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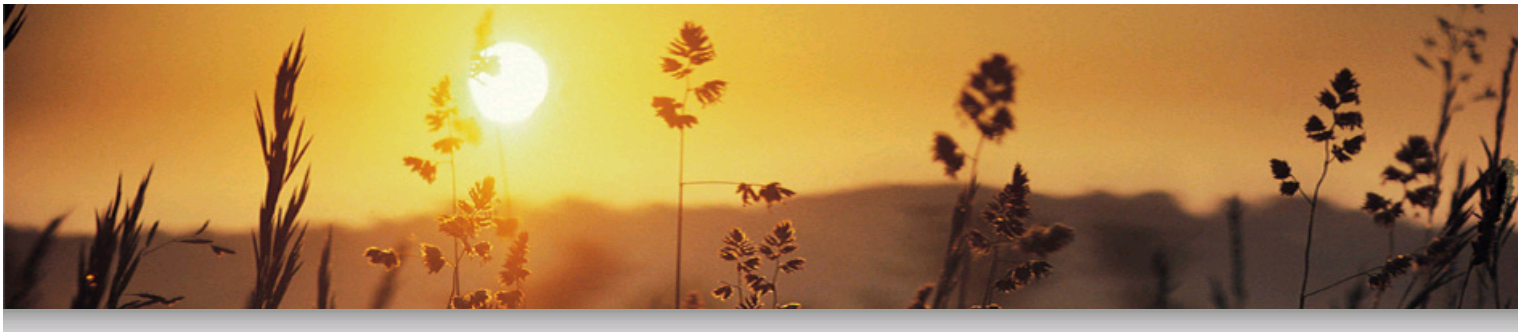

insolvency news

abandon all hope (of an interest in your old home): absentee bankrupts

The recent case of *Quaintance v Tandan* (24 July 2012) will be of interest to insolvency practitioners who are trustees in bankruptcy of individuals who have abandoned a property, normally leaving it in the possession of an ex-partner.

In most bankruptcies the main asset is the bankrupt's interest in his or her home. This will often be an interest in a property which is home for not only the bankrupt but also his or her partner and children. In the case of an unmarried bankrupt, the court has never been able to adjust the strict property rights of the parties to produce a "fair" outcome that recognises and rewards the parties' contribution to the relationship; in particular so far as bringing up any children is concerned. As a result, in the case of unmarried partners who jointly buy a property the courts have had to develop non-statutory principles that achieve some measure of justice. This has traditionally involved a declaration by the court that one party is to be treated as holding all or part of their interest in the property on trust for the other party.

The precise basis of the trust that is imposed has been the subject of much legal debate over the years. In broad terms there were those who favoured an almost mathematical approach whereby the property would be divided in proportion to the parties' financial contributions. By contrast, others thought that the court should be able to take into account a much wider range of factors in order to achieve a fair outcome. The House of Lords in the landmark case of ***Stack v Dowden*** (2007), which was approved and clarified by the Supreme Court in ***Jones v Kernott*** (2011), broadly followed the second approach. From these cases it is now clear that in taking into account all relevant factors the court is attempting to ascertain what the "common intention" of the parties was or, more controversially where the parties never actually considered the issue, what in all fairness it should have been.

An interesting aspect of this new "common intention trust" is that the intention can change over time, so that it may be that although the parties initially intended to own a property in equal shares the evidence suggests that the intention changed. For instance, the fact that one party was solely responsible for the cost of extending the property may suggest that it was the intention of the parties that the relevant party should acquire a greater share of the property at that time. However, what is the position if one of the parties moves out, perhaps even vanishes? Does that mean that the party who leaves should be treated as having abandoned his or her share in the property? If so, the trustee in bankruptcy of such a person could find that there is no longer any interest in the property that can be sold for the benefit of creditors.

Conversely, if the bankrupt is the joint owner who remains in the property, it may be that the whole property will now form part of the bankruptcy estate so that there is substantially more available for creditors. In ***Jones v Kernott***, it was held that the "bare facts of [the relevant partner's] departure from the family home and acquisition of another property are a slender foundation on which to conclude that he had entirely abandoned whatever stake he had in the previously shared property" (Lord Kerr, paragraph 76)". However, in *Quaintance v Tandan*, this is exactly what the judge felt able to infer from a partner's desertion of the family home, albeit in what may be a somewhat extreme case.

In Quaintance, the parties (Q and T) bought a home together in joint names with the intention that they should own it in equal shares. The deposit was funded by T with the balance being funded by a joint mortgage. Approximately 12 weeks after they moved in the relationship broke down and Q disappeared without leaving any contact details for T or the mortgagee. T suffered depression and, as Q provided no further assistance with the payments, she fell into arrears with the mortgage. As a result of this, the property was repossessed and sold by the mortgagee. The mortgagee then paid half of the net proceeds to T who obtained a court order to prevent the mortgagee from paying the other half to Q, who had by then been traced by the mortgagee. When T's initial application was heard, the judge decided that Q's actions suggested that there had been a change in the common intention so that Q must be taken to have abandoned his interest in the property with the result that T should be entitled to retain all of the net proceeds of sale.

Q appealed to the High Court on a number of grounds, but a principal argument was that there was no evidence that there had been any change from the initial common intention that the parties should each have an equal share in the property. Q suggested that the judge had been overly influenced by the fact that he had made no significant financial contribution and there had been no overall consideration of whether or not the outcome was fair. The judge who heard the appeal was singularly unimpressed with these arguments, pointing to the short time that Q had lived in the property and his conduct in leaving without providing any contact details; only expressing a renewed interest in the property when contacted by the mortgagee after the sale.

Although this case has fairly extreme facts, there will surely be others where a party who has abandoned a jointly owned property only resurfaces when there is a suggestion that there may be a pay out. The key question will then be whether the abandoning party's conduct has gone beyond the "slender foundation" that is provided by the "bare facts of … departure and acquisition of another home" (see ***Jones v Kernott***, above). In *Quaintance v Tandan* the line had seemingly been crossed, but this may not be so clear in other cases and where either of the co-owners is bankrupt, it will fall to the trustee in bankruptcy to gather the evidence and consider its significance.

If an interest in a property that would otherwise form part of a bankruptcy estate is held to have been abandoned, that does not necessarily mean that the trustee in bankruptcy is without a remedy since it may still be possible to challenge a transfer of the abandoned interest within the 5 year period prior to the bankruptcy on the basis that this was a transaction at an undervalue (essentially a gift) which the trustee can apply to the court to reverse pursuant to **section 339 Insolvency Act 1986**. There will be few insolvency practitioners, however, who would relish the complexity of having to make such an application unless it was absolutely necessary. By contrast, although so far as we are aware the court has not yet considered this, if a bankrupt co-owner abandons the property after the bankruptcy has commenced this should presumably not affect the interest in the property which will have already passed to the trustee.

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