

Disclaimer of a head-lease

Section 178 of the Insolvency Act 1986 (“the Act”) allows a liquidator to disclaim onerous property. Section 179 makes special provision for the disclaimer of leaseholds. Difficulties can arise where the premises subject to the lease have been sublet to a number of subtenants. The effect of the disclaimer is that the head-lessee (“L”) drops out of the picture with the result that the freeholder (“F”) and the subtenants (“A”, “B”, “C” etc.) are not bound by privity of contract or estate. Consequently neither F nor A, B and C can enforce the covenants in their leases.

Section 181 of the Act allows “any person who claims an interest in the disclaimed property” to apply for an order vesting that property in him. Section 182 makes special rules in relation to sublessees (or mortgagees). The drafting of section 182 (which is the almost un-amended descendant of section 55 of the Bankruptcy Act 1883) leaves much to be desired. Subsection (1) provides, broadly speaking, that a vesting order can only

be made on terms that the underlessee is subject to the same liabilities and obligations as the company was subject to. This may be unattractive to A, B and C, because they may suddenly find themselves liable for the rent and disrepair in relation to the whole building. Subsection (2) appears designed to solve this problem, but its wording is confusing – “For the purposes of an order under section 181 relating to only part of any property comprised in a lease, the requirements of subsection (1) apply as if the lease comprised only the property to which the order relates”. How is the Court to decide how to apportion L’s liabilities amongst A, B and C? In relation to the repair of common parts, for example, this may be far from obvious.

The apparently simple solution which was attempted in a case in which I was recently involved was for F to seek a vesting order subject to the various subleases. The difficulty, however, was that cases such as *In re AE Realisations Ltd [1988] 1 WLR 200* and *Re ITM Corporation Ltd [1997] BCC 554* have, based on authorities under the old Bankruptcy Acts, interpreted subsections (3) and (4) of section 182 of the Act in such a way that there is a hierarchy of possible applicants for a vesting order – first A, B and C, next a guarantor of L and finally F. The sting in the tail is that the person on the next rung of the hierarchy can only take a vesting order if the person on the previous rung has refused one and refusal automatically means that that person’s interest in the disclaimed property is terminated. Consequently, there was no jurisdiction for the Court to make a vesting order in favour of F which was also subject to the subleases. In theory, either the sublessees had to take vesting orders themselves, or their tenancies came to an end.

Nevertheless, Patten J was persuaded, in view of the consent of all parties before him, to make the order sought. The parties protected themselves as far as possible by giving cross-undertakings not to attempt to set aside the order and not to sell their interests without telling each other. In most cases, statutory security of tenure

would have given additional protection (see *Re Vedmay Ltd [1994] 1 BCLC 676*). Whilst this practical approach saved the considerable costs of a trial, the case illustrates the caution which is required in dealing with disclaimed property. ▲
Andrew Twigger

SEMINARS

Since the last newsletter 3 Stone Buildings has been continuing its popular series of seminars and lectures. In May chambers took its show on the road, with the pensions group presenting an in-house seminar to specialist pensions firm Sackers on “Pensions and Human Rights”. Sarah Asplin, Geoffrey Topham and Sarah Lacey all gave talks on the implications for pension schemes, employers and pensioners of the Human Rights Act 1998, along with updates on the most recent cases on the Act including Sarah Asplin’s recent Court of Appeal case *Aston Cantlow PCC -v- Wallbank*. The topic was obviously highly topical and a full turn out gave rise to lively debate after the talks on such matters as human rights and pension sharing, public sector pension schemes and equalisation issues. Possibly predictably, as many questions were raised as were answered. The evening was so successful that chambers is looking to increase the number of in-house seminars we present over the next year.

