Neutral Citation Number: [2012] EWHC 2966 (Ch)

Case No: 186 OF 2012

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
IN THE MATTER OF THE INSOLVENCY ACT 1986

The Rolls Building
The Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 01/11/2012

Before :

THE HON. MR JUSTICE HILDYARD

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Between :

ALEXANDER McROBERTS	**Applicant**
- and –	
MANDY NATASHA McROBERTS	**Respondent**

- -

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Mr Simon Calhaem (instructed by **Harris Cartier Limited**) for the **Applicant**
Mr Byron James (instructed by **Bruce MacGregor & Co**) for the **Respondent**

Hearing date: Thursday, 16th October 2012

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Judgment

The Hon. Mr Justice Hildyard :

The point in issue and the factual context

1. This application concerns a short but interesting point on the jurisdiction of the Court under section 281(5) of the Insolvency Act 1986 ("section 281(5)") to release a bankrupt from any bankruptcy debt arising under any order made in family proceedings (as defined in section 281(8)).

2. The order in the family proceedings between the Applicant and the Respondent was made by consent on 1st April 2003 in resolution of their respective financial claims ancillary to their divorce ("the 2003 Order").

3. Amongst its provisions the 2003 Order required the Applicant to pay to the Respondent a lump sum of £450,000. This was payable in stated instalments, starting on the making of the 2003 order. All instalments were due to be paid by 31st March 2009. Payment of interest was also provided for. It was further directed as follows:

> *"if the [Applicant] fails to pay any instalment or anniversary payment as set out above to the [Respondent] within 14 days of the due date, the whole of the lump sum then outstanding shall become payable forthwith to the [Respondent]…"*

4. The 2003 Order also provided for (a) the Applicant to transfer to the Respondent all his legal and beneficial interest in their matrimonial home, subject to the mortgage on it; (b) the Respondent to transfer to the Applicant all her shares in a company called Combi (UK) Limited.

5. Then in its last substantive paragraph the 2003 Order provided as follows:

> *"Upon completion of the transfer of property…and the payment of the lump sum…and compliance by the [Applicant] with his undertakings to the Court and upon the making of the final Decree herein, the [Respondent's] and the [Claimant's] claims for financial provision and Property Adjustment Orders do stand dismissed and neither the [Respondent] nor the [Applicant] shall be entitled to make any such further application in relation to their marriage under the Matrimonial Causes Act 1973, Section 23(1)(a) or (b). The foregoing provisions shall take effect only upon the grant of a Decree Absolute in this suit."*

6. In the event, the Claimant did not keep up instalment payments.

7. In March 2006 a bankruptcy petition was presented against him by one of Combi UK Ltd's trade creditors alleging non-payment of personal guarantees. He was declared bankrupt on 18th September 2006.

8. The Respondent entered a proof of debt in the sum of £244,966 being the amount then outstanding in respect of the lump sum and interest required to be paid by the Applicant.

9. In the Applicant's bankruptcy there was a large deficiency: no distributions could be made to unsecured creditors. The Respondent accordingly received nothing in respect

of her proof of debt. She has received nothing since then either. The approximate amount presently outstanding (including interest) is about £350,000.

10. The Applicant was discharged from bankruptcy in September 2007.

Relevant statutory provisions

11. The Applicant was thereby released from all bankruptcy debts provable in his bankruptcy except as provided in section 281(5) of the IA: see section 281(1) of the IA.

12. *"Bankruptcy debts"* are defined for these purposes in section 382 as including any debt or liability to which the bankrupt is subject at the commencement of the bankruptcy.

13. Prior to the IA a lump sum ordered in family proceedings was a bankruptcy debt provable in bankruptcy. Then under the IA as originally drafted such orders were excluded from the categories of provable debt.

14. But that exclusion came to be considered to represent a hardship to spouses, who were placed in consequence of it in a worse position than ordinary creditors even in the case of a debt in a sum certain, due and payable (such as a lump sum).

