Neutral Citation Number: [2024] EWHC 1576 (Fam)

Case No: FA-2020-000117

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE ORDER OF HHJ MESTON QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 June 2024

Before :

MR JUSTICE PEEL

- -

Between :

AUDUN GUDMUNDSSON	**Appellant**
- and -	
HSIAO-MEI LIN	**Respondent**

- -
- -

The appellant appeared in person
Sapna Shah for the **Respondent**
Steven Fennell for the Trustees in Bankruptcy who were not a party but were invited by the court to attend

Hearing date: 12 June 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on 21 June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE PEEL

Mr Justice Peel :

1. The tangled web and lengthy history of this appeal requires an unusually detailed exposition of the background, even though in large measure the parties are agreed as to the way forward.

2. In this judgment I shall refer to the Appellant Husband as "H" and the Respondent Wife as "W".

3. This appeal is brought by H against a financial remedies order made as long ago as 4 March 2020 by HHJ Meston QC at the Central Family Court. The target of his appeal was paragraph 1 of the order which provides for him to transfer to W his half share in the FMH at 9 Southcote Road, London N19 ("the FMH"). The FMH had an agreed value of £1.5m such that H's half share was £750,000 (ignoring sale costs).

4. Permission to appeal was granted by Knowles J on 14 August 2020. For reasons which I will explain, the appeal has become entwined with a bankruptcy order against H made on 26 February 2020, six days before the financial remedies order.

5. H now does not pursue his appeal, because it has been overtaken by the bankruptcy. However, it is necessary for me (i) to set aside the order and (ii) substitute a fresh decision to ensure that the final financial remedies order is on a sound legal footing.

The background

6. H was born in Iceland; he describes himself as a businessman and entrepreneur. W is of Taiwanese origin. Prior to the birth of their first child in 2010, she had had a commercially successful career as an artist; since then, she has been a full-time mother. Both are in their 50s.

7. The parties married in March 2009 in Iceland. In 2009 they purchased the FMH in joint names for £600,000. H paid a deposit of £300,000 and some years later the remaining mortgage (£230,000) was paid off by W from the proceeds of a flat owned by her before the marriage and sold in 2014 for £447,000 net.

8. The parties have 2 children of the marriage, aged 14 and 10, both of whom live with W at the FMH and attend a local state primary school.

9. The parties separated initially in August 2016 and, after a brief reconciliation, permanently in January 2017. Decree Absolute was pronounced in April 2020.

The resources

10. The judge found it difficult to conduct the computation stage of the case, due to H's opaque presentation of trust and business interests. A substantial part of the 128 paragraph judgment is devoted to the judge's attempts to understand the financial structures. Thus, at paragraph 13 he said: "The real difficulty in this case has been the investigation and determination of complex and sophisticated trust and other financial arrangements of the husband which were not designed to be transparent. …these arrangements have generated suspicion and investigation…a coherent picture never emerged".

11. From about 2003, loans were made to H by Esquiline Finance Limited ("EFL") in the total sum of about €2.69m. The precise nature of H's relationship with this company, a vehicle set up by his solicitor and tax adviser, was not clear to the judge. In practice, however, the judge did not consider these sums would ever be repaid by H, contrary to H's case that they should be taken into account as a liability; "…it [the debt] is not formally secured, and that fact alone suggests that the loan was not formalised to do anything more than to create an impression for tax purposes". The judge did not record the alleged debt as being a liability payable by H from his personal assets.

12. In respect of H's overall presentation, the judge concluded at paragraph 121: "Although the court cannot be wholly confident that the visible assets and resources are the only assets and resources, it would be wrong to base a decision on suspicion alone".

13. Although the judge did not go on to tabulate the assets, they can readily be collected from the judgment as a whole:

Joint	A	**£1,440,000**	FMH
Husband		£130,000	Net equity in Iceland property
		£419,353	10% of Hotel business
		£150,000	Pensions
		-£9,942	Bank balances
		-£44,985	Credit card debt and personal loans
		-£15,000	Personal debt to an ex-colleague
		-£12,670	Debt to mother[1]
		-£157,019	Debt to a friend, Klaus Ortlieb[2]
		-£34,000	Unpaid legal costs
	B	**£425,737**	
Wife		£170,000	Floodcheck Academy Investment
		£26,934	Bank balances
	C	**£196,934**	
TOTAL (A+B+C)		**£2,019,690**	

14. As for income the judge recorded that H had earned £8,500 in the previous financial year. There was no specific finding that he was likely to generate a very substantial income through business projects. As for W's income, he found that W could exercise an earning capacity of £10,000 pa as an artist.

