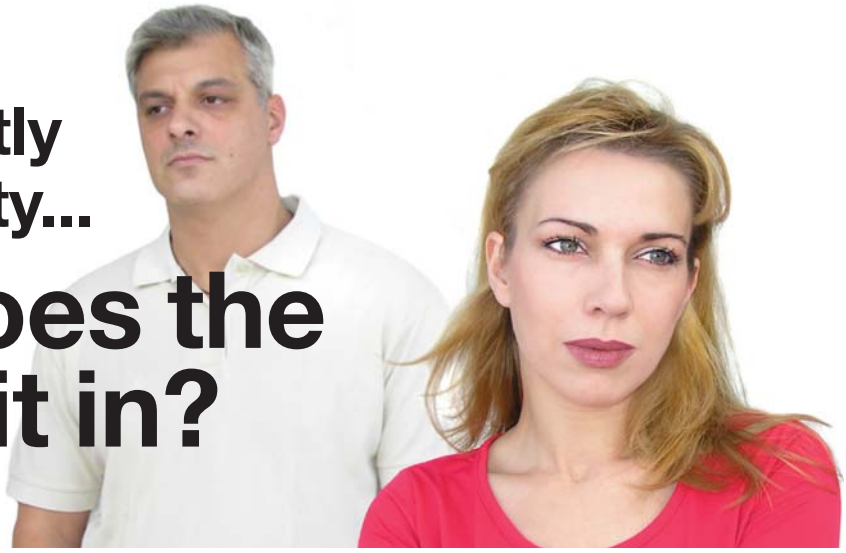
Julian Dobson SOLICITORS

Insolvency Lawyers

Newsletter

Competing claims for jointly owned property...



Where does the Trustee fit in?

What does the law say now when joint owners argue over who owns what?
The recent House of Lords case of ***Stack v Dowden*** brings us up to date. Mr Stack and Ms Dowden had lived together since 1975, first in a house owned and paid for by Ms Dowden and then in a property held in their joint names. During that time they had four children together. Eventually they split up and claimed different shares in the equity. Ms Dowden wanted more than a half share.

What does it say on the tin?

The House of Lords set out the starting point. For jointly owned property, a party who seeks to displace the "equality is equity" rule must establish a right to more. For solely owned property, the non-owning claimant must show that they have any interest at all! Cases where the entitlement to a beneficial interest will be held to be different from the legal interest would be "very unusual".

Social conditions (and the law) move on! - It's not fair

Baroness Hale looked again at ***Oxley v Hiscock*** and explained that the law had moved on in response to changing social and economic conditions. Now "the search is to ascertain the parties shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it". But that search is still to find the parties' intentions and cannot be abandoned by the Court in favour of a result the Court itself thinks fair.

Factors in support of a bigger share

The burden of proof is on the claimant and the factors the Court will take into account include:-

- Advice or discussions at the time of purchase.
- Why and for what purpose the property was acquired.
- Why the survivor can give a receipt for capital.
- Nature of the parties' relationship.
- Whether there were dependent children.
- How the purchase was financed, initially and later.
- How the owners arranged their finances and paid outgoings.
- Finance and construction of extensions or substantial improvements.

Game set and match - Ms Dowden

This case was held to be "very unusual" and their lordships awarded 65% to Ms Dowden and 35% to Mr Stack. She was given the lion's share because she was able to show:-

- The first home was bought and held in her sole name.
- She paid the mortgage and other outgoings for that home.
- She was in employment throughout.
- She contributed 64% of the price of the second home.
- Her salary was about double Mr Stack's by the time they separated.
- They kept "rigidly separate" finances.

On a more cautionary note, their Lordships warned against too much weight being placed on alleged improvements as justification for a greater share.

What happens if one of the parties is facing bankruptcy?

Although, in this case, neither of the parties faced bankruptcy, the implications for bankrupts, their partners and the Trustee are clear. The decision can be used by the Trustee to resist claims for any share by a non-owning spouse or co-habitee or a greater share than half of a jointly owned property. On the improvements point, the decision is support for a Trustee disinclined to allow much credit to be given to the n on-bankrupt for alleged improvements to the property.

Current conveyancing practice is unlikely to improve labelling

Their Lordships examined developments in conveyancing practice over the years and changes to Land Registry forms. Sufficient thought is not always given to the identification and recording of the extent of the parties' contribution and how they would wish the proceeds of sale to be held in the event of future differences between them. There are many more occasions in these days of rocketing house prices for family and friends to contribute, to get the first-time buyer on to the housing ladder and these contributions are not always recorded, although the informal donor/lender might have very definite views as to what should happen if the parties split up.