15. In two cases in the Court of Appeal that court called for the change made by the IA in excluding a lump sum ordered in matrimonial proceedings from being a provable debt to be reversed. Thus, in *Woodley v Woodley (No. 2)* [1994] 1 WLR 1167, Balcombe LJ said this:

> "I cannot leave this case without saying something about the effect of r 12.3 of the Insolvency Rules 1986. Before those rules came into force orders for periodical payments were not provable in bankruptcy… whereas an order for a lump sum was provable…. That position is understandable. However r 12.3(2)(a), by making any obligation arising under an order made in family proceedings, ie including a lump sum order, not provable, has changed that position. Whether it was the intention of those who drafted the 1986 rules to bring about this change I know not. It may be that it was considered that as a debt arising from an order made in family proceedings is not released upon the discharge of the bankrupt (s 281(5) (a) of the 1986 Act) therefore it should not be provable. However there is no necessary or logical link between the provability of a debt and its release on discharge. In some cases there is such a link see, eg a fine imposed for an offence which is not provable under r 12.3(2)(a) and is not released on discharge under s 281(4). On the other hand a liability to pay damages in respect of personal injuries is a provable debt in bankruptcy, not being the subject of any exclusion under r 12.3, but is not released on discharge: s 281(5)(a). It seems, therefore, that any link between provability and release on discharge is a matter of policy and I can see good policy grounds for saying that a lump sum order made in family proceedings should (like damages for personal

> injuries) be both provable in bankruptcy and yet not be released on discharge.
>
> I invite the Insolvency Rules Committee to consider whether a lump sum order made in family proceedings should be provable in bankruptcy as it was before the 1986 rules came into force. If it were provable, then that would be the appropriate route for the creditor to follow, since the procedure by way of judgment summons would then be barred by s 285(3) of the 1986 Act (see *Smith v Braintree DC* [1990] 2 AC 215)."

16. A decade later, there still having been no change (despite a further call for it by Sir Donald Nicholls V.-C in *Re Mordant* [1996] 1 FLR 334 at 338-9), a differently constituted Court of Appeal renewed its call; and at long last Rule 12.3 Insolvency Rules was amended in 2005 to provide such right of proof in the case of an obligation to pay a lump sum or to pay costs.

17. Other obligations under orders made in matrimonial proceedings continue not to be provable. Debts which were not provable in the bankruptcy are not released: they are untouched by the process.

18. As to the effect of the discharge of provable bankruptcy debts, section 281(5) of the IA provides as follows:

> *"Discharge does not, except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which –*
>
> *(a) consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty, or to pay damages by virtue of Part 1 of the Consumer Protection Act 1987, being in either case damages in respect of personal injuries to any person, or*
>
> *(b) arises under any order made in family proceedings or under a maintenance calculation made under the Child Support Act 1991."*

(There is no dispute or doubt that the 2003 Order was made in relevant *"family proceedings":* see section 281(8)).

19. The ordinary or default position, therefore, is that an obligation to pay a lump sum arising under an order made in family proceedings is not released by discharge of the bankrupt. But the Court undoubtedly has jurisdiction to provide for release to such extent and on such conditions as it may direct. The jurisdiction so conferred is thus discretionary.

20. It follows from the above that so far as the 2003 Order provided for payment of a lump sum that was a provable debt (and indeed as mentioned above, it was the subject of a proof duly lodged); it was not released upon the Applicant's discharge from bankruptcy; but the Court has jurisdiction to release it entirely or conditionally, in its discretion.

Ambit of the discretion conferred: principle and case law

21. As to the ambit of the Court's discretion, no express limitations are expressed. The researches of Counsel have revealed only one authority in which the scope of that discretion is addressed. That is a recent decision of HHJ Pelling QC, sitting as a Judge of the High Court, in *Hayes v Hayes* [2012] EWHC 1240 (Ch).

