4) The injunction should be maintained pending the resolution of the matter. As the evidence showed, there was a risk of dissipation of assets. There had been difficulties in enforcing court orders against W and there had been some suspicious transactions with respect to his assets. In the light of that background, the trustee had been entitled to take the precautionary step of seeking an injunction without notice.

WARD v OFFICIAL RECEIVER
[2012] BPIR 1073
Manchester County Court
District Judge Khan
31 May 2012

Bankruptcy — Sums received by Official Receiver in respect of complaint made by a discharged bankrupt about payment protection insurance policies — Whether 'property' within estate
Payment protection insurance — Complaint of misselling — Whether a cause of action falling within bankrupt's estate

On 23 January 2012 W applied to the court seeking an order that the Official Receiver release certain moneys to him. These sums constituted the balance of payments that had been made to the Official Receiver by Halifax plc (the bank) in September 2011 and these payments were related to PPI policies taken out by W in respect of loans made to him by the bank at some time before 2009.
W and his wife had successfully petitioned for their own bankruptcies in February 2009. At that time some £15,000 was owing to the bank in respect of a loan made to W. The Official Receiver was appointed as W's trustee in bankruptcy on 23 July 2009 and both W and his wife were discharged early from bankruptcy on 3 September 2009. Subsequently, in the early months of 2011, W had complained to the Financial Ombudsman about the sale of the PPI policies to him and it was this complaint that lead to the payment made by the bank. W had no knowledge about the possibility of making such a complaint until the PPI misselling affair became public knowledge.
It was against this factual background, which was not disputed by the Official Receiver, that W made his claim.

Held – dismissing the application –

(1) The payment from the bank to the Official Receiver fell within the definition of 'property' as laid down by s 436 of the Insolvency Act 1986 because it represented an interest incidental to property. The right to complain to the Financial Ombudsman arose out of the ownership of the policy and therefore the payment received as a result of such complaint was an interest incidental to that property.

(2) Alternatively, the circumstances under which the PPI policy was sold to W conferred a cause of action upon him and that cause of action could be viewed as 'property' encompassed within the estate in accordance with the meaning of s 436.

(3) The court expressed sympathy for W and it was agreed that the costs of this application be treated as expenses of the insolvency proceedings.

***RE LINFOOT (A DEBTOR); LINFOOT v (1) ADAMSON (2) BANK OF SCOTLAND PLC (3) NATIONAL WESTMINSTER BANK PLC* [2012] EW MISC 16 (CC);**
[2012] BPIR 1033
Leeds County Court
His Honour Judge Behrens
30 July 2012
Individual voluntary arrangement — Secured creditor — Entitlement of secured creditor to vote at creditors' meeting — Valuation of security — Basis upon which valuation might be challenged — Basis upon which decision of supervisor might be challenged — Insolvency Act 1986, ss 263(3), 303(1)

On 16 March 2010 L submitted a proposal for an individual voluntary arrangement (IVA). The Statement of Affairs revealed assets of £184,501 and an estimated deficiency of £7,513,803. At the heart of the proposal was an offer by L to make voluntary contributions of £2,700 per month for 5 years, a total of £162,000. On 22 June 2010 the IVA was rejected at a meeting of creditors, but, following an order of the court on 16 December 2010 the proposal (in an amended form) was approved. The R3 Standard Conditions for IVAs (the Standard Conditions) were incorporated into the IVA. Although there were disagreements between L and the supervisor as to the operation of the IVA, L duly made the voluntary contributions. On 17 January 2012, the supervisor served a Notice of Default on L, alleging (1) there was a sum of £47,000 due to the arrangement in respect of the sale of some number plates at an undervalue; (2) there was a failure to disclose all of L's assets or his current income and expenditure; and (3) L was not co-operating with the sale of a property, Ravenswick, which was charged to BoS. Meanwhile, on 5 August 2011, L had asked the supervisor to convene a meeting of creditors to consider a variation to the IVA. The nature of the variation was that the balance of the voluntary payments and the amount due in respect of the number plates be paid by a third party. The supervisor declined to hold the meeting. On 2 April 2012 the court ordered the supervisor to convene the meeting. At that meeting, which was held on 26 April 2012, votes to the value of £6,683,482 were cast in favour of the variation and £4,853,746 against it. Both BoS and NatWest, another secured creditor, voted against the proposal. BoS voted in the sum of £2,514,044, and NatWest in the sum of £537,058. Accordingly, the variation was rejected by 42.07% of the creditors voting, and so the variation was not approved by 75% in value of those present and voting as was required by r 5.23(2) of the Insolvency Rules 1986 (the Rules). By an application, L sought to challenge two decisions of the supervisor, who was acting as the Chairman of the Meeting, as regards the voting entitlements of BoS and NatWest. BoS was permitted to vote in the sum of £2,514,044, based on an estimate for the value of its security over Ravenswick in the sum of £2,000,000. L asserted that BoS should either not have been permitted to vote at all or that its vote should have been admitted in the sum of £1. Alternatively he contended that the supervisor should have adjourned the meeting in order to investigate an offer in the sum of £4,678,900 which had been made for Ravenswick on 20 April 2012. NatWest was permitted to vote in the sum of £537,058.35, based on an estimate of the value of the security, Bishopsthorpe Garth, in the sum of £2,106,180. L asserted that NatWest should either not have been permitted to vote at all or that its vote should have been admitted in the sum of £1. In the alternative he contended that the supervisor should have adjourned the meeting in order to investigate an offer in the sum of £2,600,000 which had been made for Bishopsthorpe Garth on 23 April 2012. Both the supervisor and BoS opposed the application, contending that the decisions of the supervisor were appropriate, in accordance with the terms of the IVA and in any event within his powers as supervisor. NatWest took no active part in the proceedings, and was content to abide by any order that the court made.

