PERSONAL INSOLVENCY LAW UPDATE

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Introduction

1. Personal insolvency has remained very much at the forefront of public attention over recent months, as the number of individuals becoming the subject of a formal insolvency procedure remains vastly in excess of the pre-recession levels. Insolvency Service statistics show that in the first three quarters of 2010, there were 104,360 individual insolvencies, an increase of 6.4% compared to the same period in 2009. Moreover, R3 has said the official figures are only the "tip of the iceberg", with nearly one million individuals believed to be struggling with debt, but not seeking advice, and a further 500,000 taking steps to tackle debt in ways not captured by official data.[1]

Legislative Reform

2. The Insolvency (Amendment) Rules 2010 came into force on 6 April 2010. This is the latest step in a process of modernisation and consolidation announced by the Insolvency Service in July 2005 to "reduce the regulatory and administrative burdens that exist for users of insolvency legislation." The amendments introduced by this latest legislation are intended substantially to complete the comprehensive programme of modernisation in order to pave the way for an entirely new set of Insolvency Rules consolidating all existing secondary legislation, to come into force with effect from 6 April 2011. Of particular note in relation to personal insolvency is the following:

    - communications passing between insolvency office-holders and those involved in the insolvency process may be by electronic means, provided there is consent between the sender and the recipient that communication may be effected in that way;
    - meetings that are required to be held within insolvency processes may be held other than at a physical venue;
    - the requirement for insolvency documents to be sworn before a solicitor or commissioner for oaths is being replaced with a requirement that such documents instead be verified by less burdensome statements of truth and witness statements in accordance with the Civil Procedure Rules;
    - significant amendments are being made to the bases of remuneration and the mechanism by which trustees in bankruptcy have their remuneration and expenses approved or challenged within the insolvency process;
    - provision is being made to provide greater protection to individual debtors by making it explicit that the court may consider limiting disclosure of their address or whereabouts in circumstances where it is satisfied that such disclosure might reasonably be expected to lead to violence against the debtor or a member of their family;

Proposed Reforms

3. On 8 March 2010, the Insolvency Service sent out a 'consultation letter' to interested parties concerning proposed reform to the role of the official receiver. In essence, the proposals were that the official receiver should automatically become trustee of a bankrupt's estate upon the making of the bankruptcy order unless and until such time as an insolvency practitioner is appointed trustee in his or her place and that the term 'interim receiver' be amended to 'receiver' to reflect this change. The stated purposes of such reform were to bring bankruptcy in line with other insolvency procedures to simplify the insolvency process, thereby generating costs savings and to increase the power of official receivers over assets, thereby diminishing the risk of loss to the estate at an earlier stage than at present. Currently, the official receiver automatically becomes receiver and manager of the bankrupt's estate on the making of a bankruptcy order, but the bankrupt's property remains vested in the bankrupt, albeit subject to the control of the official receiver, until the appointment of a trustee.

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[1] R3 - The depth of the personal debt iceberg

4. As a result of responses received to the consultation letter, the Insolvency Service announced on 28 October 2010 that its final policy intentions are to allow for the official receiver to become the first trustee on the making of the bankruptcy order, which removes the need for the current 'notice of 'no meeting' to be sent to creditors and filed at court. However, such reform will necessitate amendments to the Insolvency Act 1986, and can only be taken forward if a 'suitable legislative vehicle' were available.

5. In October 2010, the Insolvency Service published the responses to the *Insolvency Service Consultation Paper: Reforming Debtor Petition Bankruptcy and Early Discharge From Bankruptcy*. As discussed at last year's seminar, it was proposed that in future all debtor applications for bankruptcy would be submitted to an independent individual appointed by the Secretary of State to determine such applications (the Decision Maker) who would have the power to make or refuse to make the bankruptcy order, or to refuse the application and ask the debtor for more information. It was also proposed that the early discharge provision introduced by the Enterprise Act 2002 be repealed.

6. Overall, it would appear that there is support for both of the substantive proposals suggested by the Insolvency Service. In relation to the reform to debtor petitions, a majority of those consulted was in favour of the Decision Maker sitting within the Insolvency Service and of the procedure being made available both online and paper. However, as highlighted previously, there remains significant concern that the current proposals are not sufficient to ensure that the debtor applicant appreciates the seriousness of entering into bankruptcy. Moving forward, there are likely to be further proposals and consultations as to the precise mechanics of any overhaul to the system.

7. As regards early discharge, all but one of the respondents was in favour of repeal after an evaluation report, published in November 2007, found that the cost to government and to creditors of administering early discharge significantly outweighed any of its benefits. Again, such repeal will require primary legislation and is therefore dependent upon being brought forward 'when Parliamentary time allows'.

Case Law

8. There has been a variety of developments in the law in relation to personal insolvency in that period. What follows is a summary of some of the more interesting cases of recent months, grouped thematically.

8.1 Annulment

- ***London Borough of Redbridge v Mustafa*** **[2010] BPIR 893 (Sir Andrew Morritt (Chancellor))**

  Facts: A bankruptcy order was made against M on 31 May 2007 on the petition presented by the Council in respect of three liability orders for council tax. On 6 June 2007 M faxed through to the Council a letter dated 30 May 2007 explaining that she had attended at the Council offices that day but no one had been able to see her, together with evidence that the property had been let to tenants throughout the relevant period The Council wrote to her on 8 June 2007, indicating that as a result of the information produced the debt for which she was made bankrupt was in fact nil. On 13 February 2009, M applied to annul her bankruptcy. DJ Bowles granted the annulment and ordered that the Council pay the trustee's costs on the grounds that when the Council became aware that the order should not have been made it should have applied to annul or contacted the Official Receiver to put the Official Receiver on notice of the position so as to avoid the incurring of substantial costs. The Council appealed the costs order.

  Decision: A petitioning creditor was under no legal obligation to obtain an annulment of a bankruptcy order which had been properly made, nor was there any additional burden on it in this regard, although its conduct would be relevant on the issue of costs. Moreover, where a bankruptcy order was properly made there was no presumption that the petitioner should pay

the costs of its annulment. The question in each case was how to exercise the court's discretion. In the present case, the costs order should be set aside but rather than order a rehearing it was appropriate to exercise the court's discretion afresh and order that M pay the costs of the petition, the trustee and the appeal, but with no order for costs in respect of the annulment application.

Comment: This was a case in which although the bankruptcy order was annulled under s 282(1)(a) on the basis of grounds existing at the time it was made, when the order was made it was properly made: at the time of the presentation and hearing of the petition there were outstanding liability orders and the petitioner was not aware of any dispute. This should be contrasted with the position where the order is wrongly made, in which instance the starting point will remain that the petitioner should be liable for the trustee's costs (*Butterworth v Soutter* [2000] BPIR 582 per Neuberger J).

- ***Annulment Funding Co ltd v (1) Cowey (2) Cowlam*** **[2010] BPIR 1307 (Arden and Jackson LLJ and Morgan J)**

  Facts: The appellant, AFC, provided high interest bridging loans to bankrupts who, but for the bankruptcy, would own property which could be mortgaged to raise funds to obtain an annulment. The loans were secured by a charge on the property and, following the annulment, the intention was that the former bankrupt would obtain a re-mortgage from another lender sufficient to discharge his indebtedness to AFC and pay off any prior charge on the property.

  The bankrupt, B, co-owned a property with his partner C. B and C both signed a document accepting AFC's offer of a loan to be secured by a second charge on the property and a mortgage deed in favour of AFC, which charge was registered prior to the annulment. B obtained the annulment but could not obtain mortgage funding. AFC claimed possession of the property and C defended the claim on various grounds, including undue influence.

