

“The only limit to our realisation of tomorrow will be our doubts of today”

Realisation issues in personal insolvency

Simeon Gilchrist, Edwin Coe LLP
Paul French, Guildhall Chambers

Introduction

1. The recession and plummeting property values, against the background of the “use it or lose it” and low-value homes provisions introduced by the Enterprise Act 2002, have created some difficulties for trustees in bankruptcy seeking to realise the matrimonial home. Recent developments as regards annulments of bankruptcy orders based on local authority petitions for unpaid council tax may also give rise to issues. In this paper, we seek to set out the present difficulties and suggest some solutions.
2. The topics covered are:-
 - 2.1 Use it or lose it after *Lewis v. Metropolitan Property Realizations Ltd* [2008] EWHC 2760 (Ch); [2009] BPIR 79.
 - 2.2 Charging orders, both under the Charging Orders Act 1979 and s.313 of the Insolvency Act 1986 (“the Act”).
 - 2.3 Trustee’s costs of realisation against the background of annulments.
 - 2.4 Human rights and the matrimonial home revisited

Use it or lose it; *Lewis*

3. In *Lewis v. Metropolitan Property Realizations Ltd* [2008] EWHC 2760 (Ch); [2009] BPIR 79. In that case, the trustees and the respondent entered into a deed whereby the trustees assigned the estate's half interest in the property to the respondent in consideration of the sum of £1 and a further 25% of the net proceeds of sale of the property would be paid by the assignee to the assignor. The trustee had been reluctant to enter into litigation to realise the interest in the property without funding from creditors because of a potential equity of exoneration argument which, if successful, would wipe out the value of the trustee's interest¹. That funding was not forthcoming. The deed was entered into on the last day before the expiry of the lose it or lose it period, and the respondent was the majority creditor of the bankrupt. The bankrupt and his wife sought a declaration against the respondent that the bankrupt's interest had reverted in him because there had not been a realisation within the meaning of s.283A of the Act.
4. Whilst supportive of some of the issues that the bankrupt wished to argue, ultimately the Court concluded that as the trustee had assigned the entirety of the bankrupt's interests in the property. Albeit for deferred consideration, there had been a realisation for the purposes of s.283A(3)(a) of the Act. It was understood that there were policy considerations at stake, and that the terms of the deed meant that the bankrupt and his wife faced the threat of a sale hanging over their heads for a number of years, the very thing that the use it or lose it

¹ As a low value home, with the trustee's interest at less than £1,000, the Court would have been bound to have dismissed the application for a possession order; see s.313A of the Act.

provisions were implemented to prevent, But the Judge observed that this was nothing to do with the terms of the deed and the fact that there had been a sale for deferred consideration; there would have been a similar threat were there to have been an absolute sale for an immediate cash sum. The only way to have avoided such a risk was for the interest to have been sold to the bankrupt or a member of his family. The Judge was wary of the fact that such a finding might generate a market for a bankrupt's property interest in similar cases but expressed the view that simply because there was a power to act in a particular way, it was not necessarily the case that such a power would be exercised in all similar cases. She also observed that the purchaser may well face difficulties in realisations, because of the limited terms of the Trusts of Land and Appointment of Trustees Act 1996; a possession order was not bound to be ordered to assist in a sale of the property.

5. It is true that the judgment sits fairly and squarely within the precise wording of what s.283A actually says. At the end of the three-year period, the bankrupt's interest in the property shall revert in him unless, within that period, the trustee "realises" the interest. Here, there had been a realisation, albeit to a creditor, without an open market marketing exercise, for a deferred consideration, where the trustee had been reluctant himself to bring proceedings.
6. Against that background, there is much in the decision that is unsatisfactory. The clear policy behind the use it or lose it provisions was to benefit bankrupts and their families and to prevent the practice of trustees allowing the family home to remain vested in the bankruptcy estate for substantial periods of time such that any increase in value in the property accrued for the benefit of the estate, especially where at the outset there could have been no realisation². The provisions were intended to promote certainty for bankrupts and their families; indeed it could even be said that it was part of the policy of promoting a fresh start for bankrupts. The transaction gives the impression that the trustee was, with the assistance of a creditor, sheltering an asset outside the bankruptcy estate for the purposes of realising later, when it suited the purpose of the bankruptcy, so as to avoid the effect of the statute. The realisation to the bankruptcy estate is also controlled entirely by the whim of the purchasing creditor, outside of the control, of the trustee (or, for that matter, the Court, under ss.303 or 363 of the Act). Arguably, since the provisions were brought in for the protection of the bankrupt and his family, they should be interpreted from his point of view, such that there should be certainty after three years, rather than continued risk.
7. Perhaps the real problem with the sale in *Lewis* was the manner in which it was conducted, rather than the end result. There was no marketing effort, nor was there any approach to the bankrupt in accordance with *Edenote* principles; although there is no evidence that the bankrupt or his family would have been in a position to make a competing offer or that any such offer would have been acceptable to the trustee. The deed appears to have been motivated by the trustee's realisation that something had to be done at the last minute, rather than by any motivation to achieve the best value for creditors, even though in the absence of funding the trustee himself would not have issued proceedings.
8. It seems pretty clear that in *Lewis*, the Court would not have had countenanced an application under s.283A(6) for an extension of the three year period. The problem was caused precisely because of the operation of the statute, in particular s.283A and 313A (as

²

Indeed, in *Holtham v. Kelmanson* [2006] EWHC 2588 (Ch); [2006] BPIR 1422, Evans-Lombe J approved of the conduct of a trustee delaying in such circumstances: "[The trustee] cannot be criticised for delaying taking steps on a rising property market when the result of doing so has been that the creditors may receive payment in full of their debts or something very near it. The trustee in bankruptcy's primary duty is to the creditors. Had the Official Receiver taken steps to remove [the bankrupt] when the property was subject to negative equity there would, no doubt, have been complaints by [the bankrupt] that to do so was oppressive without achieving anything for the creditors."

regards low value homes). It is unlikely that the Court would have extended the three year period to avoid the impact of the perceived problems that these provisions were specifically directed at. Indeed, there is little guidance as to when time might be extended. There are no circumstances prescribed in the Act or in the Insolvency Rules 1986. In *Whig v. Whig* [2007] EWHC 1866 (Fam); [2007] BPIR 1418, time was extended pending the hearing of the wife's complex application to annul her husband's bankruptcy, where the trustee's rights would otherwise have lapsed during the period pending the hearing of the annulment application. But, that is a rather different case. It is easy to envisage that the trustee might obtain an extension of time where there are continuing difficulties about investigating title, say, where the land is unregistered or there are issues about adverse possession. But, in the normal run-of-the-mill case with clearly identifiable registered land, it is difficult to see the precise circumstances in which an extension of time might be allowed.

Use it or lose it; other issues

9. Another issue, not canvassed in *Lewis*, is the extent to which the use it or lose it provisions impact upon transaction at an undervalue claims relating to the matrimonial home, and in particular limitation issues regarding such actions. It is easy to envisage the following scenario:
 - 9.1. H and W buy a property with a 90% mortgage, purchased on a beneficial joint tenancy.
 - 9.2. By a gift, H transfers all his interest in the property to W, who thereafter maintains the mortgage payments, possibly even remortgaging it in her own name with a new lender.
 - 9.3. Within two years, a bankruptcy petition is presented upon which a bankruptcy order is made against H.
 - 9.4. A trustee in bankruptcy is appointed.
 - 9.5. The property has recently plummeted in value. It may be the subject of negative equity already. It may be subject to negative equity in a year's time when the transaction at an undervalue proceedings might be heard. It may be subject to negative equity anyway once W's equitable accounting issues are taken into account.
10. But first, whatever relief that the trustee might seek as regards the gift and subsequent acts, namely either a proprietary order as regards the property or a personal order as regards W, there is no guarantee that the Court would actually grant relief under s.342 of the Act.
11. In *Singla v. Brown* [2007] EWHC 405 (Ch); [2008] Ch 357, [2007] BPIR 424, M-B bought purchased the freehold of the house which she had occupied for some years as a secure tenant, with the benefit of a discount. She intended to purchase it in her sole name but, on the insistence of the mortgage company, the property was initially held by herself and her partner, B, as joint tenants. When M-B learned of the effect of the joint tenancy, she signed and gave to B a notice of severance of the joint tenancy which stated that the property would thereafter be held by them as tenants in common in unequal shares as to 99% for her and 1% for B. B signed a document acknowledging receipt of the notice of severance and accepting the apportionment of the beneficial ownership contained in it. Subsequently, B was made bankrupt. The trustee applied to set aside the transfer of 49% of the beneficial interest to M-B as a transaction at an undervalue. The application was dismissed. The

Judge, Thomas Ivory QC (sitting as a deputy judge) referred to the Court's discretion as to whether the make an order under s.342 of the Act even if all the grounds for a transaction at an undervalue under s.339 of the Act were made out. The Court regarded the case as exceptional, taking into account the following factors:-

- 11.1. M-B had lived in the house for many years prior to her relationship with B as a secured council tenant and had purchased it at a discount which reflected the value of that tenancy;
- 11.2. B had made no capital contribution to the purchase and had not contributed to the mortgage repayments in the years immediately following the purchase (although the position in subsequent years was less clear);
- 11.3. the parties had not intended B to enjoy an interest in the house in the first place, such that the transfer into their joint names as joint tenants had represented a windfall for B; and
- 11.4. having regard to principles of equitable accounting, it was not obvious that a proprietary order would have resulted in a substantial net gain for the trustee in bankruptcy in any event.

Essentially, in the circumstances, the mere restoration of the half interest in the property to the trustee would not be the end of the case and the Court was satisfied that, in the circumstances, upon realisation the trustee would only be entitled to a minimal sum. In those circumstances, it was just to make no order.

