F v F (S INTERVENING) (FINANCIAL PROVISION: BANKRUPTCY: REVIEWABLE DISPOSITION) [2002] EWHC 2814 (Fam)

Family Division

Coleridge J

29 November 2002

Divorce – Wife applying for ancillary relief – Registered charge on matrimonial home by intervenor – Whether charge be set aside – Whether husband's petition in bankruptcy be set aside – Legal Services charge

The parties were married in 1992 and had four children. The wife brought a petition for divorce in September 1999, later amended to a decree of judicial separation. Her application for ancillary relief, in which she sought a transfer into her name of the matrimonial home together with a lump sum order sufficient to discharge the mortgage on it, was complicated by the discovery that there was a charge of £150,000 on the home registered in favour of S, the intervenor, a woman with whom the husband had had a close personal relationship and business relationship for many years. The discovery of that registered charge was followed by another charging order for £275,000 also made in favour of S on a part of the property comprising the matrimonial home. Accordingly, under the umbrella of the wife's application, the court had to deal with (i) an application by the wife under s 37 of the Matrimonial Causes Act 1973 to set aside the intervenor's charges, (ii) an application by the intervenor for the charging order of £275,000 with interest to be made absolute, (iii) an application by the wife to annul the bankruptcy order made against the husband 2 days prior to the commencement of the ancillary relief hearing, and (iv) an application by the intervenor for the court to declare the extent of her interest in one or more of the properties owned by the husband. The assets of the parties, consisting of 14 and 15 N Place, which had both at one time comprised the matrimonial home, and LT, a property in France, acquired by the husband and the intervenor in the course of their long association, amounted to £600,000. The debts accumulated by the husband were £128,000. All the properties were in the name of the husband only, but it was the intervenor's case that they were either partnership assets or otherwise owned by them beneficially in equal shares.

Held –

(1) On the basis of all the transactions there was a common understanding between the husband and the intervenor that they would both benefit but not on a 50/50 basis. Rather, the husband held the properties on a constructive trust for the intervenor to the extent of a third of the equity in the properties. It was also a term of the trust, however, that money should be expended on properties for the benefit of the wife and children. Accordingly, insofar as the intervenor had an interest in 14 N Place, where the wife and children were living, realisation of it should be postponed, the period of postponement to be 10 years or until such time as it was no longer required as a home for the children, the intervenor to receive as soon as possible her third interest in the other properties.

(2) As regards the wife's application under s 37 to set aside the £180,000 charge, the husband had failed to discharge the burden placed upon him by s 37(5), in that he had failed to rebut the presumption that he had agreed to the charge with the intention of defeating the wife's claim. In those circumstances the charge would be set aside. The charging order for £275,000 was similarly tainted by the intention to defeat the wife's claim and the charging order would also be set aside.

(3) The husband's petition in bankruptcy was issued when his indebtedness amounted to some £350,000 and his assets to £660,000. Accordingly, the order 'ought not to have been made' within s 282 of the Insolvency Act 1986, had been another device designed to derail the court's ability to deal with the wife's claim and would be annulled. Payment would be ordered from the sum in court to the listed creditors of the undisputed debts of £128,000.

(4) Taking into account the remaining assets and all the factors in s 25 of the 1973 Act, in particular giving first consideration to the welfare of the children, a proper order on the wife's claims for ancillary relief was for the husband to transfer his interest in the matrimonial home to the wife and to pay out of the remaining £130,000 a lump sum of £100,000 to enable her to reduce the mortgage on the property, leaving the husband with approximately £30,000 for the down payment on a house.

Statutory provisions considered
Matrimonial Causes Act 1973, ss 1(2)(b), 25, 37
Insolvency Act 1986, s 282
Family Law Act 1996, Part IV, Sch 4
Trusts of Land and Appointment of Trustees Act 1996, ss 14, 15

Cases referred to in judgment
Coney (A Bankrupt), Re [1998] BPIR 333, ChD
Cooke v Head (No 2) [1974] 1 WLR 972, [1974] 2 All ER 1124, CA
F v F and Others (S, Intervenor) [2002] EWCA Civ 1527 (unreported) 16 October 2002, CA
Harman v Glencross and Another [1986] Fam 81, [1986] 2 WLR 637, [1986] 2 FLR 241, [1986] 1 All ER 545, CA
Kemmis v Kemmis (Welland and Others Intervening); Lazard Brothers and Co (Jersey) Ltd v Norah Holdings Ltd and Others [1988] 1 WLR 1307, [1988] 2 FLR 223, CA

Michael Glaser for the petitioner
James Bogle for the respondent
Duncan MacPherson for the intervenor

Cur adv vult

COLERIDGE J:

Introduction and applications

Mr and Mrs F, the husband and wife in this case, were married on 17 January 1992. At the date of this judgment they remain married because the only decree affecting their status is one of judicial separation granted on 1 December 2000. Accordingly I shall refer to them as husband and wife. The wife first issued proceedings on 13 September 1999. At that date they were for divorce and they were based upon the husband's behaviour. In the petition she claimed all the usual forms of ancillary relief. That original divorce petition was amended, as I have indicated, to one of judicial separation on 22 June 2000. Thus it is that the primary application before the court is the wife's application for ancillary relief arising out of her original divorce petition later amended to judicial separation.

During 1999 and 2000 the application proceeded more or less conventionally. It was first fixed to be finally determined on 6 and

7 December 2000. However, about a week before that fixed date the husband applied to adjourn it on the basis that he had by then issued a residence application which, he contended, should be heard first. The final hearing of the ancillary relief application was duly adjourned. In March 2001, as a result of obtaining office copy entries in relation to a property at that time forming part of the matrimonial home, the wife discovered that there was a charge registered upon the home in favour of S – a close friend and former business partner of the husband's. That came as a complete surprise to the wife. Since then this application for ancillary relief has become increasingly complicated.

The discovery of the registered charge came hard on the heels of a claim by S for the sum of £275,000 which it seems she had instigated in February 2001 against the husband. That claim against the husband was later translated into a judgment (in default of defence) against the husband on 19 March 2001. The judgment was itself later secured by way of a charging order eventually made absolute on 20 April 2001. The charging order was also made on a part of the property which comprised the matrimonial home. As it became increasingly apparent to all concerned that the extent to which the husband was indebted to S and the extent to which she might or might not have interests in real property owned by the husband and occupied by the wife and children, might themselves be significant issues in the primary application for ancillary relief, by an order of 1 June 2001 the district judge joined S as an intervenor in these proceedings. Accordingly, since June 2001, there have been three parties involved in these applications; the husband, the wife and S who henceforth I shall describe as the intervenor.

The substance of this hearing therefore has been to determine the wife's application for ancillary relief for herself and the four children of the family against the background of the intervenor's applications directed to securing for herself a portion of the self-same 'matrimonial' assets in priority to the wife.

The applications

In order to determine the issues in this case there are before the court the following applications:

(1) The application by the wife against the husband for all forms of ancillary relief for herself and the four children.

