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Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 July 2007

Before :

MR JUSTICE MUNBY

Case No: BF02D01818

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Between :

	R	**Petitioner**
	- and	
	M	**Respondent**

Case No: 8891 of 2003

IN THE HIGH COURT OF JUSTICE
IN BANKRUPTCY

In the matter of M (A Bankrupt)

Between :

	R	**Applicant**
	- and	
	(1) M **(2) THE OFFICIAL RECEIVER** **(3) D J CHEVERTON (the Trustee in Bankruptcy of the Estate of M)**	**Respondents**

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Ms Tahmina Rahman (instructed by Law Partnership) for R (the wife)
Mr Matthew Brett (instructed by Karina Leapman & Co) for M (the husband, a bankrupt)
Mr Shaiba Ilyas (instructed by Turner Parkinson LLP) for the husband's trustee in bankruptcy

Hearing dates: 23-25 April 2007

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE MUNBY

This judgment was handed down in private but the judge hereby gives leave for it to be published

Mr Justice Munby :

1.These are ancillary relief and bankruptcy proceedings which I have heard together. The litigation is in the High Court only because that is where the bankruptcy petition was issued. The assets are, on any view, modest. On their own the ancillary relief proceedings would never have found their way to the High Court.

2.The costs which have been incurred in these proceedings are grotesquely disproportionate to the amounts at stake.

3.An agreed schedule (see below) shows the identified matrimonial assets to be worth only some £211,551. (The wife alleges that the husband has additional undisclosed funds.) Net of debts which according to the husband amount to £67,375, the identified matrimonial assets amount to only £144,176. Even on the wife's case they amount to no more than £177,843.

4.The wife's costs of the ancillary relief proceedings are estimated at £36,239.75 and of the bankruptcy proceedings at £15,490.75 – a total of no less than £51,730.50. (I might add that her costs of certain ongoing proceedings in relation to the children amount to £21,922.33 – so her total costs of all the litigation total no less than £73,652.83.) The husband's costs of the ancillary relief proceedings are estimated at £32,551.55 (he has no additional costs of the bankruptcy proceedings). The trustee in bankruptcy's expenses of the bankruptcy (excluding legal fees) amount to £43,859.72; his legal costs of the proceedings come to a further £29,851.46 – a total of £73,711.18. The aggregate of all these sums (excluding the wife's costs of the children proceedings) comes to no less than a staggering £157,993.23 – *more*, on the husband's view, than the net aggregate value of the identified family assets and not far short of what the wife says they are worth.

5.Even if one has regard only to the costs of the ancillary relief proceedings they amount to no less than £68,791.30 – 321/2% of the gross identified family assets and, even on the wife's view, almost 39% of the net assets. One wonders with astonishment at what has been going on. One only speculate as to what anyone thinks they could possibly hope to salvage from this expensive and utterly futile fiasco.

6.I might add that neither party works. Each is reliant on state

benefits. The background

7. The husband was born in 1962 and the wife in 1967. They married in July 1991. There are two children, one born in May 1993 and the other in October 1999. They separated in July 2002. So it was an eleven year marriage. There are ongoing proceedings in the Brentford County Court in relation to the children. At present they are living with the wife. The husband does not have contact.

8. In June 2002 the husband, who was an accountant, had pleaded guilty to various offences of dishonesty against his employer. On his own admission, as set out in a statement in mitigation prepared for the subsequent confiscation proceedings, the offences had started in September 1996 when he stole £1,000:

> "I committed the first offence É to show myself that I was cleverer than they were and that they were foolish. I did it several more times for the same reasons but slowly became addicted to stealing the money. I had adopted a more lavish and extravagant lifestyle and by December 1997 I had large credit card debts and stole £9,500 to pay them off."

He added, "My wife is hard to please." On 8 July 2002 he was sentenced to two years' imprisonment. Later that year a confiscation order was made in the sum of £12,703.82 to be paid by 1 July 2003 with a further six months' imprisonment in default. He was released from prison on 10 April 2003.

The matrimonial assets

9.The matrimonial assets, as I have said, are modest.

10.The former matrimonial home, still occupied by the wife and the children, has an agreed value of £280,000 and is subject to a mortgage debt of £131,965. So the net equity, after allowing for notional sale costs of 3%, is £139,635. In May 2003 the mortgagee had issued possession proceedings in the Willesden County Court. A possession order was made on 18 August 2003. The husband applied to have the possession order set aside on the ground that he had not had proper notice of the proceedings. That application was struck out by the District Judge on 4 December 2003 and on the next day, 5 December 2003, the building society wrote to the wife announcing its intention to obtain a warrant for possession. Eventually, however, in February 2004, the wife was able on the basis of the income support she was receiving, and with some help from her relatives, to reach an accommodation with the mortgagee (I need not go into the details. The negotiations can be followed though correspondence which for present purposes began with a letter from the building society to the wife's solicitors dated 13 June 2003 and ended with another letter from the building society dated 11 February 2004.) So the home was saved, at least for the time being.