Held – dismissing the application –

(1) On the basis that both BoS and NatWest were entitled to vote in the sums allowed by the supervisor, 58% of the creditors voted in favour of the variation and the proposed variation was accordingly rejected. If the supervisor had disallowed both BoS and NatWest's claims the percentage in favour of the variation would have risen to 79% and it would have been approved. If the supervisor had disallowed the BoS claim but allowed NatWest's claims the percentage in favour of the variation would have risen to 74% and it would have been rejected. If the supervisor had allowed the BoS claim but disallowed NatWest's claims the percentage in favour of the variation would have risen to 61% and it would have been rejected. Thus L could not upset the result of the vote unless he could successfully challenge the BoS valuation, and even then he needed at least a partial success in relation to the NatWest valuation.

(2) L's application engaged s 263 of the Insolvency Act 1986 (the Act) and condition 64 of the Standard Conditions. There was an analogy between ss 263(3) and 303(1) of the Act. S 303(1) was concerned with bankruptcy and gave the bankrupt or any of his creditors the power to apply to court in respect of acts or omissions of the trustee, and had been construed very narrowly; in effect the court would only interfere if it could be shown that the trustee had acted in bad faith or so perversely that no trustee properly advised could so have acted. Precisely similar considerations applied to the exercise of the supervisor's powers and discretions. *Osborne v Cole* applied.

(3) Whether L's application were treated as an appeal under condition 64 or an application under s 263(3) of the Act, the court was confined to events as at the date of the meeting and was not entitled to look at subsequent events. *Power v Petrus Estates Ltd and Others* [2008] EWHC 2607 (Ch), *Mercury Tax Group Ltd (In Administration), Re; Her Majesty's Revenue and Customs v Maxwell and Klempka* [2010] EWCA Civ 1379 and *NatWest Bank plc v Yadgaroff and Others* [2011] EWHC 3711 (Ch) considered.

(4) Condition 64 was concerned with the admission of claims by unsecured creditors who had submitted claims under condition 63(1). However, the claims of BoS and NatWest were claims by secured creditors governed by conditions 63(3) and 39, and condition 39 gave no such right of appeal. Accordingly, the application was governed by s 263(3) of the Act and the court's function was limited in the manner set out in the authorities on s 303 of the Act.

(5) Condition 39 was of central importance in determining the appeal. It was for the secured creditor to value the security. BoS valued Ravenswick at £2,000,000 and supported the valuation with a professional valuation. The supervisor was aware that Ravenswick had been marketed for some time but this had not resulted in a sale and that there had been vandalism to Ravenswick since the marketing. Under condition 39(4) the supervisor had the right to require a professional valuation by a person agreed between himself and BoS, but he already had a valuation by a professional valuer. Aside from the offer, there could be no criticism of the supervisor's decision to value Ravenswick at £2,000,000.

(6) There were good grounds to be sceptical of the offer: it came from an unidentified source, proof of funding had not been provided, it was in an unusual sum and it was subject to contract for a figure more than double the current valuation of Ravenswick. Both BoS and the supervisor shared these concerns.

(7) It was not suggested that the supervisor's decision was made in bad faith. It could not possibly be said that the decision was so perverse that no supervisor properly advised could have acted in that way. Nor could it be said that the decision was so absurd that no reasonable person could have acted in that way. The challenge to the BoS valuation would be dismissed. The same conclusion would have been reached applying the more generous test under condition 64.