Failure to declare may cause serious problems in the future

In the worst case scenario, conveyancers who fail to address these problems at the time of purchase may subsequently be accused of negligence or failing to deal with the money-laundering requirements. If interests are not properly recorded then, as in this case, as Baroness Hale observed, "the costs of pursuing the argument to this House will have been quite disproportionate".

Courts pull the plug on Powerhouse CVA

The recent decision in *Prudential Assurance Company Limited v PRG Powerhouse Limited* has kept commercial landlords waiting in anticipation. Had the decision gone against the Applicant landlord, Prudential, the impact would have been felt throughout the commercial property world.

The case followed the approval of a Company Voluntary Arrangement (CVA). Under the terms of the arrangement, Powerhouse was to close a number of its stores. Creditors with claims arising out of the closed premises would receive a dividend of 28p in the pound, which would be funded by a contribution of £1.5 million injected into the arrangement by Powerhouse's parent company, PRG. The remaining creditors of the stores that continued to trade would remain unaffected by the CVA and would see their debts paid through the ongoing trading of Powerhouse.

CVA purports to release guarantees

PRG had provided guarantees and indemnities in respect of Powerhouse's liabilities under the shop leases. The CVA provided for the release of the guarantees and indemnities given by PRG to the landlords.

Landlords stood to lose out

Under the CVA, the landlords of the closed shops would only have received a dividend of 28p in the pound for arrears of rent up to the date of approval. They would not have been able to rely on the guarantees given by the parent company, PRG, which at the time was a financially strong covenant. This would have had a detrimental effect on the value of their commercial property portfolios.

Landlords challenge

Following the approval of the arrangement, the landlords of the closed shops challenged the validity of the arrangement and sought a declaration that it was ineffective and/or invalid so far as it purported to affect the rights of the landlords to pursue other parties, ie PRG, in respect of the guarantees and indemnities.

Secondly, the applicants alleged that the CVA was unfairly prejudicial to their position as creditors of Powerhouse.

The relevant provisions within the CVA provided that the guarantees would be released and that no proceedings could be continued by the affected landlords against PRG in respect of any liability that had been released under the arrangement.

The Court held that the CVA was not effective to release the guarantor's liability under the guarantees. However, whilst the CVA could not operate directly as a release of the guarantor, it could act as a contractual restriction on the landlord from pursuing the guarantor.

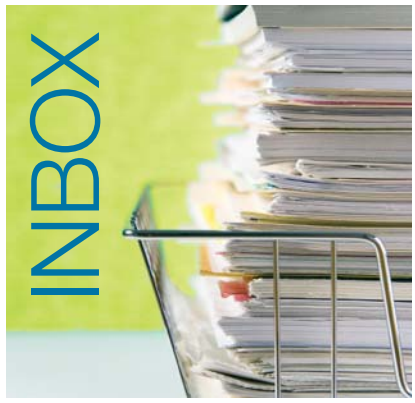
Unfair prejudice

The landlord claimed that the arrangement was unfairly prejudicial and, in this respect, the Court had to consider what constituted unfair prejudice. The Court compared the position under the CVA with the position in a winding up (the vertical comparison) and the position of creditors with other creditors or classes of creditors, under a s.425 scheme of arrangement (the horizontal comparison).

Neither comparison would necessarily be conclusive to determine whether or not the arrangement was unfairly prejudicial. It was necessary for the Court to consider all the circumstances. These included the way in which the majority of creditors had exercised their vote, whether the CVA involved a differential treatment of creditors, but ultimately whether a reasonable and honest man in the same position as the objecting creditors might reasonably have approved the CVA would be a powerful and probably conclusive factor against the challenging creditor on the issue of unfair prejudice. Further, the fact that no reasonable and honest man in the same position as the challenging creditor would have approved the CVA is not necessarily conclusive in favour of the challenging creditor.

Landlords win

The Court held that the CVA was unfairly prejudicial to the landlords and the challenge was upheld. Perhaps the most telling factor was that the guarantees that had been given by the parent company were of real value and would have been enforceable in the event of winding up.



■ Use it or lose it - Section 283A

In the last month running up to the deadline of 31 March 2007 we issued 12 applications for Orders of Possession and Sale. Since the deadline has passed we have obtained 7 Orders of Possession and Sale and 2 extensions for Trustees in Bankruptcy in Courts as far afield as Barnsley and Burton on Trent. Whilst there was a clearly audible sigh of relief that applications had been issued prior the deadline, it should be remembered that the deadline is ongoing, as the three year anniversary expires in later bankruptcy cases.

■ Transaction at an undervalue and preference claim

We recently obtained judgment on behalf of a liquidator in proceedings against a former director of an electronics company for the recovery of sums paid to or on behalf of the director which constituted a transaction at an undervalue and/or a preference.