11.The only other identified matrimonial assets are the wife's car, worth £1,000, some jewellery, said to be worth £16,000, an endowment policy worth £6,722.58 and the husband's pension worth £48,193.89.

12.Various other assets have already been realised and spent. In January 2003 various policies with Friends Provident were surrendered and realised £12,907.23. That was applied in discharging on 10 March 2003 the amount outstanding under the confiscation order. In September 2003 the wife surrendered some policies with Legal & General and received £2,601.05. The same month the husband surrendered his policies with Legal & General and received £2,676.38 (using the money, it would seem, to fund a university course on which he had enrolled). In total the remaining identified assets are, as I have said, worth only £211,551.

13.There are various liabilities in addition to the mortgage debt. The husband owes a total of £24,167.15 to various banks and credit card companies. Together with statutory interest totalling £7,391.37 the debts amount in all to £33,708. Those debts are agreed by the wife. The husband asserts, though the wife disputes, that he is also indebted to various members of his family in sums amounting in all to £26,289.33. Together with statutory interest totalling £7,378.56 those debts amount in all, according to the husband, to £33,667.

14.On the wife's case the identified matrimonial assets are worth £177,843 net; on the husband's case £144,176 net.

15.I can summarise the position in tabular form:

Assets	Joint	Husband	Wife	Total
Matrimonial home	139,635			139,635
Car			1,000	1,000
Jewellery			16,000	16,000
Policy	6,722			6,722
Pension		48,194		48,194
Total				211,551
Debts				
Creditors	2,149	31,558		33,708
Family loans		33,667		*33,667
Total				67,375

Net assets (H)		144,176
Net assets (V)		177,843

* Disputed by the wife

The litigation

16. The wife petitioned for divorce in the Brentford County Court on 18 October 2002. She issued her Form A on 14 July 2003. A decree nisi was granted on 8 August 2003. The wife swore her Form E on 27 August 2003, the husband his Form E on 26 September 2003. The first appointment was fixed for 23 October 2003.

17. Three days earlier, on 20 October 2003, the husband presented his own petition in bankruptcy to the High Court. He was adjudged bankrupt the same day. On 23 October 2003 the Deputy District Judge adjourned the ancillary relief proceedings generally with liberty to restore.

18. On 19 November 2004 the wife applied to annul the bankruptcy on the ground that the bankruptcy order "ought not to have been made": see section 282(1)(a) of the Insolvency Act 1986. On 28 January 2005 she applied to restore the ancillary relief proceedings. On 4 February 2005 the Bankruptcy Registrar transferred her application to annul to the Principal Registry, with a view to it being heard together with the ancillary relief proceedings. On 1 March 2005 the District Judge directed that the ancillary relief proceedings be restored and transferred to the Principal Registry to be heard with the application to annul.

19. Further directions were given in the Principal Registry on 21 June 2005, on 1 December 2005, on 13 March 2006, and, following what had been intended to be the final hearing (which had to be aborted for want of jurisdiction), on 24 July 2006. More directions were given in the Principal Registry on 18 August 2006. On 23 October 2006 Charles J consolidated the ancillary relief and annulment applications and gave directions with a view to a final hearing before me on 23 April 2007.

20. On 21 March 2007 the husband's trustee in bankruptcy applied for an order pursuant to section 261(9) of the Enterprise Act 2002 that the period the trustee has to realise his interest in the former matrimonial home be extended by one year after the conclusion of the wife's application to annul. On 23 March 2007 the Bankruptcy Registrar made that order, specifying that the period of one year was to be "from the date of the handing down of the judgment in respect of the É application to annul." The period of one year accordingly runs from 23 July 2007.

21. In accordance with Charles J's directions the matter came on for hearing before me on 23 April 2007. The hearing lasted 3 days. At the end of the hearing on 25 April 2007 I

reserved judgment.

The issues

22. As the case was opened to me, there appeared to be three main issues in addition to those which would inevitably arise in any ancillary relief claim:

i) the dispute as to the husband's alleged debts to members of his family;

ii) a dispute in relation to the jewellery (there is a dispute both as to where the jewellery is and who it belongs to: the husband says that certain items of jewellery are in the matrimonial home and belong to him; the wife lays claim to jewellery which she says is in a bank safe deposit box held by the husband's mother); and

iii) the question as to whether or not the wife was entitled to have the husband's bankruptcy annulled.

23. In relation to the first of these there was an obvious difficulty. The relevant members of the husband's family had not been joined as intervenors in the ancillary relief proceedings, so any finding I might make about the alleged debts would not be binding on them: see *Tebbutt v Haynes* [1981] 2 All ER 238 especially per Brightman J at pages 244, 245. (Similarly, the only aspect of the bankruptcy which was before me was the wife's application to annul. I did not have before me any application in relation to the admission or proof of debts in the bankruptcy.) In the upshot the parties agreed that the hearing should proceed without anyone being joined as an intervenor but on the basis that I would *not* be asked to make any findings in relation to these alleged debts.