  At first instance HHJ Welchman held that: (1) C had entered into the charge as the result of the undue influence of B and AFC was bound by that fact such that the charge should be set aside as against C; and (2) C was not liable as a joint debtor on an unsecured loan. AFC appealed both findings.

  Decision: The judge below had found as a fact that B and C had misunderstood the nature of the transaction and believed (1) they would be entering into a short term loan which would be replaced at an early point by a conventional mortgage with much lower interest rates and (2) the loan was not secured by a second charge. C had both placed undue pressure on B to enter into the transaction and innocently misled her as to its nature due to his own mistaken understanding. AFC had not appealed against the finding it was fixed with the necessary constructive knowledge. Both the loan and the charge were affected by the undue influence/misrepresentation as to the character of the transaction and therefore no question arose of severing the charge and the loan.

  Comment: Given the unfortunate circumstances in which annulment funding is made necessary, and the associated desperation of the bankrupt, undue influence might be expected to be a more widespread problem in these types of transaction than in ordinary circumstances. It is clear that businesses specialising in the provision of annulment funding must heed the guidelines set out in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 in just the same way as banks and other lending institutions to ensure they are not caught out in cases where they take a charge over jointly owned property.

- ***Consolidated Finance Ltd v Hunter*** **[2010] BPIR 1322 (Macclesfield County Court - DJ Swan)**

  Facts: H, a bankrupt, entered into an annulment funding arrangement with the claimant, CFL. The rate of interest on the bridging loan was 2% compound per month during the 3 month substantive period of the loan and 3.75% compound per month thereafter. H was unable to obtain a mortgage to pay back the secured bridging loan and, when he defaulted on the loan,

CFL issued possession proceedings which H defended on various grounds including that the agreements should be undone or revisited under s 140 of the Consumer Credit Act 1974.

Decision: The burden of showing that the agreements were not unfair was on CFL but it had discharged that burden. Having considered the riskiness and nature of the agreement, the risk being high on the lender's part and the bankrupt getting a very valuable benefit from being lent the money, namely the annulment of the bankruptcy order, the terms of the agreement were entirely fair. The rates were similar to other charges for credit available on the market for bridging or short term loans and this is an "ultra high risky form of short term lending". There was nothing unfair in the way the creditor has exercised or enforced his rights under the agreement as the only way in which they could seek to recoup the monies loaned was through proceedings for possession and sale. The conduct of those on behalf of CFL in assisting H with the annulment and thereafter was exemplary.

Comment: Whereas the Court generally takes a protectionist view in relation to consumers**,** this decision is an illustration of the generally positive way in which it views annulment funding. The Court recognises that the availability of such high risk lending is necessary and fulfils a valuable and useful purpose, but is dependent on institutions being able to protect themselves by means of high interest rates. The Court gave a glowing endorsement of the practices of CFL.

- ***Lewis (Trustee in Bankruptcy of Kennedy) v Kennedy*** **[2010] BPIR 886 (Mr Registrar Jaques)**

Facts: The trustee of K applied for an annulment of his bankruptcy under s 282(1)(b) IA 1986 on the ground that, to the extent required by the rules, the bankruptcy debt and expenses of the bankruptcy had all been paid or secured, partly by third party funds. As there was a surplus in the estate, the Court had to determine the question whether statutory interest should be payable on the Crown debt. HMRC had been asked by the trustee if it wished to claim statutory interest and responded in two letters, the first saying it was for the Court to decide, the second stating that it would only consider waiving statutory interest if the debt was paid by a third party, or exceptional circumstances make strict application of law oppressive or seriously unfair or would result in severe deprivation or hardship to a trader of small means. K put in evidence to show the first two conditions for waiver were met, namely that he had borrowed a sum from a third party which the Trustee had told him would be sufficient to discharge debts and expenses, such that as far as he was concerned the entire debt was discharged by a third party, and in addition his wife and children had suffered hardship as a result of the bankruptcy order.

Decision: The Judge considered the fact that the debts were outstanding for 6 years, the debtor did not co-operate with the trustee and there was a surplus in the estate out of which interest could be paid were all factors which suggested strongly that interest ought to be paid on the crown debt in the present case. However, HMRC's view that it was a matter for the court to decide could only be explained by treating it as having surrendered its discretion whether or not to ask for statutory interest to the court, it being open to a creditor in any case to waive his claim to statutory interest. In this case interest ought not to be paid because the first two reasons for waiving it in HMRC's second letter were satisfied, and it had surrendered its discretion whether to claim statutory interest to the court. The debtor procured third party funds for the express purpose of obtaining an annulment believing they were sufficient to do so, although they were not. In the circumstances, the debtor had ended up in a worse position than he would have been had he not borrowed the third party money since he had lost his house, he owed third parties more than his creditors in the bankruptcy and he was left with insufficient money to acquire a similar house to the one he had lost.

Comment: The Judge considered *Harper v Buchler* (No 2) [2005] BPIR 577 (the Court will normally require statutory interest to be paid by a debtor seeking annulment where there are sufficient assets in the bankruptcy to pay all liabilities, costs, fees and expenses) and *Wilcock v Duckworth* [2005] BPIR 682 (in the aforesaid circumstances whilst third party funds may avoid the payment of DTI fees they should not in principle deprive creditors of interest on their claims), but concluded that this was an appropriate case to rule statutory interest ought not to

be paid as the price of obtaining an annulment on the basis that HMRC had indicated the bases upon which it would be willing to waive its claim for interest and had surrendered its discretion on the matter to the court.

- ***Vaidya v Wijayawardhana*** **[2010] BPIR 1016 (Sarah Asplin QC)**

  Facts: A bankruptcy petition was presented against V based on a statutory demand which related to two costs orders made against V. V had applied to set aside the statutory demand and supported his application with an affidavit in which he admitted the costs orders but referred to a separate cross claim against the creditor in a sum vastly exceeding the figure for costs and falling within r 6.5(4)(a). V's application was dismissed on paper by DJ Toombs without detailed reasoning or express reference to the matters raised by V. A bankruptcy order was made at a hearing at which V attended and referred to the cross claim. V's application for an annulment was dismissed. V appealed on the basis that the District Judge ignored or failed to give proper weight to his cross claim and decided the previous "paper hearing" on the application to set aside the statutory demand was the appropriate time for it to have been considered.

  Decision: The Judge had jurisdiction to deal with the application to set aside the statutory demand on paper but had given no reasons for dismissing it. He should have given reasons as to why no sufficient cause had been shown for the application to be set aside. There was no basis for the assumption made on at the hearing of the petition and the application to annul that the issues had been dealt with on the merits and did not need to be considered further. Inferences as to the Judge's reasons were not good enough. The proper question was whether the arguments raised in relation to the cross claim had already been run and failed and here it was not possible to reach that conclusion. It was therefore necessary for the issue to be considered further. Further, the failure to give reasons was a breach of Article 6(1) ECHR. The matter was remitted for rehearing.

  Comment: The Judge drew a distinction between not allowing the debtor on the hearing of the petition or an application for annulment to re-argue the very grounds upon which he was unsuccessful in seeking to set aside the statutory demand, and the situation where there had been no reasoned determination at the statutory demand stage. (e.g. cases where the demand had been dismissed on a technical ground). In the latter case it could not be said that issues raised had been dealt with on their merits, and neither could that be said with any confidence where reasons had not been given for the decision. In this situation it will not be sufficient simply to make the point that the debtor had not appealed the previous order(s).

