Family / Insolvency

Reverse gear

Part one: Shantanu Majumdar examines debt cases & a judge's prerogative to change his mind

IN BRIEF

- In *Paulin v Paulin* a man declared himself bankrupt to avoid paying alimony.
- The so-called *Barrell* jurisdiction once permitted a judge to alter his judgment at any time until his judgment was sealed.

"A tactic now occasionally adopted by a devious husband confronted with an application by his wife for financial relief ancillary to divorce proceedings is to issue proceedings for a bankruptcy order to be made against himself." These opening words of Lord Justice Wilson's judgment in *Paulin v Paulin* ([2009] All ER (D) 187 (Mar); Note [2009] 3 All ER 88; [2009] NLJR 475) found their way into the news sections of a number of newspapers including the redoubtable *Yorkshire Post*. The *Daily Telegraph*'s headline "Millionaire businessman declared himself bankrupt to avoid paying ex-wife alimony" was not obviously more sober than the *Daily Mail* but behind the language of sensation two important points of principle fell to be decided by the Court of Appeal relating to: (1) a judge's jurisdiction to change his mind after judgment but before the order is sealed and (2) the annulment of a bankruptcy order made on the petition of the debtor. (The Court of Appeal's decision on the latter will form the subject of the second part of this article.)

Background

The facts are quite complex not least because of the husband's rather tangled business affairs but the following background may suffice. The husband had been an active businessman with interests in numerous companies. During the course of the parties' marriage a substantial house (the Property) had been purchased in the name of a company registered in the Isle of Man, Cativo Limited (Cativo). It was alleged by the wife and was later found that the house had been the matrimonial home albeit for a brief period.

In mid-September 2005 the wife issued a divorce petition and an application for ancillary relief in the Family Division. Cativo was swiftly joined to the proceedings and at the same time became the subject of a freezing injunction. In July 2006 a bankruptcy order was made against the husband on his own petition on the grounds that he was unable to pay his debts which he alleged to be some £191,000. The wife applied to annul that bankruptcy and this application was transferred to be heard with the ancillary relief proceedings. Prior to the final hearing, the Property was sold by its mortgagees and a surplus of some £1m was paid into court and became the main bone of financial contention between the parties.

In December 2007, little more than a month before the final hearing, Cativo went into creditors' voluntary liquidation on the basis of a debt exceeding £1m supposedly owed to a company called Dramaflight Ltd and in respect of which it had obtained default judgment. The wife applied to set aside that judgment, contending that no genuine debt was owed to Dramaflight. Cativo's participation in the proceedings thenceforth involved its liquidators.

The family judge made (what the Court of Appeal later described as) "profoundly adverse" findings about the husband's honesty. His general view was that: "His financial dealings, prior to his bankruptcy, took place through a web of companies, most of which now are either dissolved or in administration or liquidation. He appears never to have owned anything in his own name … There was little paperwork which showed that he was the owner of property or other company assets."

He held inter alia that Cativo (despite a purported transfer of its sole issued share to a third party) was owned and controlled by the husband and was effectively his *alter* ego. In reliance on the decision of Bodey J in *Mubarak v Mubarak* [2001] 1 FLR 673, [2000] All ER (D) 1797 he considered that he was entitled to lift the corporate veil and to treat Cativo's assets as the husband's assets. It was at this point that the bankruptcy became relevant since were it not to be annulled the fund in court would form part of the bankrupt husband's estate either directly or because the single share in Cativo would have vested in the Official Receiver. He also held that the Dramaflight debt, which was based on a series of inter-company assignments, was a sham and had been manufactured in order to make Cativo appear to be insolvent.

The destination of the funds in court and the resolution of the ancillary relief application itself therefore depended upon whether the husband's bankruptcy was to be annulled. Since (by s 272 Insolvency Act 1986) the only ground upon which a

debtor's petition may be presented is that he is unable to pay his debts, the only basis upon which it could be contended that the order should not have been made was that the husband had in fact been able to pay his debts at the time of the order. The judge decided that he was not so satisfied and adjourned the final determination of the ancillary relief application pending the resolution of the bankruptcy which, mindful of the husband's creative propensity in relation to debts, he somewhat unusually (as well as impermissibly) proposed to supervise.

He then received further written submissions on behalf of the wife. His order had not yet been drawn up and he directed that there should be a further hearing at which he heard submissions on behalf of husband, wife and liquidators. In a further written judgment he now decided that he should annul the bankruptcy and then proceeded to make a final order on the ancillary relief application whereby, subject to such matters as the costs of the liquidators, genuine debtors of Cativo and the husband &c, he awarded the monies in court to the wife on a clean-break basis.