24. The question of annulment is rightly seen by the wife as crucial. She says that if the bankruptcy order is annulled there will be no immediate likelihood of the matrimonial home having to be sold. The income support and the financial assistance which she receives from her family will enable her to meet her agreed obligations to the building society. If, on the other hand, the bankruptcy order stands, the trustee in bankruptcy will almost certainly be able to force a sale.

25. The wife's counsel, Miss Tahmina Rahman, identified five other matters which, she submitted, required investigation:

i) First, the wife wished me to explore the financial gains the husband had allegedly made arising out a house in Brighton which he and his sister had bought in 1988. In 1992 the husband had transferred his interest in this property (and in an endowment policy which had been taken out to secure the mortgage) to his sister. The wife's case is that the husband received money from his sister in relation to this transaction which he has not disclosed, alternatively that there is some understanding between him and his sister under which monies may be released either to him and/or to the wife and children. According to the husband he received

nothing and stands to receive nothing.

ii) Secondly, she wished to explore what had happened to the sum of £25,000 raised in 2000 by a re-mortgage of the matrimonial home. That money, according to the wife, had been intended to finance a new kitchen and/or extension and a car, but was not used for those purposes. According to the husband he used the money to pay off credit card debts.

iii) Thirdly, she wished to explore what had happened to the monies the husband had embezzled from his employers, for the amount he stole was, she says, much in excess of the sum referred to in the confiscation order and she does not know where the money has gone. According to the husband anything he stole has long since been spent.

iv) Fourthly, she wished to explore how the husband's admitted debts had been incurred, with a view to ascertaining whether they should be paid out of the 'marital pot.' She says that they arose as a result of his own irresponsibility and that she was not aware of the extent of the debts until after he petitioned for bankruptcy. The husband's case is that all these debts arose during the course of the marriage, that both parties were responsible for living beyond their means, and that what he concedes was his irresponsibility in allowing the debts to mount was matched by the wife's irresponsibility in taking no interest in the family's finances. There is, he says, nothing to show that the debts arose otherwise than as joint living expenses.

v) Finally she wished to explore what had happened to all the monies he had borrowed from his various creditors.

In short, the wife says that the husband has (or has had) the benefit of significant funds that he has not accounted for.

The husband's position

26. The husband's position is simple. Mr Matthew Brett on his behalf submits that the bankruptcy order was properly made and that there is no basis for it to be annulled. The husband denies that his petition was designed to frustrate the wife's ancillary relief claims but asserts that, as a matter of law, the question of motive is immaterial to the question of whether the bankruptcy order was properly made. He says that he made full and truthful disclosure to the bankruptcy court. He says that a bankruptcy order was virtually inevitable, if not on his own petition then on the petition of a creditor. Given the state of their finances, the fact that neither of them was working and the fact that he had no income, there was no way the debts could have been paid without recourse to the equity in the matrimonial home, and, he says, it is inconceivable that the wife would have agreed to him paying the debts out of the equity of the property. She has throughout, after all, sought the whole of the property for herself. He was therefore on 20 October 2003, he says, "unable to pay his debts" within the meaning of section 272 of the Insolvency Act 1986.

27. The only asset of the husband which is not caught by the bankruptcy is his pension, and that, he concedes, should be the subject of equal division between the parties by way of a pension sharing order. He accepts that there should be a nominal maintenance order in favour of the wife to continue for the duration of the children's minorities.

28. If, on the other hand, the bankruptcy is annulled, then, says Mr Brett, the husband will require all his realisable capital (including his share of the matrimonial home) in order to pay off his creditors and meet the costs of the trustee in bankruptcy. Otherwise he will simply be made bankrupt again. From the husband's point of view, therefore, he says, it does not make very much difference whether or not his bankruptcy is annulled. But on either basis there is, he says, no way in which a sale of the matrimonial home can be avoided.

29. If contrary to those submissions, the wife were somehow to achieve a transfer of the matrimonial home then the husband would seek (a) a charge back realisable when the younger child has completed tertiary education to first degree level and (b) a release from his obligations under the mortgage.

The wife's position

30. The wife seeks the annulment of the bankruptcy order. She says that the husband petitioned in order to frustrate her claim for ancillary relief and that he was able on 20 October 2003 to discharge his debts as they fell due.

31. Assuming she achieves that ambition she also seeks (a) the transfer to her of the husband's interest in the matrimonial home, (b) the transfer to her of the endowment policy (on her undertaking to discharge a debt of £2,149 owing to Barclays), (c) a share in or transfer to her of the husband's pension, (d) an order for nominal or reasonable periodical payments, and (e) an order that the husband return her jewellery to her.

32. She says that her needs and the children's needs must be given priority over those of the husband. This is not, she says, a case for a clean break – the children are too young and she is too vulnerable for the court to contemplate a clean break. On top of all that, she says that I should take into account as 'conduct' the fact of the husband's criminality, his conviction and its consequential impact on the family.