8.2 Applications to Set Aside Statutory Demands

- ***Moseley v Else Solicitors LLP*** **[2010] BPIR 1192 (Birmingham County Court – DJ Dowling)**

  Facts: In October 2008, M instructed the respondent firm of solicitors to act for him in respect of an application which he had already initiated to the Adjudicator to HM Land Registry. M signed a copy of the respondents' terms and conditions of their retainer which included details of the charge out rates for all classes of fee earner and terms as to the payment of any invoices rendered.

  Between October 2008 and September 2009, the respondents rendered eight invoices to M in respect of work done, all of which were promptly paid. However, M refused to pay the full amount claimed in an invoice rendered on 30 October 2009 on the grounds that he was being charged for unnecessary items, including the attendance of a trainee solicitor at a conference with counsel held on 29 October 2009.

  It was accepted that M had promised to settle the October invoice in a telephone conversation on 4 November 2009. As a result, the respondents continued to undertake work for M in respect of the forthcoming case. However, M subsequently informed the respondents that he was disinstructing them and confirmed that he would make immediate payment of the balance outstanding. M later succeeded fully in his application and was awarded all of his costs.

However, M refused to make payment to the respondents, who presented a statutory demand in the sum of £15,135.45. M applied to set aside the demand on the ground that the invoices were disputed and that he was "in the process" of applying to the court seeking detailed assessment of the invoices pursuant to ss 70-72 of the Solicitors Act 1974.

Decision: The court gave careful consideration to the question whether the amount demanded was a liquidated sum for the purposes of s 267 IA. The decision of Proudman J in *Truex v Toll* [2009] BPIR 692 was applied. A claim for solicitors' fees not as yet judicially assessed or determined is not a claim for a liquidated sum, even if the period for challenge has expired, but becomes a claim for a liquidated sum once the fees have been so assessed or determined. An unliquidated debt can also be converted into a liquidated debt by agreement for consideration or conduct giving rise to an estoppel. Where further work is only undertaken by a solicitor on condition that the client agrees to pay outstanding invoices, there is consideration for the agreement and the client cannot resile from it. In the present case, as M had told the respondents that the disputed invoice would be paid, and they had continued to undertake work on his behalf, M was estopped from disputing that invoice and the sum demanded had become a liquidated sum. There was an undisputed debt in excess of the minimum bankruptcy level, therefore the application was dismissed.

Comment: In *Truex v Toll*, Proudman J noted that it was "with some hesitation" that she concluded that a mere admission by a debtor that a certain sum was due to his solicitors, absent consideration or estoppel, was insufficient to convert the debt into a liquidated one. It is not wholly clear from the judgment whether the additional work undertaken by the solicitors as a result of the debtor's promise to pay amounted to consideration for the agreement to liquidate the debt or detrimental reliance for the purposes of grounding an estoppel. Further guidance may be necessary as to the degree of conduct that solicitors will need to show to establish that the debt has become liquidated by agreement.

- ***Feldman v Nissim*** **[2010] BPIR 815 (Richard Snowden QC, sitting as a Deputy High Court Judge)**

Facts: F, a professional poker player, had lost £700,000-800,000 playing on-line poker. N, a rabbi friend of F, suggested that F try recovering his losses through on-line spread betting. N and F agreed that N would make spread bets on F's behalf using N's account, on the basis that N would account to F for any profits made and that F would indemnify him against any losses suffered. F told N that he was prepared to risk £100,000–£200,000 in this way. N made a series of bets, ultimately suffering losses of £140,000. F accepted that N had reported to him the net losses made at the end of each session of on-line betting, and that he had requested N to continue betting. N eventually told F that he was not prepared to make any further bets and sought payment of £140,000 from F. When F did not pay, N served a statutory demand.

F applied to set aside the demand on the grounds that there was a genuine dispute as to how it was envisaged that the betting would take place, as to which bets were the subject of the agreed indemnity, and hence as to the amount of money, if any, which he owed and that he had a cross-claim against N, who owed him a duty of care and was negligent in the way he placed stop losses on the bets made.

At first instance, DDJ Duchenne dismissed the application finding that N had proved his claim just as he would have to on an application for summary judgment. He also dismissed claims that N had owed any duty of care to F and rejected a submission on behalf of F that N had behaved fraudulently, stating that there was no evidence to support such an allegation at all. F appealed, arguing that there was a significant conflict on the evidence which could only be resolved at a trial.

Decision: The undisputed facts provided more than sufficient grounds upon which to conclude that F agreed to indemnify N and that he had acknowledged that the amounts claimed by N fell within the scope of the agreed indemnity. Whilst there were inconsistencies and conflicts in the evidence of the parties as to the extent to which N sought or was given specific instructions from F to make bets on his behalf, F had not sought to identify which

bets, different to those relied upon by N, were the bets which he claimed to have authorised, and which were not. Given the course of dealing, merely pointing to such evidential differences did not amount to substantial grounds for disputing the indemnity claimed by N. F had not shown any substantial grounds for disputing that he was indebted to N in the amount claimed in the statutory demand. As to the alleged cross-claim, whilst it was possible that a duty of care may have been owed by N to F, there was no evidence to suggest that N had been negligent and there were also difficulties with establishing causation. Accordingly, F had not shown that he had an arguable counterclaim, set-off or cross-demand which would justify setting aside the statutory demand. The appeal was dismissed.

Comment: Whilst the facts of this case sound like the set up to a joke, the decision provides some important guidance on the test to be applied by an appellate court where an application to set aside a statutory demand has been refused at first instance. N argued that the court ought to apply the approach of the Court of Appeal in *Stuart v Goldberg and Linde (A Firm) and Others* [2008] EWCA Civ 2, in which on the hearing of the appeal of a decision to strike out a claim as an abuse of process it was held that the appellate court should adopt a similar approach to that which it would adopt in relation to an appeal against an exercise of discretion, namely interfering only if it was satisfied that the judge took into account immaterial factors, omitted to take into account material factors, erred in principle or came to a decision that was impermissible or plainly wrong. However, the Judge distinguished this case, holding that the decision whether to set aside a statutory demand under r 6.5(4)(b) did not call for a real exercise of judicial discretion or the balancing of a large number of factors: the debt was either disputed on substantial grounds or it was not.

8.3 IVAs

- ***Re Hargreaves (In Individual Voluntary Arrangement); Booth v Mond*** **[2010] BPIR 1111 (HHJ Hodge QC, sitting as a Deputy High Court Judge)**

Facts: H was made bankrupt on 18 July 2005. Prior to his discharge, he entered into an income payments agreement (IPA). In 2009 H entered into an IVA. Although H disclosed in his proposal that he had entered a 3-year IPA he did not disclose that he was in arrears, nor was his trustee in bankruptcy (T), included in the schedule of creditors set out in the appended statement of affairs. T sought recovery of the arrears and requested that they be included in the IVA for the purpose of receiving dividends. The supervisor of the IVA (S) rejected T's claim in its entirety, contending that H would have good grounds for making an application to the court to vary the IPA, and to have it discharged in its entirety, thereby wiping out any arrears and any claim in the IVA. However, S subsequently applied for directions as to whether or not sums due to M under the IPA should be included or excluded from the IVA for voting and dividend purposes.

S argued that, under the terms of the IVA, T ought to have issued an appeal against the rejection of his debt within 21 days of receipt of notice. T had failed to do so and was now out of time. Moreover, any claim which was inadvertently omitted from the proposals could only be admitted if the likely dividend to unsecured creditors would not be reduced by more than 10%. S accepted that the IVA arrears were a bankruptcy debt in relation to the IVA for the purposes of the statutory definition in s 382 IA, but argued that they were not a *provable* debt within the meaning of r 12.3 IR. Finally, S argued that it was not legally possible for a trustee to compromise a claim for arrears under an IPA or an IPO within an IVA by analogy with the position in relation to periodical payments orders.

