Trustees in bankruptcy challenge transfers of beneficial ownership (Gendrot v Chadwick and another)

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Restructuring & Insolvency analysis: Graham Sellers, barrister at Atlantic Chambers in Liverpool, discusses his recent case of Gendrot v Chadwick and another, in which the Chancery Division held—in favour of the trustees in bankruptcy (trustees) of a bankrupt—that a transfer of his beneficial ownership or interest in two residential properties to his wife amounted to a transaction at an undervalue, within the meaning of the Insolvency Act 1986 (IA 1986).

Gendrot v Chadwick and another (joint trustees in bankruptcy of Edward Hagan) [2018] EWHC 48 (Ch), [2018] All ER (D) 91 (Jan)

What was the background?

The bankrupt, Mr Hagan, had executed a deed of trust on 10 September 2011 under which he:

• declared that he held on trust for his wife (Mrs Gendrot) absolutely all his interest in three specific named properties, and

• indicated that he would be solely responsible for the payment of the charges registered on the three properties in question, and would keep his wife indemnified in respect thereof

A bankruptcy petition was presented on 22 December 2014 and Mr Hagan was adjudged bankrupt on 17 August 2015.

As regards the deed, the trustees issued proceedings in the County Court asserting that the deed constituted a transaction at an undervalue under IA 1986, s 339; alternatively that the deed constituted a transaction defrauding creditors under IA 1986, s 423. The claim under IA 1986, s 423, was very much a fall-back claim, and the thrust of the trustees' case was pursuant to IA 1986, s 339.

It was common ground that the deed was executed at a 'relevant time' (IA 1986, s 341) in relation to the bankruptcy.

The trustees' claim came on for trial in April 2017 before District Judge Capon sitting in the County Court at Cambridge, and in a careful and clear judgment, the district judge held:

• that there was no consideration given by Mrs Gendrot for the declaration of trust, and if there was any consideration it was substantially less than the financial value of the property transferred to her by Mr Hagan under the deed

• that on the date of the deed, Mr Hagan was insolvent, or alternatively he became insolvent as a consequence of the transfer effected by the deed, and

• that there was no valid reason why the deed should stand, and a restorative order should be made setting aside the deed

The district judge refused permission to appeal, but Mrs Gendrot was successful in persuading Morgan J that limited permission to appeal ought to be granted. Following the trial in the County Court, Mrs Gendrot retained fresh counsel for the appeal who advanced the following arguments and grounds of appeal:

• that the declaration of trust in relation to Mr Hagan's share of the matrimonial home had to be considered separately from the declarations of trust relating to the other two properties, ie that there were in fact three separate transactions, rather than just one (the first ground)

• that considered in that way, the only evidence (which the district judge should have accepted) was that Mr Hagan's equity in the matrimonial home was at most £12,000, and possibly less than that (the second ground)

• that the district judge was wrong to hold that there was no consideration in money or money's worth, and the value of the consideration given by Mrs Gendrot was not significantly less than the value of Mr Hagan's equity in the matrimonial home (the third ground)

• that the district judge failed to exercise his discretion under IA 1986, s 339(2), and should have exercised it in favour of not setting aside the deed as regards the matrimonial home, and (the fourth ground)

• that the district judge should alternatively have deferred making, or stayed, any order for the sale of the matrimonial home (the fifth ground)

As Fancourt J (hearing the substantive appeal) observed at para [12] of his judgment, the first difficulty that Mrs Gendrot faced was that the first, second, fourth and fifth grounds were not advanced at the trial.

The third ground was advanced at trial, though only in relation to the value transferred under the deed in aggregate, rather than by comparison with the value of Mr Hagan's share in the matrimonial home alone.

What did the court decide?

Fancourt J concluded (para [28]) that:

• the district judge came to the right conclusion for the reasons that he had given, and

• the new legal arguments that Mrs Gendrot sought to raise on appeal, even if permitted, would not result in a different outcome

Mrs Gendrot's appeal was accordingly dismissed

What are the practical implications of this case?

The main live issues at the trial in the County Court were:

• whether Mrs Gendrot had given consideration for the transfer from Mr Hagan, the value of which (in money or money's worth) was not significantly less than the value transferred to her, and

• whether, at the date of the deed, or as a result of the transaction, Mr Hagan was insolvent

On appeal, there was, in the end, no challenge to the district judge's finding that Mr Hagan was insolvent on the relevant date.

