

Mekarska v Ruiz and Boyden [2011]

[2011] EWHC 913 (Fam)

09/05/2011

Barristers

Henry Clayton

Court

High Court

Practice Areas

Financial Remedies

Summary

Application to annul bankruptcy order joined to ancillary relief appeal. Both matters dismissed.

Facts

The parties married in 2001. They had one child, born in the same year. Divorce and ancillary relief proceedings were commenced in 2006. The husband was acting in person. The wife obtained a freezing order against the husband's assets and an occupation order in respect of the matrimonial home. The husband had substantial debts and was no longer working. However, the former matrimonial home was held in his sole name and he had a US trading account valued at around £18,000. The husband petitioned for and obtained a bankruptcy order in December 2007, despite the fact that his debts did not outweigh his liabilities. This was clear from the statement of his assets set out in his bankruptcy. Furthermore, he made it clear in the petition that he was involved in ancillary relief proceedings with his wife. He did not mention the freezing order. In early 2008 the wife became aware of the bankruptcy order. Her solicitors wrote a letter to the trustee-in-bankruptcy threatening to apply for an annulment, but they never did so.

The ancillary relief final hearing took place before a district judge in the county court in November 2008. The district judge found that the husband should not really have gone bankrupt and accordingly would not award him any of the liquid assets. At that time the trustee-in-bankruptcy's costs were £59,600 and the husband's creditors were owed just over £72,404. There had been an offer on the matrimonial home of £270,000, which at the time the wife accepted had to be sold. The district judge made an order that the entire residue of the husband's estate would be paid to the wife once the debts and the trustee's costs had been paid. It was acknowledged that the wife would find it hard to re-house. The husband would be permitted to keep his modest pension (CETV £57,000).

Shortly after the final hearing, the offer on the matrimonial home was reduced to £250,000. The trustee-in-bankruptcy sought advice on this figure and found that the market had dropped. However, the wife refused to sell at that price, which resulted in years of litigation between her and the trustee, the costs of

which ended up effectively eclipsing the value of the husband's estate (out of which the wife's award was to be paid).

In August 2009 the wife sought permission to appeal out of time. The recorder who granted permission did not have a transcript of the district judge's judgment. Accordingly, there were fundamental misunderstandings in his judgment. He was given the impression that the bankruptcy court was not aware of the divorce proceedings, and that the district judge had not been aware of the freezing order. After permission was granted, the wife finally applied to annul the bankruptcy order.

Held

When the full appeal came before Mr Justice Peter Jackson, he suggested that the recorder may not have granted permission had he been aware of all the facts, and perhaps he should not have proceeded without the transcript. His Lordship found that, unlike in *Paulin v Paulin* [2009] EWCA Civ 221, the husband's motive had not been to frustrate the wife's legitimate claims. Furthermore, having examined the authorities, there was no proper basis upon which to deprive the trustee of his costs. Delay was also a significant factor in the refusal of the annulment and the dismissal of the appeal.

Peter Jackson J stressed how important it is for a party affected by a bankruptcy order which should not have been made to act immediately to have it annulled. His Lordship suggested that the practice in bankruptcy petitions should be changed so as to give notice to a spouse or partner who may have a legitimate interest in the outcome of the petition.

Permission

Family Law Week 