

Family Matters

From the Family Team at Tanfield

Welcome to the Autumn edition of Tanfield Chambers' Family Matters. Since our last issue we have finalised the detail of our popular CPD Crammer Day, details of which you will find on the back of this newsletter. Please book soon to avoid disappointment!

This issue takes on a financial flavour, with articles covering Bankruptcy in Ancillary Relief and Michael Bailey's thoughts on the implications of Stack v Dowden, both tasters of topics which will be covered on the Crammer day.

On a different topic, Laura Scott provides a helpful précis of the changes to the law surrounding non-molestation orders post 1 July 2007.

As ever, we welcome your feedback and suggestions on this publication and our events programme, and hope you find Family Matters an interesting read.

Dick Pears

Autumn 2007

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Bankruptcy and Ancillary Relief

Three recent cases have significant implications for the former spouse or civil partner of a bankrupt. In Hill and Bangham v Haines [2007] EWHC 1012 (Ch) HHJ Pelling (sitting as a HCJ) held that a property transfer order made in Ancillary Relief (AR) was potentially susceptible to an attack by the trustee in bankruptcy (TiB) of the transferor as a transfer at an undervalue. This was so whether the order was made by consent or after a contested hearing.

S339 Insolvency Act 1986 (IA) means that a trustee can apply to set aside a transaction whereby one spouse transfers his interest in matrimonial property to the other spouse in the absence of adequate consideration. The dismissal of W's other claims could not amount to the necessary consideration since an application for AR was not a cause of action and could not be resolved by binding contract (see Xydias [1999] 2 All ER 386).

The provisions of s339 provide that a transaction whereby the value of the consideration given 'in money or money's worth, is significantly less than the value, in money or money's worth' of the property transferred that is a transaction at an undervalue and vulnerable to being set aside, notwithstanding the fact that such transaction is authorised by the court pursuant to the MCA 1973.

The ratio expressly excludes cases where each party has been ordered to transfer assets to the other of substantially equivalent values, but the logic of the decision suggests that any exchange of property pursuant to the MCA is simply not good consideration.

Then came Segal v Pasram and Pasram [2007] Ch D (R Knowles QC) (7 Jun 07) where the court relied on Hill and Stack v Dowden [2005] EWCA Civ 857, [2006] 1 FLR 254 to

dispose of the attempt to circumvent the TiB's entitlement by way of a deed whereby W purported to give up all her claims for AR along with £1,000 to H in consideration for H's share of the matrimonial property being transferred to her. In accordance with Hill and Xydhias, this was not consideration pursuant to a legally binding contract, even though it was executed by deed.

In Avis v Turner and Anor [2007] EWCA Civ 748 the Court of Appeal held that a TiB could apply for an order for sale in a case where jointly owned property was retained for the use of W. The property was held on a trust for sale, sale being postponed until the usual trigger events. The Court held that since it would have had jurisdiction to entertain an application from H pursuant to s14 ToLATA 1996 notwithstanding the absence of a trigger event, the TiB inherited the right to make a similar application along with H's estate. However whereas any application made by the husband for an order for sale might have been very likely to have been refused, the TiB is assisted by s335A IA 1986 which provides that the interests of the bankrupt's creditors outweigh all other considerations unless the circumstances of the case are exceptional. This places the spouse remaining in the FMH in a vulnerable position as it will be very difficult to show exceptional circumstances. The W in this case was unable to rely on s283A of the IA which was enacted by the Enterprise Act 2002 and which provides that at the end of the period of three years beginning with the date of bankruptcy, any interest of the bankrupt in a dwelling house which, at the date of bankruptcy was the sole or principal residence of the bankrupt's spouse ceases to be comprised in the bankrupt's estate. That provision is subject to transitional provisions and will assist spouses in cases where the bankruptcy post dates 1 April 2004. However, there are likely to still be live cases where an estate vested in the TiB prior to that date, and increasingly where the TiB makes an application for sale within the three year period.

If five years elapses prior to the presentation of a successful divorce petition the wife will be safe from applications to set aside for transfer at an undervalue. Similarly, if a W is not met with an application from a TiB for an order for sale within three years after her ex spouses' bankruptcy she will be safe from an application of that sort. But undoubtedly both cases have serious potential implications for the spouse remaining in the

FMH, and demonstrate that there are risks for that spouse (usually the wife) whether the home is transferred outright to her, or held in joint names pending triggers, and whether the AR order is made by consent or not.

Lucy Reed

Call 2002

Lucy has recently written on North v North - Revisiting Periodical Payments.

Stack v Dowden – The Death of Resulting Trusts?

This case was at last an opportunity for the House of Lords to clarify the correct interpretation of the law in ToLATA cases. Were resulting trusts dealt a decisive and fatal blow? Possibly and possibly not seems to be the answer. Or perhaps the answer is to be found in expected legislation that will put heterosexual couples on a par with the rest if “financial hardship” can be shown.

In Stack v Dowden [2005] EWCA (Civ) 857 each judgment appears almost as a personal statement from each of the Lords. Lord Hope's “golden thread” emerges as a joint property purchase claim that fails due to unjust enrichment based on bad faith.