(2) An application by the wife under s 37 of the Matrimonial Causes Act 1973 to set aside the intervenor's charge over 15 N Place allegedly entered into on 28 April 1999 and registered at the Land Registry on 21 September 2000.

(3) An application by the intervenor that a charging order for £275,000 with interest which she obtained originally on 26 March 2001 should be made absolute. That is the obverse of an application by the wife herself to set aside the charging order altogether or alternatively set aside the judgment in default of defence dated 19 March 2001 which was the basis for it. The intervenor's application is before this court as the result of an order of Master Leslie of 4 March 2002, whereby he discharged the charging order absolute in respect of the first intervenor and transferred the matter to be adjudicated upon at this hearing. The wife's applications are similarly made under s 37 of the Matrimonial Causes Act 1973 and also under the principles

contained in *Harman v Glencross and Another* [1986] Fam 81, [1986] 2 FLR 241. A

(4) An application by the wife to annul the bankruptcy order against the husband made by Mr Registrar James on 10 October 2002, that is to say some 2 working days prior to the commencement of this hearing. The purpose in filing the bankruptcy petition was, the husband said, to ensure that his debts were sorted out prior to the wife's application being dealt with. If he had succeeded in that course this hearing would, once again, have been adjourned. Thus far by my order made on the first day of this hearing (and confirmed by the Court of Appeal) the bankruptcy proceedings are stayed and the application to annul the order by the wife awaits my adjudication during this hearing. B C

(5) Although there are no specific proceedings issued to achieve such a result, I am also asked by the intervenor, as it forms part of the overall investigation, to declare the extent of her interest, if any, in one or more of the properties owned by the husband.

It seems to me that the most sensible way of disposing properly with all these applications is to deal with them under the umbrella of the wife's application for ancillary relief. However, as I do so, and in order to determine precisely the extent of the assets and liabilities now available for distribution between the parties, I shall inevitably need to determine the subsidiary issues raised by the other applications. D

The positions of the parties in relation to the various applications is, broadly speaking, as follows. The wife seeks a transfer into her name, free of any encumbrance, the property where she is now living with the four children of the family, 14 N Place, London. In order to secure that result, that is to say a mortgage-free property, she seeks an order for the sale of a French property, LT, France, and, from the proceeds of sale of that property, a lump sum sufficient to discharge the present mortgage upon 14 N Place in the sum of just under £245,000. She also seeks a small lump sum (£10,000) in order to enable her to meet immediate requirements. Finally, she seeks an order for periodical payments against the husband, but given that he is at the moment unemployed that may not be a very live application at present. E F

So far as the husband is concerned he seeks an order for the sale of 14 N Place. He is content for the wife to retain all the equity in that property but says that she should move to a less expensive part of London and rehouse herself with the net proceeds of sale. He acknowledges that he owes a very substantial sum of money to the intervenor. The full extent of her claim is £425,000 and whilst he does not acknowledge every pound of that claim he nevertheless accepts that he is substantially indebted to her in one way or another. G

The intervenor seeks to be able to enforce both her (now registered) charge over 14 N Place in the sum of not less than £150,000 together with the satisfaction of her original charging order in the sum of £275,000. So far as the wife is concerned thus far she does not accept that S is entitled to any sum at all. H

The evidence

It is apparent that there are very significant issues between the parties and the issues have generated no less than nine lever-arch files of documents. Within the documents there are extensive statements and affidavits from the parties and their witnesses and an enormous amount of documentary evidence relating to the various transactions that have taken place either by the parties or between the parties since about 1981 when the husband and intervenor started in business together. I have heard these applications over 6 days albeit that the first day or so was taken up with the argument raised by the husband arising out of his filing his own bankruptcy petition on the eve of the hearing. I have heard oral evidence from the three main parties and a Mr Hounslow, an accountant at one time instructed by the husband and the intervenor. In addition to the written and oral evidence, I have had the benefit of both written and oral submissions from the three counsel in the case.

Background and chronology

There are two lengthy chronologies which have been produced in this case. The first was prepared by the wife and runs to some 14 pages. The second has been prepared by the intervenor. It is more confined to the transactions between the parties than the broad history but it too runs to some five pages. Both chronologies are, so far as they go, accurate and I do not propose to set out every single event which has taken place during the course of this marriage and this very lengthy litigation.

The essential facts are as follows. The husband is 51 as indeed is the intervenor. The wife is 39. The relationship of the husband and the intervenor goes back a very long way. The intervenor says that she has known the husband since she was 18, namely since about 1969, they having originally met at Guildford Technical College when they were doing their A-levels. Their business relationship began in 1981 and arose out of the husband's talent for producing children's animated/cartoon films. From 1981 until the end of 2000, the husband and the intervenor were in business together in the cartoon film business. They operated under various names and employed various legal persona but essentially their work remained the same. The husband was the creative force behind their business. The intervenor was concerned with finding finance, marketing and promotion. From first to last there was no formal or written agreement governing their business relationship. They were undoubtedly in partnership together for the production of the films but otherwise their business relationship, from time to time, insofar as it concerned both the film business, and later so far as it concerned property transactions was, as I find, vague and uncertain in the extreme. However, and this is of great significance, their relationship remained ongoing throughout the whole of the period of the relationship between the husband and wife which itself began in 1985.

From 1986 the husband and wife were more or less living together. Indeed, from 1990 they cohabited full time. They married on 17 January 1992 and the following day their first child, H, was born so that he is now rising 11. The second child, E, was born on 25 March 1993 so she is 9. The third child, ED, was born on 23 November 1994 so that he is now almost 8. Finally, the fourth child, the third son, J, was born on 29 July 1996 so that he is 5. I pause there to record that all four children are presently living with the wife at

14 N Place. They are attending a well-known private day prep school in central London, the cost of which is being defrayed by the husband's brother.

The parties initially lived at 15 N Place, at that time owned by the husband and the intervenor. In 1995 the adjoining property came on the market and in circumstances which I will deal with later, was bought by the husband and physically joined to 14 N Place to form the matrimonial home of the parties. That remained the position until 30 August 2001 when, by order of the court, 15 N Place was sold and the properties were thereupon severed once again. The net proceeds of the sale of 15 N Place remain to be dealt with in these proceedings. They are currently paid into court at the Kingston-upon-Thames County Court.

During the course of the marriage there were a number of transactions/transfers between the husband and the intervenor relating to both 14 and 15 N Place. I will deal with those transactions separately. The only other significant property transaction was that relating to the French property, LT, which was bought in the husband's name in 1991.

The marriage began to show serious signs of strain in about 1998 and on 22 March 1999 the wife registered a notice under Part IV of the Family Law Act 1996 against 14 N Place. Divorce proceedings were formally begun by the wife on 13 September 1999 when she filed a petition for divorce on the basis set out in s 1(2)(b) of the Matrimonial Causes Act 1973. The proceedings were initially defended. In February 2000, the respondent filed an answer denying that the marriage had irretrievably broken down and further denying the allegations of behaviour. The wife's applications for ancillary relief were, of course, formally made in her divorce petition but her Form A was issued on 21 February 2000. The wife filed her Form E on 11 April 2000 and the husband filed his on 9 May 2000.