In June the show was put on a little closer to home, with the latest in chambers’ series of seminars on the perennial favourite - “Loss of a Chance”. Teresa Rosen Peacocke, Gilead Cooper and Robert Hantusch were the speakers,

giving an introduction to the subject, an update on recent cases and a look at the Commonwealth jurisdictions’ approach to this tricky subject. The topic was clearly close to a lot of people’s hearts as the response to the seminar was so large that we had to forgo our usual venue of our own conference room, and crossed over to the Territorial Army’s premises at 10 Stone Buildings for the evening. The next chambers seminar is planned for October, from the realm of Trusts and Property, topics to be announced. And as always, CPD points will be available - as if such an incentive was necessary to tempt one to come. ▲

Fenner Moeran



ongoing litigation

In the last 3 months, there has been some exciting litigation undertaken in Chambers.

- Geoffrey Topham appeared for the National Grid pensioners in the House of Lords in *International Power plc v. Healy*
- Teresa Rosen Peacocke has just completed a lengthy appearance in the House of Lords in *Royal Bank of Scotland v. Etridge*: it is unlikely that the law of undue influence will emerge unscathed
- Geoffrey Vos Q.C. has been acting for the estate of Francis Bacon on Marlborough Gallery’s unsuccessful attempt to strike out the claim for breach of fiduciary duty and undue influence



You had better ask a lawyer

When considering the constraints upon the courts in deciding cases involving tax avoidance schemes, many would recall Lord Tomlin’s statement in the *Duke of Westminster* case that “...every man is entitled if he can to order his affairs so that the tax attaching...is less than it otherwise would be.” Recently, however, cases such as *Ramsay* and *Furniss v Dawson* have seemingly placed restraints on this principle, in particular in relation to sophisticated and increasingly artificial arrangements to avoid tax. These authorities must now be reconsidered in light of the recent decision of the House of Lords in *MacNiven (Inspector of Taxes) v Westmoreland Investments [2001] STC 237*. As Lord Hoffman said in this case: “In the first flush of victory after *Ramsay*...

and *Furniss (Inspector of Taxes) v Dawson*, there was a tendency on the part of the Revenue to treat Lord Brightman’s words as if they were a broad spectrum antibiotic which killed off all tax avoidance schemes, whatever the tax and whatever the relevant statutory provisions”. Lord Hoffman in his judgment, however, firmly restricts the ambit of the *Ramsay* decision and thereby gives encouragement to the bacteria. In particular, he reaffirms the earlier decision of the House of Lords in *IRC v McGuckian [1997] STC 908* that the *Ramsay* principle was nothing more than a principle of statutory construction. Lord Hoffman limits the *Ramsay* approach to the construction of commercial concepts in tax legislation, saying “The innovation in *Ramsay* was to give the statutory concepts of ‘disposal’ and ‘loss’ a commercial meaning. The new principle of construction was a recognition

chambers lectures and seminars

As Fenner Moeran explains in his article inside this newsletter our programme of seminars continues to gain in popularity. Edward Bannister Q.C. chaired the June professional negligence seminar, which was fascinating and exceptionally well attended.

Geoffrey Vos Q.C.’s February lecture to the Northern Chancery Bar entitled “Linking chains of causation: an examination of new approaches to causation in equity and common law” is being published in the Cambridge Law Journal in July.

and finally

There have been one or two hiccups in finalising our website at www.3stonebuildings.com, but we now expect to have an all singing all dancing production up and running by the end of the Summer term.

We wish all our readers a very enjoyable Summer and an excellent vacation.