Decision: The Judge directed that the sums due to M pursuant to the income payments agreement should be included in the IVA for voting and dividend purposes. The correspondence between T and S did not amount to the submission of a proof, so that the limitation period in the IVA was not engaged. On the evidence, the arrears were not inadvertently omitted by H and in any event any IVA dividend would not be reduced by more than 10% if T's claim was admitted. The exception from provability of a debt in r 12.3(3) of the Rules did not apply to arrears under an IPA or IPO; although such agreement or order is capable of review, it is not the fact of review that made a debt non-provable but rather the absence of finality. It was clear from s 310A(6) IA that an IPA could be varied by written

agreement between the parties so there could be no problem about T compromising the terms of an IPA. Section 310A(5)(b) was not infringed as the IVA did not have the effect of extending the IPA beyond 3 years, as it merely imposed a new obligation as to the method of satisfying the arrears which had already accrued.

Comment: It is important to distinguish arrears that have already accrued pursuant to an IPA or IPO as at the date of the IVA from future instalment payments which will fall ~~for~~ due for payment after the implementation of the proposals. In respect of the former, it is clear that these constitute a bankruptcy debt at the date of the IVA, whereas the latter will not. Accordingly, the arguments which failed in the present case may remain open in respect of future instalments.

- ***Child Maintenance and Enforcement Commission v Beesley and Whyman*** **[2010] EWCA Civ 1344 (Etherton, Tomlinson, Ward LJJ)**

  Facts: This appeal concerned an issue as to whether CMEC was a creditor capable of being bound by the IVA of a non-resident parent (NRP) who had failed to pay periodical child support maintenance under the Child Support Act 1991 (CSA).

  The CSA and regulations made under it provide a comprehensive code for the recovery of child support. Under section 4(1) CSA a parent with a qualifying child (PWC) or an NRP can apply to CMEC for an assessment to be made to determine the amount of child support payable by the NRP. Further, a PWC or NRP can apply to CMEC to collect and enforce that payment. At the date of the application, CMEC had no power to compromise the liability of an NRP to pay arrears in the sense of agreeing less than what had accrued following a maintenance calculation.

  W, an NRP, put forward an IVA proposal in February 2009 for payment of 27p in the pound over 5 years. Accrued arrears in child support payments of more than £25,000, representing 94% of W's liabilities, were included in the Statement of Affairs. CMEC did not attend the meeting of creditors as it believed that it was not a creditor capable of voting on, or being bound by, an IVA and the proposals were approved in its absence. CMEC subsequently issued an application pursuant to s 263(3) IA for an order that the IVA supervisor, B, incorrectly decided that it was entitled to vote at the creditors' meeting or alternatively for an order pursuant to s 262 revoking the IVA on the grounds of unfair prejudice.

  At first instance ([2010] EWHC 485 (Ch)), HHJ Pelling QC found that CMEC was a creditor for the purposes of the IVA, holding that it was open to the legislature to expressly exclude arrears due to CMEC from the IVA regime but it had chose not to do so. However, the Judge accepted that the IVA was unfairly prejudicial to CMEC's interests and therefore revoked the IVA. CMEC appealed in relation to the s 263 application; W cross-appealed in relation to the finding of unfair prejudice.

  Decision: The Court of Appeal unanimously granted CMEC's appeal. Giving the leading judgment, Etherton LJ accepted that child support liability arrears are a 'bankruptcy debt' as defined by s 382 and that CMEC was a 'creditor' for the purposes of bankruptcy pursuant to s 383. However, it was clear that the legislative policy was to exclude liability to pay child support from the consequences of bankruptcy and debt relief orders; arrears of child support are not a provable debt in bankruptcy (r 12.3(2)(a)) and are an 'excluded debt' for the purposes of DROs (s 281(5)(b)). Further, the liability to pay child support and arrears is not released by discharge from bankruptcy or the expiry of the moratorium under a DRO. The discernible policy was that child support should not be compulsorily abated together with the debts of other creditors, but should be recoverable in full from assets which do not form part of the bankrupt's estate. There was no discernable reason for adopting a different policy in the case of an IVA. This was consistent with the inability of CMEC under the present legislation to agree to waive or compromise arrears of, or future payments of, child support.

  Comment: As a result of this common sense decision, it would seem clear that NRPs cannot seek to avoid liability for arrears of child support payments by entering into an IVA rather than bankruptcy. It should be noted that amendments to the CSA, when in force, will permit CMEC

to accept part payments in satisfaction of arrears. It is submitted that this should not have any impact upon the policy reasoning underpinning this decision.

- ***Mond v MBNA Europe Bank Ltd*** **[2010] BPIR 1167 (Sir William Blackburne, sitting as a High Court Judge)**

  Facts: Two IVA providers issued a claim against MBNA, a member of the British Bankers Association (BBA), for declarations that MBNA had contravened various provisions of the IVA Protocol when voting against an IVA proposal, with the result that the IVA was rejected. The protocol was 'protocol compliant' and the key provision of the Protocol was clause 13 which provided:

  "13.1 It is understood that one of the aims of the Protocol is to improve efficiency in the IVA process and to this extent creditors and IVA providers will avoid the need for modifications of an IVA proposal wherever possible. This does not affect the right of creditors to vote for or against an IVA proposal.
  13.2 Where a creditor or their agent on their behalf votes against a protocol compliant IVA proposal their reason for so doing should be disclosed to the IVA provider."

  The principal reason for rejecting the proposal was that MBNA considered that a DMP was feasible and manageable having regard to the disposable income of the debtor and the small number of creditors.

  Decision: From the language used in the protocol and the imprecise and aspirational nature of many of its terms, it was properly to be regarded as a voluntary industry standard or a code of best practice rather than a legally binding contract. Whilst the absence of such contract did not necessarily militate against the making of the declarations sought, it was not appropriate to do so as the only persons before the Court were two IVA providers and only one member of the BBA. More crucially, the debtor in question was not a party to proceedings. Further, the Judge expressed the view that if it had been intended that BBA members were required to vote in favour of a protocol compliant IVA unmodified unless good reasons to the contrary were disclosed, it would have been made explicit on the face of the Protocol.

  Comment: Whilst it was not strictly necessary to do so, the Judge went on to suggest that there was no intrinsic reason why a protocol-compliant IVA should not be rejected because the creditor thought a DMP was preferable. On the face of it, it would appear that a creditor can reject any proposal provided that he gives a reason for so doing; at present there is no requirement that that reason be a 'good' reason. The Judge concluded by stating that while he disagreed with the IVA providers' interpretation of the Protocol as presently framed, that did not mean that he did not have 'considerable sympathy' for that approach, and noted that it was open to them to seek to have the Protocol amended by the standing committee charged with monitoring the efficient operation of the Protocol.

8.4 Petition Costs

- ***Grosvenor Estates Belgravia v Laidley*** **[2010] BPIR 1090 (Mr Registrar Jaques)**

  Facts: The undisputed part of the petition debt was paid by the debtor after he had been served with an unsealed and undated copy of the petition but before he received a sealed copy. The question arose as to the liability of the debtor for the petitioner's costs of the hearing.

  Decision: Where the petition debt is paid after service of the petition, the usual order is for the petition to be dismissed with the debtor to pay the petitioners costs. Where the debt is paid before service of the petition, the usual order is for permission to withdraw the petition or, if the petition is served after payment, for the petition to be dismissed with no order to costs. In the present case, service was only effective when a sealed copy of the order was sent to the debtor (i.e. after payment) therefore the petitioner should not be awarded his costs. Moreover, the debtor was entitled to his costs of the hearing to determine liability for costs.