In the husband's Form E he deposed to the ownership of the three properties, 14 N Place, 15 N Place and LT. He also set out details of various debts amounting to some £89,000. He made no reference to any indebtedness to the intervenor save in respect of the sum of £5,000 spent by her on furniture over the period of the marriage. In particular, he said nothing at all about any significant interest which she might have, by way of ownership or charge, in either of the three properties of which he had provided details. Nor did he suggest that he was indebted to her in any other significant way.

In June 2000, it being apparent that there were ongoing discussions about the future of the proceedings, the wife consented to her divorce petition being amended to one of judicial separation. In due course, on 1 December 2000, a decree of judicial separation was pronounced on the amended petition. Thus it was that the application was listed for substantive disposal for 6 and 7 December 2000. By that time, there were, it is right to say, a number of creditors pressing to be paid. Those creditors still remain and their debts still have to be properly confronted and dealt with in these proceedings before any distribution can be considered as between the husband and the wife. These debts include debts to banks, building societies, and building companies of one kind or another who carried out work on the matrimonial home. The partnership accountants, GB, were also pressing to be paid a substantial amount of money owed to them by the partnership.

As I have already indicated, just prior to the hearing fixed for 6 December 2000 the husband issued an application for an adjournment on the basis that his residence application filed a week earlier, on

28 November 2000, should first be resolved before the ancillary relief application was disposed of. The hearing was accordingly adjourned. Two weeks later, on 12 December 2000, the intervenor issued a statutory demand in the sum of £275,000 against the husband. She says that that was a sum that the husband accepted he owed her as a result of their various business/property dealings over the previous 20 years.

There was a veritable flurry of activity in March 2001. On 8 March 2001, office copy entries revealed that 15 N Place was already charged to the intervenor in the sum of £150,000; such charge having been entered into apparently on 28 April 1999 although not in fact registered until 21 September 2000. On 19 March 2001, the intervenor entered judgment in default of defence in relation to her claim for £275,000. On 26 March 2001, she obtained a charging order over 14 N Place for the full amount of the claim which by then with interest amounted to £278,097. The wife had no knowledge of the proceedings leading to the charging order nor was she served with any notice of the application for the charging order. The following month, on 20 April 2001, the charging order nisi was made absolute in favour of the intervenor.

The position on the ground, as it were, was that on 28 March 2001 the husband agreed to leave the matrimonial home at 14 and 15 N Place and the parties have been physically separated since that time although it may well be that they have been 'separate' in fact for somewhat longer than that.

As I have already indicated, following upon the discovery by the wife of the charge and the charging order she has issued applications for them to be set aside. Following the sale of 15 N Place in August 2001, in December 2001 the intervenor filed a creditor's bankruptcy petition against the husband but she later withdrew it. Proceedings have now also been started by the Birmingham Midshires Building Society in relation to arrears of mortgage on 14 N Place. Those proceedings stand adjourned until the determination of these applications. In August 2002 the court ordered the payment out from the Kingston-upon-Thames County Court of the sum of £48,794 to the accountants GB and also dismissed the wife's application under s 37 of the Matrimonial Causes Act 1973 so far as it related to a charge that Coutts & Co had obtained in their favour to secure borrowing made to the husband.

On 3 October 2002, the husband issued a petition for his own bankruptcy, the second, in the Kingston-upon-Thames County Court, but that was dismissed some 2 days later on the husband's application. However, a further petition was issued in the High Court on 10 October 2002 in circumstances which I have already indicated. On 11 October, the wife applied to annul the husband's bankruptcy petition and by an order which I made on 14 October that application is before me today, the Court of Appeal having confirmed that it was proper for me to deal with this matter in the context of the applications which are before the court already. That is the outline background to these applications.

The property transactions

Dealing with the property purchases the position seems to be as follows. The first property purchase was on 14 September 1984 when the husband and intervenor bought 15 N Place for £87,000 with a mortgage of £68,000. The balance of the purchase price came one way or another from business partnership earnings. On 17 November 1989, the intervenor and the husband

bought 3, CT House, London, for £100,000 with money again deriving one way or another from the business partnership. In 1991, the husband, in his name, bought LT with the aid of a mortgage in the joint names of himself and the intervenor. On 27 May 1993, the intervenor bought the respondent's half-share of 3, CT House for some £50,000. And on the same date the intervenor *gave* her share of 15 N Place to the respondent. At least that seems to be the construction to be put upon a deed of gift to be found in the papers. On 13 June 1995, there is a further transaction between the intervenor and the respondent when, according to a document at C2436, the intervenor *bought* the respondent's share in 15 N Place for £53,000. On the same date, 14 N Place was bought by the respondent for £281,000 of which some £28,100 seems to have emanated originally from the business partnership. On 19 June 1997, the intervenor sold 3, CT House for £104,000 and it would seem that the proceeds of sale found their way one way or another either to the business partnership or to the respondent. In 1999, 15 N Place was transferred from the intervenor to the husband. The circumstances are set out at C2282. The purpose of the *sale* was apparently to enable funds to be raised against the property to continue the business partnership. It was, apparently, in these circumstances that the husband granted the intervenor the charge over 15 N Place in the sum of £150,000 with interest in the terms of the document set out at C504 and C505. According to the husband and the intervenor, now, that charge was brought into being to protect the intervenor in that she no longer had any proprietary interest in any of the properties and she had parted with it at an undervalue to the husband. The charge was, apparently, drawn up by her financial advisor, not her solicitor, and it was never registered.

Thus it comes about that, as at today, all the properties in which either the husband or the intervenor have at one time or another had an interest are in the name of the husband only. The history of the transactions between the husband and the intervenor is set out in the chronology prepared by the intervenor's counsel. As can be seen, there were numerous transactions in relation to 15 N Place. These transactions, it is said, reflected the husband and intervenor's need from time to time to raise funds either for the use of the business partnership or alternatively for the husband's own use. At the end of the day, they say, it matters not in whose name the properties were registered in from time to time because they always considered the properties were owned by themselves 50/50 and eventually they would both benefit equally. It is, says the wife not surprisingly, an extraordinary feature of this case that not one word of that very simple but overwhelmingly important underlying arrangement ever found its way into the case at the Form E stage.

The parties

It is impossible to consider these applications without a consideration and evaluation of the personalities involved (as witnesses) and the underlying human relationships.

I found the wife to be a straightforward witness doing her best to make sense of the husband's procedural and evidential antics over the course of these proceedings. She is driven by the strongest maternal instinct to protect what she can from the wreckage of the parties' relationship and financial collapse for the sake of the children's security.

It is impossible to consider the husband and intervenor separately. Their evidence has to be seen against the background of their unusual personal

relationship. There is no doubt that the husband and intervenor have had a close and intimate relationship for many years. According to the wife this relationship was at one time a sexual one but that is denied by both the husband and intervenor. The wife's source of information in this regard is the husband's own sisters. It may amount to little more than gossip and supposition and I decline to make any particular finding about that precise matter. However, I have no doubt at all that their relationship was exceptionally close, even intimate, and supportive of one another.