RE CALDER (IN BANKRUPTCY); SALTER v WETTON **[2011] EWHC 3192 (CH)**
[2012] BPIR 63
Chancery Division (Leeds District Registry)
Briggs J
2 December 2011
Transaction at an undervalue — Presumption of insolvency — Whether bankrupt cash-flow or balance-sheet insolvent at the time of the transaction or in consequence of it — Rebuttal of presumption — Insolvency Act 1986, s 341(2)

S and C were the joint owners of a property, holding it on trust for themselves in equal shares. By a transfer dated 4 April 2006 all C's interest in it was transferred to S. On 5 September 2008, a bankruptcy order was made against C on his own petition. W, C's trustee in bankruptcy, applied to set aside the transfer as a transaction at an undervalue pursuant to s 339 of the Insolvency Act 1986 (the Act). It was common ground that the transfer of the property was at an undervalue. The judge held that S and C were associates within the meaning of s 435(5) of the Act so that, pursuant to s 341(2) of the Act, C was to be presumed to be insolvent at the time of the transfer (or to have become insolvent in consequence of it) unless the contrary was shown. W asserted that C had an alleged debt to a firm of solicitors in the amount of £70,000 odd plus interest, which ultimately was resolved by a judgment against C in December 2010 and demonstrated W's insolvency at the time. No other debt was relied upon in support of the application. The judge found that the debt was not a liability of C in April 2006, although he became liable to pay it at a later date. The judge determined that C was not cash-flow insolvent in April 2006, but found that the statutory presumption as regards balance-sheet insolvency could only be rebutted if S could adduce evidence sufficient to enable a positive balance sheet to be created. As S had not done so, the statutory presumption had not been displaced, and W's application was allowed. S appealed.

Held – allowing the appeal and dismissing W's application –

(1) There was an irreconcilable inconsistency between the judge's conclusions on cash-flow and balance-sheet insolvency. A person might be cash-flow solvent but balance-sheet insolvent, or vice versa, at any particular time. But the finding that C was cash-flow solvent was based upon the conclusion that at the material time, C had no debts at all. Provided that a person had some assets, however illiquid, he could not be balance-sheet insolvent if he had no debts. The inconsistency between the finding (for cash-flow solvency) that there were no debts and the finding (for balance-sheet solvency) that there were significant but undisclosed debts undermined the judgment as a whole.

(2) It was unfair for the judge to have decided the case by reference to C's undisclosed debts when S had succeeded in relation to the only debt relied upon by W as part of his case. The inconsistency in the judge's judgment fell to be resolved, as a matter of procedural fairness, in favour of S.

(3) On the evidence, C was probably both cash-flow and balance-sheet solvent at the material time.

RUBIN (TRUSTEE OF DWECK) v DWECK AND ANOTHER
[2012] BPIR 854
Chancery Division
Registrar Jones
18 April 2012

Transaction to defraud creditors — Whether conditions required for purposes of s 423 of the Insolvency Act 1986 satisfied

LD was made bankrupt on 8 December 2008 in the wake of a judgment against him in commercial litigation and the applicant, R, was appointed as his trustee in bankruptcy. R wished to challenge the transfer by LD of his interest in the family home to his wife, CR on 28 July 1995 on the basis that it was a transaction entered into in breach of s 423 of the Insolvency Act 1986. R argued that the transfer of the property (which at the time was registered in the sole name of LD) had been for nil consideration and was made in order to protect the assets of LD, who was about to embark upon a speculative business venture. LD and CR claimed that CR was already the 50% beneficial owner of the property as it had been acquired in 1982 with the aid of a bequest from his late father and a gift from his mother intended to benefit LD and CR jointly. Furthermore, it was claimed that the subsequent 1995 transfer into the sole name of CR was carried out pursuant to a promise made by LD in 1988 in connection with the domestic arrangements of LD and SR. Those arrangements were made in the aftermath of a heart attack suffered by LD in 1988 as a quid pro quo for CR agreeing to become the main financial provider for the family whilst he worked at home on his new business project. LD and CR also claimed that the transfer, which was made by LD in 1995, was also precipitated by an ultimatum from CR, who demanded that he carry out his earlier promise otherwise she would leave him. CR was said to be concerned that LD might use the family home as security for business loans. In support of his case, R pointed to email correspondence between LD's former solicitor and LD's son some 14 years after the event, which suggested that the 1995 transfer was intended to ring fence LD's assets.

Held – dismissing the application –

(1) CR was, on the evidence, a beneficial owner of a half share in the property before the transfer into her sole name in 1995. The presumption that LD as the registered owner was the sole beneficial owner was rebutted on the facts. *Stack v Dowden* [2007] UKHL 17 applied.

