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Insolvency Lawyers

Bulletin **4** 2011



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Possession proceedings by trustees in bankruptcy. What could possibly go wrong?



In the majority of bankruptcy cases the main asset which a trustee in bankruptcy will seek to realise will be the bankrupt's interest in the matrimonial home.

In most cases the process is relatively seamless and the interest in the property will ultimately be realised for the benefit of creditors.

This article looks at some of the steps needed to achieve that outcome and considers some of the things that can go wrong.

Identify the property

Owning property is a national obsession, which comes in a variety of different forms. From day one the trustee will need to establish quickly what property interests the bankrupt holds, where they are, and what they consist of.

Duty to co-operate

Whilst the bankrupt has an obligation to co-operate with his trustee and disclose that information, very often it will not be forthcoming unless the trustee asks the right questions. Generally a bankrupt will respond and disclose all property interests that they hold. Occasionally however, as in the recent case of a bankrupt comedian, a bankrupt may go to extraordinary lengths to conceal property interests involving the use of false identities and fake passports. In that instance the official receiver had the last say when the bankrupt received a 14 month jail term.

Use it or lose it – 3 year rule

Trustees are familiar with the 'use it or lose it' provisions contained in the **Insolvency Act 1986** and the fact that steps must be taken to deal with or realise any interest in property held by the bankrupt, where it was his sole or principal residence or that of his spouse/civil partner. Fortunately, where a bankrupt fails to disclose the existence of a property which may be subject to the re-vesting provisions, the three year time period does not begin until such time as the trustee is made aware of the property. This is an important safeguard, although trustees and the official receiver are alive to veiled attempts to disclose a property interest in the hope that they fail to realise that the three year rule will apply to it.

Nature of the property interest

Careful consideration should be given to the nature of the property interest. The variety of methods by which

people may hold property is considerable. Particular care should be given to any interest held under shared ownership schemes with housing associations and similar organisations. Often they contain provisions that may make realisation of a share in the property more difficult.

Sale and leaseback

Similar considerations apply to sale and leaseback arrangements which have become more common in recent years. Such arrangements were considered in the recent case of **Chen & Others v Delaney & Others [2010] AllER (D) 183** where a challenge was brought under **Section 423 Insolvency Act 1986** in respect of a sale of the leaseback arrangement. The Court of Appeal did not find that there had been a transaction at an undervalue with the intention to defraud creditors. Further the Court noted that the fact that the defendants had sought to protect themselves and their home by the creation of the sale and lease-back was an additional factor that supported the justification for the sale.

Buy to let

The popularity of buy to let has meant that increasingly, bankrupts have interests in several properties. Whilst buy-to-let properties will not usually be subject to the three year re-vesting rule, they do require careful scrutiny, particularly if it is proposed that vacant possession will be obtained prior to any sale of the property.

Practical difficulties arise, as tenants can be unwilling to provide information. Where the bankrupt owns the property in his or her sole name the trustee will become personally liable for obligations arising out of the bankrupt's capacity as landlord. In the case of solely owned property, the trustee has the ultimate remedy of avoiding those liabilities by disclaiming the interest. >



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However, in disclaiming the property, any equitable interest that he may have had will also be forfeited. Where property is jointly owned by the bankrupt and another, the position is less onerous from the trustee's point of view as the legal estate remains vested in the joint owners.

Not only will the trustee have to establish the terms of any tenancy, he will also need to identify any deposit that has been taken and whether or not that has been protected within a tenancy deposit scheme under the **Housing Act 2004**.

Calculation of the equity

Any decision to apply for an order for possession and sale will depend on a calculation of the equity in the property. In addition to taking into account the latest figures outstanding under the mortgage, consideration needs to be given to redemption penalties and the existence of any charging orders or equitable charges that may be registered against the property. All these will have a significant impact on the equity available.

Third party interests

As part of the process of calculating the value of the bankrupt's interest in the property, the trustee should establish the extent of any other party's interest in the property and whether or not those interests will be increased by additional claims.

Exceptional circumstances

In order to obtain an order for possession for the sale of the property, the trustee will have regard to the provisions of **Sections 336 and 337 Insolvency Act 1986**. Briefly, these provide that, after one year, the interests of creditors will outweigh all other considerations unless the circumstances of the case are exceptional. Following a line of cases which have attempted to define what

are exceptional circumstances, the key point is that the trustee must establish the identity of all occupiers and the circumstances of their occupation, in order to avoid a successful claim that the circumstances of the case are exceptional. Failing to establish the true extent of other party's interests in the property could lead to a disappointing or unexpected outcome, particularly where, at or shortly before the hearing, the existence of key information becomes apparent.

Failure to pay the mortgage

Once proceedings have been issued, the bankrupt may cease paying the mortgage on the property and it becomes a race between the mortgage lender and the trustee to claim possession and sell the property.

Enforcement of the warrant for possession

Once the order of possession has been granted by the court, the trustee will seek to enforce the order by means of a warrant for possession. The confirmation of a bailiff's appointment that must be returned to the court, contains a box which asks whether it is considered that the bailiff may require assistance. The answer to that question will depend on the circumstances of each case and will usually be apparent to the trustee and his solicitors by that stage. However, the reason why assistance may be required is not always obvious. On one occasion, having advised the court that assistance was not required, a telephone call was received from the court the day before the bailiff's appointment explaining that the bankrupt had applied to court to suspend the warrant for possession. The grounds for the application being that the bankrupt had nowhere to store his 12 firearms held on the premises. The bailiffs, agents and solicitors were content to wait in the nearby station car park, whilst a police firearms unit removed the offending items. >



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Illegal re-entry of the property

Notwithstanding the uniform practice of changing all the locks following the enforcement of a warrant for possession, it has become more common for bankrupts and their families to re-enter the property illegally by whatever means. In such circumstances the solution is to make an immediate application to court for a warrant of restitution.