The wife said in evidence that she always felt that the husband regarded the intervenor as more of a wife than her. That is an illuminating perception but whatever may be the precise position as between the husband and the intervenor I have no doubt at all that their relationship was very much more than merely one of business partners. They worked together for many years on a daily basis and the intervenor was made privy to the precise ebb and flow of the husband and wife's own relationship from day to day. The intervenor has herself indicated both in oral and written evidence that she was exceptionally fond of the four children of the family. I have no doubt that this is so and that this affected her attitude towards the informality of financial transactions between herself and the husband. I have no doubt also that the strength of the husband's feelings for the intervenor was a source of continuing irritation and upset for the wife and that the husband knew this. For that reason the husband did his utmost to keep the wife in the dark about his financial dealings with the intervenor, both in relation to their business and property transactions. The sudden and unannounced appearance of the £150,000 charge on the land register cannot have done anything but fuel the wife's uncertainty and suspicion surrounding the relationship of the husband and intervenor. As I find, it was a strange, unusual, and, in the broad sense, intimate relationship and it is that which lies at the root of many of the problems and complications in this litigation. There is a document in the papers (X23) which indicates that even some 3 years after the husband and wife were married the husband's own solicitor had no knowledge of the existence of the wife. The husband in his affidavit at C828 says:

> 'S has been of great support to both me and the petitioner and the children financially. She has also been very close to my family.'

By the same token the intervenor says in relation to money which was owed to her and I quote:

> 'In early December 2000, mine and the defendant's business partnership was dissolved. We both agreed that the defendant owed me a great deal of money. This debt had built up by my not drawing as much out of the partnership. I also lent him my personal money such as some money from my mother's estate. I was happy to effectively lend the defendant my share of the partnership profits to allow him to support his family. I trusted the defendant completely and always believed that he would pay me back in due course.'

I have no doubt that the intervenor still harbours very strong feelings of, at the least, affection for the respondent.

Against that background it is unsurprising, I think, that I found the husband to be an unsatisfactory witness. He was driven, as he has been throughout the proceedings, to try and face in two directions at once to satisfy simultaneously the financial aspirations of the wife and intervenor. That is never an easy or comfortable posture. His explanation for failing to disclose the charge and other debts in his Form E ranged from, on the one hand, a belief that it had lapsed through to, in deft but essentially friendly cross-examination from the intervenor's counsel, a desire not to upset the wife by its revelation. He was a witness whose answers I found were governed more by expediency than accuracy. And, additionally, in many respects, he was anyhow vague and uncertain.

The intervenor did her best to remember what had been either agreed or understood between herself and the husband but I have no confidence in her assertions as she too, like the husband, has been prepared whenever it suited the situation from time to time to sign documents as to legal relationships which she now entirely disavows. As to her method of calculating the debt which supported the statutory charge, she admitted that she had, literally, done it on the back of an envelope. 'I had a stab at it', she said, by adding up what she thought the husband owed her for the properties and adding on a random sum by way of unpaid partnership profits. The terms of the charge over 15 N Place make no sense at all in the context of a partnership which shared the profit equally.

At the end of the day I found both her and the husband to be unreliable. Not that they were deliberately setting out to deceive the court but that they could not really remember so they resorted to their old practice of saying that which suited their case at the time.

Against that chronological background and the background of the unusual relationship between the husband and intervenor, I turn to consider the assets and liabilities in this case and, in that context, consider the intervenor's interest if any in the assets.

The assets and liabilities

In simple terms the list is straightforward. There are three assets:

(1) 14 N Place. This has an agreed value of £544,000. There is an outstanding mortgage in favour of the Birmingham Midshires Building Society in the sum of £244,740. If notional costs of sale are calculated at 3% (£16,200) there remains an equity in that property of some £280,000 or thereabouts.

(2) LT, France. This has an agreed value of £400,000 and there is an outstanding mortgage in the favour of a French finance house in the sum of £130,000. Costs of sale have been calculated at 10%, somewhat higher than in this country (£40,000), accordingly there is potentially an equity in that property of £230,000.

(3) The remaining proceeds of sale of 15 N Place amount to £156,000. They are, as I have indicated, presently sitting in the Kingston-upon-Thames County Court.

Thus, the grand total of the equity and existing proceeds of sale of those properties is £660,000.

As disclosed on the schedule of debts annexed to the husband's bankruptcy affidavit, there are some 13 or so debts of one kind or another which require immediate payment and which, in my judgment, can properly be described as family debts, ie debts which were essentially run up for the family's benefit. It is right to say that they are primarily debts due by the husband but they relate, as I find, to sums spent by the parties during the course of the marriage on their living or on the matrimonial home. Leaving aside the GB debt of £48,794 (clearly a debt of the former business partnership of the husband and intervenor) which has by order of Johnson J already been discharged (leaving the sum now at the Kingston-upon-Thames County Court) there remain the following debts which are not in contention:

- Coutts & Co: £27,464
- Barclays: £15,000
- Credit cards: £7,500
- Premiere Preservation: £8,250
- Simon Culver Evans: £4,000
- John Lewis: £2,000
- Abbey National: £8,421
- BB Construction: £5,000
- HSBC: £2,135
- Unpaid utilities on 14/15 N Place: £3,500
- NatWest: £10,000
- GE Capital: £3,511
- Inland Revenue: £31,000

The grand total of those family debts amount to some £128,000 to the nearest whole number. Those debts must be paid sooner rather than later and I propose to allow the overall sum of £130,000 from the £666,000 to enable those debts to be paid out straight away. I shall provide for those debts to be paid straight away from the sum of money sitting in the Kingston-upon-Thames County Court account. It is suggested that if I make provision in this way it may fall foul of the Legal Services Commission statutory charge on sums of money recovered or preserved in the proceedings. I do not accept that contention. By no sensible stretch of the imagination can this amount be said to have been recovered or preserved in these ancillary relief proceedings between the husband and wife. As I have indicated, these debts are not in contention, and as with any ancillary relief application, I cannot carry out the distribution exercise inherent in it without establishing in the first place what 'the bottom line' is; the debts having been subtracted from the assets. It seems to me that I am doing no more than the court did on 15 August 2002 when it ordered the payment out of court to GB or for that matter the court's approach on 30 August 2001 when the court (His Honour Judge Bishop) distributed the proceeds of sale of 15 N Place in a particular way. These are valid family debts which have to be paid and it seems to me that it would defeat the whole purpose of public funding if the Legal Services Commission could place their charge on this sum of money in advance of my having made a distribution to either side from the net remaining sum. It might have the effect of driving the husband into bankruptcy which is surely not the underlying purpose of the public funding of litigation for those of very limited means (see *Cooke v Head (No 2)* [1974] 1 WLR 972).