The trustee in bankruptcy's position

33. Mr Shaiba Ilyas, appearing on behalf of the husband's trustee in bankruptcy, tells me that the trustee is neutral in respect of the wife's annulment application. But in his role as an officer of the court, and also as the only voice of the creditors (whose interests, he suggests, have not been properly addressed by the wife) the trustee points out that:

    i) The fact that the husband's assets may have exceeded his liabilities is not in any way determinative of his then solvency. The key question is whether on 20

October 2003 the husband was able to pay his debts as they fell due in circumstances where, as Mr Ilyas properly points out, the husband had *no* income at the time.

ii) Whether or not the husband is indebted to members of his family, at the time the bankruptcy order was made he had other creditors whose debts came to over £24,000.

iii) Two of the husband's creditors have confirmed to the trustee that they do not wish to see the bankruptcy order annulled, as that would further prejudice their position. (Because of the bankruptcy order they have been precluded from taking any enforcement action of their own since 20 October 2003.) Were the bankruptcy order to be annulled then the wife would, at least in the first instance, be benefiting at the expense of the creditors.

iv) Were the bankruptcy to be annulled the husband would remain liable to his creditors and, unless able to access the equity in the matrimonial home, would still be and remain insolvent.

The evidence

34. At this point I must say a little about the evidence. I heard oral evidence from the wife, from the husband's father, from the husband's mother and finally from the husband.

35. The wife I found to be an honest, truthful and, for the most part, reliable witness.

36. The husband's parents did not come over as being at all partisan. His father, for instance, made it clear that he was accommodating his son not through choice but out of a sense of duty. He said, and I believed him when he said it, that he did not want his son there, but that he had no choice. Circumstances forced him to put him up – he was his flesh and blood – but he was not otherwise supporting him. I found both the father and the mother to be clear, straight-forward and impressive witnesses. I have no hesitation in accepting their evidence.

37. The husband was a less impressive witness. He came over as self-pitying, at times almost abject. Whilst he was not caught out in any obvious falsehoods, and although most of the time he was probably telling the truth, I would not necessarily want to accept everything he said.

Undisclosed assets

38. The first task is to ascertain whether there is any substance in the wife's suggestions that the husband has, or has access to, funds which he has not disclosed. This is relevant for two quite different purposes. First, and before embarking upon the exercise of my discretionary jurisdiction under the 1973 Act, I have to know what is available for

distribution. Equally important, however, it goes to the crucial question of whether or not the husband was able to pay his debts at the time he issued his petition in bankruptcy in 2003.

39. The wife identifies four different sources of funds which she says the husband still has and which he has not disclosed: the Brighton property, the re-mortgage monies, the monies he embezzled from his employers, and the monies he borrowed from his various creditors.

40. I can deal with this quite shortly. In my judgment the wife has wholly failed to establish that the husband has now, or that he had in October 2003, access to any undisclosed funds.

41. So far as concerns the Brighton property the husband was adamant that he received nothing from a venture which was always intended not for his benefit but for the benefit of his sister. The matter was explored in some detail. I can only say that I am inclined to believe the husband's categorical denial but that in any event the wife has wholly failed to establish that he has ever received or that he has any continuing right to receive anything in relation to the property. At the end of the day, there is little beyond the wife's mere assertion to support her case – and assertion is not evidence.

42. So far as concerns the three other suggested sources the position seems to me to be equally clear. The husband asserts, in substance, that all the money has long since gone on extravagance of one sort or another supporting a lifestyle funded not merely by embezzlement and out of the re-mortgage monies but also in significant part by borrowing on credit cards which themselves had to be repaid out of further embezzlement or borrowing. The money has all gone, he says, even if it is no longer possible to be precise as to when and how it has all been spent. I am inclined to believe what the husband says. And the wife, however strong her belief to the contrary, was not at the end of the day able to gainsay him.

43. I am not prepared to find as a fact that there are no hidden funds. It is possible, though I think unlikely, that there are. But the wife has wholly failed to establish that there is any hidden money, let alone that if there is it exists in significant amounts. All the indications, moreover, are that there is no hidden money. I do not think that the husband, who came over as rather pathetic and limited, would have had the imagination, or indeed the capacity, to squirrel away large sums of money. And if he had had access to hidden funds in the summer and autumn of 2003, then surely he would have used some of those funds to fob off the most pressing of his creditors and keep them at bay. After all, most of them indicated that they were prepared to consider any proposals that he might wish to put forward with a view to meeting his liabilities. And there is nothing in the picture of his rather sad existence in his parents' house – tolerated but hardly welcomed – to suggest that he is somehow managing to live the life of Reilly at the expense of his creditors and his wife.

44. In the light of all the evidence I have read or heard I conclude that the wife has failed to establish that there are, or were on 20 October 2003, any hidden assets. The likelihood,

indeed, is that there are not and were not.

45. I proceed, therefore, on the basis that the assets are indeed as set out in the

Table. The jewellery

46. This topic was explored at some length during the cross-examination of the husband's parents. I accept their evidence. The husband's mother was adamant that she does not have any of the wife's jewellery. I believe her.

47. Neither of the husband's parents is holding any of the wife's jewellery. Nor is the wife holding any jewellery that belongs either to the husband or to his parents. The jewellery in the matrimonial home belongs to her.