that the statutory language was intended to refer to commercial concepts, so that in the case of a concept such as ‘disposal’, the court was required to take a view of the facts which transcended the juristic individuality of the various parts of a pre-planned series of transactions..... It is thus the statute itself which applies the test of ordinary business. And for present purposes the significant feature of applying a test of ordinary business is that it may require an aggregation of transactions which transcends their juristic individuality”. Lord Hoffman upheld the decision in *Duke of Westminster* and reconciled it with *Ramsay*, making it clear that *Ramsay* only applied to the construction of commercial concepts. He went on, however, to emphasise that there are many terms in tax legislation that are purely legal concepts and therefore not susceptible to the *Ramsay* approach. He further indicated how a purely legal concept could be identified: “Taxing statutes often refer to purely legal concepts. They use expressions of which a commercial man, asked what they meant, would say ‘You had better ask a lawyer’”. Lord Hoffman also repeated what he had said in *Norgelm Ltd v Reeds Rains Prudential Ltd [1999] 2 AC 1, 13-14*: “The question is simply whether upon its true construction, the statute applies to the transaction. Tax avoidance schemes

are perhaps the best example. They either work (*Inland Revenue Commissioners v Duke of Westminster [1936] AC 1*) or they do not (*Furniss v Dawson [1984] AC 474*). If they do not work, the reason... is simply that upon the true construction of the statute, the transaction which was designed to avoid the charge to tax actually comes within it. It is not that the statute has a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes”. Undoubtedly this judgment is a great encouragement to all those currently devising antibiotic resistant strains of tax mitigation schemes. ▲

Andrew Child





Prospective Costs Orders in Trust Proceedings

On 1 May 2001 a helpful Practice Statement was issued by direction of Sir Andrew Morritt V-C in relation to applications by trustees, beneficiaries, or other persons concerned for prospective costs orders in proceedings regarding the administration of a trust brought pursuant to CPR Sch 1, Ord 85, including questions of construction, questions relating



to the exercise of powers conferred by the trust, or questions as to the validity of the trust.

Where trustees have power to agree to pay the costs of some other party to such an application and such a power is properly exercised, CPR r 48.3 is applicable so that where the court assesses costs they are to be presumed to be costs which have been reasonably incurred and reasonable in amount. An order is not required in such a case and the trustees are entitled to recover out of the trust fund any costs which they pay pursuant to the agreement made in the exercise of such power. However if the trustees do not have or decide not to exercise a power to make such an agreement, the trustees or the party concerned may apply to the court *at any stage of proceedings* for an order, known as a “prospective costs order” that the costs of any party to the application (including the costs of the trustees) shall be paid out of the fund.

It is made clear that on an application for a prospective costs order the court may (a) in the case of the trustees’ costs, authorise the trustees to raise and meet such costs out of the fund; (b) in the case of the costs of any other party, authorise or direct the trustees to pay such costs (or any part of them, or the costs incurred up to a particular time) out of the trust fund to be assessed, if not agreed by the trustees, on the indemnity basis or, if the court directs, on the standard basis, and to make payments from time to time on account of such costs. The court will always consider whether it is possible to deal with the application on paper without a hearing; in an ordinary case it would expect to be able to do so. If the trustees consider that a hearing is needed for any reason they should say so and explain why in their evidence. If any other party to the administration proceedings or a party interested in the trust fund considers that a hearing is necessary, for example because

they wish to oppose the making of the order, they should also explain this in their evidence or in a letter to the court. Evidence in support of an application for a prospective costs order should be given by witness statement. The trustees and the applicant (if different) must ensure full disclosure of relevant matters to show that the case is a suitable one for a prospective costs order. If the court is minded to refuse the application on paper, the parties will be notified and given the opportunity within a stated time to ask for a hearing. The Practice Statement is cited at [2001] 1 WLR 1082 and includes a model form prospective costs order designed for use in straightforward cases where a question needs to be determined which has arisen in the administration of the trust, whether the claimants are the trustees or a beneficiary. In more complicated cases, such as hostile proceedings, the form may be adapted. ▲
Carlos Pimentel

THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS ACT) 1975:- Recent Developments

Decisions under the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”) rarely come to the attention of practitioners as reported cases. As His Honour Judge Cooke, sitting as a judge of the High Court, said:

“From the point of view of a gatherer of precedents the 1975 Act has had its difficulties. The jurisdiction is now comparatively rarely exercised by a judge in open court but more usually by masters and district judges in chambers where decisions are not reported (and cannot be unless leave is given). Furthermore, the jurisdiction has since 1975 been exercised in two Divisions of the High Court whose approaches do sometimes differ.”