The intervenor's interest

The intervenor's case is, put simply, that all the properties bought by the parties, at any time during their business relationship, were either partnership assets or otherwise in effect owned by them beneficially jointly and equally. It is the intervenor's case that whatever may have been the primary business partnership relationship, the properties were jointly funded and so owned. It is, on the other hand, the wife's case that this attempt by the intervenor to hive off part of the value of these properties is no more than a device and that the beneficial ownership is the same as the legal ownership viz that the husband owns all three properties outright. It is the intervenor's case that the charge which she obtained over 15 N Place, clandestinely so far as the wife is concerned, was a genuine attempt by her to calculate what was due her in relation to property transactions up to that time. So far as the statutory charge of £275,000 is concerned, the intervenor maintains that that too was, an attempt, albeit rough and ready, to try and calculate what was owed to her both by way of unpaid partnership profit and interest in the properties (over and above the other charge for £150,000).

The wife's case in relation to both the charge and the charging order is that they were transactions carried out effectively by the husband and the intervenor (or at least by the intervenor with the husband's full complicity) designed solely or principally to defeat her claims arising on the breakup of her marriage to the husband.

The high-water mark, so far as the intervenor's evidence is concerned, is contained at C2289 where she says, 'with the exception of 3, CT House, which started as a joint investment but became my own by virtue of my purchase of Mr F's share, all the properties were owned equally and were purchased with the benefit of partnership funds. I remain of the view that half the equity is mine'.

In the course of the evidence, the intervenor sought to suggest that there was a prior agreement between her and the husband that the properties should be shared equally. However, she was constrained to admit that no such agreement had ever really been asserted until her affidavit of July 2002. The wife is, unsurprisingly, extremely sceptical about this late claim. Why was there no mention of the intervenor's interest in the husband's Form E or any other document prior to the first hearing fixed for December 2000? The husband has variously explained his failure to include this indebtedness to the intervenor as I have set out above. The explanation that he wished to avoid the revelation for the sake of saving his relationship with the wife, attractive though superficially it may seem, might have been more persuasive if it had surfaced earlier than almost the last day of the hearing. I think the financial relationship between the husband and the intervenor was characterised by informality and vagueness. It was also characterised by a willingness to sign documents as and when required containing inaccurate statements to obtain favourable stamp duty treatment, mortgage advances and the like. It gives me no confidence in their case so neatly and tidily put forward now. The intervenor admitted in evidence that she had really no independent recollection of the various transactions and had to be guided by documents. As I have said, I certainly do not suggest for a moment that she set out deliberately to mislead the court but I think she is piecing together events and transactions many years later to try to weave now a consistent story. Mr Hounslow's evidence that he always believed and dealt with the properties

on the basis that they were owned equally falls into this category. It is just one part of the jigsaw produced now to support the story. His evidence cannot be looked at it in isolation. The intervenor admitted in evidence to me that her calculations underlying the statutory charge and subsequent charging order were done 'on the back of an envelope'. Similarly, the calculation of the figure of £150,000 to justify the charge was extremely crude and inconsistent with her case that in any event all the properties were owned 50/50 by agreement between her and the husband.

Underlying all the transactions in this case was the (film making) business partnership between the husband and the intervenor. The partnership accounts show that, save for the very earliest years, the profits were attributed to them in the proportions two thirds to the husband and one third to the intervenor. That is the only solid evidence of any financial relationship between the husband and the intervenor. Thereafter the financial transactions between the husband and the intervenor were unrecorded, informal and entirely intermingled. Partnership bank accounts were used for private expenditure. Private bank accounts were used for partnership expenditure. There is no sensible distinction that can be discerned between them.

Where do I arrive, having considered all the oral and written evidence in this case so far as the intervenor's interest is concerned? I have no hesitation in saying that these properties are not partnership assets in the generally accepted sense of that term. They form no part of the business partnership accounts. If there was any partnership it was extremely informal and the later transaction involving the establishment of the charge and its incidental terms seems to me to be inconsistent with a partnership arrangement. However, there is no doubt that the husband and the intervenor did undertake these numerous property transactions, particularly in relation to 3, CT House and 15 N Place, on the basis of some underlying understanding that they would each benefit from these transactions to some extent and at some future time. I have been referred to cases on constructive trusts in circumstances similar to this except that this is particularly unusual because the husband and the intervenor were not cohabiting in any of the properties.

At the end of the day, I am satisfied that on the basis of all the circumstances and transactions there was a common understanding between the husband and the intervenor that they would both benefit, but I do not find that the evidence goes anywhere near establishing that the underlying arrangement was a 50/50 sharing one.

The intervenor said to me repeatedly that she trusted the husband 'to see her right'. In a way I think that says it all and so I am satisfied that the intervenor has established an equity in her favour. The question is to determine its extent and to consider the way in which it should be satisfied.

In the 30th edition of *Snell's Equity* (Sweet and Maxwell, 1999) this appears at p 640 in the chapter referring to equitable estoppel:

> '… the extent of the equity is to have made good, so far as may fairly be done between the parties, the expectations of A which O has encouraged. A's expectation or belief is the maximum extent of the equity.'

Later in the same chapter under the heading 'Satisfaction of the Equity' is found:

> '… if the equity is established effect is given to it in whatever is the most appropriate way taking into account all relevant circumstances including the conduct of the parties. The court adopts a cautious approach looking for the minimum equity to do justice.'

I am satisfied that the intervenor has acted to her detriment by continuing to allow partnership monies to fund mortgages and the like on the strength of her belief and understanding that she would benefit to some extent from the property transactions. The only firm ground upon which I am prepared to calculate her equity however is on the basis of the proportions in which the profits generated by the partnership were divided. The only difficulty I have in this regard is that in the last 3 years of the partnership representations were made to the Inland Revenue to the effect that the partnership profits were divided 75% to the husband and 25% to the intervenor. That is not consistent with the partnership accounts which were drawn up two thirds/one third. It is a yet further example of the husband and intervenor massaging the figures to suit the (fiscal) circumstances at the time.

Looking at the evidence overall, I find that the husband does hold the properties (or their proceeds of sale) on constructive trust for the intervenor to the extent of one third of the equity in those properties.

However, the matter does not end there. To the extent that I have found the husband and the intervenor were involved in a constructive trust arrangement for their joint benefit, I am also satisfied that it was a term of that trust that money would be expended on the properties for the benefit of the family of the husband and wife. It was as much part of the common understanding between the husband and intervenor that the property should be shared in the proportions in which I have found as it was also part of the understanding that the properties should provide a home for the husband, the wife and children. That applies to both 14 and 15 N Place. I am of course conscious that 15 N Place was purchased before the wife married the husband, however it was later well understood that that property would be used for a home for them and later the children. That was why 14 and 15 N Place came to be joined. Accordingly, I propose to provide that (pursuant to ss 14 and 15(1)(b) and (c) of the Trusts of Land and Appointment of Trustees Act 1996), insofar as the intervenor has an interest in 14 N Place where the wife and children now live, realisation of it should be postponed. Having considered and balanced the interests of the wife and children as against those of the beneficiary and the intervenor, the period of postponement will be 10 years or until such time as it is no longer required as a home for the children or until such other time as the court may appoint from time to time depending upon the circumstances, whichever shall first occur. If, for instance, the wife were to remarry or cohabit for a significant length of time, I would not intend that the intervenor should be expected to continue to provide a roof in those circumstances.