(2) For the purposes of an application under s 423 of the Insolvency Act 1986: (a) the limitation period only began to run from the date of the bankruptcy order; (b) a promise to forbear from taking matrimonial proceedings could constitute valuable consideration; (c) the central issue was whether a substantial purpose of the transaction was to put assets beyond the reach of a person who might at some time make a claim against him; (d) the court enjoyed a broad discretion in determining relief.

(3) The evidence, which had to be assessed with caution due to the time interval involved, did not support the defence that the transfer represented the belated carrying out of a promise made to CR in 1988. However, the evidence established that the transfer in 1995 was the result of the ultimatum given by CR to LD who proposed divorce because she was bearing too much of the family burden. It was not linked to the business ventures of LD (which were still some way off being developed). The conflicting evidence as to the purpose of the 1995 transfer, relied on by R, in the form of emails sent years later by a solicitor who had acted for LD, which suggested that LD had intended to ring fence his assets in anticipation of his business venture was outweighed by the evidence submitted by LD and CR. The purpose of the transfer was not to defraud creditors but to acknowledge CR's sacrifices and prevent the divorce.

(4) Although it was not necessary to determine whether the transaction was at an undervalue in view of the above findings, the court would have found that CR by not pursuing a divorce had provided some consideration (albeit immeasurable) which was not less than the value of the beneficial interest transferred to her. *Papanicola v Fagan* [2008] EWHC 3348 (Ch) applied.

WILLIAMS (TRUSTEE IN BANKRUPTCY OF TAYLOR) v (1) TAYLOR (2) RAINES **[2012] EWCA Civ 1443**
[2013] BPIR Issue 1
Court of Appeal
Ward, Lloyd and Rafferty LJJ
23 October 2012

Bankruptcy – Transaction defrauding creditors – Whether statutory purpose made out – Insolvency Act 1986, s 423

T married R in September 2001. They each had children and properties from previous marriages. T was an accountant, who had retired as a director and employee from the family company earlier in 2001. Thereafter, he had spent time renovating his solely owned property (the Property) which R had demanded that he do before she and her children would move into it. Upon being asked to return to the company in mid-2002, T invested £120,000 by way of capital, but in April 2003 it went into creditors' voluntary liquidation. In April 2003, the Property had been subject to mortgages which secured some £310,000 or so, including the amount for which T would or might be liable by way of counter-indemnity in respect of a guarantee given by National Westminster Bank in favour of Lloyds of London, where T had been a Name until 2001, but in respect of which he remained liable under the run-off arrangements under Lloyds for at least three years after that date. At the time of the transfer, these liabilities, other than the liability in respect of the Lloyds guarantee, were refinanced by a mortgage loan from Manchester Building Society for some £310,000. That had priority to the security for the Lloyds guarantee. By a transfer dated 23 April 2003, T transferred the Property to R and himself, to hold on trust for themselves as tenants in common in equal shares. The consideration was expressed to be not for money or anything which had monetary value. By a declaration of trust dated some three weeks later, it was recorded that the transfer was to reflect R's interest in the Property, and she was stated as having paid £120,000 after the marriage to pay for building work to extend and improve the Property and as having lent £120,000 to the family company, guaranteed by T, which was still outstanding. The improvement works were stated to have increased the value of the Property by more than the amount of their cost, and that was acknowledged to be at least one-third of the current value, which was put at £850,000, with the share being put at £305,000, somewhat more than one-third, which would have been £283,000. The aggregate of the value of the Property attributable to the improvement works, and the amount of the loan to the company, was recorded as equating to a half-share in the property, therefore, accounting transfer into joint names on trust to themselves in equal shares. Further, T accepted that the burden of the secured liability was to be borne by his half share, in priority to that of R. It was also recited that T was able to pay his debts as they fell due and that his assets exceeded his liabilities. The Property was sold in 2007, and a second property bought in R's sole name. The Property was sold for a gross sum of £900,000, a net sum of just over £890,000, providing half shares of just over £445,000 each. The redemption of the mortgage and the National Westminster Bank's second charge absorbed all of T's half share and £8,500 of R's half-share. The second property cost £350,000 plus costs. R lent T £42,000 out of the balance, and received the rest of just over £31,500. A bankruptcy order was made against T on his own petition on 6 April 2009. By a claim brought under s 423 of the Insolvency Act 1986, W, T's trustee in bankruptcy, sought to set aside the transfer and the declaration of trust, thereby effectively seeking to recover for the benefit of the creditors of T the second property plus the £31,500. On 2 November 2011 HHJ Hodge QC (sitting as a High Court Judge) dismissed the application. W appealed.

