HILL v HAINES: supremacy of the family court

Introduction

1. In what circumstances is a transfer of matrimonial assets made in the context of ancillary relief proceedings susceptible to challenge by the transferor's trustee in bankruptcy? According to recent jurisprudence the answer must be very few. The undoubted tension between the two statutory schemes of insolvency and matrimonial rights has, for all practical purposes, been resolved in favour of the latter for reasons of statutory interpretation, authority and public policy.

2. The decision of the Court of Appeal in *Hill v Haines* [2007] EWCA Civ 1284 (delivered on 5th December 2007) can now, following the refusal of permission to appeal by the House of Lords on 4th March 2008, be taken as the starting point for determination of the principles applicable to transaction avoidance claims in the family context.

3. The only basis upon which the trustee sought to upset the transaction in *Hill v Haines* was as a transaction at an undervalue within s 339 of the 1986 Act. It was not alleged that the transaction was a voidable preference under s 340. As will be seen, however, that provision offers little hope to bankrupts' creditors in this context either.

4. It is important to put the decision in its proper context. The Court was dealing with a property adjustment order (made after a contested hearing) which required the husband to transfer his interest in the matrimonial home to the wife. The position may, as will be seen, be different where the relevant transaction arises out of an agreed release (with no proceedings) of prospective rights under the Matrimonial Causes Act 1973 ("The MCA") for in such a case there will have been no independent judicial assessment of the reasonableness of the agreed financial provision.

Transaction for the purposes of s 339

5. One of the first points considered in the judgment of Sir Andrew Morritt, the Chancellor was identification of the relevant transaction for the purposes of s 339 of the 1986 Act.

6. It was conceded on behalf of the wife before the Court of Appeal that it was the order of the matrimonial court that constituted the relevant transaction and not the actual disposition implementing that order (which post-dated bankruptcy). Was that concession rightly made?

7. It is arguably inconsistent with the terms of s 39 of the MCA which provides:

   The fact that a settlement or transfer of property had to be made in order to comply with a property adjustment order shall not prevent that settlement or transfer from being a transaction in respect of which an order may be made under s 339 or 340 of the Insolvency Act 1986 (transactions at an undervalue and preferences).

8. Yet on the other hand *Mountney v Treharne* [2003] Ch 135 is clear authority to the effect that it is the court order recording exercise of the court's discretion which effects a transfer of the relevant beneficial interest in the assets (i.e. is the relevant transaction) not the subsequent disposition (in compliance with the order).

9. A broader question is whether a court order which does not embody an agreed compromise of ancillary relief rights (but which records a determination made following a contested application) is a "transaction" at all for the purposes of s 339? If not, there is no scope for relief under that provision.

10. Intuitively one might consider that a transaction for the purposes of s 339 would necessarily involve some element of voluntary disposition. Such an approach is arguably supported by the partial definition of "transaction" in s 436 of the 1986 Act:

"transaction" includes a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly.

11. Moreover it has been held that "transaction" in this context has connotations of two persons involved in a dealing: see *Clarkson v Clarkson (a bankrupt)* [1994] BCC 921.

12. Judge Pelling (hearing the first appeal) considered, however, that s 39 of the MCA "trumped" any suggestion that an order made after a contested ancillary relief hearing could not be a "transaction" for the purposes of s 339.

13. With respect to Judge Pelling, however, nothing in the language in s 39 necessarily means all property adjustment orders must are properly characterised as "transactions" irrespective of the circumstances in which they were made. Moreover, as is noted above, it is the property adjustment order which is the "transaction" for the purposes of s 339 and not the actual disposition implementing that order.

14. Given the limited circumstances in which a trustee might now successfully challenge a property adjustment order it is probably unlikely that any spouse seeking to resist such a claim will need to invoke any defence based on the absence of a "transaction" but for cases not the product of consent or compromise the theoretical possibility exists.

15. One limit on "transaction" in this context was identified by the Chancellor at paragraph 31; where he said:

    …I do not think it helps to resolve the issues in this case to dwell on what the legal effect of an out of court compromise of ancillary relief proceedings may be. Such a compromise cannot amount to the transaction for the purposes of s 339 of the Insolvency Act 1986 so that the extent to which it may have been made for consideration or is otherwise enforceable is immaterial.

16. This may be correct so far as it goes but plainly if the out of court compromise is implemented by an appropriate disposition of property, that disposition must be theoretically susceptible to challenge as a transaction at an undervalue.