The application to annul

48. These matters out of the way I turn to the central issue in the case. Is the wife entitled to have the bankruptcy order annulled? In my judgment she is not.

49. I propose to deal first with the law before turning to consider the

facts. The application to annul – the law

50. Section 282(1)(a) of the Insolvency Act 1986 provides that:

> "The court may annul a bankruptcy order if it at any time appears to the court ... that, on any grounds existing at the time the order was made, the order ought not to have been made ... "

51. The burden of proving that the bankruptcy order "ought not to have been made" rests on the wife, as the applicant. The burden of proof is the balance of probabilities, but where annulment is being sought on the ground that the husband presented a false picture of his financial circumstances to the bankruptcy court, a high standard of proof is required to reflect the gravity of the stain on the husband's integrity: *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359 at page 366.

52. Section 272(1) of the Insolvency Act 1986 provides that:

> "A debtor's petition may be presented to the court only on the grounds that the debtor is unable to pay his debts."

So the central question in relation to the application for an annulment (which, as we have seen, necessarily has to proceed on the footing that "the order ought not to have been made") is whether on 20 October 2003 the husband was "unable to pay his debts." The

test of that is not whether his assets exceeded his liabilities ('balance sheet' insolvency) but whether he was unable to pay those debts at the time they were due ('commercial' insolvency): *Re Coney (A Bankrupt)* [1998] BPIR 333.

53. The matter was put very clearly by the Deputy Judge, Mr David Oliver QC, at page 335:

> "Inability to pay one's debts, at least in the context of insolvency, has historically long been construed as an inability to pay one's debts at the time that they are due. I have no doubt that this is the proper interpretation of the phrase in s 272 of the Act. One of the justifications for this interpretation, quite apart from the sanctity of contract, is to avoid just the sort of prevarication that potentially derives from an excess of assets over liabilities, but a lack of liquidity. The counterpart to this approach to solvency is that even if one's liabilities exceed one's assets on a balance sheet basis, it does not follow that a person is insolvent, albeit that it is all the more likely to result in the state of the individual's relations with his bankers constituting the ultimate test of solvency."

He went on at page 336:

> "Whilst not excluding the possibility of doing so in any circumstances in my judgment it would not normally be right pursuant to s 282(1) of the Act to annul a bankruptcy order unless at least it is shown that as at the date of the order the debtor was in fact able to pay his debts, or had some tangible and immediate prospect of being so able which has since been fulfilled or would so have been but for the order itself. It is with regard to a 'tangible and immediate prospect' that the assets and liabilities of a debtor and their nature will usually be of relevance."

I respectfully agree with all of that.

54. It is important to appreciate that if in fact the husband was "unable to pay his debts" on 20 October 2003, the fact that his motive may have been to spite the wife and frustrate her claim to ancillary relief is neither here nor there. If his motive was corrupt then no doubt the court will scrutinise with some care the self-serving assertion that he was insolvent, but if satisfied that he was indeed insolvent then the court cannot annul the bankruptcy order under section 282(1)(a).

55. I go first to *In re Holliday (A Bankrupt), ex p Trustee of the Property of the Bankrupt v Holliday* [1981] Ch 405, where Goff LJ said this at page 414:

> "The first question which arises on these appeals is whether on March 3, 1976, the debtor was able to pay his debts, for if so then the receiving order and the adjudication order clearly ought not to have been made.
>
> If, however, he was not so able, then prima facie those orders were

> rightly made, but Mr. Muir Hunter has submitted that even on this hypothesis they are still bad as an abuse of process. Initially he rested this argument solely on the ground that the proper inference from the facts must be that the debtor's motive or purpose was not that of protecting himself from undue pressure by creditors, or to secure a fair distribution of his assets between them, but to baulk the claim the wife was making for a transfer of property order. In my judgment, however, even if this were his main or sole motive (and it may well be that it was) still that cannot alone make the petition an abuse of process. But then Mr. Muir Hunter submitted that the petition was an abuse of process if at the time the debtor believed that he was able to pay his debts or filed his petition without directing his mind to that question one way or the other. There is, however, in my view no evidence to establish either of those postulates. I turn back to the question whether he was in fact able to pay his debts."

56. The same approach was adopted by Blackburne J in *Re Dianoor Jewels Ltd* [2001] 1 BCLC 450 in relation to an administration order which had been made in respect of a company which was alleged to be the husband's alter ego, the other two directors supinely doing the husband's bidding. It was said that the husband's only or predominant purpose in putting the company into administration was to prevent the wife's attempts to enforce orders made in her favour against the husband in ancillary relief proceedings. The argument failed. Blackburne J said this at page 458:

> "the fact that the directors of the company petitioning for the administration order have a private motive, unconnected with the protection of the company's creditors, for seeking to have the company placed in administration, even if that purpose is to thwart the wife of one of them from enforcing a court order in her favour, does not seem to me to weigh in the matter. An administration order is a class remedy for the benefit of the company's creditors ... The fact that the making of an administration order may thwart the genuine claims of a third party is not a reason for not making it ... It frequently happens that a purpose of the making of an administration order is to stop the prosecution of legal proceedings against the company's property. It is none the worse for that."