From a pure insolvency perspective, the knotty issue arose as to what consideration, if any, Mrs Gendrot had actually supplied. On the particular facts, Mrs Gendrot was contemplating seeking a decree of judicial separation, rather than a decree of divorce. Fancourt J held that the district judge had been right to find that no consideration was given by Mrs Gendrot (para [20]).

Since the decision of HH Judge Raynor QC in *Papanicola v Fagan* [2008] EWHC 3348 (Ch), [2009] BPIR 320 (in which case it was held that the wife had in fact given valuable consideration by her forbearance from petitioning for divorce and prosecuting her valid claim for a property adjustment order), the thorny issue of 'consideration by forbearance' has really not been easy, but this decision of Fancourt J now provides some highly welcome clarification for insolvency practitioners (IPs) in this potentially difficult and awkward area.

Key points

From an IP's perspective, the following key points emerge:

• No consideration in money or money's worth was given by Mrs Gendrot for the transfer. Mr Hagan retained the mortgage liability and Mrs Gendrot assumed none. Mrs Gendrot made no enforceable promise in the deed or in any collateral agreement at that time. The consideration must arise as part of the transaction. Mrs Gendrot took on no liability or obligation, and she made no agreement to desist from presenting a judicial separation petition in consideration of the transfer effected by the deed (para [16]).

• Mrs Gendrot sought to argue that there was valuable consideration moving from her, in that Mr Hagan did, in fact, obtain some reassurance that he could continue to see Mrs Gendrot and their son on regular occasions. Although the hope and expectation that this might happen could have been seen by Mr Hagan as being worth something, it was of no value in law, because no right to it was conferred. There was no evidence that Mrs Gendrot had entered into a binding agreement to submit to future access, or not to pursue her rights for a judicial settlement of the matrimonial difficulties (para [17]). As a matter of law, giving up a right to pursue a claim can be valuable consideration but there was no valuable consideration unless the right is given up in an enforceable way, as distinct from the giving of an unenforceable assurance given, or the right in question simply not being exercised subsequently (para [18]).

• There was no evidence of any binding agreement, oral or written, or of even any request from Mr Hagan that in return Mrs Gendrot would not exercise her rights if he executed the deed. Mr Hagan merely hoped that in return for his generosity, Mrs Gendrot would allow him to continue to have access. Mrs Gendrot's evidence at trial was that she was going to pursue the petition for judicial separation. She had not bound herself to accept twice-weekly access to her son, or weekly access to herself. Whether or not Mr Hagan enjoyed those advantages depended entirely on her will and actions after the deed was executed (para [19]).

From a litigator's perspective, there are at least three key points:

• Deciding which particular issues to run before a court at first instance always merits very careful consideration but the decision of Fancourt J in this case serves as a timely and robust reminder that new arguments will not be permitted on appeal if they were not deployed in the lower court, and if their being deployed might have caused the respondent to conduct its case differently as regards the evidence adduced, or otherwise (see *Jones v MBNA International Bank* [2000] Lexis Citation 3292, at paras [38] and [52], and *Crane v Sky In-Home Ltd* [2008] EWCA Civ 978 at para [21]). A party seeking to advance a different case on appeal bears a particularly heavy burden in terms of demonstrating that the case would not have been conducted in a materially different way in terms of the evidence and/or cross-examination.

• The case emphasises that the appellate courts impose restrictions upon the taking of new points on appeal, and where a party has successfully contested a case advanced on one basis, it should not be expected to face—on appeal—a new case advanced on a different basis. In general, the appellate courts expect and demand that each party advance their whole case at the trial. In the interests of fairness to the other party, the appeal courts are slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time on appeal.

• Practitioners should also remember the correct approach when permission to appeal has already been granted on grounds that were not raised below. As Lloyd LJ observed in *Re Southill Finance Ltd (In Liquidation); Mullarkey v Broad* [2009] EWCA Civ 2, [2009] All ER (D) 143 (Jan), the granting of leave to appeal simply shows that there were considered to be reasonable prospects of success, but it did not amount to a grant of leave to rely on the new point, but merely gave the appellant the right to advance the points to be decided as a full hearing.

Graham Sellers appeared for the trustees in this case.

Interviewed by Tracey Clarkson-Donnelly.

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