12. So, in the absence of any unusual circumstances as regards how the property came to be acquired in the first place, the trustee will still have to overcome the hurdle of showing that after the application of the principles of equitable accounting, there would still be a substantial interest in the property worthwhile pursuing.
13. Also of note is the decision in *Re MDA Investment Management Ltd; Whalley v. Doney* [2003] EWHC 2277 (Ch); [2004] 1 BCLC 217, where an order was refused, on the basis that the company that had entered into the transaction at an undervalue was on the verge of collapse as the date of the transaction. It was held that:-
 - 13.1. even when a transaction at an undervalue was established, the remedy of restoration of the company to the position it would have been in if it had not entered into the transaction would not be granted if the company would have been in an even worse condition if it had not entered into the transaction at all;
 - 13.2. the Court's discretion under s.238(3) of the Act was limited to restoring the company to the position it would have been in if it had not entered into the transaction at all, not to reconstructing the position to what it would have been if the company, as well as not entering into the actual transaction, had entered into a different transaction instead; and
 - 13.3. since the company was on the verge of collapse at the time it entered into the agreement there would be no benefit in restoring it to that position.

Therefore, the liquidator's claim under s.238 of the Act was refused.

14. In that scenario, the trustee cannot enter in to a *Lewis* type sale, because until the transfer to W is set aside, there is nothing in the estate of any value that can be sold. The trustee cannot assign the transaction at a undervalue claim. There is a strong risk that the Court will

not make a proprietary order restoring H's half interest in the property to the bankruptcy estate, because that will not be worth anything. Can the trustee:

- 14.1. seek a monetary order for the Court, making W pay the value of H's interest in the property as at the date of the gift; or
 - 14.2. wait and do nothing, until limitation in respect of the transaction at an undervalue claim might expire after 12 years?
15. As regards remedy, s.339(3) of the Act provides that the Court shall, on an application for an order under s.339 of the Act in respect of transactions at an undervalue make such order as it thinks fit for restoring the position to what it would have been if the gift had not been entered into. Without prejudice to the generality of this, s.342(1) of the Act provides a non-exhaustive menu of relief available to the Court, such that the order may:-
- (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; ...
 - (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"

Thus, technically, the Court has the power to make either a proprietary order or a money order.

16. The Court does not start with a presumption in favour of any relief, but must fashion the most appropriate remedy with a view to restoring so far as practicable and just the position the parties would have been in if the gift had not been entered into the transaction. Importantly, the Court should not start with a presumption in favour of monetary compensation³. Indeed, the very premise of the decisions in *Re Thoars* and *MDA* was that the position should be restored to the pre-transaction position, not that the Court should re-write the bargain. However, in an appropriate case, even though the Court is reluctant to encourage the notion that a transferee in a transaction at an undervalue might take the risk and pay his way out of trouble later, in an appropriate case the Court will consider the payment of monetary compensation rather than a more proprietary-based remedy⁴.
17. Hence, the position usually adopted by the Court is to set aside the relevant transfer and deal with the consequences of that, rather than order the recipient to make a monetary compensation order to the trustee in bankruptcy representing the difference in values given and received as at the date of the transaction. That was the position in *Singla v. Brown*, where the Court made no order because, after restoring the property to the trustee, but making him the subject of equitable accounting, it was likely that he would end up with little⁵.
18. Although it has a wide discretion as to how to approach the granting of relief (if it exercises its discretion to do so) the Court is far more likely to grant proprietary-based relief. In *Pena*

³ See generally *Re Thoars (dec'd) (No. 2)*; *Reid v. Ramlort Ltd* [2004] EWCA Civ 800; [2005] 1 BCLC 331, [2004] BPIR 985, *Lord v. Sinai Securities Ltd* [2004] EWHC 1764 (Ch); [2005] 1 BCLC 295 and *Walker v. WA Personnel Ltd* [2002] BPIR 621.

⁴ See *Pena v. Coyne (No. 2)* [2004] EWHC 2685 (Ch); [2004] 2 BCLC 730, [2004] BPIR 1286, a case under s.423 of the Act. Although, it is to be noted that in that case the claimant did consent to the notion of there being a monetary order, even though the respondent had limited cash assets. It was recognised that, were the sum not to be paid, the claim would have to be restored for hearing as to potential alternative relief.

⁵ The notice of severance and receipt were given in February 2000, the bankruptcy order was made in March 2005 and judgment was handed down in March 2007. Therefore, there were at least two years of capital repayments and potential improvements to consider, if not seven years, on the basis that the bankruptcy estate would have to restore to M-B any value that she had added to the property in reliance upon the severance and receipt.

v. Coyne (No.2) a personal order for a sum of money was appropriate because all the relevant parties consented, as it was too difficult to unravel all the transactions that had been entered into subsequent to the impugned transaction⁶. The proposal offered a realistic and reasonable means of resolving a difficult issue. The Court will commonly make a personal order where the trustee is unable to assert a proprietary claim against a third party who has subsequently acquired the relevant property, because it can rely upon the protection of s.342(2) of the Act, being a good faith purchaser of the property without notice.

19. But, neither of these issues arises in the *usdal* case. The property is readily identifiable in W's hands⁷. To the extent that the remortgage with the new lender is an issue, that can be resolved by making orders as regards the partition of the enforceability of the that mortgage⁸, so no third parties have acquired rights over the property. Because the issue will be the value of the property as at the date of the gift, quantification of the claim would necessarily descend into a battle of experts' historic valuations⁹.
20. Accordingly, the Court would not commonly restore the position to what it would have been if H had not entered into the gift by making a personal order for payment of a sum of money from W, at the option of the trustee, simply because the property has gone down in value. That is not restoring the position. It is rewriting the bargain because the trustee does not want to seek to have the property restored to him.
21. So, can the trustee simply do nothing, and reassess the position in year 11? How does the use it or lose it period of 3 years affect this? As a matter of construction, the use it or lose it provisions do not apply precisely to the present scenario between H and W.
22. Any interest in the property, occupied by the bankrupt as his sole or principal residence as at the date of the bankruptcy order, was not comprised in "the bankrupt's estate" at that time, for H had transferred it away and it was vested entirely in W. The interest in the property reverted in the trustee under s.342(1)(a) of the Act would become part of the bankrupt's estate when ordered¹⁰. Given that the effect of s.283A(5) of the Act is that the trustee in bankruptcy would have three years from first becoming aware of that the relevant property existed and was vested in the bankruptcy estate, then one might have thought that, at the very least, he would have 3 years from such vesting to make his realisation¹¹.

⁶ Similarly, it is likely that in *Phillips v. Brewin Dolphin Bell Lawrie Ltd* [2001] UKHL 2; [2002] 1 WLR 143 an order for the payment of a sum of money would have been ordered. The asset transferred that was the subject of the impugned transaction was the stockbroking business of AJ Bekhor, which had long since been merged with the stockbroking business of the recipient, Brewin Dolphin.

⁷ Similarly, in *Segal v. Pasram* [2007] BPIR 881, an order was made restoring the one half beneficial interest in the property to the bankruptcy estate even though the relevant transaction was effected in September 1999, the bankruptcy order made in May 2000 and judgment handed down in June 2007; the property remained readily identifiable in the recipient's hands. In *Re Thoars*, since there were no obstacles to a straightforward reversal of the transaction, the most appropriate remedy was for the transaction to be set aside on terms that the respondent was entitled to recover the payments which it had made.

⁸ For example, if W borrowed more from the new lender than was required to discharge the original lender, then that extra sum might be ordered to be paid out of W's interest in the property first.

⁹ Indeed, in *Re Thoars*, the Court of Appeal, affirming the High Court decision, specifically determined that for the purposes of the transaction at an undervalue provisions, a transaction was caught whenever the Court was satisfied that, whatever might be the precise values, the incoming value was on any view significantly less than the outgoing value, and there was no implication in s.339(3)(c) of the Act that the Court was required to calculate the exact amount of the incoming or outgoing values. If the Court had to consider how much the respondent would have to pay in order to "buy off" the element of undervalue, the Court would have to carry out the precise exercise that the Court of Appeal said was not necessarily required by the statutory provisions.

¹⁰ Similarly, any sum ordered to be paid to the trustee would become part of the estate; see s.342(3) of the Act.

¹¹ Although, in most cases, the trustee would seek a possession order as part and parcel of the transaction at a undervalue proceedings.

23. But the terms of s.283A(1) of the Act are not so clear. The section applies where property which is part of the bankrupt's estate (which would be the case after the order under s.342(1)(a) of the Act) consists of a dwelling occupied by the bankrupt as at the date of the bankruptcy order (which is satisfied). So the section applies in this case. s.283A(2) states that such interest reverts in the bankrupt three years after the bankruptcy order. There is an argument that were a proprietary order to be made more than three years after the bankruptcy order, the effect would be that any interest in the dwelling-house thereby conferred would be retrospectively lost, since the precise terms of s.283A(1) of the Act do not require the interest in the dwelling-house to have formed part of the bankruptcy estate at the time of the bankruptcy order¹²; they only require the property to be occupied as a dwelling-house as at that date.
24. It seems to somewhat ridiculous that the Court would construe s.283A of the Act in such a way so that if it made an order under s.342 of the Act, s.283A of the Act would apply, somewhat retrospectively, so as to disentitle the trustee to the benefit of the relief claimed¹³. There appears to be only one re[ported case where, after the implementation of s.283A of the Act with effect from 1 April 2005, the Court has considered a transaction at an undervalue claim more than three years after the bankruptcy order was made; the argument was not raised¹⁴.
25. Similarly, it might be argued that, were the trustee to obtain relief under s.339 and 342 of the Act, but that the possession order claim was dismissed, then s.283A(4) of the Act might apply, reverting the interest in the bankrupt. Clearly, there would have been an application for a possession order or order for sale within s.283A(3)(b) or (c). The application would be dismissed. Therefore, there might be reverting in the bankrupt, as expressly contemplated by s.283A(4) of the Act.
26. In the circumstances, there are two potential solutions:-
- 26.1. the Court could retrospectively extend time under its powers under s.283A(6)(b) of the Act, so as to:-
- 26.1.1. validate the possession and sale proceedings; or
- 26.1.2. extend time further beyond the hearing for the purposes of enabling the trustee to realise the property on the back of the successful transaction at a undervalue proceedings
- as appropriate; or

¹² Nigel Braddock of Eversheds, in a short article in *Recovery*, Spring 2007, p.14 expresses the view that the terms of s.283A(1) of the Act require that the bankrupt's interest in the property be comprised in the bankrupt's estate as at the date of the bankruptcy, such that so it does not apply to a transaction at an undervalue claim where all the bankrupt's interest in the matrimonial home was transferred to his wife prior to the bankruptcy petition. This is supported by the authors of *Muir Hunter on Personal Insolvency* (loose-leaf edition) at para. 3-669, who suggest that the terms of ss.283A(2) and (5) of the Act suggest that the section is concerned only with property vested in the bankruptcy estate as at the date of the making of the bankruptcy order. However, it is suggested that s.283A(1) of the Act, which sets the conditions within which the section applies, does not say that.