Accordingly, when I come to deal with the detailed distribution of the available resources, I propose to provide that the intervenor should receive as soon as practicable her one-third interest in the proceeds of 15 N Place and LT. Her one-third interest in 14 N Place will be secured by way of a deferred charge over that property. It will be calculated by reference not to the net value after repayment of mortgage but by reference to the gross value. The gross value at present is taken at £540,000. The intervenor's one-third interest

in the *net* proceeds equates to a charge to the extent of 17% of the *gross* proceeds.

In the forum of these proceedings I am not prepared to go further than deal with the intervenor's interest in the properties as set out above. I am aware that it is claimed by her that she is also owed money by the business partnership and also, possibly by way of loans to the husband. Such claims which may or may not exist are not properly quantified (or I suspect quantifiable) and in any event this is the wrong forum for the resolution of those outstanding disputes. Within the context of this ancillary relief application I have been prepared to consider her co-ownership claims because they impact directly on the properties which are, one way or another, claimed by the wife. I am not, however, prepared to go further in relation to any vague and unquantified claims by the intervenor generally against the husband arising out of their business or other relationships. It is far from clear to me the basis upon which any other monies were allowed by her to be used by the husband. Whether therefore the intervenor is entitled to some kind of partnership account is quite beyond the ambit of these proceedings to determine. There is no doubt that the intervenor has been generous to the husband and family but whether that gave rise to a legal rather than a moral obligation I think is highly questionable. If the intervenor wishes to pursue those matters elsewhere I cannot prevent her from doing so but given the husband's parlous financial position she may consider it not worthwhile.

The s 37 applications

The wife seeks to set aside both the charge granted by the husband to the intervenor over 15 N Place (£150,000 with interest) and also either the judgment in default of 19 March 2001 or the charging order for £278,097 over 14 N Place granted consequent to that judgment on 26 March 2001. The intervenor, on the other hand, seeks that the charging order be made absolute.

In relation to the charge over 15 N Place, the application is made under s 37 of the Matrimonial Causes Act 1973 which gives the court power to set aside such a charge, being a disposition:

> '… if it is satisfied that (the husband) has with the intention of defeating the claim for financial relief (of the wife) made a reviewable disposition and if the disposition were set aside financial relief or different financial relief would be granted to the (wife).'

Given that the charge was made less than 3 years before the application by the wife to set it aside, there is a presumption, unless the contrary is shown, that the husband agreed to the charge with the intention of defeating the (wife's) claim for financial relief (s 37(5)). Accordingly, it is for the husband to rebut the presumption that the charge was provided other than with the intention of defeating the wife's claim. The intention to defeat the claim does not have to be the sole or even the dominant intention as long as it plays a substantial part in the husband's intentions as a whole (see *Kemmis v Kemmis (Welland and Others Intervening); Lazard Brothers and Co (Jersey) Ltd v Norah Holdings Ltd and Others* [1988] 1 WLR 1307, [1988] 2 FLR 223).

I say straightaway, in my judgment, the husband has wholly failed to discharge the burden placed upon him by subs (5). The whole circumstances surrounding the granting of the charge and the intervenor's relationship with

the respondent and family must be considered in this regard. At the time when the charge was entered into (April 1999) the marriage of the husband and wife was very unstable. On 22 March 1999, the wife had registered a notice under Part IV of and Sch 4 to the Family Law Act 1996; clear evidence that she felt insecure in the home. And it is to be remembered that the divorce petition was filed only a few months later on 13 September 1999. I am satisfied that the intervenor was aware, on a more or less daily basis, of the state of the relationship between the husband and the wife; she was working daily with the husband and, as I have found, had a very close relationship with him. Both she and the husband must have known that if the marriage foundered it could and probably would have very significant financial consequences so far as the future of the three properties generally was concerned. I am quite satisfied that one of the important motives so far as the husband was concerned when granting that charge, was to ringfence that amount of money in the intervenor's favour and, by the same token, take it out of the arena of future debate with the wife over finance. Anything less like a transaction at arm's length is hard to imagine. If anyone had notice of the wife's claims or potential claims it was the intervenor.

The wife believes that the charge was not in fact created in 1999 but at a later date. I am not prepared to go that far and I do not need to do so. I am quite satisfied that it was entered into at a time when the marriage was floundering and that one of the motives was to affect the type of financial relief granted or likely to be granted to the wife. Its existence certainly would reduce the amount available to the wife and so it falls within s 37(2)(b). As I have already indicated, the intervenor's co-ownership claims are to be dealt with partly by way of a cash payment and partly by way of a future charge. The cash payment is of a value of about £128,000 and so manifestly the present charge, being of more value, would prevent my dealing with the wife's claims to the extent that I intend.

In arriving at these conclusions I have particularly in mind the evidence of the husband about the circumstances in which the charge came to be drawn up (C827 and C828) and also the evidence of the intervenor herself at C1009 where she says:

> 'Throughout the latter part of 1999 and early 2000, I became increasingly concerned about the Fs' matrimonial difficulties. I continued however to trust Mr F who continually assured me that I would be repaid in full. I therefore held off from registering my charge. I was assured by the fact that in March 2000 Mr and Mrs F had approached the mortgage brokers John Charcoal with a view to remortgaging both 14 and 15 N Place.'

At C1010 the intervenor (at para 24) explains her motives for eventually registering the charge. She says:

> '… since the property was registered in Mr F's sole name I was worried that the property could be taken away from him by Mrs F and I would never be repaid.'

I am satisfied that those anxieties existed far earlier than she maintains and were a significant motive in the obtaining of the charge in the first place. I am

quite satisfied that both she and the husband appreciated the real possibility of her position being prejudiced and the charge was created accordingly.

In all the circumstances I shall set aside the charge for £150,000 in favour of the intervenor.

Application to set aside the judgment/charging order

Insofar as the charge for £150,000 was tainted by an intention to defeat the wife's claim, the actions by the intervenor, with the husband's passive complicity in obtaining the judgment and then the charging order absolute on 28 April 2001, are that much more so tainted. The original claim upon which the charging order was based was not even in existence prior to the date initially set for the hearing of the wife's application for ancillary relief (6 December 2000). The statutory demand was not made until some 6 days later and judgment in default of defence was not granted until March 2001. By this time of course the husband and wife were in the thick of divorce proceedings. There is no doubt at all that the driving motive, both of the intervenor in commencing these proceedings and in the husband in standing back and allowing them to proceed undefended, was to allow them to significantly prejudice if not defeat the wife's claims (and by the same route protect the intervenor). Furthermore, upon investigation the calculations carried out by the intervenor were, as I have said, carried out 'on the back of an envelope'. They took no proper account of the complex financial relationships that existed between them arising, as I find, partly by way of partnership, partly by way of co-ownership and partly by way of loan and/or gift. Insofar as the figure of £275,000 represented a portion of the equity in the three properties, no valuations existed at the time. As the intervenor said to me in evidence, and I quote, 'I arrived at the figure by having a stab at it. I worked out the equity and halved the result and added something for the partnership'. That is not the proper basis, in my judgment, for the obtaining of a judgment much less a charging order. I have no hesitation in finding that the whole procedure from statutory demand through to charging order absolute was a manoeuvre, one of the primary motives of which was to deprive the wife of financial relief. There is also no doubt that unless I do set the judgment/order aside the wife's claims will be virtually valueless. Accordingly, I shall, also under s 37 of the Matrimonial Causes Act 1973, set aside the judgment and so the charging order.