Comment: The facts of this case are comparatively unusual (indeed the Registrar described them as 'unique' in his experience). However, Registrar Jaques took the opportunity to send a 'loud message' to petitioners and court staff that it is important to ensure that all the steps required by the rules have been complied with.

8.5 Section 284 IA 1986.

- ***Warwick (Formerly Yarwood) v Trustee in Bankruptcy of Clive Graham Yarwood*** **[2010] BPIR 1443 (Birmingham County Court - HHJ David Cooke sitting as a High Court Judge)**

  Facts: W and Y, a married couple, separated in April 2004. W issued a divorce petition and subsequently applied for ancillary relief in September 2004. After negotiation, on 28 September 2006 the parties agreed by a draft consent order that the proceeds of sale of the jointly owned matrimonial home ("the Property") would be divided 75% to W and 25% to Y. The consent order had an annex dealing with pension sharing arrangements which was still in draft and yet to be agreed. Conveyancing solicitors were instructed in relation to the sale of the Property and advised as to the division of the net proceeds. Contracts were exchanged 19 March 2007. A bankruptcy petition was presented against Y on 20 March 2007. The sale completed on 23 March 2007 and the proceeds distributed on 26 March 2007. The final order in the ancillary relief proceedings was made by consent on 4 June 2007. A bankruptcy order was made on the petition against Y on 13 September 2007. The Trustee applied for an order that the additional 25% of the proceeds of sale W had received over and above her half share was a void disposition under s 284 of the Act.

  At the trial, the Deputy District Judge held an agreement had been reached between the parties on 28 September 2006 for the transfer to Y of an additional 25% of the beneficial interest in the Property, but that on the authority of *Xydhias v Xydhias* [1999] 1 FLR 683 it was not enforceable and could therefore not have operated to vary the beneficial interests of the parties. W appealed on the grounds that the agreement of 24 September 2006 was an enforceable contract for the immediate transfer to W of an additional 25% of the beneficial interest in the property, or gave rise to a constructive trust or proprietary estoppel, alternatively that the exchange of contracts on 19 March 2007 gave rise to a constructive trust or proprietary estoppel, and *Xydhias* was contrary to previous Court of Appeal authority.

  Decision: The decision was upheld on different grounds. On the facts no enforceable contract had been reached on 28 September 2006 as the parties had not reached agreement on all terms, including the pension sharing arrangements. In any event, the draft consent order was an agreement for sale of the matrimonial home and the payment of an amount of money defined by reference to and paid out of the sale proceeds, not an agreement for immediate transfer of a beneficial interest in the matrimonial home. There was no common intention or promise to vary the parties' beneficial interests and no constructive trust or estoppel could arise. When contracts were exchanged on 19 March 2007 this was simply a step taken to implement the arrangement with no new intention or promise made in relation to the beneficial interests.

  Per curiam: were it necessary to decide the appeal, the Court would have accepted that *Xydhias* was inconsistent with earlier decisions of the Court of Appeal and held that on the balance of authority in principle an agreement between parties which satisfied all the normal requirements of formation for a valid contract might be enforceable notwithstanding that it was made in compromise of ancillary relief proceedings.

  Comment: The issue of whether matrimonial property orders made prior to the bankruptcy are transfers at an undervalue contrary to s 339 of the Act has been considered elsewhere (see *Hill v Haines* [2007] EWCA Civ 1284, where the High Court held that an order made after contested proceedings could be characterised as a transaction at an undervalue.), but in this case the Court considered the less usual scenario where such an order is made after presentation of the bankruptcy petition. The importance of a careful review of the effect of any agreement between the parties on their respective property rights is highlighted - it is insufficient for a promise to be made to pay a sum of money as this is not itself a disposition.

- ***Sands and Treharne v Wright*** **[2010] BPIR 1437 (Mr Registrar Simmonds)**

  Facts: Shortly after the presentation of a bankruptcy order against him, the debtor made a payment of £22,000 out of the net proceeds of the sale of his matrimonial home to W, allegedly in repayment of unpaid invoices and loans made by W to the debtor. The trustees in bankruptcy sought an order that the payment to W was a post-petition disposition which was void by reason of s 284 IA. W sought to rely on the defence in s 284(4) IA.

  Decision: Section s 284(4) IA provides a defence to a party who receives property from a bankrupt (i) before the commencement of bankruptcy, (ii) without notice of the bankruptcy, (iii) for value and (iv) in good faith. It was accepted that W did not have notice of the bankruptcy proceedings, thus the issues for the court were whether value was given for the £22,000 and whether it was received in good faith. On the facts, there were too many inconsistencies in W's evidence to discharge the burden of proving that value had been given for the transfer. Whilst authorities under the old Insolvency legislation should generally not be followed, the pari passu principles applied equally to both regimes and the question of good faith did not differ between them. Applying *Re Dalton* [1963] Ch 336, W had not acted in good faith; W's knowledge of the debtor being in deep financial trouble and that whoever applied the greatest pressure was likely to be paid to the exclusion of other creditors ought to have put him on inquiry, and by accepting the position he avoided finding out the truth.

  Comment: This decision confirms that a mere suspicion that a debtor cannot satisfy all of his other creditors may be sufficient to prevent the recipient from relying on s 284(4) if he turns a blind eye to that possibility and a petition has been presented at the time of the payment. It would appear that the judge accepted the opinion advanced by the editors of *Schaw Miller & Bailey* that the strength of the suspicion would have to be at the high end of the spectrum, including cases where he was aware of unsatisfied judgments or of the service of an uncontested statutory demand. In the present case, W had sufficient knowledge of the debtor's financial situation to be at that high end of the spectrum.

8.6 Debt Relief Orders

- ***R (Payne and Cooper) v SS for Work and Pensions*** **[2010] EWHC 2162 (Admin) (Cranston J)**

  Facts: C had been overpaid welfare benefits and P had been granted a social loan from the budgeting fund which she was liable to repay ("the Debts"). The Secretary of State for Work and Pensions wished to make deductions under Social Security legislation in respect of the Debts from future welfare benefit payments. Both C and D were the subjects of debt relief orders (DROs) and their liabilities to repay the Debts had been recorded as debts due under the terms of their DROs. P and C argued that the deductions constituted a "remedy" in respect of the Debts and were therefore caught by the moratorium imposed by s 251G(2) of the Act. SS argued that the deductions should be permitted (in accordance with reported authority in the Bankruptcy context) on the basis that "remedy" should have a narrow construction and, failing that, because of the net entitlement principle i.e. that the beneficiary of social security benefits has no entitlement to a gross benefit, only to the benefit after deductions.

  Decision: The Judge found that the right to make deductions was caught by the DRO moratorium, since right to make deductions from an ongoing benefit is in effect the statutory equivalent of a right of set off. "Remedy" should be given its ordinary meaning, being the legal means to enforce or recover a right, and as such includes self help measures such as set off, whether automatic or discretionary. The so called net entitlement principle which had been held to be effective in the context of bankruptcy to remove deductions from the ambit of section 285 was not determinative in the present context, in each case statutory interpretation is required. There is a similarity of language between the two sections but they are not identical and the regimes are different. DROs were a new regime in 2007 and their operation could not be determined by precedents relating to bankruptcy. DROs are for people with no real assets or disposable income and have the sole purpose of debt relief, whereas

bankruptcy is based upon the realisation of the bankrupt's estate for the benefit of creditors. Permission was given to appeal.