Consideration

17. To succeed on a claim under s 339 of the 1986 Act the applicant trustee must satisfy three pre-conditions:

    (1) the existence of a transaction entered into at a relevant time by an individual who is subsequently adjudged bankrupt;

    (2) the terms of the transaction are such that the individual receives no consideration, or

    (3) consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual.

18. Even if these pre-conditions are satisfied, the court retains a discretion to whether any and if so what order ought to be made in consequence: *In re Paramount Airways Ltd* [1993] Ch 223.

19. The territory for argument before the Court of Appeal (and before Judge Pelling QC on the first appeal) was in relation to the second and third pre-conditions: did the extinguishment of the wife's application for ancillary relief inherent in the determination of her claim constitute consideration for the purposes of s 339 and if it did, was the value of such consideration significantly less than that provided by the husband (the transfer of his share of the property)?

20. In allowing the appeal the Court of Appeal agreed with the District Judge at first instance, resolving the questions as yes and no respectively, thus concluding them in favour of the wife.

21. According to Sir Andrew Morritt, the Chancellor, the starting point for determination of the relevant issues is Part II of the MCA which contains the court's powers in relation to the granting of financial relief.

22. In exercising that jurisdiction the court is seeking to achieve what is fair, as between both parties to the marriage. Fairness does not, of course, mean financial equality.

23. The Chancellor (at paragraph 30) rejected Judge Pelling's reasoning that for forbearance or exchange to constitute consideration for the purposes of s 339 it must be related to a pre-existing proprietary or contractual right or to a cause of action.

24. Although an agreement between the spouses depends on a court order for its recognition (because the court's jurisdiction cannot be ousted by agreement of the parties), such a pre-order agreement is not without legal effect – it is a relevant circumstance to the court's exercise of its matrimonial jurisdiction.

25. In recognising that the rights of a spouse under the MCA to apply for financial relief do or may have value, the Court of Appeal has simply given effect to previous authority (on admittedly slightly different legislative wording in the Bankruptcy Acts of 1883 and 1914): see *In re Pope* [1908] 2 KB 169 and *In re Abbott* [1983] 1 Ch 45.

26. The Chancellor also held, disagreeing with Judge Pelling below, that the consideration provided by a spouse in giving up her ancillary relief rights (whether by compromise or order) is something measurable in money or money's worth.

27. The process undertaken by the matrimonial court is, said the Chancellor, a quantification of the applicant spouse's ancillary relief statutory right under the MCA by reference to the value of the property thereby ordered to be paid or transferred by the respondent spouse to the applicant. The one balances the other (at least where there has been no operative fraud, mistake or misrepresentation).

28. If the applicant spouse is not to be regarded as providing valuable consideration, s 39 of the MCA would, according to the Chancellor (at paragraph 36), be worded differently, providing that all such transfers were void under s 339(a) or (c) of the 1986 Act.

29. Section 39 of the MCA does not, therefore, recognise vulnerability of property adjustment orders etc arising out of the absence of any valuable consideration but the possible existence of traditional grounds for impeaching any bargain, fraud, mistake or concealment: see the judgment of Thorpe LJ at paragraphs 54-56.

30. It matters not that a claim for financial relief under s 24 of the MCA is founded entirely in statute and the exercise of the court's discretion, its compromise or release can be assessed in monetary value even if such compromise is itself subject to the supervision and ultimately the approval of the court.

31. Perhaps the true limits of the trustee's ability to challenge a court determined entitlement or court sanctioned compromise of ancillary relief proceedings appears most clearly in paragraph 79 of Rix LJ's judgment:

    "…Where [a section 24 claim] is assessed by the court itself, in adversary proceedings, in circumstances where the court is required to take account of all the circumstances, there must be little if any room for the possibility that the court's decision can be reviewed on the ground that it gives to the transferee more than the transferee is entitled to in law, even if in theory it is possible for the court itself to be deceived by dishonesty or collusion."

32. In resolving the undoubted tension between the two statutory schemes of insolvency and matrimonial rights in favour of the latter, the Court of Appeal was evidently driven (at least to some extent) by policy considerations and the undesirability of rendering vulnerable to challenge for up to 5 years, every court determined property adjustment order. Absent

dishonest collusion[1], it would, according to Rix LJ, be "entirely foreign to the concept of a "clean break" if the husband's creditors could thereafter seek to recover, in bankruptcy, the property transferred or its value.

