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Arif v Anwar & Anor [2013]

[2013] EWHC 624 (Fam)

21/03/2013

Barristers
Nicholas Fairbank

Court
High Court (Family Division)

Practice Areas
Financial Remedies

Summary
Financial remedy application – bankrupt husband – oral disclosure hearing – directions given for hearing of two preliminary issues

Facts
W issued her divorce petition on 21.6.11. H (an insolvency practitioner) was made bankrupt on his own petition on 6.10.11. The only asset in the bankruptcy estate was the Former matrimonial home. The FMH had been registered in W's sole name but in 2003 she executed a deed of trust declaring H to be the absolute beneficial owner. The value of the FMH was taken, for the purpose of argument, as having been £1.8m at the time of the bankruptcy order. The company through which H operated his insolvency practice, 'RMC' had collapsed and been placed into administration, H's bankruptcy threatening his accountant's and insolvency practitioner's licences.

A very substantial claimant in the bankruptcy was S (H's son from a previous marriage). S asserted a beneficial interest in the FMH under a constructive trust which arose from him having invested in building work in the property. This was put by both H and S at 50% albeit H's account of how this arose differed in his Form E and his Statement of Affairs in the bankruptcy, in which he simply said S had a charge over the property. Additionally, S had paid various lenders to whom H had liabilities and taken over those liabilities. He also discharged a debt owed to Barclays Wealth in Jersey in the sum of £425,000, which was secured on a property at Charles Lane which was beneficially owned by S. A further creditor was "Declan", whom H claimed to owe some £500,000 in repayment of an advance commission for work in respect of "a commercial deal which did not complete" in 2005 which, on H's case, had to be repaid.

As W could only obtain an order for a financial remedy if there was a surplus of assets over liabilities in the bankruptcy, W initially applied within the bankruptcy proceedings to annul the bankruptcy, but later abandoned this application. The bankruptcy proceedings therefore went ahead. However within the financial remedy proceedings, Eleanor King J, following the procedure adopted in OS v DS [2004] for preliminary oral discovery hearings, made a direction for a preliminary hearing "to determine the

consequences on [H]'s financial resources of (a) The effect of transactions between [H] and [S] on (i) the beneficial ownership of [the FMH] and (ii) the extent of any personal debts between [W] and [H] and [S] and (b) The effect the transactions between [Declan] and [H] either personally or through their businesses, on the extent of any debts between [Declan] and [H]".

That hearing came before Norris J. At the start of the hearing H applied for it to be "adjourned generally" pending an examination in the Chancery Division into the size of the bankruptcy estate. He argued that the direction of Eleanor King J listing the hearing had been made on the footing that there would be a surplus to meet W's needs on a modest level, but it now appeared that in no circumstances would there ever be any surplus in the bankruptcy estate. Norris J rejected that submission. S then made an application that the hearing should not proceed because it was procedurally unfair. Norris J reminded himself that the result of such a hearing could be "preliminary indications or even findings", but they would only result if a judge considered it procedurally fair to make them. There was no procedural unfairness inherent in the process of oral disclosure itself and therefore the hearing proceeded. Oral evidence and submissions were made over the course of 4 days.

Norris J indicated in his judgment that he had gained the impression that H and S wished to avoid scrutiny of their affairs and that there was a case for further enquiry, albeit not the "roving" enquiry sought by W. It was apparent that W's case was in general that the apparent dealings between H and S did not reflect the reality of the case, that whatever S held really belonged to H and this was "the custom of their people". However, Norris J commented that ownership was determined by legal rules, not cultural norms, and found that it would be disproportionate to order an inquiry into every dealing between H and S and adjudicate on which transactions constituted shams.

Norris J made directions that there be hearings of two preliminary issues. The first of these was "the Beneficial Interest Issue" namely whether in the events which have happened S was on 6 October 2011 (a) the beneficial owner of a 50% share in the FMH; or (b) was entitled to some other (and if so what) interest in it; or (c) was a creditor of H in respect or all or some of the alleged payments made by him to H for works on the property.

The second preliminary issue of which Norris J directed a hearing was "the Dealings Issue" namely (1) whether S had repaid the following sums borrowed by H and W and applied for his benefit (i) £245,000 borrowed from Barclays Wealth as indirect replacement for the Norwich Union mortgage charged upon Charles Lane (ii) £390,000 borrowed from Woolwich BS and £155,000 borrowed from Barclays Wealth and used to fund the purchase of Tema House (together with £16,450 borrowed from the same source to pay the costs and stamp duty) and (iii) £174,250 transferred to a Capital Account for S's benefit from the Barclays Wealth facility ("the Mortgage Liabilities"); (2) whether any such repayments by S in respect of the Mortgage Liabilities (and if so, which) were made out of funds not derived from the accumulated or accruing rental income of Charles Lane (" the External Funds"); (3) what was the source of the External Funds used to repay the Mortgage Liabilities and what was the nature of S's interest in them; (4) what drawings were made on the Barclays Wealth account (secured by a charge on Charles Lane) between 29 May 2009 and 6 October 2011 and which of them was not for the benefit of S.

Held

On both issues, Norris J directed that S be the Claimant in both issues and made directions for the filing and serving of points of claim and defence and standard disclosure by list.

Norris J did not consider it necessary to formulate a preliminary issue in relation to the sums due to Declan. He commented that this would be a matter for the Trustees, but on the evidence before him and the difference between the accounts given by Declan and H, the Trustees "may well have issues o to

examine before admitting the debt to proof in full."

Norris J ordered that H and S be jointly and severally liable for 20% of W's costs in connection with the oral disclosure application and the remaining 80% be W's costs in the ancillary relief application. He held that the disclosure exercise had been necessitated by the failure of H to provide adequate financial information, but his order should reflect that there was a possibility that the whole process resulted in no surplus from the bankruptcy estate.