Held – dismissing the appeal –

(1) The court could only make an order under s 423 of the Act in relation to a transaction entered into by a person for the purpose (a) of putting assets beyond the reach of a person who was making, or might at some time make, a claim against him or (b) of otherwise prejudicing the interests of such a person in relation to the claim which he was making or might make. That purpose did not have to be shown to be the sole or dominant purpose, but it had to be a real, substantial purpose of the transaction. *Hashmi v The Commissioners for Inland Revenue* [2002] EWCA Civ 981 applied.

(2) The declaration of trust was intended to give effect to the arrangements already made between the parties, and the process which led to the trust being declared was initiated before the creditors' voluntary liquidation of the family company. The judge held that no part of T's

purpose in entering into the transfer and the deed of trust was to escape his liabilities. W's appeal was fairly and squarely a challenge to the judge's findings of fact, founded on contentions that the judge's conclusions of fact as to the absence of the statutory purpose, as an intention on the part of T, could not stand in the face of a number of objective indicators.

(3) The objective factors did shift the evidential burden, in the sense that if there had been no evidence in answer to that of W based on the documents and the objective contemporary circumstances, it would have been a legitimate inference that the statutory purpose was at least a substantial purpose of T in entering into the transaction. But there was evidence adduced on the other side, and the question was therefore not to be analysed in the absence of such evidence. It came down to a question of the judge's treatment and assessment of that evidence in that context. The substantial proposition that the judge came to untenable, or at least unreasoned, conclusions of fact in considering the evidence of the witnesses could not be accepted.

(4) It could not be said that the judge failed to understand the primary points in the case, or that he had no regard to them in coming to the conclusions that he reached as to the acceptance of T's and R's evidence of the prior agreements and otherwise. The evidential process was not easy or straightforward, and it might be that a different judge would have come to a different conclusion as to the credibility and reliability of the witnesses.

(5) Ultimately, the appeal came down to saying that the objective factors were so powerful that the judge could not properly have believed the respondents as to either the existence of the prior agreements or the absence of the statutory purpose from T's motivation in 2003. It was for the judge to consider whether he did believe them, having heard the evidence. He did so. His conclusion could not be successfully challenged.

HAFIZ v INGRAM (TRUSTEE IN BANKRUPTCY OF HAFIZ) **[2012] EWHC 274 (CH)**
[2012] BPIR 1116
Chancery Division
Roth J
17 January 2012
Bankruptcy — Discharge — Suspension of discharge — Interim order — Insolvency Rules 1986, r 6.215

This was an application for permission to appeal an order in the Romford County Court on 2 June 2011, whereby on the application of I as trustee in bankruptcy of H the district judge had suspended the discharge of H 'until further order of the court'.
I's application, effectively filed on 24 May 2011 and with a return date of 2 June 2011, sought permission to serve the application on short notice and an order that the period before discharge be suspended indefinitely or until the court saw fit but not before the fulfilment of various conditions being the supply of information and cooperation by H. Although H did not personally receive a copy of the application and evidence, the papers were sent to the solicitors on the record as acting for H on 26 May 2011. The district judge did not make an order abridging time for service but made the order set out above. It was however common ground for the purpose of this hearing that such an order could not stand as it did not comply with s 279(3) of the Insolvency Act 1986. I sought an order for interim suspension with directions for further evidence on the substantive issue and a further hearing to determine the substantive relief.

Held – granting permission to appeal and varying the order of the district judge to substitute an interim suspension order as well as giving directions for a rehearing of the application to be transferred to the High Court [1] –

(1) Whilst H had been served through his solicitors on the record, such service was short and no order giving permission had been given. H had not had proper time to respond. Furthermore, there was no evidence that the Official Receiver had been served as required by r 6.215(5) of the Insolvency Rules 1986.

(2) Given that it was common ground that the order could not stand in its present form, and following an opportunity for further evidence would have to be varied, it was necessary to consider whether to make an interim suspension order pending the substantive hearing. In that regard the test to be applied was that derived from *Bagnall v Official Receiver* [2003] EWCA Civ 1925, namely whether there were reasonable grounds to consider that a suspension order would be ordered at a substantive hearing.

(3) Given that H had indicated at the hearing that there were still some outstanding matters on which his cooperation had not yet been completed, it seemed that there were reasonable grounds to conclude that an order would be made at a further hearing, which conclusion justified the making of an interim suspension order.

