

Case: Re Singh; Sands (as Trustee in Bankruptcy of Tarlochan Singh) v Tarlochan Singh and others [2016] EWHC 636 (Ch); Newey J, 22 March 2016, and Re Elichaoff; Robert (as Trustee in Bankruptcy of Elichaoff deceased) v Woodall [2016] EWHC 538 (Ch); Registrar Jones, 15 March 2016

Synopsis: Both these cases concern (among other things) ancillary relief orders in matrimonial proceedings in which the husband became bankrupt. In *Singh*, the consent order was made in ancillary relief proceedings before the presentation of the petition and was held not to be a transaction at undervalue under s339 IA 1986. In *Elichaoff*, the consent order for periodical payments in favour of the deceased bankrupt's spouse and child was, however, a post-petition disposition, but any claims which the bankrupt might have had against his spouse under ss23 and 24 Matrimonial Causes Act 1973 did not vest in the TiB as property within the bankruptcy estate.

Topics covered: Bankruptcy: Clawback claims: Transaction at Undervalue: Disposition post-petition: Ancillary relief under Matrimonial Causes Act 1973

The Facts

In *Singh*, the TiB applied to set aside two charges which Mr Singh, the bankrupt, had granted over a property in Coventry in 2010 in favour of his father (the January Charge) and his sister (the April Charge), either as shams or as preferences under s339 IA 1986. He also applied to set aside a trust deed dated 6 December 2010 and a consent order dated 31 January 2011 dealing with ancillary relief in the divorce proceedings between the bankrupt and his wife, under which the bankrupt was to hold the house on trust for the couple's children, with his wife having an entitlement to occupation. Mr Singh had been adjudged bankrupt on 28 September 2011 on a creditor's petition presented after he had defaulted in complying with a consent order in favour of the creditor made in April 2011.

In *Elichaoff* the consent order in ancillary relief proceedings (which had provided for the less wealthy husband to pay maintenance to his wealthier wife, who claimed to be a substantial creditor too) was made after the presentation of the bankruptcy petition, so the basis of the TiB's claim to impugn it derived from s284 IA 1986. The TiB had applied (after the death of the bankrupt some months earlier) for a declaration that the consent order was void and also as to whether the TiB could apply for a lump sum or other financial provision under the provisions of the Matrimonial Causes Act 1973 (MCA), (the TiB arguing that there was a cause of action under those provisions which was an asset of the estate which had vested in him on his appointment) reflecting the commonly held view that the (poorer) husband might have expected to be the recipient of any transfers of value in the financial settlement. There was an additional claim against the former wife concerning payments totalling £40,000 as transactions at undervalue or preferences. The former wife applied to strike out the claims. It was this application which was the subject of the decision by the Registrar.

The Decision

In *Singh*, the judge decided that the January Charge was a sham ([50]-[52]) but the April Charge was not, nor was it a preference of the bankrupt's sister ([57]-[60]). More importantly for present purposes, the judge held that the trust deed and consent order should not be set aside as a transaction at undervalue either under s339 IA 1986 or s423 IA 1986 ([61] et seq.). It is the position in relation to ancillary relief which is of most interest.

The judge reviewed the authorities and set out (in [73]) a very useful summary of the law concerning orders made in ancillary relief proceedings, and the circumstances in which such orders could be set aside as transactions at undervalue. In particular, he held that a TiB may be able to set aside the order if he can show a vitiating factor. The judge referred to collusion as one such factor but indicated that it would also be possible if there was some other vitiating factor although, having said that, the court would be slow to set aside an order in the absence of collusion. In this particular case, the judge held that there was no direct evidence of collusion between the spouses ([77]). He also held that there was adequate consideration for the consent order (an ancillary relief claim under the MCA was to be regarded as having a value equivalent to the money or other property ordered to be paid or transferred to the recipient spouse), so this was not an exceptional case where a non-collusive order should be set aside as a transaction at undervalue ([79]-[86]).

In *Elichao*, the Registrar set out at [7] what is established law in this area. Again this provides a very useful summary. In applying the law as so summarised, he decided that the consent order was a disposition for the purpose of s284 IA 1986 and was therefore void. However, the claims under the MCA did not vest in the TiB as they could only be pursued by the spouses themselves during their joint lives ([19]-[20]). If the Bankrupt had been alive it would have been a matter for him. The TiB's claim in this regard should be struck out. However, the Registrar did not strike out the TiB's preference claim bearing in mind that there was a presumption of a desire to prefer the former spouse in the absence of evidence rebutting that presumption and the former spouse had not rebutted the presumption at the strike out application before the Registrar. It was in principle a matter for a trial (although (see [30-31], the Registrar invited the TiB to reconsider the evidence which had been provided by the ex-wife as to the existence of a running account between her and her ex-husband).

Comment

Both decisions deal with the interaction between bankruptcy and orders for ancillary relief on divorce under family law. Both contain useful summaries of the legal position, and each relies on and follows the decision in *Hill v Haines* (see technical [bulletins 99](#) and [126](#) for the first instance and CA decisions respectively). In the case of *Singh* this was in relation to a transaction at undervalue and in *Elichao* a post-petition disposition. Neither case offers much encouragement to creditors that a TiB might be able to clawback value once

held by the insolvent, but transferred to his or her spouse under ancillary relief orders blessed by the matrimonial courts.

Elichaoff also addressed the question whether the ancillary relief claims in ss23 and 24 MCA vested in a TiB. Although the result is not unexpected, the case provides a clear decision that such claims did not vest in a TiB. So the fact that the consent order was void did not assist the TiB in his quest to obtain ancillary relief from the wealthier spouse in favour of the deceased bankrupt's estate. Further, the Registrar felt that the TiB should have adjudicated on the wife's claim to be a creditor in the bankruptcy as material to these proceedings and to the conduct of the bankruptcy, notwithstanding that the TiB (understandably) preferred not to adjudicate upon her proof of debt until he was in a position to pay a dividend ([30]).

Finally, although perhaps a small procedural point, the judge in *Singh* indicated that a TiB could bring separate proceedings in the bankruptcy court in relation to a transaction at undervalue. The challenge to an order made in ancillary relief proceedings need not be mounted in the ancillary relief proceedings themselves. In practice, most trustees would favour bringing such claims in the bankruptcy proceedings rather than intervening in the matrimonial proceedings themselves.