¹³ A view supported by *Muir Hunter* at para. 3-669.

¹⁴ See *Papanicola v. Fagan* [2008] EWHC 3348 (Ch); [2009] BPIR 320. The trustee in bankruptcy's claim, based on ss.339 and 423 of the Act, was dismissed anyway, so the issue of relief did not really arise. However, the Judge did express views that, had the ground been made out, as in *Singla v. Brown*, he might have exercised his discretion against making any order. In all the other reported transaction at an undervalue cases relating to post-1 April 2005 bankruptcies, it appears that the application was heard, or at least issued, within three years of the bankruptcy order. Whether that has been done with knowledge or caution, or merely by accident, is not clear.

- 26.2. instead of making a possession order in respect of property that might have reverted in the bankrupt, the Court could make an order for a payment of money in lieu of a proprietary order.

But, as pointed out earlier, there is no guidance as to whether the Court would actually do this.

27. Whatever route the trustee adopts, there is a potential limitation issue. In principle, on an application to avoid the consequences of a transaction at an undervalue, the limitation period is 12 years, as it is a statutory remedy¹⁵. But where, in reality, the claim is for a sum of money, despite the fact that it is a statutory remedy, the limitation period is six years¹⁶. If the true aim of the trustee in bankruptcy's proceedings is the recovery of money (whether, in the case of a transaction at an undervalue, because the Court might not make a possession order or because the property is protected in the hands of a third party or, in the case of a preference, he merely seeks recovery of a sum of money from a paid creditor) the limitation period is six years.
28. Say the trustee waits until year 11 to issue the transaction at a undervalue proceedings, which he is strictly entitled to do. But, say W sold the property at arm's length in year 7, to a bona fide purchaser for value without notice who might have the protection of s.342(2) of the Act. There would then be no basis upon which the Court could make a proprietary order. The trustee would then be compelled to seek a personal money order. But, if the true aim of the proceedings is the recovery of money, the limitation period is six years¹⁷. The limitation period could have expired at the end of year 6, without the trustee actually knowing it at the time.
29. Also the Court could take the view that such conduct would be entirely contrary to the expectations engendered by s.283A of the Act. In *Lewis* the Court specifically considered that the sale of the trustee of the estate's interest in the bankrupt's property meant that the sword of Damocles continued to hang over the heads of the bankrupt and his family, and that a sale in such manner might be seen as an "easy escape route" for trustees seeking to salvage something at the end of the 3-year use it or lose it period and that it might seem contrary to the "use it or lose it" legislative purpose. It is an entirely justifiable view that the "use it or lose it" provisions are designed to benefit the bankrupt and his family. It would appear to be reasonably arguable that the manipulation of the manner of realisation as in *Lewis* or reliance upon the technical limitation entitlements, as in the case between H and W, would be contrary to the parliamentary objectives in the provisions, namely as supporting a "fresh start", of removing the family home from long-term vulnerability to the bankruptcy process, and to provide a cut-off date and consequent certainty for the bankrupt and/or his family.
30. So, against the background that Parliament will no longer allow a trustee to sit back and await the increase in value of the bankrupt's half-interest in the matrimonial home before taking steps to realise it, it can easily be seen why waiting nearly 12 years to issue an application to set aside a transfer of a bankrupt's half-interest in the matrimonial home as a transaction at an undervalue, whereas had the transaction not been effected, the trustee would only have been entitled to wait for 3 years, is rather objectionable.

¹⁵ See *Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144, *Re Nurkowski* (a bankrupt); *Hill v. Spread Trustee Co Ltd*, [2006] EWCA Civ 542, [2006] BPIR 789 and *Segal v. Pasram*

¹⁶ See *Re Priory Garage (Walthamstow) Ltd*.

¹⁷ See *Re Priory Garage (Walthamstow) Ltd*.

31. At the very least, if the Court does construe ss.283A and 339 of the Act, together with the Limitation Act 1980, as entitling the trustee to wait that long, the fact that he has done so may cause the Court to exercise its discretion so as to not make an order, even though the circumstances would warrant it. In *Re Byford (deceased)* [2003] EWHC 1267 (Ch); [2003] BPIR 1089, a pre “use it or lose it” case that was heard after Royal Assent was given to the Enterprise Act 2002, but before it came into force, Lawrence Collins J, as he then was, stated as follows at para. 15:-

“Parliament has now made it clear in the new section 283A of the Insolvency Act 1986 to be introduced by section 261 of the Enterprise Act 2002 (not yet in force) that it is undesirable for trustees to wait many years before resolving their rights in respect of the home of the bankrupt or his spouse. This introduces a general rule that the trustee must take steps to realise his interest in the home of the bankrupt or his spouse within three years of the bankruptcy, subject to specified exceptions. If he fails to do so the property vests in the bankrupt and the creditors lose all rights to it. All parties concerned would know where they stand within a reasonable time. Although the section is not in force and will not apply to this case when it is it can be taken as a strong indication of public policy, and the Court should take into account that policy in deciding what is equitable.”

Against that background, the Court could quite easily decline to grant the trustee relief to which he might technically be entitled to request.

Charging Orders

32. Two issues are relevant here:-
- 32.1. the extent to which a pre-bankruptcy charging order obtained by a judgment creditor against a bankrupt's interest in the matrimonial home might be defeated by limitation; and
 - 32.2. as regards a trustee's charging order under s.313A of the Act, how does the trustee go about enforcing it?
33. For many years, trustees have faced the issue of having to work out whether a charging order obtained as against a bankrupt's property some years before the bankruptcy remained enforceable, thereby conferring secured creditor status upon the judgment creditor. For many years, a perfectly justifiable view was that, in the absence of any payment or acknowledgement so as to cause the re-accrual of the cause of action, the enforcement of a charging order made under the Charging Orders Act 1979 (“the 1979 Act”) would not be permitted by the Court after the passage of 12 years from its making. This was a view supported by the decisions in *Gotham v. Doodes* [2006] EWCA Civ 1080; [2007] 1 WLR 86, [2006] BPIR 1178 and *Ashe v. National Westminster Bank plc* [2008] EWCA Civ 55; [2008] 1 WLR 710, [2008] BPIR 1 (and, more particularly, at first instance, [2007] EWHC 494 (Ch); [2007] BPIR 988), albeit that neither case was directly on point.
34. As shown by *Ezekiel v. Orakpo* [1997] 1 WLR 340 and *Lowsley v. Forbes* [1999] AC 329, a charging order has a life of its own independent from the judgment. It takes effect as an equitable charge created by the bankrupt by writing under his hand, not as a deed; see s.3(4) of the 1979 Act. There are two remedies available: application to the Court for an order for sale or for the appointment of a receiver. Neither of these two steps is limited by the application of the Limitation Act 1980 (“the 1980 Act”). That limits applications for possession¹⁸ or for the recovery of principal¹⁹ or interest²⁰ secured by a mortgage or charge.

¹⁸

See s.15 of the 1980 Act.

Similarly, the enforcement of a charging order is separate from the enforcement of the judgment, the limitation period for which is 6 years²¹.

35. Therefore, the judgment creditor is simply in the situation that he has the benefit of a charging order and the 1980 Act does not apply to prevent the necessary steps that he has to take to enforce; the remedies that would be sought are simply not covered by the 1980 Act. However, the fact of any delay is something that the Court will take in to account in determining whether to enforce the sale. There is a long-established doctrine that equity, following the law, adopts a time limit by analogy with any comparable time period. Similarly, the equitable doctrine of laches requires that remedies are sought without unreasonable delay.
36. Therefore, in taking into account the delay when considering its discretion as to whether to allow equitable relief to the judgment creditor, one factor is a comparison with what the position would have been if the judgment creditor had taken a legal mortgage over the property from the bankrupt. Upon the expiry of 12 years after the accrual of the cause of action for possession, the judgment creditor would have lost that right by extinguishment²². At that stage, upon extinguishment, the judgment creditor would further have lost all title to the land and the bankrupt would have been entitled to delivery up of the mortgage and other title deeds²³. This would appear to be the case, even though there is no limitation period prescribed for exercising the power of sale conferred by a mortgage and the mortgagee is entitled to exercise the power of sale independently from any action for foreclosure, possession or the principal money.
37. That pretty much was the effect of the first instance decision in *Ashe*, the effect of which was affirmed by the Court of Appeal on different grounds²⁴. In that case, the bankrupt and his wife granted a mortgage to the bank in 1989. In March 1993, the bankruptcy order was made. No possession proceedings were brought by the bank. In proceedings issued in September 2006, as summarised in paragraph 29 of the first instance judgment, the trustee in bankruptcy argued that:-
- 37.1. the bank's right of action to recover the property accrued either on 21 January 1992 when the bank demanded repayment from the bankrupt or on 4 June 1992 when it made formal demand relying upon the Mortgage;
- 37.2. either way, the right of action accrued more than twelve years ago;
- 37.3. accordingly, the right of action was statute-barred by virtue of s.15(1) of the 1980 Act; and
- 37.4. it followed that the bank's charge has been extinguished by s.17 of the 1980 Act.
38. The next part of the judgment is also material:-

"[30] Before turning to the grounds on which [the bank] resists the claim, it is convenient to set out four points which were not disputed before me.

¹⁹ See s.20(1) of the 1980 Act.

²⁰ See s.20(5) of the 1980 Act.

²¹ See s.24 of the 1980 Act.

²² See ss.15 and 17 of the 1980 Act.

²³ See *In re Hazeldine's Trusts* [1908] 1 Ch 34, *Lewis v. Plunket* [1937] Ch. 306 (although the report at [1937] 1 All ER 530 is better, especially at p.534 regarding extinguishing the title) and *Midland Bank plc Cooke* (CA, 18 July 1996).

²⁴ Although the point as to the operation of the 1980 Act in this manner was not considered; the appeal related as to whether the mortgagor was to be treated as being in adverse possession for the purposes of the 1980 Act.