■ Pre-pack administrations continue to be popular

Pre-pack administrations for companies involved in businesses as diverse as tracing agents to heat sealing machine manufacturers have kept us busy.

■ Misfeasance/undervalue claim against former accountant

We were able to make a full recovery on behalf of a Liquidator under a transaction at an undervalue claim against the company's former accountant who had mistakenly forgotten to pass on a payment he had received of £100,000 to HMRC.

■ Director's loan accounts and illegal dividends

We have been instructed by office holders to recover illegal dividends and loans paid to shareholders and directors by companies. We have also been able to assist directors in defending such claims.

A more detailed technical analysis of the decisions discussed in this newsletter is available, free on request by contacting us on info@juliandobson.com.

Super Tuper?

It is now over a year since the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations") came into force.
The Regulations were enacted partly in response to criticism that the old regulations, by transferring employees' liabilities to the purchaser/transferee, made it difficult for insolvency practitioners to sell businesses.

The Regulations continue with the concept that where the whole or part of the business is transferred to a purchaser, the rights and liabilities associated with the employees will pass to the purchaser, and that employees' contracts of employment continue unbroken with the purchaser as their employer.

The Changes

The major changes brought in by the Regulations are as follows:-

1. The transfer of liability for employees to the purchaser will not apply to certain insolvency proceedings.
2. Employees' terms and conditions of employment may be varied in certain circumstances.
3. The transferor is obliged to provide certain information concerning employees.
4. Joint and several liability to consult concerning the transfer.

Summary of Key Regulations

Regulation 4 - A relevant transfer of a business will not terminate employees' contracts of employment. Their contracts will be transferred to the purchaser.

Regulation 7 - Any dismissal arising out of the transfer of the business or for a reason connected with it, which is not economical, technical or organisational will be automatically unfair.

Regulation 8 (1)-(6) - Where the transferor is subject to insolvency proceedings which are not with a view to the liquidation of assets, employee liabilities pass to the transferee (subject to the National Insurance Fund meeting certain employee liabilities).

Regulation 8 (7) - This provides that Regulations 4 and 7 will not apply in the case insolvency proceedings conducted with a view to the liquidation of assets. Employment obligations will not transfer to the purchaser.

Administration, Voluntary Arrangements, Administrative Receivership and Members Voluntary Liquidation

These types of insolvency procedure come under the heading of "insolvency proceedings opened not with a view to liquidation of the assets of the transferor". As such Regulations 4 and 7 will apply to any transfer made under the auspices of an office holder in any of the above procedures. Employees' contracts of employment will not terminate and will be passed to the new employer and any dismissal in connection with the transfer which is not for economic, technical or organisational reasons will be automatically unfair.

In such cases, where the employees are transferred by reason of the Regulations to the purchaser, the National Insurance Fund will meet payments that would otherwise be payable to employees under the Employment Rights Act 1996.

In the case of any employees dismissed in connection with the transfer, the National Insurance Fund will, in addition make redundancy payments. Apart from the above, all other liabilities will pass to the transferee.

The Regulations also allow in the above types of insolvency procedure, for the terms of employees' contracts of employment to be varied before or after the transfer has taken place. This is permitted where the variation is in connection with the transfer and is designed to safeguard employment opportunities, ensuring the survival of the whole or part of the undertaking. Variations must be agreed with employee representatives.

Bankruptcy, Compulsory Liquidation and Creditors' Voluntary Liquidation

These procedures are referred to as "bankruptcy or analogous proceedings instituted with a view to liquidation of assets".

In these cases, Regulation 8(7) provides that any relevant transfer under the above insolvency procedures is not subject to Regulations 4 and 7.This means that the rights and obligations under employee contracts do not automatically pass to the transferee on the transfer of part or all of the business.

The practitioner may safely transfer the business to a purchaser in the knowledge that the price negotiated has not been discounted to take into account potential employee liabilities that may otherwise have transferred to the purchaser.

Notification of employee liability information

Regulation 11 creates a new obligation on the part of the transferor to provide certain information concerning employees. The information should normally be provided at least 14 days before the transfer takes place, or if there are special circumstances which make this not reasonably practicable, as soon as reasonably practicable thereafter. Any failure to provide the information may allow the transferee, within 3 months of the transfer to make a complaint to an Industrial Tribunal for an award to be paid by the transferor to the transferee.

Obligation to inform and consult

The Regulations provide an obligation to inform and consult affected employees concerning the proposed transfer. Any failure to inform or consult under the Regulations will enable an employee to apply to an Industrial Tribunal for an award. Liability for such an award is deemed to be joint and several as between the transferor and transferee.

Contractual considerations on the sale of a business by an office holder

Even though a claim from an employee may not have any merit, it will, nevertheless, involve time and expense in dealing with it. Where possible, a general indemnity should be sought from the purchaser. This should cover any costs, liabilities or claims that may be received by the transferor and/or the office holder as a consequence of the disposal of the business.