Delays in finalising the judgment

[1] Although H says the figure is higher, because of monies loaned by his mother and referred to at para 110(1) of the judgment, I read this as a loan made to the business rather than to H personally and am not prepared to conclude otherwise in the absence of a finding by the judge.

[2] The sum in the Trustee in Bankruptcy report, rather than the sum of £200,000 mentioned by H to the judge

15. The final hearing took place between 18 and 20 February 2019. Due to pressure of work, the judge was unable to complete the judgment until September 2019. Shortly before it was delivered, however, the court's attention was drawn by H to a number of matters which were said to affect H's financial position. The judge thereafter allowed further written submissions and evidence and fixed 27 January 2020 for delivery of judgment. Prior to that hearing, further developments were notified to the judge, who again adjourned, this time to 4 March 2020.

16. The judge considered all the updating material which had been submitted to him and handed down final judgment on 4 March 2020. An order bearing the same date i.e 4 March 2020, was made reflecting the terms of the judgment.

The net effect of the order

17. In simple terms the judge ordered a transfer of H's interest in the FMH to W, and a nominal PPs order until the younger child started secondary education.

18. The net effect of the order, based on the assets as recorded by the judge, is as follows:

Husband	£130,000	Net equity in Iceland property
	£419,353	10% of Hotel business
	£150,000	Pensions
	-£9,942	Bank balances
	-£44,985	Credit card debt and personal loans
	-£15,000	Personal debt to an ex-colleague
	-£12,670	Debt to mother
	-£157,019	Debt to a friend, Klaus Ortlieb
	-£34,000	Unpaid legal costs
	£425,737	
Wife	£1,440,000	FMH
	£170,000	Floodcheck Academy Investment
	£26,934	Bank balances
	£1,636,964	

The appeal

19. H appealed against the order. The Grounds of Appeal asserted that the capital division in W's favour was unfair. Unfathomably, no part of H's appeal mentioned the fact that he had been made bankrupt. However, Knowles J granted Permission to Appeal in the light of the bankruptcy order.

Bankruptcy of the Husband

20. On 4 March 2020 H (at that stage acting in person) told the court (I think after judgment had been handed down) that he had been made bankrupt in London on the petition of Mr Ortlieb for £200,000 (although the Trustees in Bankruptcy report refers to £157,019 which is the figure I take for the asset summaries above).

21. Although H produced no evidence at the time, a copy of the bankruptcy order was obtained soon after. He had been made bankrupt on 26 February 2020, six days before delivery of the judgment and the making of the financial remedies order. A short postscript to the judgment reads, in relation to the bankruptcy, that "As indicated during the hearing I do not propose to comment on the possible implications of this for the order which I have today made".

22. It also became clear that H had been served with the bankruptcy petition on 22 December 2019, which in turn was based on a statutory demand served on him on 18 November 2019.

23. Thus, H concealed from W and the court (i) the statutory demand, (ii) the bankruptcy petition and (iii) the bankruptcy order, all of which took place over a five-month period prior to the hearing on 4 March 2020 at which judgment was delivered. It is hard to resist the conclusion that he acted in this way deliberately to leave W and the court no opportunity to prevent the bankruptcy taking its course.

24. Since the bankruptcy order, the Trustees in Bankruptcy ("the Trustees") have gathered together the creditors' claims which come to about £2.574m. That includes £2.31m being the sterling equivalent of the EFL loan to H which the judge found would not be repaid by H. That debt has been admitted in proof by the Trustees, despite H's opposition. It is an irony of the case that H, having asserted the sum to be a liability in the financial remedy proceedings, has denied it is a liability in the bankruptcy proceedings.