[31] The first is that [the bank's] personal claim against [the bankrupt] for the debt he owes is statute-barred by virtue of section 20(1) of the 1980 Act. This does not in itself affect [the bank's] security under the Mortgage, however. The debt remains owing, and unless the charge has been extinguished by section 17, [the bank] can enforce its security against the property and thereby recover the outstanding amount."²⁵

39. The Judge declared that the charge granted to the bank was extinguished by the operation of s.15 and s.17 of the 1980 Act, and he ordered the register to be rectified by cancelling the registration of the bank's charge and removing it from the charges register.
40. In *Gotham v. Doodes*, the issue was whether there was any limitation period applicable to the enforcement by a trustee in bankruptcy of a charging order granted under s.313 of the Act. The bankrupt contended that since more than 12 years had elapsed between the making of the charge and the application for sale of the property, the trustee in bankruptcy was barred from recovering any sum of money secured by the charge by virtue of s.20(1)(a) of the 1980 Act. The Court of Appeal concluded that:-
- 40.1. the rights created by a charging order made under s.313 of the Act were proprietary and a charge for the purposes of s.20(1) of the 1980 Act;
- 40.2. the right to receive the principal sum under the charge did not accrue to the trustee upon the creation of a charging order;
- 40.3. in the case of charges imposed by orders made under s.313 of the Act the right to receive could not predate an order for the sale of the property; and
- 40.4. as there had been no order for sale of the property, time had not started to run under s.20(1) of the 1980 Act.
41. Whilst not expressly stated in clear terms, it is fairly clear that the Court of Appeal thought that the limitation period for enforcement of the trustee's charging order was therefore 12 years from the date upon which the right to receive the money accrued²⁶.
42. Thus the situation is that the judgment creditor is a secured creditor with the statutory equivalent of an equitable charge. In seeking an order for sale, he would be taking action to recover what was due to him, not as a judgment creditor, but as a secured creditor. He would have to apply to the court for orders for possession and sale, not because he was executing a judgment, but because he would need an order for possession in order to effect a sale²⁷.
43. However, the difference between the judgment creditor here, and a trustee in bankruptcy with the benefit of a charging order under s.313 of the Act, is that, prior to the grant of a charging order, the judgment creditor had an existing right to receive the money. He had a debt, which had merged into the judgment. It is the fact that the judgment was immediately payable, and remained unpaid, that enabled the Court to make a charging order at all, as s.1 of the 1979 Act provides:-

“(1) Where, under a judgment or order of the High Court or a county court, a person (the “debtor”) is required to pay a sum of money to another

²⁵ The Court of Appeal specifically referred to this concession by the bank, without any adverse comment on it, at para. 30 of the judgment.

²⁶ This may be due more to the fact that the trustee's charging order is a statutory remedy, carrying a limitation period of 12 years, rather than it being a claim to a possession of land, which carries the same period.

²⁷ See *Ezekiel v. Orakpo* at p.347.

person (the “creditor”) then, for the purpose of enforcing that judgment or order, the appropriate court may make an order in accordance with the provisions of this Act imposing on any such property of the debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.”

Therefore, a charging order could only have been made by the Court where, under a judgment or order of the High Court or a county court, the bankrupt was required to pay a sum of money to the judgment creditor for the purpose of enforcing that judgment or order. The grant of a charging order conferred no right to receive the money, as it does with a charging order under s.313 of the Act, albeit only a future right rather than a present one.

44. If the judgment creditor had the benefit of a legal charge, and sought to recover the principal sums due thereunder, he would be prevented from doing so by s.20 of the 1980 Act²⁸. The judgment creditor would not be able to obtain a possession order, pursuant to *Ashe*. Accordingly, the judgment creditor should not be able to argue that it is in a better position by virtue of its having a charging order (operating as an equitable charge) than it would be if he had a legal charge.
45. Therefore, there was a good argument that the Court should not have permitted the judgment creditor to enforce a charging order by an application for an order for sale, the necessary step to enable it to recover the sums due under the security and that the court should exercise its discretion against the judgment creditor, on the basis of his delay in enforcing a charging order.
46. With a legal mortgage, the effect of the passage of the limitation period is clear. As regards possession, the right of action is statute-barred and the mortgage is extinguished. A claim to recover the principal sum is statute-barred²⁹. A mortgagee protected by the deposit of title deeds can be ordered to deliver up the deeds. A registered mortgage will be removed by alteration of the entries at HM Land Registry. The position is a little different with an equitable mortgage. The passage of time can entitle the Court to exercise its discretion not to allow enforcement, and confers no direct rights upon the equitable chargor. It is not automatically the case that the chargee’s rights are extinguished. Nonetheless, on an application by the equitable chargee/judgment debtor after the passage of 12 years, I would have thought it more likely than not that a Court would order that the judgment creditor should no longer be able to enforce the charging order.
47. This scenario was useful for a trustee in bankruptcy. He could argue against a bankrupt that the charging order could be ignored, and so increase the value of the equity in the property for the purposes of a negotiated sale, leaving (usually) the bankrupt’s family to pay a price for the trustee’s interest in the matrimonial home and to argue it out with the judgment creditor. The trustee could usually persuade the Court that there was substantial equity at stake, so that a possession order was entirely warranted so as to endure that the creditors got paid. In some cases, trustees also argued that the charging order could be ignored, such that the low-value home provisions did not apply.
48. However, such arguments were effectively dismissed in *Yorkshire Bank Finance Ltd v. Mulhall* [2008] EWCA Civ 1156; [2009] BPIR 200, a case directly on the question of the application of the 1980 Act where a creditor had the benefit of a judgment against the debtor, supported by a charging order, but had not taken steps to enforce the judgment or

²⁸ See *Bristol & West plc. v. Bartlett* [2002] EWCA Civ 1181, [2003] 1 WLR 284, *Scottish Equitable v. Thompson* [2003] EWCA Civ. 225, *West Bromwich Building Society v. Wilkinson* [2005] UKHL 44; [2005] 1 WLR 2303 and *Bradford & Bingley plc. v. Rashid* [2006] UKHL 37; [2006] 1 WLR 2066.

²⁹ Although not extinguished; the limitation defence would still have to be alleged in the Defence to the money claim.

the charging order for more than 12 years: was the debtor entitled to have the charging order set aside on the basis that it could no longer be enforced? The Court of Appeal firmly answered “No”.

49. M had entered into a guarantee with the bank. It issued proceedings against M for the amount guaranteed and obtained judgment in default and subsequently a charging order. 16 years later M sought to set aside both the judgment and the charging order on the basis that the bank had taken no steps to enforce them. She was unsuccessful and appealed to the Court of Appeal. It held that despite the lapse of time, since the making of the charging order, neither ss.20(1) nor 24(1)³⁰ of the 1980 Act applied enforcement of it. The 1980 Act made no provision that affected the enforcement of the charging order, such that M could not rely upon a lapse of time to argue against its enforcement. Thus M could only redeem the charging order on payment of all principal and interest outstanding under the charge, irrespective of any limitation period under s.20 of the 1980 Act (Ezekiel v. Orakpo having held that s.20 of the 1980 Act did not apply to a redemption by a mortgagor). Thus M, who sought to clear the title, could do so only on payment of all that was due under the charge and until then, the bank continued to enjoy its rights as a secured creditor.
50. This is important from the perspective of a trustee. The bankrupt’s interest in a property will be subject to a charging order in favour of a judgment creditor no matter how old it is³¹. The value of the charging order will have to be taken into account in determining the extent to which the property might be low-value home. It will be relevant for the purposes of valuing the extent of the recovery, whether in persuading the Court to make a possession order or in negotiating a sale with a third party or the bankrupt’s family. Bizarrely, whilst a trustee must exercise proprietary rights in respect of a property vested in him, a judgment creditor with a mere equitable charge by way of security can wait as long he wants to enforce. The sword of Damocles that a judgment creditor hangs over a debtor is obviously not as sharp as that held by the debtor’s trustee in bankruptcy, so that the debtor needs less protection for the creditor.
51. As well as taking into account how long before the bankruptcy order a charging order was obtained. In a recent case, *Tagore Investments SA v. Official Receiver* (Mann J, 11 Nov 08) a creditor was able to obtain a final charging order after the bankruptcy order, albeit that there was no contrary argument put. The creditor obtained an interim charging order over the debtor’s property. In ignorance of the fact that a bankruptcy order had been made against the debtor on his own petition, the creditor obtained a final charging order one day after the bankruptcy order. The creditor applied under s.346(6) of the Act for relief to enable it to rely upon the charging order; otherwise, since the final order had not been made before the bankruptcy order, the creditor would not have been able to keep the benefit of it. It argued that the debtor’s own petition was part of a deliberate scheme on his part to ensure that the creditor’s enforcement, both generally pre-judgment and in relation to the obtaining of the charging order, was frustrated and it was not taken in the interests of his creditors. Mann J held that the Court had a discretion under s.346(6) of the Act and that it had to consider the extent to which the creditor’s previous pre- and post-judgment steps had been frustrated, with the emphasis on post-judgment, with appropriate inferences to be drawn where appropriate. Whilst the jurisdiction had to be exercised with great caution and only in an exceptional case, the burden was on the creditor to show sufficient unfairness if the charging order were not permitted to stand to generate an exception in his favour. Since the debtor’s pre-and post-judgment conduct had been designed to frustrate the creditor, and the

³⁰ Which provides that “An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable”.

³¹ And, if it pre-dates April 1, 1993, it might carry interest at 15%, rather than 8%.

petition was a deliberate step to disadvantage the creditor, the appropriate degree of unfairness had therefore been established and it was appropriate for the court to exercise its discretion under s.346(6) of the Act.