Comment: This case highlights the important differences between the bankruptcy process and the relatively new DRO regime, and the Court's attitude to them. It is not surprising that in the context of the sort of low income debtor with relatively small liabilities and no assets intended to be assisted by a DRO, that the Court would be slow to carve out ways in which their liability for certain debts would be maintained despite the moratorium, The Judge expressly stated he had approached the matter as a question of statutory construction and treated as irrelevant issues of larger matters of public policy (individual hardship caused by deductions to benefit recipients v the difficulties facing the SS in the management of debt stock from overpayments and debt fund repayments). However, he went on to expressly indicate that if it is thought desirable as a matter of public policy that s 251G(2) should not affect the power to make deductions from ongoing benefit entitlement where a DRO is in place, the SS has the power readily to take steps to achieve that goal. Watch this space!

- ***Newport City Homes v Dearden*** **15 October 2010 unreported (Newport (Gwent) County Court - DJ RA Evans)**

Facts: On 2 March 2010 the Claimant housing association issued a claim for possession and a money judgment under Ground 10 of Schedule 2 of the Housing Act 1988 (rent arrears) against one of their tenants, D. At a hearing on 6 April 2010, which D did not attend, an order for possession was made against her suspended on payment of instalments to clear the arrears. D applied to have the order varied on the ground that she could not prefer one of her creditors as she was subject to a DRO dated 22 January 2010 which included the debt due to the Claimant. At a case management hearing the District Judge refused the Claimant retrospective leave to proceed under s 251G(2)(b)(ii) of the Act, such leave being necessary for a creditor owed a qualifying debt to commence an action against the debtor during the moratorium. The claim could therefore not survive unless leave was not required in this case. The question for consideration was what "an action for the debt" means

Decision: The Claimants sought the composite remedy of possession, payment of unpaid rent and mesne profits and costs. The remedy obtained on 6 April 2010 was possession suspended on payment of the rent and the arrears and costs by instalments. The Claimant's primary purpose was not to evict D while she paid the rent and arrears. These proceedings were not akin to those where a landlord uses a notice of termination under the "quickie" procedure and only seeks recovery of the property. Although at a very late stage the Claimants abandoned their money claim and pursued only the claim for possession, this was not sufficient to change the nature of proceedings, which were proceedings for a debt. In any event the Claimant must fail by reason of section 215(g)(2)(a) since what else could a possession order relying on a debt be save for a remedy in respect of the debt? The Judge accepted that it wouldn't result in the Claimant recovering the debt but considered that this was not what this section means or how it should be construed. In any event, if that was wrong, Ground 10 was a discretionary ground and having heard no evidence as to D's circumstances it was not reasonable to make an order for possession against her. A DRO is supposed to be statutory remedy for people in such difficulties.

Comment Another case emphasising the difference between the bankruptcy and the DRO regimes. In the bankruptcy context, the Court had decided in *Harlow v Hall* [2006] 1 WLR 2116 that Mr Hall was not entitled to a discharge of a possession order made against him by arguing that his liability for arrears of rent and costs were debts provable in the bankruptcy. However, the Judge decided that case was not of assistance in the present circumstances as the claim, the order and the date for surrender all pre-dated the bankruptcy order so Mr Hall's property in the tenancy had already been extinguished. The Judge again considered that the two sets of provisions for bankruptcy and DROs were similar but not identical and the differences were significant, but gave permission to both parties to appeal straight to the Court of Appeal for guidance on these issues.

8.7 Appeal of decision under s340 by the bankrupt

- ***Sands and Another v Monem and Another*** **[2010] BPIR 1431 (Norris J)**

  Facts: On 6 February 2006, B transferred a property into the joint names of himself and M, and on 27 April 2007 B and M transferred the property into the sole name of M in partial discharge of indebtedness. Subsequently, B was made bankrupt. On 20 April 2010 the Court ordered that these transfers should be set aside as constituting unlawful preferences. B (but not M, the ultimate recipient) applied for permission to appeal out of time on the basis that M was a secured creditor because her father held the benefit of an equitable charge created by a loan agreement between B and himself on trust for her (a technical argument turning on the correctness of the decision in *Morely v Morely (*1858) 25 Beav 253) such that the transfer to her of property subject to an unperfected equitable charge held on trust for her did not constitute a preference.

  Decision: The Judge granted the application to extend time but refused permission to appeal on the basis that M, the person whose property is affected by the appeal, did not wish to appeal any aspect of the order and neither did any other person with any real economic interest in the bankrupt's estate. The essential question (ignoring the issue of whether an 1858 case was correctly decided) was whether there was a real prospect of B persuading an appeal court he had any standing in the matter. The Judge decided there was not. He had no economic interest in the outcome of the bankruptcy and could not challenge an order accepted as correct by all the parties who do have a real interest in the bankruptcy.

  Comment: This case illustrates the general principle that the Court will not entertain appeals on points of purely academic interest by an individual with no economic interest in the result.

8.8 Transactions at an Undervalue & Shams

- ***Chen and Du v Delaney*** **[2010] EWCA Civ 1455 (Lord Neuberger MR, Carnwath and Sullivan LJJ)**

  Facts: On 8 May 2008 the debtors sold a residential property to a Mr Delaney for £210,000. On 1 May 2008, in anticipation of the transfer, Mr Delaney had granted a tenancy of the relevant property to C and D expressed to commence on 8 May 2008 and to expire on 9 May 2029. The relevant tenancy was said to be exclusive to C and D and to be non-assignable. The intention was, therefore, that C and D would continue to live at the property notwithstanding the transfer to Mr Delaney. Judgment creditors of C and D challenged the sale of the property under s423 IA as a transaction defrauding creditors. Valuation evidence submitted on behalf of Mr Delaney and C and D indicated that the value of the property with the benefit of full vacant possession as at May 2008 was in the region of £275,000 and the value of the property subject to the tenancy agreement was in the region of £115,000.

  At first instance, the district judge held that the transaction was one at an undervalue and entered into with the requite prohibited purpose. In approaching the question of undervalue, the district judge noted that s423 required a comparison to be made between the value obtained by C and D and the value of consideration provided by C and D, and concluded that the difference between the unencumbered freehold value (£275,000) and the amount paid to C and D (£210,000) gave rise to an undervalue of £65,000 which she held was sufficiently significant for the purposes of the section. On appeal, HHJ Purle QC overturned the decision, holding that whilst the purpose of the transaction was to place the property beyond the reach of creditors, there was no undervalue in the consideration obtained by D and C; the £210,000 was the equivalent of a sale at £275,000 with a lease back at a premium of £65,000. Therefore, s 423 was not engaged. The Judgment Creditors appealed to the Court of Appeal.

  Decision: The appeal was dismissed. Giving the majority judgment, Lord Neuberger MR indicated that there were two ways of analysing the transaction. Firstly, C and D sold the freehold subject to the lease; Mr Delaney acquired the freehold reversion (£115,000) for 275,000. Secondly, the debtors sold the unencumbered freehold (£275,000) for a combination of £210,000 and the lease. The appellants argued in favour of the second construction,

arguing that it was for C and D and Mr Delaney to establish that the lease had value, that their failure to do so meant it should be treated as having no value and accordingly that the resultant shortfall (£65,000) was an undervalue. Lord Neuberger rejected that conclusion. Even if the second analysis of the transaction was correct, there was a marriage value between the value of the freehold with vacant possession and the freehold subject to the lease of £160,000. Appropriating that value between the freehold and the lease equally, the lease would be worth £80,000 and therefore C and D received more than the £275,000 which the property was worth. It was not therefore necessary to decide which of the two analyses was correct as on either basis it was clear that there was no undervalue.