(Re Abram (deceased) [1996] 2 FLR 379) Nonetheless, our attention has recently been turned to a claim by adult children and the possibility of a claim by a parent maintained by a child. In *Espinosa v Bourke [1999] 1 FLR 747 (CA)*, the Court clarified the position of adult children claiming under section 1(1)(c) as “a child of the deceased”. The deceased died aged 87 leaving his estate of £196,000 to his grandson (“G”) and making no provision for his daughter



(“A”), the mother of G. In 1987, A’s mother made a will leaving everything to the deceased who said that, if the will was not changed, he would ensure her estate passed to A. At the time of the hearing A was aged 55 and G was 19 and studying at university. Partly as a result of A’s chequered relationship history (5 marriages, the last to an unemployed Spanish fisherman some 20 years younger than herself), G had lived with his grandparents since the age of 8. Shortly after the death of the grandmother when G was 12, the deceased and G moved into A’s house and she gave up work to look after them. The deceased discharged A’s mortgage, paid for home improvements and provided £350 per month maintenance. The deceased had made a will in favour of A in 1988 but, in 1994, some nine months before his death, he executed his last will in favour of G. Clause 5 of the will read:

“I have made no provision for my daughter because she has, during my lifetime, been adequately provided for and she has also shown, in my opinion, a degree of irresponsibility”.

At first instance, the judge found that the deceased owed a moral obligation to A, arising from the promise that she would inherit her mother’s estate and from her care of her father for the last seven years of his life, but held that this obligation had been discharged. On appeal, the Court held that, although the conduct obligation had been discharged, the “promise” obligation had not. Butler-Sloss LJ stated that the Court must have regard to the matters set out in section 3(1)(a) – (g) but that the starting point was the applicant’s financial position. The lower court had made no findings as to A’s financial needs and resources although evidence had been put before it. The Court



of Appeal held that a moral obligation under s.3(1)(d) was not a threshold requirement, that too much emphasis had been placed on the ‘moral’ rather than the ‘promise’ obligation and that an adult child was in no different position from any other applicant: “If the applicant is of working age, with a job or capable of obtaining a job which would be available, the factors in favour of his claim for financial provision may not be of much weight in the scales”. A lump sum of £60,000 was awarded to A which would enable her to pay off her business debts of £56,000 and provide a small cushion against other immediate expenses. Unusually, in *Bouette v Rose [2000] 2 WLR 929 (CA)*, Mrs. Bouette (“A”) made a claim under section 1(1)(e) of the 1975 Act as a person “who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased”. The deceased was her daughter (“L”) who had been born with severe mental and physical disabilities due to negligence at birth and had died intestate at the age of 14. The Defendant was L’s father who had left the family shortly after her birth. L’s affairs (which included a £250,000 award of damages)

were managed by the Court of Protection who, in 1985, provided 75% of the purchase price of a bungalow, and, until the date of L’s death, had made regular payments for her care. A first applied for leave to bring a claim out of time before Master Bragge who granted leave and dismissed the Defendant’s strike out application. On appeal, Parker J struck out A’s application and found that A had not been maintained by L immediately before her death. The Court of Appeal reversed this decision holding that there was nothing absurd in the notion of the Court of Protection acting as the conscience of the patient and making provision for those to whom the patient, had they been of full mental capacity, would have felt a moral obligation. In accordance with *Jelley v Illife [1981] Fam 128*, there was no need to find an overt demonstration of an assumption of responsibility as it must have been obvious to the officials of the Court of Protection who took decisions about L’s funds that those funds were to be used in a way that met A’s financial and material needs so as to enable her to look after L throughout L’s lifetime. ▲
Kerry Bornman