

Simple possession

Possession claims continue to be a fertile area for litigation and a springboard for the development of many areas of law, notwithstanding that almost all begin in simple enough terms

The recent judgment in *Stablewood Properties Ltd v Viridi and another* [2010] EWCA Civ 865, provides an example of such a case – issued as a possession claim against trespassers that later developed into a complex claim concerning trusts and company law.

Ability to purchase

In *Stablewood*, the appellants (V) appealed against an order made against them in possession proceedings brought by the respondent company (S), acting by its sole director (N), who was also the registered owner of the issued shares in S.

The property at the heart of the dispute was located next door to Vs' family home. V had been unable to purchase the property when it came to the market for sale. The first appellant, a qualified solicitor (suspended from practice) and N had been business friends. At Vs' request N caused S to purchase the property for £500,000, funded by a £325,000 mortgage with the balance coming from S's funds which had in turn been provided by N. V and N intended that at some future point V would take control of S, and therefore the property. N amended a letter ("the letter") drafted by the first appellant which stated:

"I note it is agreed that you are holding all the issued shares in the above company [S] on trust for me and my family subject old account being cleared to be approved by company accountant."

The words shown as emphasised were added by N just before signing the letter. After the property was acquired S rented it out to third parties, collected the rent and paid the mortgage. However, V then physically seized control of the property and began to collect and retain the rent, leaving N to pay S's mortgage instalments from his own resources. N caused S to sue for possession.

Capital

The principal factual matter before the lower court was Vs' contention that the capital contributed by S to the purchase had its genesis as their money from earlier

business dealings. V did not claim a direct interest in the property, but rather asserted that N held the shares in S (the company being the registered owner of the property) on trust for them and therefore was not entitled to cause S to bring the possession proceedings, as the claim was contrary to V's interests as beneficial owner of the shares. N maintained that he would not have settled in a trust his financial interest in S before he was paid the value of the same by V.

V also brought a counterclaim alleging that N was in breach of fiduciary duty in failing to transfer the shares.

The lower court found that all the money used for the purchase of the property (save the mortgage) was provided by N to S. The lower court also held that the letter signed by N was simply an agreement for the transfer of shares upon the settlement of an account between the parties, and until that was agreed, N continued to be the sole legal and beneficial owner of S and remained its sole director. An order for possession was made in S's favour.

Immediate trust

On appeal, V contended that the letter created an immediate trust in the shares and it was irrelevant whether N had protected his capital investment into S and/or the property.

The Court of Appeal agreed with V that the letter did create an immediate trust, but went on to conclude that trust was subject to a right of security given to N. On the basis of this security interest N was entitled to cause S to seek possession and the appeal against the possession order consequently failed.

The argument as to the construction of the letter was fact-specific and not perhaps of general application. In short, the Court of Appeal determined that the language of the letter did not support the lower court's interpretation – it was written in the present tense indicative of an immediate trust, and; the words, "subject [to] old account being cleared" appeared at the end of the sentence, suggesting the "account" was not a condition precedent. (For another recent example of a court grappling with a similar issue, but in the very different

context of complex, professionally drawn documentation, see *Mills & Others v Sportsdirect.com Retail Ltd* [2010] EWHC 1072 (Ch).)

The conclusions in *Stablewood* of greater interest and future application concerned the relevance of the trust to the possession order made and the interplay between the different roles occupied by N as a director; (nominee) shareholder; trustee, and the holder of a security.

The Court of Appeal found as a holder of security over the beneficial interest in the shares, N was not a bare nominee shareholder. N was entitled to exercise the voting rights attached to the shares in his own interests as the holder of a security interest (*Musselwhite C H v Musselwhite & Sons Ltd* [1962] Ch 964 applied). In particular, N was able to direct S to seek an order for possession so that the property could be let and the mortgage paid, thereby protecting the principal asset supporting the security interest. As a director, N was not obliged to give effect to Vs' wishes (as the beneficiaries of the trust) in preference to his own interest as the holder of a security interest. In any event, the court held that N's first duty as S's director was to ensure that the company received rent from the property so that it did not default on the mortgage. Finally, the lawful interests of V as beneficiaries (the proper control and management of the property) were the same as N and S's in any event such that there could be no conflict of interest between N's position as the holder of security and his duty as a director and trustee. Accordingly, the Court of Appeal concluded that the lower court had been right to make an immediate possession order.

Trust

The use of company vehicles and trust arrangements continues apace in property acquisition and ownership. The judgment in *Stablewood* provides clear and timely guidance of general relevance as regards the rights of parties who hold nominee and trustee positions as against the rights of beneficiaries, and should form part of any property lawyer's arsenal of cases.

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