***BRAMSTON v HAUT* [2012] EWCA CIV 1637**
[2013] BPIR ISSUE 1
Court of Appeal
Rix, Arden and Kitchin LJJ
14 December 2012

Bankruptcy — Automatic discharge — Undischarged bankrupt seeking to suspend automatic discharge to allow consideration of proposal for a post-bankruptcy individual voluntary arrangement — Whether trustee in bankruptcy acting unreasonably in refusing to seek or support suspension — Whether jurisdiction for undischarged bankrupt to apply for suspension — Insolvency Act 1986, ss252, 256, 256A, 279(1), (3), (4), 303(1), 363

A bankruptcy order was made against H on 4 April 2011 on an HMRC petition. On 9 August 2011 H gave notice to creditors of a meeting on 6 September 2011 to propose an individual voluntary arrangement (IVA). B was appointed as H's trustee in bankruptcy at a creditors' meeting on 11 August 2011. On 31 August 2011 B applied for directions under s 363 of the Insolvency Act 1986 (the Act) requiring H to withdraw the proposal and preventing H from making any further proposal for an IVA for 3 months, on the basis that B had a number of concerns as to the accuracy of the information contained in the proposal, in particular that H had not provided full and accurate information as to his assets, that some of the creditors' claims had not been properly substantiated and that the proposal contained inaccurate or misleading information. On 2 September 2011, the deputy registrar made the order sought. Thereafter, investigations into H's affairs continued, including by a public examination. On 22 March 2012 a person who claimed to be a creditor of H in the sum of £561,733 sent a request to B pursuant to s 298 of the Act for B to summon a creditors' meeting to consider removing B as H's trustee. On 28 March 2012 H's solicitors sent a draft of a second proposal for an IVA to B, requesting comments by 4.00 pm the next day since, as that proposal had to be issued within a year of the bankruptcy order, H intended to issue it on 30 March 2012. A member of B's staff responded that there were still concerns, as the proposal was not substantially different from the first, and that full details of H's assets and liabilities had still not been provided, nor provision for B's costs and legal fees. It was also noted that an application for the interim suspension of H's discharge would need to be made, as it would not be possible for the meeting of creditors to agree the IVA post-discharge. Correspondence then ensued as to whether H could apply under ss 279, 303 or 363 of the Act for such suspension. H's application was issued on 3 April 2012 with a return date of 17 April 2012. Accordingly, without notice on 3 April 2012, H obtained an order from Arnold J suspending his discharge from bankruptcy until 15 May 2012, or further order in the meantime, with permission to B to apply to set aside or vary it on 2 clear days' notice. At the hearing of H's application on 10 May 2012, which took place a few hours before the adjourned creditors' meeting to consider the IVA proposal, B sought to set aside the without notice order, and raised issues as regards H's affairs, at least some of which H accepted appeared to warrant further investigation by B. Arnold J dismissed the application to set aside the without notice order and suspending H's discharge for 6 weeks to allow the proposal to be considered, and ordered B to pay H's costs. B appealed.

Held – allowing the appeal –

(1) The purpose of a suspension under s 279(3) of the Insolvency Act 1986 ("the Act") was plainly connected to a failure by a bankrupt to comply with his obligations under Part IX of the Act. The subsection contemplated an application being made by the trustee or the official receiver, not by the bankrupt. A purpose of the power conferred by s 279 of the Act was to extend the period of the bankruptcy and to ensure that the bankrupt continued to suffer the disabilities arising from his undischarged bankruptcy until he complied with his obligations. *Shierson and Birch v Rastogi (a bankrupt)* [2007] EWHC 1266 (Ch) considered.

(2) The order made on 3 April 2012 was not linked to the failure by H to comply with his obligations; nor was it made to ensure that H continued to suffer from the disabilities of being an undischarged bankrupt until he had fully complied with those obligations. Nor is it suggested that it was made for any other purpose that might be within s 279(3) of the Act. Instead it was made to give H time to put before the creditors in his bankruptcy an IVA proposal and thereafter secure the annulment of his bankruptcy order, and was impermissible and outside the scope of the jurisdiction conferred by s 279(3) of the Act.

(3) The judge was faced with a conflict of evidence which he had to resolve in order to satisfy himself that H had failed or was failing to comply with his obligations. But he did not do so. The judge wrongly conflated the separate and distinct issues of jurisdiction and discretion and wrongly failed adequately to address the former.

(4) The proper gateway for H to have made an application for the suspension of his bankruptcy lay in the provisions of ss 252-256 of the Act. In an appropriate case the court could make an order under s 252 of the Act suspending the automatic discharge of the bankrupt for a specified period. It was open to H to make an application for an interim order under s 252 of the Act because, although he had made an IVA proposal within the preceding 12 months, it was made by the non-interim order procedure of s 256A of the Act. However, while H's nominee did in fact submit a report purportedly in compliance with s 256 of the Act, the report did not comply with it. *Hook v Jewson* and *Greystoke v Hamilton Smith* applied. If H had made an application for an interim order under s 253, it would inevitably have foundered.