57. Mr Ilyas referred to these authorities as displaying what he was pleased to call "the strict approach advocated by Chancery judges." I do not understand the observation. The High Court of Chancery and the Court for Divorce and Matrimonial Causes were both abolished by the Judicature Acts. Ever since then, as Vaisey J once observed (see *In re Hastings (No 3)* [1959] Ch 368 at page 377-378), there has been only the one court – the High Court of Justice – and all the judges of that court are simply judges of the High Court. He said:

> "It is a curious thing, and I think very notable and encountered in many connections, how hardly this idea of the separate courts dies ... The expression "The Court of Chancery" is constantly heard, yet it is three generations since it existed as a court. "The Court of

> Queen's Bench" is referred to in the same way: but there is now only one court – the High Court of Justice ... [A] good deal of colour is lent to the suggestion of separate courts by various expressions which are used, "a Chancery judge," "a Queen's Bench judge," which mean, respectively, a judge assigned to do the work which is commonly denominated Chancery work, and a judge assigned to do that work which was commonly done in the old court of Queen's Bench. Section 2 of the Supreme Court of Judicature (Consolidation) Act, 1925, obliges us to be appointed under the description of "judges of the High Court" ... That has to be remembered. If it is thought that there is some kind of emanation of the Chancery spirit which can overrule the decisions of the Queen's Bench, or some special inspiration of common sense which allows a judge of the Queen's Bench to say that the decisions in the Chancery Division are wrong, that is complete illusion."

58. Nigh on fifty years have passed since those words were uttered, yet the illusion that there is some special inspiration of common sense infusing the Family judges and which is lacking in our brethren in the Chancery Division – an illusion no doubt fostered by our inveterate practice of sitting in private – seems to be as prevalent today as ever. It cannot be stressed too much that there is simply no basis for this illusion.

59. As I recently had occasion to observe (*A v A (St George Trustees Ltd, interveners*) [2007] EWHC 99 (Fam) at para [19]), the Family Division cannot simply ride roughshod over established principle, least of all where there are, or appear to be, third party interests involved. I continued (para [21]):

> "it is important to appreciate (and too often, I fear, is not appreciated at least in this Division) ... that the relevant legal principles which have to be applied are precisely the same in this Division as in the other two Divisions. There is not one law of 'sham' in the Chancery Division and another law of 'sham' in the Family Division. There is only one law of 'sham', to be applied equally in all three Divisions of the High Court, just as there is but one set of principles, again equally applicable in all three Divisions, determining whether or not it is appropriate to 'pierce the corporate veil'."

And the same I might add – one really ought not to have to emphasise the point – goes for the law and practice relating to the annulment of bankruptcy orders.

60. The Family Division applies *precisely* the same principles, and in *precisely* the same way, as the Chancery Division, or for that matter the Queen's Bench Division. A creditor is not to be prejudiced because a wife's application to annul the bankruptcy order on which he depends is heard by a Family Division judge (more properly, as Vaisey J explained, a judge of the High Court who is assigned for the time being to the Family Division) any more than a wife is to be prejudiced because her application is heard by a Chancery judge.

61. I have been taken to a number of decisions where judges sitting in this Division have annulled bankruptcy orders. None of them throws the slightest doubt on the principles laid down, by 'Chancery' judges, in the relevant authorities.

62. In *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359, to which I have already referred, Thorpe J (as he then was) annulled a bankruptcy obtained by a husband on his own petition which was based on a deceitful presentation to the bankruptcy court that (see at page 366) "omitted assets outside the jurisdiction that are cardinal to any evaluation of his true net worth." Far from being insolvent the husband was found to have substantial assets.

63. In *Couvaras v Wolf* [2002] 2 FLR 107 Wilson J (as he then was) annulled a bankruptcy obtained by a confederate of the husband with the support of another confederate in circumstances where there was every reason to doubt whether either the petitioning creditor or the supporting creditor was in fact a creditor at all, where it was "obvious" that the husband had "contrived to make himself bankrupt" and where, in conclusion, Wilson J found that the bankruptcy petition was a sham.

64. In *F v F (S intervening) (Financial Provision: Bankruptcy: Reviewable Disposition)* [2002] EWHC 2814 (Fam), [2003] 1 FLR 911, Coleridge J annulled a bankruptcy order obtained by the husband on his own petition. Applying *Re Coney (A Bankrupt)* [1998] BPIR 333, Coleridge J found (see at page 928) that the husband had had at the time he petitioned "some tangible and immediate prospect of being able" to meet his liabilities in due course. True it is that this would have required the husband to sell one (or possibly two) houses, but an important factor, as Coleridge J pointed, out was that the bankruptcy petition was presented only two working days before the final hearing of the ancillary relief proceedings in which, as the judge observed, he would necessarily have to take into account the husband's outstanding debts. In other words, if the properties had to be sold to pay the debts that is something that could, with judicial assistance if necessary, have been achieved without undue delay.