33. The only real glimmer of hope for trustees in bankruptcy is provided by those cases where a bankrupt seeks to justify the transfer of assets to his wife as consideration for her forbearing to issue ancillary relief proceedings (see, for example, *In re Kumar* [1993] 1 WLR 224). Because of the absence of independent judicial assessment of the consideration, there may be some scope for demonstrating an element of bounty (and hence undervalue).

Ball v Jones

34. The limits of *Hill v Haines* were explored recently in the decision of Mr Registrar Baister in *Ball v Jones* (27.03.08). This was a challenge by Mrs Jones's trustee in bankruptcy to a consent order in ancillary relief proceedings which provided for the transfer of property by Mrs Jones to her former husband. The relevant order was made some 13 months before Mrs Jones's bankruptcy.

35. The trustee attacked the consent order as both a transaction at an undervalue (under s 339 of the 1986 Act) and as a voidable preference (under s 340).

36. In seeking to upset the consent order as a transaction at an undervalue the trustee was, following *Hill v Haines*, obliged to rely on the presence of vitiating factors. The trustee alleged that Mrs Jones had misled the matrimonial court on the extent of her income but this failed on the facts. As an alternative, it was said that this was a case of dishonest collusion between husband and wife to protect the matrimonial home for the benefit of the children of the marriage, against the interests of Mrs Jones's creditors.

37. As to that, part of the material deployed by the trustee included legal advice given to Mrs Jones which was to the effect that the compromise ultimately embodied in the consent order was "very disadvantageous", "not appropriate" and similar. Moreover, it appeared that Mrs Jones only submitted to the compromise upon appreciating that any greater provision retained by her would be likely to be taken by her creditors.

38. It was said on behalf of the trustee that the agreement reflected in the consent order under which Mr Jones received the matrimonial home was the product of collusion and had the effect of preferring Mr Jones and the interests of the children over Mrs Jones's creditors.

39. The court rejected the argument based on collusion. The fact that the consent order or agreement recorded in it had the effect of putting a spouse ahead of creditors was not enough. What was required, according to the court, was a specific collusion between husband and wife to do down the creditors by seeking to put assets beyond the reach of a trustee.

40. If right, that represents a very high hurdle for applicant trustees to surmount and little different from what is required fro claims under s 423 of the 1986 Act (transactions defrauding creditors).

41. The court went on to find, in any event, that the necessary element of undervalue was not present having regard to all of the circumstances of the parties and the needs of the child of the marriage.

42. Moreover, even if the transaction were susceptible to being set aside under s 339 as one at an undervalue, it was not an appropriate case in which to exercise the court's discretion in favour of the trustee as, on the figures, it could not be satisfied that there would have been a real, tangible benefit to creditors.

43. That left the trustee's alternative line of attack, his claim that the order constituted a voidable preference. That required the trustee first to satisfy the court that Mr Jones was, in his capacity

[1] Or, presumably, the other vitiating factors identified by the Chancellor.

as an applicant for ancillary relief, a creditor[2] of his wife. As to that, the court concluded he was not, accepting the analogy drawn on behalf of the wife with the position in relation to a litigant with a claim (but no order) for costs.

44. That determination was sufficient to dispose of the claim under s 340 but the court went on to hold that the statutory presumption (stemming from Mr Jones's status as an "associate" of Mrs Jones) that Mrs Jones was influenced in deciding to give the alleged preference by a desire to improve Mr Jones's position in the event of her bankruptcy had been rebutted on the facts. The fact that the ancillary relief proceedings were contested was inconsistent with the presence of any such desire and Mrs Jones's ultimate capitulation could not be equated with a desire to prefer.

45. Finally, even if the trustee had satisfied the court that the transaction was vulnerable as a voidable preference, the court's discretion would have been exercised against him for the same reasons as in relation to the claim under s 339.

Summary

46. It must now be taken as settled law that a pre-bankruptcy property adjustment order made in the context of ancillary relief proceedings is not susceptible to successful challenge by a trustee in bankruptcy of the transferring spouse:

    (1) as a voidable preference (the transferee not satisfying the statutory requirement of being a creditor of the transferor by reason of a pending ancillary relief claim);

    (2) as a transaction at an undervalue except where the order was procured through some form of mistake, concealment, misrepresentation or dishonest collusion.

47. A transfer of property in anticipation of ancillary relief proceedings (which in consequence of the transfer are never issued) may offer some scope for challenge as the value of the statutory rights in Part II of the MCA will not have been independently determined or approved by the court.

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[2] There was, on the facts, no question of his being a surety or guarantor for any of his wife's debts: see s 340(3)(a) of the 1986 Act.