25. It is beyond doubt, in my judgment, that although the judge was able to make a financial remedy order notwithstanding the bankruptcy order, he had no power to order a disposition of any of H's assets, including, most significantly, his interest in the FMH:

    i) By s283 of the Insolvency Act 1986 all H's assets fell into the bankruptcy estate. That includes his interest in the FMH. By s306 the bankruptcy estate vests in the trustee in bankruptcy

    ii) A long line of authority in family courts establishes that in such circumstances it is simply not open to the court to make orders disposing of assets formerly belonging to H, and now vesting in the trustee in bankruptcy: see for example **Re Holliday (A bankrupt) [1981] CH 405**, **McGladdery v McGladdery [1999] 2 FLR 1102, Ram v Ram (No.2) [2004] EWCA Civ 1684 [2005] 2 FLR 63**

    iii) Specifically, a property adjustment order cannot be made against a bankrupt: **Ram v Ram (supra).**

    iv) A lump sum order can be made as it does not constitute an order disposing of property of the bankrupt. A lump sum order is provable in the bankruptcy. But ordinarily a lump sum order will only be made when the court has a clear idea of the likely residue of the estate once the bankrupt is discharged: **Hellyer v Hellyer [1996] 2 FLR 579.** Thus, if the court is satisfied that the bankrupt will have a surplus upon discharge, there is no reason in principle why a lump sum

order cannot be made which bites against the surplus. Plainly, however, the court must be cautious when estimating the likely available resources in the future.

26. Accordingly, that part of the order providing for a transfer of H's purported legal and beneficial interest in the FMH to W ought not to have been made and cannot take effect, for the asset in fact vested in the Trustees. I have sympathy for the judge as it does not appear that W's then counsel (not counsel appearing before me) drew the judge's attention to the legal position; had he done so, the judge surely would not have made the order.

27. On 6 April 2020, W applied to annul the bankruptcy under s282(1) of the Insolvency Act. That is a well-trodden route where a spouse considers that the bankruptcy is a device designed to defeat her claims, and asserts that the assets of the bankrupt are sufficient to meet the debt owed or for some other reason the bankruptcy order should not have been made; **Paulin v Paulin [2009] 2 FLR 354**.

28. On 24 February 2021 (at a hearing on this appeal) I refused an application by W for the annulment application to be transferred from the Business and Property Courts to the family court for two reasons:

    i) First, such an application should be made to the Business and Property Courts; see **Arif v Arif [20123] EWCA 986**.
    ii) Second, by then the annulment application was only a month or so away from being heard in the Business and Property Courts. A transfer to the family court would have led inevitably to an adjournment and further delay.

29. The annulment application was heard on 23 and 24 March 2021 in the Insolvency and Companies List of the Business and Property Courts by Chief ICC Judge Briggs. On 21 April 2021, pursuant to a written judgment dated 6 April 2021, the annulment application was dismissed. The same order required the Trustees in Bankruptcy to inquire into the alleged EFL debt of £2.31m which led, as I have indicated, to that debt being admitted to proof by the Trustees.

30. Thereafter, W and the Trustees were embroiled in disputes as to the extent of W's beneficial interest in the FMH and whether the FMH should be sold. The resolution of those issues seems to have taken an inexplicably long time. I adjourned the financial remedies appeal until the outcome of the bankruptcy proceedings was known.

31. On 10 April 2024, Deputy Insolvency and Companies Court Judge Frith delivered judgment, which was reflected in an order dated 15 April 2024. The judge's main findings and conclusions were:

    i) He dismissed a claim by W that she had a 100% beneficial interest in the FMH pursuant to principles set out in the Court of Appeal decision in **Hudson v Hathaway [2023] KB 345**. Of course, the reason for W running this argument was to attempt to secure sole beneficial ownership of the FMH so as to prevent H's 50% legal interest vesting in the Trustees.

    ii) He recorded that W and the Trustees each own 50% of the beneficial interest in the FMH.

iii) He recorded H's total indebtedness in the bankruptcy to be £2.574m, of which £2.31m (the trust loan) had been admitted to proof.

iv) He recorded that H and the Trustees had reached an agreement whereby H will pay the Trustees £203,000, in return for which the Trustees in bankruptcy will not pursue his assets in Iceland. H told me that he has paid the £203,000 by taking out a loan secured against his mother's property.