Lord Walker's gravamen is as to whether the court can find a real bargain exists between the parties in the absence of express intention by looking at whether there is sufficient evidence to infer or impute a bargain. Academic bias, unjust enrichment proprietary estoppel, resulting or constructive trust may be significant but only in the context of looking at the primary issue of direct and indirect payments to the acquisition of trust property. Resulting trusts are applicable to those in an “emotional and commercial relationship” with a quasi contractual flavour, but in a domestic relationship there will be a heavy evidential burden to establish an imputed intention to keep a balance sheet of all expenditure. A wide view should be taken as to what contributions are referable to a property's acquisition.

Baroness Hale gives the lead judgement: an

express declaration of trust is conclusive unless vitiated by fraud or mistake and a severance of a joint tenancy results in a tenancy at common in equal shares. The post 1998 TR1 with its three tick box options (JT, TiC in equal shares, and some other trusts), if complied with, will mean the problem will “eventually disappear”. She suggests a further tick box : not prepared to commit at this present time as to size of beneficial interests. There is a strong onus on a person seeking to show that the beneficial interests are otherwise than the way the legal interest is held. She disapproves the resulting trust approach in a number of cases and gives a checklist of factors to divining true intention that are not intended as an exhaustive list. Joint names was equally consistent with having some interest in a property: the issue was the size of that interest in the light of the parties conduct.

Lord Neuberger sets out the case for retention of the resulting trust in the absence of express declaration. He suggests a resulting trust plus a constructive trust or a resulting trust modified by a constructive trust is the solution: “The property may be bought in joint names for reasons that cast no light on the parties’ intentions with regard to beneficial ownership. It may be the solicitor’s decision or assumption, the lender’s preference for the security of two borrowers, or the happenstance of how the initial contact with the solicitor was made”.

Lord Neuberger recognises that parties in a loving relationship are not often anxious to discuss how they should divide the beneficial interests in the home they are about to buy. If they are happy with an equal share of beneficial interest at the outset they might be expected to say so.

The conclusion to be drawn from this case is that, even with an express declaration of trust, the facts surrounding such an instrument must be subject to evidential scrutiny along with the course of financial dealing or conduct between the parties, in order to ascertain any change in the parties’ intentions over what could be a considerable period of time. It is perhaps no surprise that the Government looks set now to introduce legislation that would curtail such excessive litigation.

Michael Bailey

Call 1986

Michael is talking at The Crammer Day on 12th Oct.

New FLA 1996 Pt IV Provisions

The new provisions for non-molestation orders finally came into force on 1st July 2007. Section 1 of the Domestic Violence, Crime and Victims Act 2004 creates a new s42A in the FLA 1996, making the breach of a non-molestation order a criminal offence.

Although the new provisions only came in on 1st July, they apply to non-molestation orders granted prior to that date where the order remains in force without a continuing power of arrest.

For non-molestation applications made after 1st July, it is no longer possible to achieve a compromise with undertakings instead of a full order being made, and powers of arrest cannot be attached to any non-molestation order. The maximum sentence for breach of a non-molestation order is now 5 years imprisonment, making it an either-way offence allowing for trial by jury.

Enforcement can still be brought in the civil courts, and the use of warrants of arrest to bring defendants to court is likely to become more common. The courts also now have the power to grant warrants of arrest for breaches of undertaking (which are still possible instead of occupation orders). A defendant cannot be convicted of both the criminal offence of breaching an order and contempt of court, but there is no bar on parallel proceedings.

The category of associated persons has been extended to include those who “have or have had an intimate personal relationship with each other which is or was of significant duration”, and minors can now be subject to non-molestation orders.

The new orders have much in common with ASBOs and a number of ASBO authorities will apply in relation to issues such as the standard of proof and the drafting of orders.

Laura Scott

Call 2001

Laura is talking at The Crammer Day on 12th Oct.

**FAMILY TEAM
AUTUMN DIARY DATES**

20 September

Timothy Shuttleworth

**Contact with Older Vulnerable
Persons**

The evening seminar will attract 1 hour CPD points and will run from 6.00pm to 7.30pm at Tanfield Chambers and will be followed by refreshments.

12 October

CPD Crammer Day

including:

Olivia Murphy

**Recent Developments and
Current Issues in Ancillary
Relief**

Philip Dixon

**The Impact of Insolvency and
Confiscation Orders on
Ancillary Relief Applications**

Laura Scott

Child Law Update

Michael Bailey

**Stack v Dowden – The Death of
Resulting Trusts?**

This event will be held at Tanfield Chambers, will run from 9.30-5.00pm and will attract 5 1/2 hours CPD points.

If you are interested in attending either event please contact Susan Yacoub or Debbie Haigh on 0207 421 5300 or at syacoub@tanfieldchambers.co.uk.

Places are limited.

**TANFIELD'S
FAMILY TEAM**

Peter Hughes QC 1971

Gavin Merrylees 1964

Timothy Shuttleworth 1971

Philip Conrath 1972

Dick Pears 1975

Kerstin Boyd 1979

William Holland 1982

Sebastian Reid 1982

Philip Dixon 1986

David Sharp 1986

Michael Bailey 1986

John Buck 1987

Sarah Dines 1988

Gerald Wilson 1989

Catriona Maclaren 1993

Robin Powell 1993

Charlotte Jewell 1999

Laura Scott 2001

Olivia Murphy 2001

Lucy Reed 2002

Mandy Short 2003

Darren Watts 2005

Katherine Harmer 2005

Want to find the right skills and experience to suit your case?

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or speak to the Family Team Clerk Richard Preston for more information.

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