As far as the obligation to supply detailed information concerning employees is concerned, whilst it is not possible to contract out of these obligations, if the information is to be provided, then an acknowledgement should be sought in the contract that the purchaser has received the information as required under the Regulations. An indemnity in respect of any costs incurred as a consequence of any complaint to an industrial tribunal that may be brought against the company/office holder to an Industrial Tribunal should be sought.

The Regulations requiring the transferor to consult with employees is often impractical to implement in an insolvency situation. Any failure to inform or consult renders both the transferor and transferee jointly and severally liable. Again, whilst it is not possible to contract out of this provision, an indemnity should, nevertheless, be sought in the agreement with the purchaser concerning such liability.

More change needed

The Regulations have so far been shown to be lacking in a number of areas. Attempts to lobby for change continue and it is to be hoped that further clarity can be brought to bear on this difficult area of the law before the next recession bites.

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Trustee in Bankruptcy 1, Former wife 0

The recent decision in *Hill & Bangham v Haines [2007] EWHC 1012 Ch* once again demonstrates the power of Trustees in Bankruptcy to successfully challenge Property Adjustment Orders made in divorce proceedings.

Does a Property Adjustment Order = a transaction at an undervalue?

It has always been open to Trustees to challenge Property Adjustment Orders made in matrimonial proceedings on the ground that they constitute a transaction at an undervalue and are, therefore, caught by Section 339 of the Insolvency Act 1986.

Such claims rely upon the Trustee being able to establish that the matrimonial order constituted a gift or transaction in respect of which the debtor received "no consideration" or, alternatively, that it constitutes a transaction where the value of the consideration received by the debtor in "money or money's worth" is "significantly less than the value in money or money's worth of the consideration provided".

Usually a Property Adjustment Order providing for the transfer of the debtor's interest to the former wife is part of an application containing a number of claims, including property adjustment and regular maintenance payments. In order to demonstrate that the matrimonial order represents a transaction at an undervalue, it has been necessary to determine the extent and value in money in money or money's worth of the consideration provided by the respective parties to the order. As this process involves attempting to place a value on the rights given up in the terms of the final order, ie the right to pursue future maintenance payments, this has not always been a straightforward exercise.

Previous decisions had held that a transfer or settlement made pursuant to a compromise of ancillary relief proceedings was capable of being supported by sufficient consideration to prevent an application under Section 339 to set aside such a transfer or settlement. However, whilst the giving up of such rights may be considered to be valuable consideration, it had also previously been held that such rights were not measurable in monetary terms, as required by Section 339 of the Insolvency Act 1986.

Consent order v contested proceedings

Historically, Trustees in Bankruptcy have been more likely to successfully challenge a Property Adjustment Order where it was made pursuant to a Consent Order, as opposed to being the outcome of contested proceedings.

Trustee in Bankruptcy wins

In the present case, the Property Adjustment Order was being challenged by the Trustees in Bankruptcy, even though it followed a contested hearing. The Court held that the previous Order of

the Court providing for the transfer of the bankrupt's interest to his former wife did constitute a transfer at an undervalue and would be set aside.

The position now is that regardless of whether nor not the matrimonial order was the result of a Consent Order/settlement or contested proceedings, such orders will be equally vulnerable to potential attack by a Trustee in Bankruptcy. As highlighted above, the compromise of claims does not constitute consideration in money or money's worth.

Warning to matrimonial lawyers

This case sends out a clear warning to matrimonial lawyers that, regardless of whether or not a Property Adjustment Order is agreed by consent or following on from contested proceedings, such an Order may still be vulnerable to attack by a Trustee in Bankruptcy on the grounds that it constitutes a transaction at an undervalue.

Competition Win £100 Lillywhite's voucher!

Here's your chance to run off with a £100 Lillywhite's voucher... All you have to do is design an alternative London 2012 Olympic logo!

There's been a lot said about the recently unveiled official logo, and we think that perhaps our readers can do better!

The sample shown here is simply to help get your creative juices flowing. You don't need to be able to design or even draw! It's the idea that counts. Sketch something on the back of an envelope... or even keep the kids busy for an afternoon designing their own logos! All entries will be carefully considered and given an equal chance no matter how old the designer!

So get sketching... remember it must include the words 'London', '2012' and the Olympic symbol. Then post your entry to us at the address overleaf, or attach it to an email to info@juliandobson.com. Good luck!

The winner will be chosen by our design consultants, SF Creative and Mr Dobson himself. Entries close at 5pm Friday 24th August 2007. The winner will be notified by email shortly afterwards. The choice of winner shall be final with no correspondence being entered into.

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