Comment: In reaching the conclusion that there was no transaction at an undervalue, Judge Purle agreed with the reasoning in *Redstone Mortgages Plc v Welch* (2009) 36 EG 98 CC, to the effect that a registered purchaser under a sale and lease back transaction acquired nothing more than the freehold reversion ([2010] EWHC 6 (Ch) at [11]). This case was recently disapproved in *North East Property Buyers Litigation* [2010] EWHC 2991 (Ch), a consolidated action of a number of cases involving transactions whereby NEPB, a sale and leaseback company, had bought property, purportedly on a sale and leaseback basis, funded by purchase mortgages and defaulted on mortgage repayments. On the applications of the mortgagees for possession, it was held that the mortgagees' rights had priority over any equitable rights the occupiers may have had against NEPB as a result of its representations. HHJ Behrens expressly stated that, if Judge Purle's judgment related to the decision on priorities rather than the nature of the transaction itself, he disagreed with it. In consequence, it is possible that on a slightly different factual scenario the court will need to consider the potential unenforceability of any lease as against a mortgagee when determining the actual value received by the vendor under a sale and leaseback agreement for the purposes of TUV claims.

- ***Doyle v James*** **[2010] BPIR 1063 (Cardiff County Court – HHJ Chambers QC, sitting as a High Court Judge)**

  Facts: J and his wife were the joint beneficial owners of a property in Barry which was the subject of an equitable mortgage in favour of Barclays. In 1991, J was made bankrupt and his half interest vested in his trustee. During the bankruptcy, Barclays sought to enforce their mortgage by taking possession proceedings and a compromise was subsequently reached pursuant to which Barclays agreed to transfer whatever interest it had in the property to the respondents. The Official Receiver, by then the trustee in bankruptcy, consented to the withdrawal of a caution in respect of the property. Subsequently, J and his wife purported to effect a transfer of the property to their daughter, N. In 2004, N transferred her interest in the property back to J's wife.

  In 2008, J was made bankrupt for a second time by reason of his failure to pay an order in respect of costs and expenses obtained by the Council in respect of a venture involving the erection of cages for the accommodation of exotic species in a property at Barry. J's trustee in bankruptcy in the second bankruptcy (T) brought an application for an order to the effect, whether by declaration or transfer, that he was the holder of half the beneficial interest in the property on three grounds: (1) J's half interest in the property remained vested in his first trustee notwithstanding the release of the equitable mortgage and removal of the caution until 2007 when it automatically revested in J pursuant to s 283A IA (the 'use it or lose it' provisions); (2) the transfer to N was a sham and the transfer of the property by her to J's wife in 2004 was a transaction at an undervalue; (3) those transfers were transactions defrauding creditors under s 423 IA.

  Decision: The withdrawal of the caution by the OR did not constitute the realisation of the beneficial interest in the property. The withdrawal amounted to a statement that the OR would not object to Barclays' proposal to transfer any interest it had in the property but the bankruptcy estate still held whatever interest it had always held. In any event, s 283A IA was aimed at the situation in which the asset had been 'cashed in', that is realised for the benefit of creditors. As there had been no transfer of the beneficial interest from the bankruptcy estate, the only basis on which J could now succeed would be by way of estoppel, which on the facts did not arise.

The Judge went on to consider the alleged transactions defrauding creditors. Prior to the attempted transfer of the property to N, J had been pursued by the council in relation to alleged tipping at the property. The Judge held that in making the putative transfer to N, J was not concerned in any way to put the property beyond the reach of anyone to whom he might become liable in respect of costs and fines but because he wished her to continue with the litigation.

Comment: The Judge drew an important distinction between a scenario where a debtor transfers property to prevent it from being subsequently available to his creditors to meet his liabilities and where, as in the present case, he does so with the intent of protect himself from being responsible for subsequent debts arising as a result of the use of the property.

- ***Re Ramratten*** **[2010] BPIR 1210 (Mann J)**

Facts: R was made bankrupt in October 1995. Within the period of 5 years prior to this he had transferred the family home, previously held in his sole name, to his wife AB. The trustee made an application pursuant to s 339 in October 2007, 5 days within the 12 year limitation period. The matter came to trial in 2009 after a two year delay from the issuing of the proceedings, caused by the bankrupt. During the appeal it was revealed that the transfer was a forgery and only R's signature on the transfer papers was genuine.

Mr Registrar Simmonds found that R was unreliable and dishonest and made declarations that the transfer was a sham and/or a transaction at an undervalue. However, the Registrar decided he would exercise his discretion to give no relief on the basis that the proceedings were not prosecuted with due diligence, causing prejudice to R and AB. He considered that evidence may have been destroyed owing to the passing of time, the creditors of R would have most likely lost both records and interest in the proceedings and their debts may have been written off, it would now be difficult for R and AB to re-finance the bankruptcy debt due to their age, a substantial amount was owed in respect of solicitor's costs under a conditional fee arrangement and the risk of not recovering fees was built into the contract and a large sum claimed by the trustee was for interest caused by the delay which it would be unfair to take out of the matrimonial home.

The trustee appealed the Registrar's decision to the High Court on the grounds that the judge erred in holding he could take delay in commencement of proceedings into account at all if they were commenced within the limitation period, the facts and matter the Registrar relied on in exercising his discretion were improper and/or of no real weight and the consequences of the finding that the transaction was a sham meant that, irrespective of section 339, the trustee should have succeeded.

Decision: The judge on appeal found that, having come to the conclusion that the transfer was a sham, the Registrar should have granted the appropriate relief and the trustee was entitled to a declaration that AB held the property on trust, first for R and after the bankruptcy for the trustee, In fact, since the transfer was forged it was a nullity and had no real dispositive effect at all. In relation to the s 339 appeal the delay in bringing proceedings was not by itself a reason to refuse relief where it would otherwise be appropriate since this would curtail a limitation period prescribed by Parliament. Further, the starting point would always be to grant relief following on from a finding that the requirements in 339 were fulfilled unless a significant, strong or even exceptional case could be raised against it. The Registrar was not entitled to exercise the discretion in the way that he did. In particular, the conclusions drawn in relation to the ability to re-finance or the keenness of the creditors to recover their debts were not based on evidence, the interest claim was not unfair and only arose because the creditors had been kept out of their money while R and AB have had the benefit of living in the property, and the trustee's fees and costs were what they were, he was entitled to them and if he delayed in recovering the assets he also suffered delay recovering his fees - this was not a relevant factor. Exercising the discretion afresh, there was no material advanced by R or AB to prevent the discretion being exercised against them.

Comment: This decision has been heralded as a victory for officeholders. It is important to realise that when considering transactions at an undervalue the court has a discretion but should exercise that discretion in favour of a trustee where the other factors in s 339 are made out unless the Bankrupt can raise strong circumstances which warrant a different order. The starting point should always be in favour of a trustee. Furthermore it highlights the pitfalls where a Court makes decisions based on conjecture and not the evidence put before it.

A further interesting facet of the case was a secondary set of arguments heard at a later hearing in relation to the use it or lose it provisions (s283A(2) IA 1986). R argued that they applied to an interest passed back to the bankrupt's estate by virtue of s 339. This point was raised late and without full notice or opportunity for argument. On these facts the issue did not require determination since the trustee had succeeded in establishing that the transaction was a sham, with the 3 year period in s283A(2) running from the date of the first hearing in 2009 when the trustee first had knowledge of the forgery. However, the Judge gave his preliminary view that it was impossible to sensibly make s 283 A of the Act apply to an interest in the matrimonial home which was recovered as a transaction at an undervalue because it was difficult, if not impossible, to feed in the interlocking provisions and concepts of property comprised in the bankrupt's estate and a re-vesting period of 3 years beginning with the date of the bankruptcy and have it all make sense as part of one scheme.