52. The Court will be justified in not making a final order on an interim charging order if the debtor is insolvent; and a scheme of arrangement (such as bankruptcy) has been set on foot by the main body of creditors and has a reasonable prospect of succeeding³².
53. Also, it is strongly arguable that that the making of the final charging order amounts to a disposition of the bankrupt's property, whether the interim charging order was made either before or after the presentation of the petition upon which the bankruptcy order was made. Whilst the interim charging order would impose an immediate charge, such charge is no more than a defeasible charge³³. Consequently, the rendering of the charge indefeasible amounts to the final disposition of the bankrupt's property, especially if, were nothing to have been done, the application of the authorities would mean that the interim charging order would be bound to be discharged in the event of a supervening bankruptcy before it was made final. The fact that it is the Court that makes the final charging order, rather than the debtor, makes little difference. It is now clear that a property adjustment order in ancillary relief proceedings between a debtor and his spouse, can be a disposition, even if it is not a consent order³⁴. There is no reason why a final charging order, made by the Court without the attendance of the judgment debtor, should be treated any differently.
54. Further, s.3(4) of the Charging Orders Act 1979 expressly provides that, subject to the provisions of that statute, "a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand". Accordingly, a final charging order is treated as if it has been created by the judgment debtor.
55. So, quite why the Court should have used its powers under s.346 of the Act to ensure that a final charging order, palpably in breach of the pari passu principle and strongly arguably a void disposition under s.284 of the Act, is not clear. After all, the whole thrust of s.284 of the Act and, indeed, s.346, is to ensure that all creditors of the same class should be treated equally, and to ensure that the bankrupt's estate is not dissipated post-petition, so that there can be a rateable distribution of the bankrupt's estate amongst his creditors.
56. Nonetheless, in assessing the value of the bankrupt's interest in a property, and hence the realisation prospects, a trustee in bankruptcy has to be wary that he might find himself bound by a charging order effectively granted after the making of the bankruptcy order.
57. At the other end of the spectrum, assuming that the trustee has obtained a charging order under s.313 of the Act, when can the trustee go about enforcing that charging order and what test should be applied? Remarkably, there is little or no guidance, either in the Act or the Rules.
58. Usually, a charging order is obtained under s.313 of the Act when the trustee recognises that there are exceptional circumstances which would mean that a possession order would not be granted. Assuming that to be the case, when could the trustee apply to enforce that

³² See *Roberts Petroleum Ltd v. Kenny Ltd* [1982] 1 WLR 301 at 306. This observation was not disapproved in the House of Lords decision reported at [1983] 2 AC 192, albeit that a different conclusion was reached.

³³ See *Roberts Petroleum Ltd v. Kenny Ltd* at p. 209.

³⁴ See *In re Flint (A Bankrupt)* [1993] Ch 319, approved by the Court of Appeal in *Mountney v. Treharne* [2002] EWCA Civ 1174 [2003] Ch 135 at para. 77 and followed in both *Treharne and Sand v. Forrester* [2003] EWHC 2784 (Ch); [2004] BPIR 338 and *Re Baverstock (a bankrupt); Shah v. Baverstock and Baverstock* [2007] BPIR 1191.

order? Could he do so whilst the exceptional circumstances still prevailed, or would he have to wait until there was a substantial change of circumstances? And, at the hearing, would the test be that provided by s.335A of the Act? Or ss.14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996? Or some other test?

59. If the property is jointly owned, then it seems that the test is as provided for in the Trusts of Land and Appointment of Trustees Act 1996: the trustee will be in the position of a secured creditor seeking to enforce its security against one of two (or more) co-owners. There will be no presumption in favour of a sale as under s.335A of the Act, although on the current state of the law, it is likely that the court would order a sale unless there are grounds for thinking that the creditor can be compensated for being kept out of its money³⁵. If the situation is that the charging order is over solely owned property of the bankrupt, then technically the test is the one governed by the Charging Orders Act 1979 and Part 73 of the Civil Procedure Rules not by the Act or the Rules. The test is a simple one, merely that all the circumstances of the case should be considered in considering how the Court should exercise its discretion.
60. Thus, in *Pickering v. Wells* [2002] 2 FLR 798, David Oliver QC (sitting as a judge of the High Court) held that the purpose underlying the Court Rules (then Order 88 of the Rules of the Supreme Court) was to ensure that the court had notice, for the purpose of exercising the discretion whether to enforce a charging order, of all competing proprietary interests in the property so that it could take account of the proprietary interests of third parties. The rule did not extend to consideration of the welfare or needs of those in occupation. The policy of the law was that a creditor was entitled to be paid in due time and The court did not have to consider the welfare of affected children when considering the competing interests in a property before enforcing a charging order. There was no specific provision in to protect the interests of minors. However, in *Close Invoice Finance Ltd v. Pile* [2008] EWHC 1580 (Ch); [2008] BPIR 1465, HHJ Purle QC (sitting as a High Court judge) held that the position had not in reality changed by the introduction of CPR Part 73, but that the test adopted by Mr Oliver QC was rather capricious, dependent entirely upon whether the property was jointly owned or sole owned. Accordingly, he took the view that the same considerations which arose under the Trusts of Land and Appointment of Trustees Act 1996 would be applicable to the exercise of the court's discretion under CPR r 73.10 and such discretion had to be exercised compatibly with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 including respect for private and family life and the home as well as the enjoyment of possessions of all living in the property, although it was also necessary to consider the right of the claimant under its equitable charge not to have to wait indefinitely for payment with no means of enforcing its security. In balancing those interests and exercising its discretion the court took into account (i) the debtor's position would not of itself have justified a period of delay; (ii) that even though the debtor's wife was a judgment debtor a longer period of undisturbed possession would assist in her treatment for breast cancer; (iii) the education of one of the children who was 17 and still in full-time education; (iv) the general family position; and (v) the position of the mortgagee, although here there was a relative lack of prejudice, despite a falling house market. A possession order was made effectively enforceable in a year.
61. Similar criteria will be at play when a trustee comes to enforce his charging order under s.313. If there were particular reasons for obtaining a charging order (such as exceptional circumstances) then it is likely that the whilst not necessarily looking at whether there had been a change of circumstances, the Court will take into account the same factors that motivated the trustee to seek the charging order in the first place. Thus, having satisfied

³⁵

See *Mortgage Corporation Ltd v. Shaire* [2001] Ch 743 WLR [2000] BPIR 483, *Bank of Ireland Home Mortgages Ltd v. Bell* [2001] BPIR 429 and *Edwards v. Lloyds TSB Bank Plc* [2004] EWHC 1745 (Ch); [2004] BPIR 1190.

himself that, in the terms of s.313 he “is, for any reason, unable for the time being to realise that property” the trustee cannot obtain the charging order and then proceed to enforce it immediately. The trustee should not be able to obtain in two steps what he was unable to obtain in one.

Costs of realisations and annulments

62. Since *Butterworth v Soutter* [2000] BPIR 582 and, more recently, *Thornhill v. Atherton*, trustees have been incurring costs in administering the estate and making realisations relatively safe in the knowledge that, in the event of an annulment under s.282(1)(a) of the Act, on the basis that the order ought not to have been made, then someone would end up bearing the trustee's costs, either the petitioning creditor or the debtor. However, the recent case of *Ella v. Ella* has taken away the prospect of such an unquestioning indemnity. And, with the recent council tax cases giving rise to annulments, it is now incumbent upon a trustee to at least conduct some investigation as to the status of the bankruptcy order.
63. In *Thornhill v. Atherton* [2004] EWCA Civ 1858; [2005] BPIR 437, more than four years after the bankruptcy order, the debtor successful obtained an annulment on the basis that the order ought not to have been, raising the point of law as regards the enforceability of matrimonial debts. The order was conditional upon the debtor discharging the trustee's costs and expenses, as the judge determined that the delay in raising the points which gave rise to the annulment had been the fault of either the debtor or his solicitors. The debtor appealed, contending that either his wife or the petitioning creditor (to whom his wife had assigned the alleged debt) should pay the trustee's costs and expenses. The Court of Appeal dismissed the appeal, holding that the issue as to who should pay the trustee's cost and expenses was between the debtor and the trustee. The trustee was an entirely innocent third party and was entitled to be paid his costs and expenses. Substantial costs and expenses had been incurred and the assets in the debtor's estate were sufficient to cover them. It was logical and sensible (i) to order the debtor to pay the trustee's costs and expenses; and (ii) to leave the bankruptcy in place until the costs and expenses were paid so that the trustee could use his statutory powers of realisation in order to see that they were paid. Such an order was not unfair to the debtor.
64. Subsequently, in *Thornhill v. Atherton (No 2)* [2008] BPIR 691, the trustee sought to enforce his costs and expenses against the debtor's property, seeking an order for possession and sale. A submitted that the application was an abuse of the process of the court on the basis that it was improper for the trustee to use this process to obtain the benefit for himself of recouping the costs and expenses of bankruptcy when no benefit would accrue to any other creditor. The judge made the possession order. The trustee was fully entitled to bring the proceedings to obtain payment of the costs and expenses of the bankruptcy, as envisaged by the terms of the annulment order and by the Court of Appeal, and was acting perfectly reasonably in doing so. It was not an abuse of the process if the net proceeds of sale of a property were swallowed up in defraying the expenses of the bankruptcy and that the creditors received nothing³⁶.
65. Against that background, one would have thought that the trustee was fairly safe in relying upon the certainty of the bankruptcy order having been made. If it turned out that it ought not to have been made, then either the petitioning creditor or the debtor would be responsible for the costs.

³⁶

See *Trustee of the Estate of Eric Bowe (A Bankrupt) v. Bowe* [1997] BPIR 747.