22. In *Hayes*, Judge Pelling QC considered two principal questions. The first concerned whether an application for release was required to be and could only be made at the date of the bankrupt's discharge, or whether it could be made at a later date. It was held that the wording did not exclude a later application. The second concerned the nature of the discretion conferred on the court. As to this second point, it was held that the discretion is unfettered, and (see paragraph 13 of the judgment)

> "to be exercised by reference to all the relevant circumstances as they exist at the date when the application is determined…"

23. Judge Pelling QC went on to identify various circumstances that would be relevant, including

    (1) any lapse of time between the date when the discharge occurred and the date of any application for release, and the reasons for any delay;

    (2) the future earning capacity of the applicant, the possibility of some future income or capital receipt or windfall, the prospect accordingly of the obligation being fulfilled in whole or in part if not released, and in the round whether there is any good reason for maintaining the obligation;

    (3) the risk of the respondent to the application using the fact of the obligation (if not released) to harass the applicant, for example by seeking to diminish the applicant in the eyes of the community, or his future prospects, by reference to the stigma still relating to bankruptcy, or by bringing new and abusive bankruptcy proceedings calculated to restrict the applicant in building a new life;

    (4) the duration of time that has elapsed since the relevant obligation arose.

24. I agree that all these factors should be taken into account, although I doubt that the last will often weigh materially in the balance. As it seems to me, the ultimate balance to be struck is between (a) the prejudice to the respondent/obligee in releasing the obligation if otherwise there would or might be some prospect of any part of the obligation being met and (b) the potential prejudice to the applicant's realistic chance of building a viable financial future for himself and those dependent upon him if the obligation remains in place.

25. In striking that balance I consider that the burden is on the applicant; unless satisfied that the balance of prejudice favours its release the obligation should remain in place: that follows from the fact that continuance is the default option, and from the rationale of excluding such obligations from automatic discharge. As Judge Pelling QC put it (in paragraph 15 of his Judgment):

> "The policy behind this approach is not one which is necessary for me to comment upon but probably stems from the desirability of ensuring that family liabilities are not avoided by a bankruptcy."

26. I would add this, since it is of relevance in this particular case: it seems to me that the purposes for which the discretion is conferred do not include review of the merits or overall fairness of the underlying obligation. In my view, the purpose of the discretion is to enable the Court, in order better to achieve the objectives of discharging a bankrupt, to release an obligation if persuaded that the likelihood of its being satisfied is not such that its continuance is likely to have be of any benefit to the obligee, and that, conversely, its release is necessary in order to assist the obligor in building a viable financial future.

27. Further, as it seems to me, in the case of an obligation imposed in matrimonial proceedings, that is so, even if circumstances have changed such as might suggest that the obligation might fairly be reviewed or modified. In my view, any such review or modification of the underlying obligation should be reserved to the matrimonial courts in the exercise of its jurisdiction to do so (if any) conferred by the Matrimonial Causes Acts; and if review or modification is not within their jurisdiction under those Acts, I do not consider that section 281(5) of the IA was intended or should be deployed to supply some additional basis of review.

The parties' respective submissions: application of the provisions in this case

28. I turn to continue the application of these provisions and analysis in the present case, and the submissions addressed to me in that regard.

29. Counsel for the Applicant much pressed upon me as his first point that the 2003 Order "was highly unusual in its terms" since (to quote his skeleton argument at paragraph 2) "whilst the relief granted to the [Respondent, the petitioner in the matrimonial proceedings] was by way of maintenance (monthly payments with an annual top-up), the order was crafted as an order for a lump sum payable by instalments under the Matrimonial Causes Act 1973 s23(3)(c)."

30. I understood him to do this in order to establish that the relevant obligation should properly be characterised as an obligation to pay maintenance, or at least (or alternatively), an obligation to pay a lump sum by instalments, such as (in either case) to be capable of variation under the matrimonial jurisdiction (unlike the position in *Hayes*).

31. I understood this to be the corner stone of his further argument that if the obligation was of such a character that it could be reviewed and modified under that matrimonial jurisdiction then this court should be able (its discretion being unfettered) to review and release or modify it in the same way, giving effect to its perception of what would be fair and just in the circumstances now obtaining, as would the matrimonial courts. He suggested that this court should not "shirk" or abdicate from its duty in this regard in favour of the family courts; and further, that this court had quite sufficient analogous experience (for example, in the context of Family provision claims) to discharge this duty fairly and appropriately. He also pointed out that maintenance arrears are unenforceable without leave of the Court if they are older than 12 months (pursuant to section 32(1) of the Matrimonial Causes Act 1973) indicating that this

court should lean against subsistence of the obligation after it has been left unenforced by the Respondent for so long.