- ***Soutzos v (1) Asombang (2) Dawkins (3) Fox*** **[2010] BPIR 960 (Newey J)**

Facts: S, a creditor of A , a discharged bankrupt, argued that: (1) pursuant to s 281(3) IA 1986, A's discharge did not release him from liability for certain debts owed to S since he was induced to make the loans to A by fraudulent misrepresentation, (2) A, D and F were liable to him for unlawful means conspiracy (3) D and F were liable to him for dishonestly assisting the misapplication by A in breach of trust of the loan moneys and for knowing receipt of such monies (4) that declarations of trust over and transfers of certain properties were shams and (5) that those declarations of trust and transfers were transactions with the intention of defrauding creditors.

Decision: The Judge found on the facts that S had not proved that A had represented the loans in question were to be used exclusively for any particular purpose or that S had relied on any misrepresentations A may have made. Even if misrepresentations had been made, there was no direct evidence that D or F knew of or intended these and there were no acts from which a conspiracy to injure could be inferred. The likelihood was A had aimed to repay the loans when he borrowed them from S. S had not established the monies lent were to be impressed with a Quistclose trust and not at the free disposal of A, and even had he done there was no basis to allege dishonest assistance or knowing receipt as he had failed to prove dishonesty or unconscionability. Further, applying *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 and *Hitch v Stone* [2001] STC 214, the declarations of trust and transfers on their face were not shams but were intended to be effective. S had not established they were entered into at an undervalue, or the requisite purpose for a claim under s423, or that he was capable of being prejudiced by them such that he was a victim with standing to bring a claim. In any event, it was doubtful that it would have been appropriate to grant relief under s 423 where two of the three properties had been sold by receivers and there was no equity in the third.

Comment: This case turned largely upon its own (rather complicated) facts, but it does emphasise the fact that the Court places squarely on the shoulders of the claimant the burden of proving every element of his claim. One point to note was the Judge's attitude (although obiter) to relief under s 423. The Court has the power to make such order as it thinks fit to restore the position (not just to unravel the transaction) but here the Judge considered it was doubtful that it would be appropriate to grant relief where the asset transferred had been subsequently disposed of.

8.9 Exceptional Circumstances

- ***Everitt v (1) Budhram (2) Budhram*** **[2010] BPIR 567 (Henderson J)**

Facts: Bankruptcy orders were made against both H and his wife (W) on a local authority petition for unpaid council tax. The petition debt and costs were paid but no application for annulment was made. H and W's trustee issued an application for the sale of their home. H appeared to lack capacity to conduct proceedings and the trustee sought a stay against him but applied for an order for sale against W. W's medical evidence confirmed that both H and W suffered from a number of chronic medical conditions. The Deputy District Judge refused the application and ordered that the property should stand charged with fees and legal costs of the trustee, to be assessed or agreed within 3 months of the date of the order. The main ground he relied on in refusing to make the order was the conduct of the local authority in pursuing the debt by means of bankruptcy proceedings and not a judgment and charging order. He found that the needs of H and W extended to their medical, emotional and mental needs and the circumstances of the case were exceptional. The trustee appealed.

Decision: The Judge considered the Deputy District Judge had made five errors. First, he had erred in law in taking into account the fact that in his view bankruptcy proceedings were an inappropriate method for the local authority to seek to recover the debt. Secondly, his reasoning was an inappropriate attempt to put the trustee in the same position as the holder of a charging order over the property, subverting the entire bankruptcy process. Thirdly, he was wrong to take account of the needs of W on an application against her as the bankrupt. Fourthly, a sale can still be regarded as being in the interests of the creditors where the result is that all the proceeds are in fact used to meet the expenses of the bankruptcy, yet in this case there would be sufficient equity to pay the creditors in full as well. Fifthly, he should not have ordered assessment of the trustee's costs and fees where there had been no application for a review or assessment in accordance with detailed code in the Practice Statement [2004] BCC 912. Exercising his discretion afresh, the Judge concluded H's circumstances were exceptional and there should be an order for sale to take effect in 12 months or 3 months after obtaining an order for possession against H, whichever was the soonest.

Comment: This is a very useful case giving guidance as to the proper use of the Court's discretion as to whether to make an order for possession and sale. The Court cannot look behind the bankruptcy order - once it is in place in the absence of an appeal, rescission, review or annulment, the Court has to approach the position on the basis that the bankrupt's assets should be realised to pay the creditors. To treat the mortgagee as if he were a charge subverts the bankruptcy process.

On the question of exceptional circumstances, the Court confirmed that the Bankrupt's needs, including her mental, emotional and physical needs as well as financial, must be excluded from consideration. However, where both joint owners of a property are bankrupt, in considering an application for possession and sale in relation to each the needs of the other can be considered. However, as a matter of common sense, it would seem wrong that a bankrupt should be in a better position because her co-owner is also bankrupt than she would be otherwise. This case further confirms that even where there are exceptional circumstances, this does not prevent the Court from ordering possession and sale. The trustee was seeking an order to take effect some time after the application against H was determined, yet the Judge made an order that applied to both H and W in order to achieve finality and satisfy the interests of creditors.

Importantly, the decision confirms that if there is to be a challenge to the trustee's remuneration, it has to be on a proper basis in accordance with the practice statement; it is not for the court of its own motion to initiate that process or, in effect, to determine it there and then.

- ***Pick (Trustee in Bankruptcy of Sharon Lesley Sumpter) v Sumpter*** **[2010] BPIR 638 (HHJ Purle QC, sitting as a High Court Judge)**

Facts: A bankruptcy order was made against S. The family home was jointly owned and had equity of c. £170,000. The trustee issued possession and sale proceedings, providing an estimated payment in full calculation of £25,571. DJ Freeborough heard the application on 2 May 2006 and ordered a sale upon terms that S and her husband deliver up possession to the trustee on 30 May 2006 unless the sum of £25,571 was paid to the trustee by that date. At

a later hearing the trustee sought to review the previous order in the light of the latest calculations and to ensure the correct figures were out in the order. The District Judge refused to amend the figure and extended the time to pay until 31 October 2006, a date almost a year after the first calculation. The Trustee appealed.

Decision: The Judge considered that the approach of the District Judge was misconceived**.** He effectively treated the application before him as a mortgage possession action, treating the bankruptcy liabilities as mortgage arrears. That might have been justified if this had been an application to annul on the basis that the debts had been or were about to be paid or secured; it was not the right approach on an application for possession and sale. Further, it was not appropriate for the District Judge to use a figure which the evidence indicated was an estimate and may not be enough. He was not considering the interests of the creditors in so doing, nor did he cater for DTI fees or continuing statutory interest. It was clear the District Judge's objective was to ensure the bankruptcy debts were paid, but it was self evident that he did not succeed in that objective. He should have made an unconditional order and left it to S to apply for an annulment and suspension if she could raise sufficient money to pay her debts. The trustee had satisfied the onus of establishing exceptional circumstances justifying a review.

Comment: Again this case confirms that the court must not treat the position as if the trustee were a mortgagee applying for an order for possession and sale, nor as if the bankrupt were applying for an annulment on the basis that the bankruptcy debts had been or would be paid in full. The trustee is in principle entitled to an order for possession and sale unless the circumstances of the case are exceptional. If the bankrupt is in a position, herself or by third party funds, to pay the trustee by buying out the trustees' estate or funding an annulment, that is what she should do in the appropriate way.

Holly Doyle
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Guildhall Chambers
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