66. However, a different view was expressed in *Ella v. Ella* [2008] EWHC 3258 (Ch); [2009] BPIR Issue 3. H and W were undergoing extremely aggressive divorce proceedings, involving a clash of jurisdictions with Israel, where H had issued his own divorce petition. W obtained an order requiring H to pay maintenance to her of more than £3,000 a month, together with costs of £15,790. H successfully obtained a stay of W's divorce petition on a condition that payment of monthly sums of £3,450 maintenance by the husband to the wife were maintained, together with an order for costs against W, not to be enforced until the divorce proceedings were finally disposed of. That costs order was likely to exceed the earlier costs order against H. Nonetheless, W served a statutory demand on H based on the costs order in her favour. H unsuccessfully applied to have the statutory demand set aside. W presented a bankruptcy petition against H and a bankruptcy order was made on it against H in his absence. The Official Receiver reported to creditors that there was surplus in the estate exceeding £4.2 million. Joint trustees were appointed at a meeting of creditors, joint trustees in bankruptcy were appointed on the basis of the vote of a company claiming to be a creditor of H in the sum of £1.7 million. It subsequently transpired that the claim as much smaller and that, until the making of the bankruptcy order and for a period subsequently, H was the creditor's sole director and the shares in the company were held by a discretionary trust of which H was one of the discretionary class. After the bankruptcy order, H ceased paying the maintenance. W unsuccessfully sought a lifting of the stay of her divorce petition and the Family Court suggested that the bankruptcy order should be annulled, thereby removing H's excuse for not paying maintenance. W applied for an annulment of the bankruptcy order under s.282(1)(a) of the Insolvency Act 1986, supported by H. In the meantime, the joint trustees had incurred costs of £30,000 approx, the official receiver's costs having been £1,345.
67. Sir Edward Evans-Lombe annulled the bankruptcy order, charging the matrimonial home with the official receiver's costs, but otherwise making no order as to costs either on the application or in relation to the bankruptcy. The bankruptcy proceedings were an abuse of the bankruptcy process. The bankruptcy proceedings had been used by the parties as a weapon in the family dispute between them and it was not a genuine case where the bankruptcy proceedings had been designed to realise the assets of an insolvent for the benefit of his creditors. Whilst the matrimonial home, the only asset within the jurisdiction, would be charged to secure the official receiver's costs, the joint trustees' costs were not be so charged as they should have realised the bankruptcy proceedings were highly likely to have been an abuse of the process, stating as follows:-
- "21. I am only concerned that the costs of these bankruptcy proceedings which I have categorised as an abuse of process shall not in any way be borne out of public funds.
22. Therefore, as part of the order annulling the bankruptcy, I will impose on the only asset within the jurisdiction, which is the matrimonial home, a charge to secure the official receiver's costs of £1,345. It will, of course, be a matter for the official receiver as to how he recovers those costs, but I would suggest to him that this is a relatively small sum and I would recommend (I am in no position to order him) that he hold his hand as to the enforcement of that order for costs pending the matter getting back to the Family Division which is much better suited than this court to determine where those costs should be paid, and generally to determine who is responsible for the difficulties which have arisen.
23. The only question is whether I should order the joint trustees' costs also to be a charge on the matrimonial home. I have concluded that I should not do so. I was shown the decision of this court in the case of *Mellor v. Mellor* [1992] 1 WLR 517 where the late lamented Hart J, when sitting as a deputy judge of this court, was dealing with a case where a receiver had been appointed by the Court over the assets of a company. The Court subsequently took the view that order should not have been made and annulled it without providing for the costs incurred by the

receiver in the interim while administering the affairs of the company. He said this at page 7 of the report:

“The idea that the Court may subsequently deprive a receiver of his right to remuneration on the sole ground that the Court with hindsight comes to the conclusion that the receivership which it had ordered had better not been ordered at all has only to be stated in those terms for its injustice to be apparent.”

24. In my judgment, the facts with which Mr Hart QC, as he then was, was dealing in that case are substantially different from the present case. The joint trustees were appointed by, effectively, the alter ego of the husband, namely a family-controlled trust. When they were appointed they must have been approached by the company, controlled by the trust, suggesting that it was a creditor of the husband.
 25. As a result of over-estimating the extent of the husband's indebtedness to the company the meeting of creditors where the trustees were appointed to replace the official receiver was dominated, by the husband. If no provision is made in my order for annulment for the costs of the joint trustees they will be entitled to look to their appointing company for the costs which they have incurred.
 26. It seems to me that the trustees are not wholly blameless for their own position. They should have realised that this was highly likely to be the sort of bankruptcy proceedings which constitute an abuse of process. They may also have recourse to the husband who is an extremely wealthy man so I am not too concerned that their costs are not being treated in the same way as the costs of the official receiver.
 27. So, in the result, I will make an order annulling the bankruptcy, but impose a charge on the matrimonial home to secure the official receiver's costs of £1,345 and I will make no order as to the costs of today or the costs of the bankruptcy proceedings generally.”
68. Whilst the facts in *Ella* may not necessarily be particularly common³⁷, trustees are becoming more increasingly involved in applications to annul bankruptcy orders made on the basis of petitions in respect of unpaid council tax. In *London Borough Of Lambeth v. Simon* [2007] BPIR 1629, Registrar Simmonds made it clear that the registrars had for some time been dissatisfied with the particulars of debt relied upon by local authorities in support of their petitions. In that case, despite liability orders having been made in the magistrates' courts, upon which the petition was based, there was a total lack of awareness of the state of accounts between the local authority and the debtor, which cast doubt upon the integrity of the statements in the petition. The liability orders had not been properly explained, nor had there been any explanation as to how the debtor's payments had been appropriated. Accordingly, the court could not be satisfied that the statements in the petition were true, so the petition had to be dismissed. The registrar directed that in all future petitions by local authorities relying upon liability orders, both the statutory demand and the petition should set out a full history of the account properly showing all debits and credits. Where a liability order was to be relied upon, the local authority should be in a position to, and be prepared to, prove the existence of the liability order to the satisfaction of the court³⁸.

³⁷ Although *Thornhill v. Atherton* and *Paulin v. Paulin* [2009] EWCA Civ 221; [2009] BPIR Issue 3 indicate that annulments under s.282(1)(a) of the Act, on the basis that the bankruptcy process is being used as an abuse of process in the context of matrimonial proceedings, are far from uncommon.

³⁸ Judicial criticism of local authority enforcement of council tax arrears in the bankruptcy context continues. In *R (Mohammed) v. Southwark London Borough Council* [2009] EWHC 311 (Admin); [2009] BPIR forthcoming, M applied for judicial review of a liability order made against him for outstanding council tax payments owed to the local authority. The order covered sums due for a period that had already been the subject of a previous liability order. When the order was made M was an undischarged bankrupt, of which the local authority was aware because it was the petitioning creditor. The local authority had not sought leave of the court before it commenced proceedings against M. The liability order was quashed. Some of the debt the subject of the liability order was a bankruptcy debt, unenforceable outside bankruptcy, resulting in the liability order being defective, as it was for too high an amount. The local authority was not entitled to seek the liability order and was therefore responsible for the magistrates' court making an unlawful order.

69. In three recent reports the Local Government Ombudsman has expressed dissatisfaction with the use of bankruptcy proceedings by local authorities for the purposes of enforcing particularly low council tax arrears; see *Ford v. Wolverhampton City Council* [2008] BPIR 1304, *Report of an Investigation into Complaint No 07/A/12661 against the London Borough Of Camden* [2008] BPIR 1572 and *Report on an investigation into complaint number 08 002 300 against Exeter City Council* [2009] BPIR Issue 3.
70. In *Wolverhampton*, the Ombudsman found that the council did not follow due process in making Mr Ford bankrupt. First, the council gave Mr Ford inadequate warning of the consequences of bankruptcy before commencing proceedings, in breach of its usual practice. Secondly, the council failed to properly consider the alternative of seeking a charging order against Mr Ford's home. On the balance of probabilities had such failings not occurred then Mr Ford would have made an offer of repayment to the council prior to the commencement of proceedings. Finding maladministration causing injustice, in order to put Mr Ford in the position that he would have been in had no maladministration occurred the Ombudsman considered Mr Ford's bankruptcy should be annulled and that the council should pay for this by arrangement with the trustee in his bankruptcy (subject to Mr Ford has first entering into a binding arrangement with the council to repay the debt as soon as reasonably practicable).
71. In *Camden* Mrs Gordon had mental health difficulties and was not capable of managing her own affairs. the council's Community Mental Health Team was aware of this. Mrs Gordon had not paid her council tax. The council's Revenue team applied for a bankruptcy order, which was granted. They did not adequately record what checks they made and did not make any checks with the social care side of the council, which would have shown that bankruptcy was not an appropriate recovery method in this case. The consequence was that the resolution of a separate legal case concerning Mrs Gordon's financial affairs was delayed, and substantial unnecessary costs, payable by Mrs Gordon, were incurred by a court appointed litigation friend and the trustee in bankruptcy. The Ombudsman having found maladministration causing injustice, the council has agreed to apply to the court to annul the bankruptcy.
72. In *Exeter*, Miss Byrd suffered from untreated mental and physical health problems, and owed the council a significant sum in arrears of unpaid council tax. Her mother complained that that the Council had made her daughter bankrupt without giving proper consideration to her vulnerability, as her daughter had been incapable of dealing with her own financial affairs at the time the arrears had accrued. The Ombudsman found that the Council had pursued this debt over a number of years without making adequate enquiries into the debtor's health problems to determine whether this was a suitable course of action, although in 2001 she had told the Council that she was terminally ill. The Ombudsman criticised the Council for (1) failing to have adequate written procedures to include standard checks at an early stage as to whether the debtor's personal circumstances made bankruptcy proceedings inappropriate; (2) failing to make such enquiries; and (3) failing to keep a clear written record of the way its decisions were made. However, Miss Byrd's reclusive behaviour, while apparently a function of her mental health problems, would not have helped the Council in making these enquiries, and the Ombudsman was not able to say clearly that the Council would not have sought her bankruptcy even without maladministration. He noted that the Council, as the only creditor in the bankruptcy proceedings, had withdrawn its claim, once it was made aware of the problem. The Council undertook to pursue an annulment of the bankruptcy order, bearing any necessary costs itself.
73. Similar issues were raised by a District Judge particularly experienced in mental health issues in *Hunt v. Fylde Borough Council* [2008] BPIR 1368. Mr Hunt had been arrested for

failing to attend his public examination. He had Huntington's disease and shut himself off from the world, refusing support from social services and living in unsatisfactory conditions. He had been made bankrupt for failing to pay his council tax. The court annulled the bankruptcy order. Having regard to rr7.43 and 7.44 of the Rules, which the court could apply of its own initiative, Mr Hunt was incapable of conducting or engaging in bankruptcy proceedings by reason of both mental disorder and physical affliction or disability and that a representative should have been, and should be, appointed. The bankruptcy order should not have been made without that representation having been provided for. The local authority had adopted a blinkered view, treating the petition as a routine debt collecting exercise and potentially overlooking its positive diversity duties imposed upon it as a public authority under the Disability Discrimination Acts, so that the outcome of the rehearing was not a foregone conclusion. Having regard to *Wolverhampton*, the local authority would have to decide whether it was appropriate to proceed with the petition³⁹.