32. I do not accept this submission. That is not so much because this court lacks analogous experience (though I myself consider that the matrimonial courts would be better equipped to review their own orders). It is because (a) I am not persuaded that the relevant obligation should be re-characterised as in substance an order for maintenance payments (b) I am not persuaded it would be open to review in matrimonial proceedings and (c) in any event, I do not consider that the discretion conferred by section 381(5) of the IA was intended to extend to such a review.

33. As to (a), Counsel for the Respondent pointed out first that section 23(2)(c) of the Matrimonial Causes Act 1973 expressly provides for payment of a lump sum by instalments without any suggestion that provision for instalment payments alters the essential character of the obligation (being for payment of a lump sum). Secondly, he drew my attention to the specific provision in the 2003 Order (to which I have already referred in paragraphs 3 to 5 above) which provides for the whole of any lump sum then outstanding to become payable forthwith upon failure to pay any instalment: so that the provision is, given multiple defaults, now plainly a provision for payment of a lump sum without any instalment option.

34. As to (b), Counsel for the Respondent submitted that a lump sum was not susceptible of review under the Matrimonial Causes Acts: section 31 of the 1973 Act has no application. That seems to me to be right: and I am not satisfied that the matrimonial courts could or would be likely to review this settled obligation.

35. Counsel for the Respondent also submitted that in any event it would be most unfair to review and vary the lump sum order since it was a *quid pro quo* for the transfer to the Applicant of the (then apparently valuable) shares in Combi (UK) Ltd and would render the overall deal unfair. There seems to me some force in this, though without further detail as to the circumstances of the 2003 Order I do not feel able to reach a concluded view on that, and it does not seem to me to be either necessary or appropriate that I should attempt to do so.

36. As to (c), and even if the matrimonial courts could review and vary such an obligation, I do not consider that such a review would be within the scope of my discretion, for the reasons I have sought to provide in paragraph 26 above.

37. Counsel for the Applicant submitted, secondly, that if the obligation was discharged that would not cause irremediable prejudice in the event that the Applicant does in the future receive some significant income or capital: for the matrimonial courts would still have jurisdiction to make orders for financial provision given that the "clean break" provisions of the 2003 Order were subject to conditions that had never been satisfied.

38. Counsel for the Respondent accepted that in principle: but he stressed that the matrimonial courts would then be looking at the matter purely in terms of the Respondent's needs and not by reference to other matters such as any shared property interests in the matrimonial assets (which would be treated as satisfied by the 2003 Order). This seems to be right: once released an obligation cannot surely be revived, even if some different obligation might be imposed; and I did not understand it to be

disputed that any fresh order imposing a new obligation would be on the basis of need not pre-existing property rights.

39. In any event I would not consider the possibility of future orders by the matrimonial courts to justify release even if that possibility might be a further comfort if the balance appeared otherwise to favour such release.

40. As to what appears to me to be the ultimate and crucial balance to be struck, as indicated in paragraph 26 above, the question really is whether there is so little prospect of the outstanding lump sum being paid, even in part, that its release would not substantively prejudice the Respondent but would materially advantage the Applicant in a realistic effort to build a viable financial future for himself and his dependents.

41. As to this, Counsel for the Applicant submitted (I quote from his skeleton argument) that the Applicant's "financial position is such as to make any chance of payment of £349,000 impossible now, or in the foreseeable future." He took me in this context to evidence that the "curtain had come down" on the Applicant's business ventures (based largely in Africa), and that his income stream had thus been turned off. He made the further point that if the Applicant had had other sources of income or assets the Official Receiver would surely have found them before agreeing to discharge the bankruptcy.

42. It does indeed seem that the Applicant's business ventures have been closed down or terminated, amongst allegations of his involvement in bribery and corruption which the Applicant entirely denies and may well, for all I know, be baseless, but which have caused his employers to terminate their relationship with him. As to other sources of income or assets, I think my assumption should be that none is presently accessible.