v) He recorded the Trustees' legal costs at £859,554 (less the £203,00 which has been paid by H, so about £657,000).

vi) He recorded that W is a creditor in the bankruptcy, claiming £290,925.

vii) Other than H's Icelandic assets, and his interest in the FMH, he has no assets of any significance.

viii) He found that H on 5 occasions between presentation of the bankruptcy petition on 22 December 2019 and the making of the bankruptcy order dated 26 February 2020 corresponded with HHJ Meston QC to ask him to postpone handing down the judgment, but did not inform the judge about the bankruptcy petition. Had he done so, it is likely that the judge would have endeavoured to hand down judgment earlier, and make an order earlier, such that W would have received 100% of the FMH prior to the bankruptcy order.

ix) He concluded that there existed "exceptional circumstances" under s335A(3) of the Insolvency Act 1986 whereby the interests of the creditors should not outweigh all other considerations. The exceptional circumstances were:

a) H's conduct in not informing W and the court of the bankruptcy petition, thereby depriving W of the opportunity to receive 100% of the FMH;

b) Although the EFL debt of £2.31m has been admitted to proof, EFL is itself in liquidation. The creditors of EFL have secured judgment against EFL's insurers. The insurers therefore have a subrogated right to pursue the said sum against H, but the judge expressed some doubt that they will in fact do so.

c) Other aspects of H's general behaviour, and the impact on W and the children.

x) In the light of the "exceptional circumstances", the FMH should not be sold until August 2032, when the youngest child turns 18.

32. I am informed that the Trustees have lodged an appeal against the delayed sale order. They seek an order that the FMH be sold forthwith.

My conclusions

33. FPR 30.12(3) provides that an appeal may be allowed where the decision was wrong or unjust for serious procedural irregularity.

34. H does not pursue his appeal against the capital division. He sensibly acknowledges that to do so would be futile.

35. Nevertheless, in my judgment the appeal must be allowed to rectify the erroneous property adjustment order.

36. It is common ground that paragraph 1 of the order of HHJ Meston QC which requires H to transfer to W his 50% legal and beneficial interest in the FMH was wrong and must be set aside for the reasons set out above. In a nutshell, there was no interest to transfer as by the date of the order the interest vested in the Trustees.

37. The 50% interest, which it is assumed may be worth about £750,000, will be largely swallowed up by the Trustees' costs which are about £657,000, and will increase until everything is resolved. Any surplus will be paid pari passu to the creditors, including to W who is a creditor by reason of costs orders made against H. If, by the time of sale, the FMH sells for more than £1.5m, it follows that there may be more available for the creditors (although the Trustees' costs will also be higher).

38. In the improbable event that there is any surplus after payment of (i) the Trustees' costs and (ii) the creditors' debts, then in my judgment such surplus should be paid to W. That would reflect the intentions of HJ Meston QC, who provided for W to receive the entirety of the FMH. It would be the just outcome given H's conduct in concealing the fact of his bankruptcy from W and depriving her of the opportunity to secure for herself the entirety of the FMH.

39. Should the Trustee's appeal succeed, and the FMH have to be sold forthwith, the outcome which I provide for herein should, in my judgment, be the same as if it is sold in 2032.

40. I shall therefore:

    i) Allow the appeal.

    ii) Discharge para 1 of the order of the judge providing for transfer of H's interest in the FMH to W.

    iii) Record that W owns 50% of the property beneficially.

    iv) Provide that upon sale of the FMH (which will take place either by operation of court order in the Business and Property Courts, or, if sooner, by W voluntarily selling it), any surplus from what was formerly H's 50% (i.e after payment of the Trustee's costs and all sums paid to creditors under the bankruptcy) shall be paid to W.

    v) I will order H to return W's paintings, with the costs of transportation to be borne equally. This is by way of implementation of part of the order of the judge below.

    vi) W invited me to vary upwards the nominal periodical payments order. I decline to do so. I have no updated information from either party about their

income/outgoings. W is entitled to pursue a variation application if she so chooses.

Anonymisation

41. This was an appeal hearing which took place in open court. Much of the material in this judgment is already in the public domain as a result of the judgments in the Business and Property Courts. H asked me to anonymise the judgment but, having undertaken the **Re S** balancing exercise, I decline to do so.