(5) Thus the judge fell into error in concluding that the court had jurisdiction under s 279(3) of the Act to make an order suspending H's discharge from bankruptcy for a period of six weeks in order to give him time to place the second proposal before his creditors.

(6) The court was properly reluctant to interfere with the day to day administration by a trustee of the bankruptcy estate. It was only be right for the court to interfere with the decision the trustee in bankruptcy has taken if it can be shown he has acted in bad faith or so perversely that no trustee in bankruptcy properly advised or properly instructing himself could so have acted, alternatively if he has acted fraudulently or in a manner so unreasonable and absurd that no reasonable person would have acted in that way. *Re Edennote Ltd* considered. *Osborne v Cole* applied. The test was not one of *Wednesbury* unreasonableness.

(7) The judge fell into error in adopting the *Wednesbury* unreasonableness test. It was wholly impossible to say that B acted perversely in refusing to allow H to make an application on his behalf under s 279(3) of the Act for the purpose of putting the second proposal before his creditors when that provided no jurisdictional basis for such an application. The functions of B were to get in, realise and distribute the bankrupt's estate in accordance with the provisions of Chapter IV of Part IX of the Act and to exercise his discretion in carrying out those activities and in administering the estate. It was not one of the duties of a trustee to respond affirmatively to a bankrupt's request that he co-operate in the promotion of a proposal for an IVA. Furthermore, in the circumstances of this case, B believed that H was in continuing default of his obligations and that the second proposal was defective, prejudicial to the interests of the creditors who had no personal connection to H and appeared to be designed to thwart his efforts to carry out a proper investigation into H's affairs. This was far from a case where he had acted perversely or as no other reasonable trustee would have acted.

(8) Arnold J ought to have set aside his earlier order of 3 April 2012 and he ought not to have ordered B to pay H's costs.

***HAYES v HAYES* [2012] EWHC 1240 (Ch)**
[2012] BPIR 739
Chancery Division
His Honour Judge Pelling QC (sitting as a High Court judge)
23 March 2012

Bankruptcy – Family proceedings – Discharge – Application under Insolvency Act 1986, s 281(5) – Insolvency Act 1986, s 281 – Insolvency Rules 1986, r 12.3

Following divorce proceedings, a costs order was made against the appellant husband which costs were assessed in the sum of £35,721.19. Although not then provable, a statutory demand and petition were served. The appellant did not oppose the making of a bankruptcy order. There followed an annulment application but this was dismissed because by then r 12.3 of the Insolvency Rules 1986 (the Rules) had been amended to permit, inter alia, a proof in respect of costs and it was considered unfair to the respondent wife to annul the order simply for her to petition again. The appellant was discharged from bankruptcy on 23 March 2006. The respondent served a second statutory demand in respect of costs and interest. The appellant applied to set aside the statutory demand together with an application for a discharge of the debt, the subject of the statutory demand, under s 281(5) of the Insolvency Act 1986 (the 1986 Act) but this was dismissed. Permission to appeal was given by the registrar but the appeal was only pursued in relation to the application under s 281(5).

Held – dismissing the appeal –

(1) The court had jurisdiction to entertain the application even after discharge from bankruptcy, but when considering the application it was open to the court to consider, as part of the exercise of its discretion, the lapse of time between discharge from bankruptcy and the making of the application combined with the reasons for delay as well as its effect, including the effect on the ability of the Official Receiver to provide a report.

(2) If an order were made under s 281(5) of the 1986 Act, it would mean that the debt would be unenforceable so that if there were significant income or other sum received by the debtor none of them would be payable to the creditor. This would mean that a discharge order under s 281(5) would be disproportionate unless the court could be confident that the debtor would never be in receipt of income or capital. This was always likely to be a significant factor when considered alongside the position under s 281 of the 1986 Act and r 12.3 of the Rules to the effect that family orders survived discharge from bankruptcy and remained enforceable.

(3) Although likely to carry insignificant weight when weighed with the proportionality issue in (2) above, a relevant factor for the court to consider was the time which had elapsed since the relevant debt arose.

(4) The other factor in the present case was the risk of abuse of the bankruptcy process derived from any subsequent bankruptcy order, but taking into account the controls available in relation to such process such risk did not outweigh the other factors in favour of the creditor.

(5) The registrar was entitled to exercise her discretion to refuse the application.