43. However, Counsel for the Respondent referred me to the Applicant's self assessment tax returns. Whilst these indicate that even when employed the Applicant was receiving very little by way of salary they also disclose very substantial payments for expenses, travel and subsistence (over £100,000 in a year). Counsel also took me to photocopies of pages in the Applicant's passport showing stamps for destinations (such as the Maldives at Christmas-time) which do not appear to be in countries where the Applicant said in his witness statements he had been doing business.

44. These indications do not encourage the conclusion that the Applicant has done everything he can to discharge his obligations to his ex-wife; they do encourage a sense that the Applicant's finances may not be entirely transparent. By contrast, they do encourage a feeling, since these fairly substantial sums were being provided to him whilst the obligation to pay subsisted, that if (as he maintains he will) he demonstrates the allegations against him to be false he may well be able to generate funds or means of support in the future which may be enough both for his and his family needs and also to begin to enable him to reduce the lump sum outstanding.

45. Further, the Applicant did not provide any evidence of some future enterprise or activity that he had in mind and which would be blighted if the obligation in question was not released. More generally, he offered no special or particular reason why the continuation of the obligation would restrict him moving forward, given the flexibility

that the Respondent has shown in the past. As to the stigma of bankruptcy, the point should not in my judgment be exaggerated: after all, he has obtained his discharge: that is a matter of record.

46. The reality is that the Applicant's case came down to this: that under present circumstances, his own needs and those of his own family are greater than the needs of the Respondent (who is earning a reasonable amount) and that the "fair outcome" would be release of the debt. That would simply be to treat section 281(5) as an adjunct or addition to the jurisdiction of the matrimonial courts. For the reasons I have already given I do not think that is what was intended nor do I consider it appropriate.

Conclusion and disposition

47. The discretion conferred by section 281(5) is unfettered; but as with all such discretionary power it must be exercised for the proper purposes for which it is conferred.

48. The purpose for which it is conferred is not, in my judgment, to review and vary an obligation according to what, as between the parties, a matrimonial court would now think to be appropriate; it is to enable the objective of discharge to be accomplished more completely where the continuance of the obligation serves no substantial purpose because it is so unlikely ever to be satisfied.

49. The question is not whether the obligation would now be justified if it could be satisfied; it is whether, accepting that its imposition was justified, there is any real prospect of it being satisfied now or in the future and whether its release is necessary to enable or at least substantially assist the discharged bankrupt to re-establish himself.

50. Returning to the circumstances identified by Judge Pelling QC in *Hayes* as likely to be relevant (see paragraph 23 above), some 7 years have elapsed since the date on which the Applicant was discharged from bankruptcy. I agree with Judge Pelling QC that the Bankruptcy Court's discretionary jurisdiction to release a relevant obligation can be exercised at any time after discharge (see paragraph 13 of *Hayes*). I have considered whether this factor (see paragraph 23(1) above) militates for or against release. On the one hand, it might suggest that the continuance of the obligation has not resulted in identified special prejudice; on the other hand, it might suggest that there is a lesser prospect of him becoming able to generate funds or means of support in the future, having apparently failed to do so over that period of time. On balance, I do not consider that the balance weighs substantially either way.

51. As to the fourth factor identified by Judge Pelling QC (see paragraph 23(4) above), again it does not seem to me that the fact that the 2003 Order was made some time ago weighs materially in the balance: and the Respondent's restraint should not be held against her.

52. I have in part already addressed (in paragraph 45 above) the third factor identified by Judge Pelling QC, that is, the risk of the Respondent using the fact of the obligation to harass the Applicant (see paragraph 23(4) above). Whilst the risk may be there, I do not detect from the (fairly limited) evidence provided to me of the Respondent's past behaviour that this is likely to eventuate. Further, and like Judge Pelling QC, I am

comforted that if the Respondent were to seek to use or threaten bankruptcy proceedings for improper and oppressive purposes there are significant controls available to protect the Applicant, including refusal to make a bankruptcy order even if the petition is founded on a provable debt (and see *Shepherd v Legal Services Commission* [2003] BPIR 140). The Bankruptcy Court could also treat such oppression as grounds for releasing the obligation at that later stage.

53. In conclusion, in my judgment, in all the circumstances of this case, the balance remains in favour of keeping in place the obligation; certainly, in my judgment, there is no sufficient reason to override the default provision. I shall dismiss the application accordingly.