74. There are legions of cases where a bankruptcy order is made on council tax arrears, with possibly one or two other creditors, whose total debts are vastly exceeded by the value of the equity in the debtor's property. In the absence of any response from the debtor, the trustee commences proceedings for the recovery of the property, and then a member of the family picks up the issue, points out the mental or physical difficulties of the debtor and complains about the obtaining of the bankruptcy order and the fact that the trustee is seeking to repossess a property for such a small amount of debt⁴⁰. Whilst the background matters are well outside the knowledge of a trustee in bankruptcy, they will cause problems. In many cases, upon recognising the difficulties, the local authority would be quite prepared to accept a s.282(1)(a) annulment but is unwilling to pay the trustee's time costs or costs of attempted realisation⁴¹.
75. Against the background of *Ella*, it is quite easy to see that a judge could make adverse findings against a trustee, stating that having regard to the known issues about local authority petitions, some checks at least should have been made about the debtor before embarking on the possession proceedings, that the proceedings would not have been issued had the truth been known and that the trustee's intransigence about payment of costs has further exacerbated the matter.
76. Therefore, in particular in local authority council tax petitions and where there has been absolutely no contact with the debtor, the trustee should be wary of commencing possession proceedings without further thought or inquiry. If it transpires that the trustee should have realised that the bankruptcy order was highly likely to be the sort of order that should be annulled, then he might be regarded as not wholly blameless for his position and made to

³⁹ However, such public law grounds founding an application for judicial review of the local authority's decision to present a bankruptcy petition based on council tax arrears will not automatically entitle a debtor to an adjournment of the hearing of the petition. The bankruptcy court will consider all the circumstances of the case, including the prospects of success of the judicial review proceedings; see *Watts v. Newham Borough Council* [2009] EWHC 377 (Ch); [2009] BPIR Issue 3.

⁴⁰ Although it should be pointed out that in *Owen v. Her Majesty's Revenue And Customs* [2007] EWHC 395 (Ch); [2008] BPIR 164, Lewison J at para. 21 said: "Sympathetic though one must be to Mr Owen's mental problems, the fact remains that even those with mental problems must pay their tax."

⁴¹ See, for example, *Tetteh v. London Borough of Lambeth* [2008] BPIR 241. The debtors successfully obtained an annulment on the basis that the petition, based on council tax arrears, had been served on the wrong address. Registrar Nicholls ordered the petitioning creditor to pay the debtors' costs of the annulment application and the debtors to pay the costs of the trustee in bankruptcy from the date of his appointment. He held that where an annulment had been granted on the basis that the bankruptcy order ought not to have been made, the starting point in respect of the trustee in bankruptcy's costs was that it was the petitioning creditor who should pay the same, but that here the presumption was rebutted because of the long delay on the part of the debtors in making their application which had caused an increase in the costs of the trustee such that the debtors should pay the trustee's costs from the date of his appointment. The petitioning creditor had resisted the debtors' application for annulment but had been unsuccessful so that it should pay the costs of the application itself.

bear his own costs. At least some attempt to verify the position with the petitioning creditor local authority or, if possible, members of the debtor's family, should put the trustee in a good position to ensure that the court does not make such an order.

Human rights again

77. After the decisions in *Foyle v. Turner* [2007] BPIR 43 (jointly owned property) and *Holtham v. Kelmanson* [2006] EWHC 2588 (Ch); [2006] BPIR 1422 (solely owned property) one would be forgiven for thinking that the issue as to the delay in the trustee seeking possession of the bankrupt's matrimonial home, and the alleged impact upon the rights of the bankrupt and his family under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, had been done and dusted.
78. But, neither of those cases took into account the decision of the European Court of Human Rights in *GJ v. Luxembourg* [2000] BPIR 1021, where the court determined that conducting the equivalent of a compulsory liquidation for 6 years amounted to an unreasonable delay in determining GL's civil rights as the 90% shareholder in the company. And a recent decision of the High Court of Northern Ireland, *Official Receiver v. Rooney* [2008] NICH 22 has highlighted the issue again.
79. The facts in *Rooney*, and the case that was heard alongside it, *Official Receiver v. Paulson*, will be familiar to all trustees, as will the arguments that were put. The bankruptcy orders were made in 1990 against the husband, who jointly owned the matrimonial home with the wife. An offer to sell the interest in the property to the spouse had not been responded to. The mortgage was paid and improvements to the property carried out, funded by the spouse and other members of the family. In *Rooney*, the Official Receiver in December 1995 implicitly indicated that they would be left undisturbed unless and until they might wish to sell the property at some time in the future. The bankrupt was chronically ill. In *Paulson*, the Official Receiver never indicated any intention that he might at some time in the future seek to recover possession of the house for the purposes of sale the bankrupt's daughter had spina bifida and the property had been adapted to meet her needs. In 2002, the Official Receiver applied for possession and sale of the properties. Article 309 of the Insolvency (Northern Ireland) Order 1989 is in substantially similar terms to s.335A of the Act, providing that "where a suit is maintained after the expiration of one year from the first vesting ...of the bankrupt's estate in a trustee, the High Court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations".
80. The respondents relied principally upon the rights contained in:-
- 80.1. Article 6 (1) to Schedule 1 of the Convention:
- "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

80.2. Article 8 to Schedule 1 of the Convention:

- “(1) Everyone has the right to have respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for protection of the rights and freedoms of the others.”

80.3. Article 1 of the First Protocol:

“Every natural legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

81. Their argument was that the Official Receiver waited far too long to move to sell their homes, having caused them to believe that they could remain in them subject only to the proviso that in the long run they would not be able to sell them without recourse to the Official Receiver as joint owner. As a result they had remained on in their homes, spent very considerable sums in discharging the mortgage payments and in carrying out repairs, maintenance, adaptations and improvements. Moreover they were now too old to be able to start again to obtain the finance needed to acquire new homes as they would otherwise have done, and been able to do, had the Official Receiver moved to obtain orders for sale within any reasonable period or even signalled that he might do so in the event that the equity in the properties should increase so as to make that course worthwhile. They submitted that they were further lulled into a sense of false security and thereby encouraged to act to their detriment by the Official Receiver's prolonged silence and inactivity. As a result they provided the opportunity for the properties to avail of the rise in house prices. Had they simply walked away from the houses at the time of the bankruptcies in 1990 and started life again elsewhere there would have been nothing for the creditors to realise then, now or in the future nor would any attempt at realisation have been made by the Official Receiver at that time in view of the negative or neutral equity valuations then prevailing. The wives being then twelve years younger might have bought new homes in their own names or obtained the tenancies of alternative suitable public or private housing. Instead they chose not to walk away. The Official Receiver never indicate that he had changed or even might change his mind until his sudden *volte-face* following his review in or about 2002.

82. So far, so familiar. But, somewhat surprisingly, the Judge accepted the arguments and dismissed the applications, on the following grounds:-

82.1. The dispossession of the families at their time in life after all that had been done by them to preserve and enhance the properties and their values during the Official Receiver's inactivity of almost twelve years would be a quite disproportionate interference with the Article 8 rights of the wives as co-owners and, in the case of Ms Paulson, the disabled daughter of Mr and Mrs Paulson, for whom the house has been especially and expensively extended and adapted to her specific needs.

- 82.2. In breach of Article 6, a delay of almost twelve years was outside the parameters of a reasonable time for deciding whether to take the properties, respectfully disagreeing and distinguishing with the decision of Evans-Lombe J in *Holtham v. Kelmanson* to the effect that it was reasonable for the trustee to wait for a lift from the incoming tide, on the basis that that conclusion did not in any real sense to balance the interests of the creditors with the Article 6 obligations and in that case there was no non-bankrupt co-owner or family member whose rights required consideration under Article 8 and the case is therefore distinguishable in that respect.
- 82.3. A reading of the (chiefly) English decisions concluded that little more than a nod has been accorded to the effect of the Convention upon the meaning of “exceptional circumstances”.
- 82.4. It was not consonant with the principles of Articles 6 or 8 that the Official Receiver should be able to wait almost indefinitely to decide that he would like to obtain an order for sale and fail to tell the occupiers that that was his intention so that as a result they decided to live on in their homes, discharge their mortgage obligations and outgoings, maintain and improve them and thus by their good husbandry unwittingly act to their irredeemable prejudice.
- 82.5. The use it or lose it provisions, operating in England and Wales since 1 April 2004 and in Northern Ireland since 27 March 2006 were indicative of Parliament’s view as to what period of time was reasonable for the trustee to decide whether to move to sell the property regardless of the state of the market and therefore a useful yardstick of Parliament’s view of the longest period appropriate to allow in order to secure compliance with the requirements of Article 6. The periods of almost 12 years in the present cases were plainly well outside this limit.
83. The judgment is possibly the first attempt to rationalise the Convention rights of each of the bankrupt, the bankrupt’s spouse and other occupiers separately. But, it is a little difficult precisely to discern from the judgment what the Judge regarded as purely breaches of the Convention rights amounting to exceptional circumstances and what may have amounted to exceptional circumstances irrespective of the Convention rights. Certainly, in the *Paulson* case, the right result appears to have been reached; all would accept that the adaptation of a house to meet the needs of a disabled child would amount to exceptional circumstances and would be likely to delay a sale for a considerable period of time⁴². Nonetheless, from the human rights angle, it does seem to be a somewhat simplistic view, reached without analysis of a number of other English cases considering the impact of the Convention rights of the operation of s.335A, such as *Hosking v. Michaelides* [2006] BPIR 1192, *Nicholls v. Lan* [2006] EWHC 1255 (Ch); [2006] BPIR 1243 and *Foenander v. Allan* [2006] BPIR 1392, where detailed consideration was given to the impact of the Convention rights on the balancing exercise to be conducted under s.335A of the Act. Perhaps it was rather unrepresentative to rely on *Holtham v. Kelmanson* as representing the law, as in that case the property was solely owned by the bankrupt and there were no independent property-owning rights to be considered; it was always likely to be a harsher decision than in the common jointly-owned cases.
84. However whilst this is definitely a pro-bankrupt case to be filed alongside *Martin-Sklan v. White* [2006] EWHC 3313 (Ch); [2007] BPIR 76 (network of support for children of alcoholic

⁴²

For a recent example, see *Re Haghighat (a bankrupt)* [2009] EWHC 90 (Ch); [2009] BPIR Issue 2, where a sale was deferred for three years, with a view to securing the availability of suitable local authority housing for the bankrupt, his spouse and their disabled child. It does not appear that the property had been adapted.

mother where payment in full likely) or *Claughton v. Charalambous* [1998] BPIR 558 and *Re Bremner* [1999] BPIR 185 (ill-health of spouse) it is easy to overstate its practical effect. There are likely to be very few cases of this type left, due to the introduction of the use it or lose it provisions with effect from 1 April 2004. It is possible that there are some cases commenced before the deadline of 1 April 2007 that have not yet come to trial, or there may have been cases where, despite the long delay in realisation, an extension of time was granted. Perhaps there are still a few Bankruptcy Act 1914 cases out there where the property has yet to be realised, since the stand-alone use it or lose it provisions of s.261 of the Enterprise Act 2002, applying to existing cases, do not apparently apply to 1914 Act bankruptcies⁴³.