Even were I not to do so under s 37, I should have no hesitation in doing so in accordance with the principles of *Harman v Glencross and Another* [1986] Fam 81, [1986] 2 FLR 241. In considering all the circumstances of the case as I would be required to do in determining whether to grant a charging order absolute, I have in mind, in addition, that the wife had no notice of any part of the proceedings leading to the making of the charging order. I am sure that had the court been fully aware of all the circumstances it would never have granted one at all.

Accordingly, both the charge and the judgment/charging order will be set aside.

Application to annul the husband's bankruptcy

By order of the Court of Appeal of 16 October 2002, my decision staying the husband's bankruptcy petition dated 10 October and adjourning the wife's application to annul it to the conclusion of this hearing has been confirmed

(*F v F and Others (S, Intervenor)* [2002] EWCA Civ 1527 (unreported) 16 October 2002). I am further fortified in my decision to deal with this aspect of the matter at the conclusion of this hearing by the judgment of Chadwick LJ who, when dismissing the husband's application for leave to appeal my order, indicated that, in his opinion, there was no impediment to an application being made by the wife in these circumstances to have the bankruptcy set aside. Accordingly I shall consider the application now.

Section 282 of the Insolvency Act 1986 provides that:

> '(1) The court may annul a bankruptcy order if at any time it appears to the court—
>
> (a) that, on the grounds existing at the time the order was made, the order ought not to have been made, or
> (b) that to the extent required by the rules, the bankruptcy debts and the expenses of the bankruptcy have all, since the making of the order, been either paid or secured for to the satisfaction of the court.'

The basis of the husband's petition for bankruptcy (issued by him on the eve of this hearing) is set out in his witness statement dated 14 October 2002.

On the basis of the analysis set out above, the debts then owing to Mr F came to some £128,000 together with such sum as was due to the intervenor. I have now found that the intervenor's interest amounts to an equitable interest arising out of a constructive trust. Such an interest is not itself provable in bankruptcy. And in any event I have quantified it at a value of about £222,000. It is clear that even taking the debts and including the value of the whole intervenor's interest, the total indebtedness of the husband at the time when he filed his bankruptcy petition was some £350,000 or thereabouts. His assets at the time amounted to some £666,000. True, the majority of that value was to be found in two properties (14 N Place and LT) but there was also the sum of £156,000 in court at the Kingston-upon-Thames County Court. Looking at the husband's position overall at that time (that is 10 October 2002) I have no hesitation in finding that he had 'some tangible and immediate prospect of being able' to meet his liabilities in due course. (see *Re Coney (A Bankrupt)* [1998] BPIR 333). The court, some 2 days hence, was to be charged with the task of dealing with this application for ancillary relief which necessarily would have to take into account his outstanding debts. There was no basis for his filing a bankruptcy petition on that date. It was, in my judgment, another device designed to derail the court's ability to deal with the wife's claim. Accordingly, 'the order ought not to have been made' and, finding as I do that he was solvent at the time, I shall here and now annul the bankruptcy order.

The wife's claims for ancillary relief

The position so far as the remaining assets are concerned as a result of the findings I have made in relation to the intervenor's claim and the undisputed debts is now as follows.

The overall assets are valued at £666,000. I have found that the intervenor's interest amounts to one third of that, that is to say some £222,000. I propose to provide (in a manner which I will set out below) that she receives her one-third interest in the proceeds of both 15 N Place and LT

out of the proceeds of LT. Her one-third interest in 14 N Place will remain as a charge on the gross proceeds (valued at about £93,000) for the time being in the manner I have dealt with above. So far as the remaining cash position is concerned, upon a disposal of LT there will be total available cash of some £385,000 including the sum at the Kingston-upon-Thames County Court. I have already indicated that the husband's debts which are undisputed amounting to some £130,000 will be paid first out of the £156,000 in court leaving £26,000 now. The intervenor will be paid £128,000 from the proceeds of LT (ie one third of LT, £76,000, and one third of 15 N Place proceeds, £52,000). The remaining sum amounts to some £102,000 from LT plus the balance of the Kingston-Upon-Thames County Court money; £26,000, total £128,000 in cash. There is, of course, the remaining equity in 14 N Place less the intervenor's charge, ie £186,000. It is that sum (£128,000 plus £186,000 total £314,000) which I am now concerned to deal with as between the husband and wife.

As between the husband and wife, of course, this application is dealt with in accordance with s 25 of the Matrimonial Causes Act 1973. I do not propose to set out that section at length; it is familiar to all the professionals in the case. However, it is of particular relevance in this case to note that the court has to 'have regard to all the circumstances of the case *first consideration being given to the welfare of any child of the family who has not attained the age of 18*'. That factor is certainly uppermost in my mind at this stage. There are four children in this case, aged 10 and under. They have been subjected to something of a battering as a result of these prolonged divorce proceedings which have now been on foot one way or another for over 3 years. Those proceedings have included an application for a residence order which the husband commenced in the middle of the ancillary relief debate. I am concerned to provide them with the minimum of further disruption if it is reasonably feasible.

I have dealt with the assets and liabilities in this case and I turn now to consider briefly the question of the parties' earning capacity. The husband is a talented man, capable, self-evidently, of generating a perfectly reasonable standard of living for his family from his film-making talents. However, they have not been employed recently because he says that he has been and is suffering from the trauma of the marriage breakdown. I have seen a medical report about him and I do not query the fact that he has indeed been very affected by the separation from his wife and children. One way or another the fact is that he has not provided any financial support for the family for, I think, some 2 years and as a result the family are now on state benefits of one kind or another. The prognosis is not, it seems, at all good and so I must deal with this application upon the basis that it is unlikely in the short and medium term that any income support will be forthcoming for the wife and children from the husband.

The wife struck me as a plucky individual who will do her best against the constraints of caring for four children of 10 and under to generate some remuneration for herself. She wants to train to teach pilates. She thinks she has some talent in this regard. Admirable though I regard her intentions, as a source of significant financial reward I have serious doubts. This family is living on state benefits amounting to less than £1,000 a month but they are in the fortunate position of having a relative (the husband's brother) who is prepared to pay the very considerable private education costs.