Enforcing the warrant against the correct property

Having obtained a warrant for possession, it is important to ensure that the correct property has been identified when the warrant is enforced. Recently there have been cases of buy-to-let landlords holding multiple flats in a block resorting to re-numbering the flats in order to defeat bailiffs with possession orders. The key point is to identify correctly the property in respect of which the proceedings are to be taken from the outset, in order to avoid an embarrassing and potentially costly mistake.

With possession comes additional responsibilities

Taking possession of a property will bring with it additional responsibilities which can be of an unusual nature, as in a recent case where a cat was left in occupation of the property. Fortunately the trustee's agents provided a cat

sitting service and were able to make arrangements to ensure the safety of the animal. However, sometimes the occupiers have items at the property that can be hazardous, necessitating the use of specialist services.

Having gained possession, the trustee's agents will seek to market the property and achieve a sale as quickly as possible, particularly where the market is in decline. Having finally agreed a sale, difficulties can still arise, particularly in the case of jointly-owned property, where the bankrupt and his spouse refuse to sign the appropriate documentation. Provided such problems are catered for in advance, the assistance of the court can be quickly obtained to execute the sale agreement and transfer documentation with minimal delay.

Realising a bankrupt's interest in a property can potentially involve difficult tasks which can be made easier by good preparation and communication with all stakeholders. ■



Ancillary relief and bankruptcy.

When is it a done deal?

In the recent case of Warwick (formerly Yarwood) v Trustee in Bankruptcy of Clive Graham Yarwood [2010] EWHC 2272 the court had to consider the effects of the Insolvency Act 1986 in relation to negotiations in ancillary relief proceedings.

Having obtained a decree absolute, the parties' respective solicitors continued to negotiate the terms of an ancillary relief application.



In correspondence it was confirmed that matters were agreed between their respective clients, save for an outstanding issue concerning the value of the pension to be split.

It was agreed that the net sale proceeds of Teapot Farm would be split 75% to the former Mrs Yarwood (Mrs Warwick) and 25% to the husband. The farm had been owned equally by Mr and Mrs Yarwood. The farm was sold and immediately following sale the conveyancing solicitors remitted 75% of the net sale proceeds to Mrs Warwick. Unfortunately a bankruptcy petition had been presented against Mr Yarwood some six days earlier.

All the terms of the ancillary relief settlement between the parties had not been finally concluded because of the outstanding pension division issue, and had not been approved by the court. Following the appointment of Mr Yarwood's trustee in bankruptcy, the trustee sought to recover the additional 25% of the net sale proceeds paid to Mrs Warwick following the sale. The basis for the trustee's claim was that the payment was made in the period between the presentation of the petition and the vesting of the estate and was therefore void pursuant to **Section 284** of the **Insolvency Act 1986** unless ratified by the court. There was never any question that the court would ratify such a transaction under the section. The court will, in broad terms, only ratify where it is in the interests of creditors. The payment to Mrs Warwick was not.

The terms that were proposed in the draft consent order were that Mrs Warwick would receive 75% of the net sale proceeds following the sale. It did not provide that there would be any transfer of the additional 25% beneficial interest prior to or pending sale of the farm.

At the first hearing the court held that the disposition was void under **Section 284**. On appeal, the court noted that there was no binding or enforceable agreement between the parties and that the principle in **Xydhias v Xydhias [1999] 2 All ER 386** applied notwithstanding concerns expressed as to aspects of that decision.

In short the **Xydhias** principle provides that an agreement for the compromise of an ancillary relief application does not give rise to a contract enforceable in law. The only way of enforcing the terms of any settlement reached in respect of an ancillary relief application is by converting the concluded agreement into an order of the Court.

One of the doubts expressed about that principle was that it was argued that an enforceable agreement could be reached between the parties before being approved in the form of an order by the court. However that point did not have to be resolved conclusively one way or the other, as in this particular instance the Court was clear that there was no binding contractual agreement between the parties before the payment was made.

The court noted that the entitlement of Mrs Warwick was to receive a share of the net sale proceeds. The terms of the proposed order did not effect any transfer of any part of the beneficial interest in the property to Mrs Warwick. Similarly it did not grant any interest to her by reason of a constructive trust or any proprietary estoppel.

Matrimonial lawyers will note that it was accepted that the payment out of the proceeds of sale did constitute a void disposition. This could have been avoided if the parties had concluded an enforceable agreement which effected a variation of the parties' beneficial interests in the property, as opposed to an entitlement to receive part of the proceedings following sale.



Solicitors and Insolvency 2

In the second of two articles Julian Dobson looks at the effects of the current recession on solicitors firms.

The second article focuses on the various options available to insolvent practices and the difficulties of continued trading. It also explains some of the problems encountered with the successor practice rules.

The article explains the effect of the recent decision in **OTG Limited v Barke [2011] UK EAT 0320/09** on the sale of solicitors' practices using the administration procedure. Finally the article highlights the circumstances in which solicitors can become personally liable under professional indemnity insurance policies.

To download the article in full please [click here](#).