> **"The only ground upon which a debtor's petition may be presented is that he is unable to pay his debts"**

The husband appealed, alleging that (i) the judge did not have the jurisdiction to reconsider his first judgment or, alternatively, should not have done so and that in any event (ii) he should not have annulled the bankruptcy order.

Jurisdiction to reconsider

The husband's primary case was that the so-called *Barrell* jurisdiction which permitted a judge to alter his judgment at any time until his judgment was sealed had not survived the introduction of Pt 52 of the CPR (Appeals) in May 2000. Hitherto, RSC Order 59 had governed appeals in the post-CPR era and provided that time for appeal did not begin to run until the relevant order of the court was "sealed or otherwise perfected" but Pt 52 provides that time begins to run from "the date of the decision of the lower court".

This had the effect that the "the neat symmetry" (*per* Wilson LJ) which had hitherto existed between the point from which time for appeal started to run and the exhaustion of the judge's jurisdiction to change his mind would be lost, but was this enough to have caused the implied abrogation of the *Barrell* jurisdiction? This imaginative but ambitious argument was defeated by the decision of the Court of Appeal in *Hyde and South Bank Housing Association v Kain* (27 July 1989). This had been decided in the context of RSC Ord 59 r 19(3) which then provided, so far as appeals from the county court were concerned, that time ran from the date of the decision (rather than perfected order) and it was held in *Hyde* that this had no bearing upon the existence of a jurisdiction to change that decision until the order was perfected since the judge was not *functus officio* until that point. (Nicholls LJ pointed out in *Hyde* that if the judge exercised his jurisdiction to reconsider, then time for appeal against that decision would run from its oral pronouncement and we can take it that the same rule must apply under the CPR.)

In *Paulin* Wilson LJ summarised the jurisdiction thus:

(i) Reversing a decision and amplifying the reasons for it are not the same thing. Generally amplification of allegedly inadequate reasons should be sought before complaining about their inadequacy on appeal and a judge has an unfettered power to amplify before the sealing of his order: *Re T (Contact: Alienation: Permission to Appeal)* [2003] 1 FLR 531.

(ii) A judge has jurisdiction to reverse his decision at any time until his order is sealed (pursuant to CPR 40.2(2)(b)) but not afterwards: *In Re Suffield and Watts* (1888) 20 QBD 693, [1886-90] All ER Rep 276.

(iii) A written reserved judgment may be less open to a judge's reversal than an *ex tempore* judgment: *Stewart v Engel* [2000] 1 WLR 2268, [2000] 3 All ER 518; and if a written judgment has been disseminated only as a draft, it may be more open to reversal by the judge than if it has been handed down: *Robinson v Fernsby* [2003] EWCA Civ 1820, [2003] All ER (D) 414 (Dec).

(iv) In *re Barrell Enterprises* [1973] 1 WLR 19, [1972] 3 All ER 631 the Court of Appeal narrowed the circumstances in which reversal can take place:

"When oral judgments have been given, either in a court of first instance or on appeal, the successful party ought, save in most exceptional circumstances, to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgments in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present."

The reference here to "oral judgments" seems to be by way of distinction not to written, reserved judgments but to written, sealed orders: (v) This "exceptional circumstances" condition has been reaffirmed post CPR by the Court of Appeal in both *Stewart v Engel* and (*obiter*) in *Taylor v Lawrence* [2003] QB 528 but in *Compagnie Noga D'Importation et D'Exportation SA v Abacha* [2001] 3 All ER 513 Rix LJ observed that it was not a statutory definition to be rigidly applied at the expense of the interests of justice and posited "strong reasons" as an alternative formula and in *Robinson v Fernsby* May LJ said that he preferred "strong reasons".

Despite the continued existence of the *Barrell* jurisdiction, the Court of Appeal held that the judge had been wrong to reverse his decision in the way that he had not least because annulment was the pivotal issue in the case and had already been the subject of extensive argument; the first judgment was reserved for six weeks and had been delivered; neither counsel nor the judge had identified the need for exceptional circumstances (or strong reasons) and none were stated; instead it was sought to re-argue the point without reference either to new evidence or authority and the judge had fixed the further hearing without having received submissions from the husband on the matter.

Yet even: "[i]f a judge gives reasons why he is recalling his order or a draft judgment which he has sent out and those reasons are unpersuasive, that in itself does not seem to me to require the court to interfere with the perfected order unless it can be said that the judge's final judgment is thereby, or for some other reason, shown to be wrong." (*Per* Peter Gibson LJ in *Robinson v Fernsby)*

The annulment issue therefore fell to be decided by the Court of Appeal. NLJ

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