The 'financial needs' of the family are overwhelmingly the most decisive factor under s 25 for my consideration (the children's interests coming first). In particular, the need is for a secure home for the children and their main carer, the wife. The wife is, understandably, extremely anxious to remain living where she is; 14 N Place. It is by no means large, indeed it is a small mews house. However, it is in an area where the children have always lived and the wife is surrounded by a support network which, given her parlous financial state, is of special value to her. The location is one which is practical so far as transporting the children to and from school is concerned. The location is also one which contains, the wife believes, the sort of property owners upon whom she could deploy her pilates skills. She wants to stay put and I think that it is not an unreasonable aspiration given the value of the equity being tied up and all the other circumstances. The husband, somewhat unattractively, has produced a bundle of unresearched estate agents' particulars downloaded off the internet. They are of properties in south London or beyond and are at an asking price round about the value of the equity in the home. Litigants who find themselves in the position of this husband and wishing to persuade a court that their family should be uprooted from their settled home must at the very least, in my judgment, carry out the basic research required to enable the court to undertake a proper consideration of the proposal. If it is to be suggested that a family should move then it is for the person making that proposition to seek out appropriate properties, visit them and come to court in a position to provide proper details as to what is available. I was not impressed by the husband's proposals which I think are impractical insofar as the children's schooling is concerned. Although, of course, it is possible to find property at an asking price of about the value of the equity in this home, I have to look at the reasonable needs of the children so far as housing is concerned overall. Given the lack of future income support other than via the state and all the other circumstances, I propose to provide a solution which enables the wife and children to stay where they are at least for the foreseeable future.

The husband accepts that once the debts have been paid and the intervenor's claims have been satisfied there is simply insufficient to provide a fund for his housing. That is a realistic appraisal of the position and so there is little point in my trying to consider this aspect of the matter further. However, I do very much have in mind that ideally he should be provided at least with a modest fund which would enable him to make a down payment on some property for himself. He is presently living on the charity of his brother at their home in Cobham. I am sure that is by no means an ideal arrangement albeit that it is the best that can be devised at present.

The only other factors in s 25 which call for further specific mention are first, contributions (f), and secondly, conduct (g).

Contributions

Until the breakup of the marriage I have no doubt that there was nothing to choose so far as 'contributions' were concerned as between the husband and the wife. The husband was, as I have well illustrated, a successful film maker and were he still doing so his contribution to the family one way or another would match that of the wife. However, since the onset of his inability to generate income his contribution to the family has fallen way below that of the wife. She is the children's full-time carer. She is carrying out her role with

considerable difficulty and on very limited resources. She will continue to do that for at least another 15 years. I take that into account when deciding how to deploy the limited remaining resources in the case.

Conduct

Normally this factor plays no part in these cases particularly where the resources are as limited as they now are in this case. However, I am clear that many of the problems in this case have been caused by the husband's attempts at keeping the wife in the dark so far as the true position in relation to his finances is concerned and in obfuscating the true position in relation to his financial and other relationship with the intervenor. I have already indicated that I make no finding about the extent of any physical relationship between the husband and the intervenor. In a sense that is neither here nor there. However, I do think their relationship was of a character and intensity which was bound to cause the wife suspicion particularly when the extent of his financial involvement with her outside the business partnership became clear. I am quite sure that these proceedings have been hugely complicated by the relationship and his failure to be frank with the wife about it. The sudden discovery by the wife in the course of these proceedings of the existence of the charge (which I have now set aside) must have only served to confirm her worst fears and suspicions. It has led, in my judgment, to this extraordinarily lengthy enquiry. It may be said that from time to time the wife has overreacted but I am not surprised. The husband, in my judgment, has brought the detail of this enquiry down upon his own head. And in saying this I do not wholly exonerate the intervenor either. She was, as I have found, privy to all the husband's actions and reactions. Her close relationship with the husband and involvement with the family has had both benefit and detriment.

Taking all the factors under s 25 into account (and this being a case where the *White* principles have to be subjugated to the financial needs largely of the children) I have come to the conclusion that the only fair and sensible course is to order the husband to transfer his interest in 14 N Place to the wife and pay out of the remaining £130,000 or so a lump sum of £100,000 to the wife to enable her to reduce the mortgage on 14 N Place from £244,000 to £144,000 or thereabouts. This payment will reduce the mortgage to a level where social security will meet the monthly interest charge without demur. It will also provide an extra £100,000 worth of housing fund should it be required during the children's minority. The lump sum will be satisfied first from the balance in court after paying the debts and the remainder from the proceeds of sale of LT.

I am not prepared to go beyond that figure because I am concerned to ensure that the husband too has a figure for the down payment on a house. Accordingly, he will receive the balance of the available cash at present which by my calculations amounts to some £30,000 or thereabouts. I am aware that the wife would like a modest lump sum to meet immediate needs (car, washing machine, etc), I am afraid she will have to re-borrow from the building society to meet those needs.

I have given anxious consideration as to whether or not it would be appropriate to grant a charge to the husband over 14 N Place payable at some future time in accordance with the *Mesher* procedure, as and when the youngest child has completed education. However, given the sums involved and given the findings I have made about contribution (both present and

future), conduct and need, I have come to the conclusion that no such charge would be proper or fair in the circumstances.

Conclusion

I shall invite counsel to draft an order which reflects the findings and declarations set out above. In essence I wish to provide orders to meet the following requirements:

(1) Payment out from the sum in court to the listed creditors of the undisputed debts of £128,000.

(2) A declaration in favour of the intervenor to the extent of one third of the equity in each of the three properties satisfied as to one third of the value of LT and one third of the proceeds of 15 N Place, all to be paid out of the proceeds of sale of LT.

(3) A deferred charge to the intervenor for one third of the present equity in 14 N Place to be expressed by way of a charge of 17% on the gross proceeds. The purpose of expressing the charge as a percentage of the gross proceeds is to avoid disputes about precisely what amounts to equity at any given time in the future. The period of deferment will be for 10 years or until the wife remarries (or cohabits in circumstances akin to marriage) or the house is no longer required as a home.

(4) There will be an order for the sale of LT. The husband and the intervenor are to have the conduct of the sale in the first place with liberty to make further application to the wife in the event that the sale does not proceed speedily.

(5) There will be an order for the transfer of the husband's interest in 14 N Place to the wife subject to the existing mortgage.

(6) There will be an order for the payment of the lump sum of £100,000 to the wife, the first £30,000 of which or the sum left after paying the debts out of the 15 N Place proceeds be paid to the wife in satisfaction of the lump sum and the balance be paid from the proceeds of sale of LT.

(8) The charge, the judgment in default and the charging order will be set aside. The stay on the bankruptcy proceedings will be removed and the bankruptcy order annulled.

(7) Insofar as any sums are recovered by either the husband or the wife there will be the appropriate certificate that any charge to the Legal Services Commission shall be deferred on the basis that the sums are to be used for the housing of themselves and the children.

Order accordingly.

Solicitors: *Russell-Cooke* for the petitioner
H.C.L. Hanne & Co for the respondent
Johnson Sillett Bloom for the intervenor

PATRICIA HARGROVE
Law Reporter