***McROBERTS v McROBERTS* [2012] EWHC 2966 (Ch)**
[2013] BPIR Issue 1
Chancery Division
Hildyard J
1 November 2012

Bankruptcy – Discharge – Release from debts - Debt arising from family proceedings not released by discharge – Debtor's application for release – Relevant criteria to apply –Insolvency Act 1986, s 281(1), (5)

By a consent order dated 1 April 2003, resolving their respective financial claims ancillary to their divorce, among other things, the applicant, H, was ordered to pay to the respondent, W, a lump sum of £450,000, in stated instalments finishing on 31 March 2009. Payment of interest was also provided for, together with a provision that if H failed to pay any instalment within 14 days of the due date, the whole of the lump sum then outstanding should become payable forthwith. The consent order also provided for H to transfer to W all his legal and beneficial interest in their matrimonial home, subject to the mortgage on it and for W to transfer to H all her shares in a company. H did not maintain the instalment payments. In March 2006 a bankruptcy petition was presented against H by one of the company's trade creditors alleging non-payment of personal guarantees, and a bankruptcy order was made on it on 18 September 2006. W submitted a proof of debt in the sum of £244,966 being the amount then outstanding in respect of the lump sum and interest required to be paid by H. However, there was no likelihood of any distribution to creditors in H's bankruptcy. W received nothing in respect of her proof of debt, and received nothing further. H was discharged from bankruptcy in September 2007, whereupon he was released from all bankruptcy debts provable in his bankruptcy except as provided in s 281(5) of the Insolvency Act 1986 (the Act), which covered the debt arising from the consent order made in family proceedings. H applied under s 281(5) of the Act to be released from that debt.

Held – dismissing the application –

(1) The ordinary or default position was that an obligation to pay a lump sum arising under an order made in family proceedings was not released by discharge of the bankrupt. But the court undoubtedly had jurisdiction to provide for release to such extent and on such conditions as it might direct, the jurisdiction so conferred being discretionary.

(2) As far as the application for release was concerned, it could be made at any time after the date of the bankrupt's discharge. The discretion was unfettered, and had to be exercised by reference to all the relevant circumstances as they existed at the date when the application was determined, although the following circumstances would be relevant: (a) any lapse of time between the date when the discharge occurred and the date of any application for release, and the reasons for any delay; (b) the future earning capacity of the applicant, the possibility of some future income or capital receipt or windfall, the prospect accordingly of the obligation being fulfilled in whole or in part if not released, and in the round whether there was any good reason for maintaining the obligation; (c) the risk of the respondent to the application using the fact of the obligation (if not released) to harass the applicant, for example by seeking to diminish the applicant in the eyes of the community, or his future prospects, by reference to the stigma still relating to bankruptcy, or by bringing new and abusive bankruptcy proceedings calculated to restrict the applicant in building a new life; and (d) the duration of time that had elapsed since the relevant obligation arose. *Hayes v Hayes* [2012] EWHC 1240 (Ch) applied.

(3) The ultimate balance to be struck was between (a) the prejudice to the respondent/obligee in releasing the obligation if otherwise there would or might be some prospect of any part of the obligation being met and (b) the potential prejudice to the applicant's realistic chance of building a viable financial future for himself and those dependent upon him if the obligation remained in place.

(4) In striking that balance, the burden was on the applicant, and unless satisfied that the balance of prejudice favoured its release, the obligation should remain in place. That followed from the fact that continuance was the default option, and from the rationale of excluding such obligations from automatic discharge. The purposes for which the discretion was conferred did

not include review of the merits or overall fairness of the underlying obligation. If circumstances had changed such as might suggest that the obligation might fairly be reviewed or modified, any such review or modification of the underlying obligation should be reserved to the matrimonial courts in the exercise of its jurisdiction to do so.

(5) On the facts, the question really was whether there was so little prospect of the outstanding lump sum being paid, even in part, that its release would not substantively prejudice W but would materially advantage H in a realistic effort to build a viable financial future for himself and his dependents.

(6) The evidence did not encourage the conclusion that H had done everything he could to discharge his obligations to his ex-wife. It encouraged a sense that H's finances might not be entirely transparent and that he might well be able to generate funds or means of support in the future which might be enough both for his and his family needs and also to begin to enable him to reduce the lump sum outstanding. H did not provide any evidence of some future enterprise or activity that he had in mind and which would be blighted if the obligation to W were not released. He offered no special or particular reason why the continuation of the obligation would restrict him moving forward, given the flexibility that W had shown in the past.

(7) In all the circumstances of this case, the balance remained in favour of keeping in place the obligation and there was no sufficient reason to override the default provision.

Paul French
Guildhall Chambers
February 2013