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PROPERTY TEAM NEWSLETTER

Article: Trustee in bankruptcy cannot frustrate family court order by Philippa Harris

The recent Court of Appeal decision in the case of *Haines v Hill and another* [2007] EWCA Civ 1284 revisits the principles to be followed by the courts when considering creditors' claims that property has been sold at an undervalue. The parties, Mrs Haines ('Wife') and Mr Hill ('Husband'), were joint legal and beneficial owners of a property called Strudges Farm, Worcestershire (the 'Property'). On 25 April 2003, the Wife petitioned for divorce and commenced matrimonial ancillary relief proceedings. After a contested hearing in Worcester County Court, the Husband was ordered to convey his interest in the Property to the Wife. A short time later, on March 31 2005, a bankruptcy order was made against the Husband on his own petition and in December 2006, the trustees in bankruptcy applied to the court to set aside the order for the transfer of the Property in the ancillary relief proceedings under section 339 (3) of the Insolvency Act 1986.

Section 339 states that where an individual is adjudged to be bankrupt and has entered into a transaction with any person at an undervalue (i.e. a gift or transaction on terms that provide for no consideration or consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual) the trustee of the bankrupt's estate can apply for 'such an order it thinks fit to restore the position to what it would have been had the individual not entered into that transaction'.

The trustees' case was that the transfer of the Property did not involve the Wife giving any consideration and certainly not such that could be measured as money or money's worth within the meaning of section 339(3) and thus it was a transaction at an undervalue. The district judge at first instance dismissed the application, whereupon the trustees appealed to the High Court. The Wife submitted that she had provided consideration equivalent to the value of the property transferred relying on (*In Re Abbott (A Bankrupt)* (1983) Ch.45) and (*In Re Kumar (A Bankrupt)* (1993) 1 WLR 224) which established the proposition that a transfer or settlement made pursuant to a compromise of ancillary relief proceedings was supported by consideration to prevent an order under section 339 being made. However, the High Court ruled that the Wife could not argue that she had given consideration by purportedly compromising her claim for ancillary relief because such relief is discretionary and a claim for ancillary relief is not a cause of action. The appeal was upheld and the transfer of the Property set aside in favour of the trustees.

The Wife appealed to the Court of Appeal. The Court concluded that an order made in ancillary relief proceedings to convey property, in the absence of fraud and collusion, was not a transaction without consideration for the purpose of section 339(a). Section 339 was inapplicable because the Wife did give consideration. The consideration provided by the Wife was in money or money's worth not less than the value of the consideration provided by the bankrupt. Therefore, the appeal was allowed.

The conclusion reached by the Court of Appeal was that between the systems of insolvency and ancillary relief law there needed to be a fair balance which protected creditors against collusive orders and orders justly made to protect the applicant and any children of the family. As a matter of policy it would be very unfortunate if the court approved that property orders could be reversed for up to five years later because the husband (or wife) became bankrupt within that period. It would also be contrary to the concept of a clean break in ancillary relief proceedings, if the husband's creditors could seek to recover, in bankruptcy, the property transferred or its value. Such a position would require an overthrow of long established jurisprudence, a reinterpretation of section 339 and misunderstanding of the doctrine of consideration. The case may yet be appealed to the House of Lords which may have to consider these issues further but until then trustees in bankruptcy may be very reluctant to bear the litigation risk in pursuing claims under section 339 in all but the most blatant of cases.

Did you see..... ? Recent cases you may have missed

Real Property

Civil Procedure; County Courts Act 1984 s.40(2)

National Westminster Bank v Patrick R King [2008] EWHC 280 (Ch)

In an action to enforce a charging order over residential property by means of an order for sale, the Claimant bank applied for directions on the question of whether the High Court had jurisdiction to order the transfer of proceedings to the County Court under s.40(2) of the Act, notwithstanding that the proceedings would otherwise fall outside of the County Court's jurisdiction.

Held: The opening words aside, the wording of s.40(2) was clear and unambiguous and was not constrained by the limits that otherwise operated in respect of a county court's jurisdiction and from a legislative policy perspective there was every reason to consider that the High Court should have an unlimited power of transfer if that was considered appropriate. The opening words provided that the power of transfer was subject to any provision of a kind mentioned in s.40(8), the only relevant provisions of which did not qualify the power of transferring proceedings from the High Court. Accordingly, the power of transfer under s.40(2) was not limited to cases that would otherwise be within a county court's jurisdiction.

Landlord and Tenant

Lease Extension, s.47 Leasehold Reform, Housing & Urban Development Act 1993

Majorstake Ltd v Curtis [2008] UKL10

The tenant, who held a long lease of a unit in a block of 50 flats, served a s.42 notice in order to acquire a new lease under the Act. The landlords planned to convert the flat and the one below it to create a duplex apartment and sought to rely on s.47 as they had an intention to "carry out substantial works of construction on, the whole or a substantial part of any premises in which the flat is contained". They brought proceedings for a declaration that the right was not exercisable. The Court of Appeal overturned the first instance decision in favour of the tenant.

Held: The Act was intended to give long leaseholders rights akin to freeholders. The purpose of the Act would be defeated if a landlord, who intended to carry out what were objectively (by comparison with the size of the block) minor works, were allowed to define the referable premises and thereby satisfy the criteria of 'substantial part'. Appeal allowed. Landlord's s.45 counter-notice was declared invalid.

Landlord and Tenant

Relief from Forfeiture, Waiver

Greenwood v WEF and another [2008] EWCA Civ 47

The Defendants appealed against the first instance finding that the landlord had not waived its right to forfeit the lease and the judge's decision not to grant relief.

Held: The landlord's demand for payment of a judgment debt in respect of arrears of ground rent and service charges owed by D2 in respect of a period of its occupation pursuant to the lease did not constitute an unqualified demand for future rent upon D1, who had taken a later assignment of the lease. The judge had been correct to hold that the claimant had not waived its right to forfeit and there were no grounds for interfering with the exercise of the judicial discretion not to grant relief.

Landlord and Tenant

Service Charges, Business Premises, Contractual Liability

Leonora Investment Company Co. Ltd v Mott Macdonald Ltd [2008] EWHC 136 (QB)

The Defendant tenant held separate leases in respect of each of four floors of an office block. The landlord could elect to send notice of the anticipated service costs for the year whereby the tenant would make quarterly payments and, in any event, was obliged to provide a balancing statement at the end of the year. The landlord did so elect and the tenant paid the sums due for the relevant year and credit notes were issued in accordance with the year end statement. The landlord then rendered an additional invoice covering all four leases in respect of redecoration of the common parts and pursued the claim for payment on the basis that, irrespective of form of demanded payment, the monies were service costs for which the tenant was contractually liable.

Held: (As a preliminary issue) on proper construction of the leases the tenant was only liable to pay service charges if the prescribed procedure was followed. Accordingly, the tenant was not liable for payment of the invoice. The judge noted that the lease did not preclude the landlord from rendering a revised year end statement.

Case summaries Alice Marshment and Andy Creer

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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