65. The wife relies upon those last two decisions in support of her application to annul. I do not see how they help her. *Couvaras v Wolf* [2002] 2 FLR 107 was a case very far removed on its facts from anything that the wife can allege in the present case. *F v F (S intervening) (Financial Provision: Bankruptcy: Reviewable Disposition)* [2002] EWHC 2814 (Fam), [2003] 1 FLR 911, explicitly applied *Re Coney (A Bankrupt)* [1998] BPIR 333 and proceeded on the basis of an express finding of fact that the husband was, in the circumstances, able to pay his debts.

66. At the end of the day the key question is whether the wife can establish, the burden being on her, that the husband *was* on 20 October 2003 able to pay his debts in the sense in which that expression was explained by the Deputy Judge in *Re Coney (A Bankrupt)* [1998] BPIR 333. It is to this question that I now turn.

<u>The application to annul – the facts</u>

67. Leaving aside altogether the disputed debts to members of his family, there are certain

indisputable facts in relation to the husband's indebtedness on 20 October 2003:

i) First, that he owed monies to six different creditors: Barclaycard (£12,805.67), MBNA (£6,802.12), Barclays (£2,149.50), Citibank (£1,768.17), Beneficial (£1,760.24) and RBS (£1,030.95) – a total of over £24,000.

ii) Second, that four of these debts (Barclaycard, MBNA, Barclays, Citibank) had been assigned to third parties or were in the hands of debt collectors all of whom were pressing for repayment: see letters dated 15 August 2003 (the Barclaycard debt), 18 July 2003 (the MBNA debt), 19 April 2003 (the Barclays debt) and 21 August 2003 (the Citibank debt). Indeed, one of them had put the matter into the hands of solicitors: see letter dated 24 September 2003 from solicitors acting on behalf of debt collectors in relation to the Barclaycard debt. In addition, on 5 October 2003 Beneficial suspended the husband's credit facility and withdrew his use of its credit card.

iii) Third, that he was not working and had no income.

iv) Fourth, that his only liquid asset was an endowment policy worth some £6,700.

68. In these circumstances one struggles to see how it can be disputed that the husband was indeed insolvent. On the face of it he was plainly unable to pay his debts as they fell due, plainly unable to pay the creditors who were closing in on him.

69. The simple fact is, as Mr Brett correctly submitted, that there was on 20 October 2003 (just as there is today) no way the debts could be paid without recourse to the equity in the matrimonial home.

70. The wife's case turns, at the end of the day, on whether it can sensibly be said, to use the words of the Deputy Judge in *Re Coney (A Bankrupt)* [1998] BPIR 333, that on 20 October 2003 there was "some tangible and immediate prospect" of the husband being able to pay his debts by having recourse to the equity in the matrimonial home. The plain reality, in my judgment, is that there was no such prospect.

71. The husband, in my judgment, was on 20 October 2003 unable to pay his debts. The wife's application for an annulment must accordingly fail.

72. There is nothing in the decision in *F v F (S intervening) (Financial Provision: Bankruptcy: Reviewable Disposition)* [2002] EWHC 2814 (Fam), [2003] 1 FLR 911, to assist the wife. In that case the bankruptcy order was made immediately before the start of the final ancillary relief hearing and in circumstances where, as I have pointed out, if the properties in question had to be sold to pay the debts that was something that could, with judicial assistance if necessary, have been achieved without undue delay. Here the circumstances were very different. The bankruptcy order was made three days before the first appointment, many months at the very least before it would be realistic to expect any final

determination of the ancillary relief proceedings. Moreover, as Mr Brett says, it is inconceivable that the wife would have agreed to the husband paying off his debts out of the equity in the property, something that in reality could probably have been achieved only by a sale. For what lender would want to lend to a divorcing couple neither of whom was working and who were already saddled with a very substantial mortgage.

73. The wife has throughout fought to prevent the property being sold; she has throughout sought the whole of the property as a home for herself and the children. Indeed that is still her position today. The husband and the wife had found it impossible, even assuming they ever tried, to co-operate in saving the house from the building society. Each took steps, but unilaterally and without reference to the other. The idea that they would have co-operated in seeking to utilise the house in order to hold off the husband's creditors is far-fetched.

74. The brute reality is that the only way the husband could have paid his debts, unless he won the Lottery, was by plundering the equity in the matrimonial home, in all probability by selling it. But that is something the wife would never have agreed to, indeed would have fought to resist. And it is very doubtful that the husband would have been able to enlist the assistance of the court in forcing a sale before the final hearing of the ancillary relief proceedings, in other words in time to hold off his creditors.

The application to annul – consequences

75. There is really little room for argument as to what the proper outcome is in the event of the bankruptcy order remaining in force.