85. Or, perhaps we might see these Convention rights being run as a defence against claims for possession by purchasers of the trustee's interests in the matrimonial home on deferred consideration terms.

⁴³

See *Pannell v. The Official Receiver* [2008] EWHC 736 (Ch); [2008] BPIR 629.

Appendix; Insolvency Act 1986

s.283A

- (1) This section applies where property comprised in the bankrupt's estate consists of an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of –
 - (a) the bankrupt,
 - (b) the bankrupt's spouse or civil partner, or
 - (c) a former spouse or former civil partner of the bankrupt.
- (2) At the end of the period of three years beginning with the date of the bankruptcy the interest mentioned in subsection (1) shall –
 - (a) cease to be comprised in the bankrupt's estate, and
 - (b) vest in the bankrupt (without conveyance, assignment or transfer).
- (3) Subsection (2) shall not apply if during the period mentioned in that subsection –
 - (a) the trustee realises the interest mentioned in subsection (1),
 - (b) the trustee applies for an order for sale in respect of the dwelling-house,
 - (c) the trustee applies for an order for possession of the dwelling-house,
 - (d) the trustee applies for an order under section 313 in Chapter IV in respect of that interest, or
 - (e) the trustee and the bankrupt agree that the bankrupt shall incur a specified liability to his estate (with or without the addition of interest from the date of the agreement) in consideration of which the interest mentioned in subsection (1) shall cease to form part of the estate.
- (4) Where an application of a kind described in subsection (3)(b) to (d) is made during the period mentioned in subsection (2) and is dismissed, unless the Court orders otherwise the interest to which the application relates shall on the dismissal of the application –
 - (a) cease to be comprised in the bankrupt's estate, and
 - (b) vest in the bankrupt (without conveyance, assignment or transfer).
- (5) If the bankrupt does not inform the trustee or the official receiver of his interest in a property before the end of the period of three months beginning with the date of the bankruptcy, the period of three years mentioned in subsection (2) –
 - (a) shall not begin with the date of the bankruptcy, but
 - (b) shall begin with the date on which the trustee or official receiver becomes aware of the bankrupt's interest.
- (6) The Court may substitute for the period of three years mentioned in subsection (2) a longer period –
 - (a) in prescribed circumstances, and
 - (b) in such other circumstances as the Court thinks appropriate.

- (7) The rules may make provision for this section to have effect with the substitution of a shorter period for the period of three years mentioned in subsection (2) in specified circumstances (which may be described by reference to action to be taken by a trustee in bankruptcy).
- (8) The rules may also, in particular, make provision –
 - (a) requiring or enabling the trustee of a bankrupt's estate to give notice that this section applies or does not apply;
 - (b) about the effect of a notice under paragraph (a);
 - (c) requiring the trustee of a bankrupt's estate to make an application to the Chief Land Registrar.
- (9) Rules under subsection (8)(b) may, in particular –
 - (a) disapply this section;
 - (b) enable a court to disapply this section;
 - (c) make provision in consequence of a disapplication of this section;
 - (d) enable a court to make provision in consequence of a disapplication of this section;
 - (e) make provision (which may include provision conferring jurisdiction on a court or tribunal) about compensation.”

s.284

- (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.”

s.313

- (1) Where any property consisting of an interest in a dwelling house which is occupied by the bankrupt or by his spouse or former spouse or by his civil partner or former civil partner is comprised in the bankrupt's estate and the trustee is, for any reason, unable for the time being to realise that property, the trustee may apply to the court for an order imposing a charge on the property for the benefit of the bankrupt's estate.

- (2) If on an application under this section the court imposes a charge on any property, the benefit of that charge shall be comprised in the bankrupt's estate and is enforceable, up to the charged value from time to time, for the payment of any amount which is payable otherwise than to the bankrupt out of the estate and of interest on that amount at the prescribed rate.
- (2A) In subsection (2) the charged value means –
- (a) the amount specified in the charging order as the value of the bankrupt's interest in the property at the date of the order, plus
 - (b) interest on that amount from the date of the charging order at the prescribed rate.
- (2B) In determining the value of an interest for the purposes of this section the court shall disregard any matter which it is required to disregard by the rules.
- (3) An order under this section made in respect of property vested in the trustee shall provide, in accordance with the rules, for the property to cease to be comprised in the bankrupt's estate and, subject to the charge (and any prior charge), to vest in the bankrupt.
- (4) Subsections (1) and (2) and (4) to (6) of section 3 of the Charging Orders Act 1979 (supplemental provisions with respect to charging orders) have effect in relation to orders under this section as in relation to charging orders under that Act.
- (5) But an order under section 3(5) of that Act may not vary a charged value.

s.313A

- (1) This section applies where –
- (a) property comprised in the bankrupt's estate consists of an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of–
 - (i) the bankrupt,
 - (ii) the bankrupt's spouse or civil partner, or
 - (iii) a former spouse or former civil partner of the bankrupt, and
 - (b) the trustee applies for an order for the sale of the property, for an order for possession of the property or for an order under section 313 in respect of the property.
- (2) The Court shall dismiss the application if the value of the interest is below the amount prescribed for the purposes of this subsection.
- (3) In determining the value of an interest for the purposes of this section the Court shall disregard any matter which it is required to disregard by the order which prescribes the amount for the purposes of subsection (2)."

(The Schedule to the Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004 (SI 2004/547) provides that the minimum value of interests in a dwelling-house for application by trustee

for order for sale, possession or an order under section 313 for the purposes of s.313A(2) of the Act is £1,000. Art. 3 of that Order further provides as follows:-

The Court shall, in determining the value of the bankrupt's interest for the purposes of section 313A(2), disregard that part of the value of the property in which the bankrupt's interest subsists which is equal to the value of:

- (a) any loans secured by mortgage or other charge against the property;
- (b) any other third party interest; and
- (c) the reasonable costs of sale.)

s.342

(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.

s.346

(1) Subject to section 285 in Chapter II (restriction on proceedings and remedies) and to the following provisions of this section, where the creditor of any person who is adjudged bankrupt has, before the commencement of the bankruptcy–

- (a) issued execution against the goods or land of that person, or
- (b) attached a debt due to that person from another person,

that creditor is not entitled, as against the official receiver or trustee of the bankrupt's estate, to retain the benefit of the execution or attachment, or any sums paid to avoid it, unless the execution or attachment was completed, or the sums were paid, before the commencement of the bankruptcy.

- (2) Subject as follows, where any goods of a person have been taken in execution, then, if before the completion of the execution notice is given to the sheriff or other officer charged with the execution that that person has been adjudged bankrupt-
- (a) the sheriff or other officer shall on request deliver to the official receiver or trustee of the bankrupt's estate the goods and any money seized or recovered in part satisfaction of the execution, but
 - (b) the costs of the execution are a first charge on the goods or money so delivered and the official receiver or trustee may sell the goods or a sufficient part of them for the purpose of satisfying the charge.
- (3) Subject to subsection (6) below, where-
- (a) under an execution in respect of a judgment for a sum exceeding such sum as may be prescribed for the purposes of this subsection, the goods of any person are sold or money is paid in order to avoid a sale, and
 - (b) before the end of the period of 14 days beginning with the day of the sale or payment the sheriff or other officer charged with the execution is given notice that a bankruptcy petition has been presented in relation to that person, and
 - (c) a bankruptcy order is or has been made on that petition,
- the balance of the proceeds of sale or money paid, after deducting the costs of execution, shall (in priority to the claim of the execution creditor) be comprised in the bankrupt's estate.
- (4) Accordingly, in the case of an execution in respect of a judgment for a sum exceeding the sum prescribed for the purposes of subsection (3), the sheriff or other officer charged with the execution-
- (a) shall not dispose of the balance mentioned in subsection (3) at any time within the period of 14 days so mentioned or while there is pending a bankruptcy petition of which he has been given notice under that subsection, and
 - (b) shall pay that balance, where by virtue of that subsection it is comprised, in the bankrupt's estate, to the official receiver or (if there is one) to the trustee or that estate.
- (5) For the purposes of this section-
- (a) an execution against goods is completed by seizure and sale or by the making of a charging order under section 1 of the Charging Orders Act 1979;
 - (b) an execution against land is completed by seizure, by the appointment of a receiver or by the making of a charging order under that section;
 - (c) an attachment of a debt is completed by the receipt of the debt.
- (6) The rights conferred by subsections (1) to (3) on the official receiver or the trustee may, to such extent and on such terms as it thinks fit, be set aside by the court in favour of the creditor who has issued the execution or attached the debt.
- (7) Nothing in this section entitles the trustee of a bankrupt's estate to claim goods from a person who has acquired them in good faith under a sale by a sheriff or other officer charged with an execution.
- (8) Neither subsection (2) nor subsection (3) applies in relation to any execution against property which has been acquired by or has devolved upon the bankrupt since the

commencement of the bankruptcy, unless, at the time the execution is issued or before it is completed-

- (a) the property has been or is claimed for the bankrupt's estate under section 307 (after-acquired property), and
- (b) a copy of the notice given under that section has been or is served on the sheriff or other officer charged with the execution.

**Paul French, Guildhall Chambers
Simeon Gilchrist, Edwin Coe LLP
May 2009**