76. The wife will retain her interest in the matrimonial home and in the endowment policy, her jewellery and her car. I cannot make any order in her favour in relation to the husband's interest in the matrimonial home, for that has vested in the trustee for the benefit of the husband's creditors. So far as concerns the husband's pension, this is not caught by the bankruptcy. The husband concedes that the wife should have half of it, by means of a pension sharing order. In all the circumstances, and on a proper application of the Matrimonial Causes Act 1973, it seems to me that she should have the whole of it. It may go some small, if inadequate, way to meeting the needs of the wife and the children. I will make a nominal maintenance order in favour of the wife.

77. In principle the trustee must be entitled to an order against the wife for his costs of the annulment application.

The application to annul – other matters

78. I think I should indicate briefly how this matter would have been resolved if I had indeed been persuaded to annul the bankruptcy order.

79. In the first place it seems to me that, almost inevitably, the matrimonial home would have had to be sold in order to enable the husband to pay off his commercial creditors (I say

nothing about the alleged debts owed to members of his family).

80. There are two quite separate reasons for that.

81. In the first place I am inclined to agree with Mr Brett that these were indeed matrimonial debts, insofar as they went, in significant part at least, to support the family's standard of living. (In saying that I do not overlook the distinct possibility that some of the money was being used by the husband alone for his personal pleasures.) Be that as it may, however, it would not in any event be right for the court to exercise its powers under the 1973 Act to the prejudice of these creditors. Any order I might make would, in my judgment, have to make provision for the payment of the debts owing to the commercial creditors and it is difficult to see how (unless members of the wife's family were willing to come to her rescue) this could be achieved without a sale of the matrimonial home.

82. Secondly, however, there is the simple fact that, if the bankruptcy order were annulled, the husband would remain at the mercy of his creditors. Unless the debts are paid, or compounded for, it is probable that he will simply be made bankrupt again, for debtors who may well feel that they have been 'given the run around' for the best part of four years are unlikely to be merciful. And in the event of the husband again being made bankrupt any order I might have made in favour of the wife would be vulnerable to attack under section 339 of the Insolvency Act 1986 as a "transaction É at an undervalue."

83. There was some debate before me as to whether in fact the wife would derive any advantage from an annulment bearing in mind the possible impact of section 339. At the time when the hearing before me began that was a question of some nicety. Mr Ilyas helpfully referred me to the authorities, including in particular *In re Abbott (A Bankrupt), ex p Trustee of the Property of the Bankrupt v Abbott* [1983] Ch 45, *In re Kumar (A Bankrupt), ex p Lewis v Kumar* [1993] 1 WLR 224 and *Jackson v Bell* [2001] EWCA Civ 387, [2001] BPIR 612. But he was also able to tell me that the very point was to be determined in a case to be heard later the same week in the Chancery Division by His Honour Judge Pelling QC (sitting as a Judge of the High Court). Judgment in that case was in the event handed down a few days later on 3 May 2007: *Hill and another v Haines* [2007] EWHC 1012 (Ch), [2007] 2 FCR 513.

84. Judge Pelling held that an order under the 1973 Act, even if made after fully contested proceedings, is vulnerable to challenge under section 339. Indeed, referring to the definition of undervalue in section 339(3), he held (at para [23]) that:

> "for the purposes of considering the applicability of Section 339, to a case such as this, the position is the same whether the Matrimonial Court makes an order following a contested hearing or following a compromise agreement – in neither case does the receiving party give, nor the paying party receive, consideration."

So any ancillary relief order is liable to be set aside as a transaction at an undervalue if the husband is made bankrupt within the next five years: see section 341 of the Insolvency Act 1986.

85. There is a further issue which would have arisen had I decided to annul the bankruptcy order: the matter of the trustee in bankruptcy's costs. The starting point is that if, as here, an annulment application is made under section 282(1)(a) of the Insolvency Act 1986, then it is the petitioner – usually the petitioning creditor, sometimes (as here) the debtor himself – who should pay the trustees' costs of the bankruptcy if there is an annulment: *Butterworth v Soutter* [2000] BPIR 582 at page 585.

86. In the event of the annulment application being successful, the trustee in bankruptcy sought an order that the husband to pay his costs (including his legal costs) of administering the husband's estate. But he also sought an order giving him a first charge on the husband's assets to secure those costs, on the basis that the charge, as I understand it, should rank ahead of any award made to the wife under the 1973 Act. I can see the force of the latter submission. And in any event, even if I refused to give the trustee the charge he was seeking, there would presumably be nothing to prevent him petitioning for the husband's bankruptcy on the basis of his unpaid costs and then attacking my order under section 339.

87. So there are powerful arguments for saying that any order I might have made under the 1973 Act would have had to make provision, one way or another, not merely for the debts owing to the husband's commercial creditors but also for the costs payable by him to the trustee in bankruptcy.

88. I need not explore any further issues which in the event do not arise for decision. What is pretty apparent, however, is that the wife's attempt to preserve the matrimonial home was probably always doomed to failure and that the result of these ruinously expensive proceedings has been to diminish very drastically indeed the part of the 'matrimonial pot' which remains available for distribution to the parties.

Orders

89. I invite counsel to draft the appropriate orders, one in each of the proceedings, to give effect to this judgment.