

DEBT, IMPROVIDENCE & THE MATRIMONIAL HOME: A CASE STUDY

1. Mr & Mrs Smith were married in 1990. In 1992 they jointly purchased their home, Greenacre, which is situated in the leafy and well-to-do suburb of Greenland. They have two children.
2. The marriage broke down and Mr Smith left the property in 1993. Divorce proceedings were commenced, and a consent order was made in 1994, the relevant parts of which state:

“1. The trust for sale in respect of the [the Property] shall be varied forthwith to provide that Mr & Mrs Smith shall hold the net proceeds of sale upon trust for themselves as tenants in common so that Mrs Smith is entitled to two thirds, and Mr Smith to one third.

“2. The sale of [the Property] pursuant to the trust for sale shall be postponed until the happening of one of the following events:

(a) the re-marriage of Mrs Smith;
(b) Mrs Smith’s cohabitation with another;
(c) Mrs Smith serving written notice on Mr Smith that she requires [the Property] to be sold
(d) the death of Mrs Smith.

“3. Until such time as [the Property] is sold Mrs Smith shall have exclusive rights of occupation but Mrs Smith shall be responsible for the discharge of the mortgage repayments from the date hereof and shall be responsible for the ordinary day to day maintenance and repairs of [the Property].”

Since then Mrs Smith has occupied Greenacre and she has continued to pay the mortgage instalments from her own funds.
3. In 1995 a bankruptcy order was made against Mr Smith on a petition presented by HMCR as a result of his failure to file returns for his small business. At the time of the bankruptcy there was little equity in Greenacre and the OR therefore decided not to summon a meeting of creditors for the purpose of appointing a trustee in bankruptcy, and had himself become the trustee in bankruptcy pursuant to the provisions of s293(2) of the Insolvency Act 1986.
4. No action was taken in respect of Greenacre by the OR, but in April 2006 an outside trustee was appointed by the Secretary of State on the initiative of the PRU.
5. Without further delay the trustee applied to the relevant bankruptcy Court in May 2006 for an order for the sale of Greenacre, that Mrs Smith and her children give vacant possession and for further or other relief, including, if necessary, a charge over the property under s313 of the IA’86.

The proceedings and evidence before the District Judge

6. The application of the trustee was supported by evidence demonstrating that Greenacre had been valued at approximately £225,000, and the outstanding mortgage was approximately £80,000, leaving a substantial equity of £145,000. The bankruptcy debts and expenses total £60,000.
7. Mrs Smith opposed the making of a possession order on the following grounds:
 - (a) that the trustee was bound by the terms of the 1997 consent order, so that Mrs Smith was entitled to reside in Greenacre until the occurrence of one of the events specified in that order (as she puts it, “Over my dead body.”);
 - (b) that the OR’s delay of some 11 years rendered the proceedings a breach of Mrs Smith’s rights under article 6 of the ECHR to a fair and public hearing within a reasonable time. Had the property been sold in 1995 Mrs Smith could have afforded to purchase a similar home,

whereas by reason of the upward movement of the housing market in recent years a similar home is out of her reach;

- (c) that Mrs Smith's physical and mental health amounts to exceptional circumstances within the meaning of section 335A of the Act. Mrs Smith has a detailed medical report demonstrating that she has an emotionally unstable personality, suffered from alcohol dependency and had taken a number of overdoses. She has a tendency to act impulsively without consideration of the consequences. She conforms to the World Health Organisation International Classification of Diseases (10th Revision) – emotionally unstable personality disorder, borderline type F60.31. Her inability to cope with stress and trauma generally are quite dissimilar to an "ordinary person". An order for the sale of Greenacre was likely to result in a relapse, with a potential threat to her physical health and safety;
- (d) in any event, that any sale should be postponed until the children have finished school. Mr & Mrs Smith purchased Greenacre specifically because it was within the catchment area of a newly-built flagship secondary school ("RGS Greenland"). If the family move they will necessarily have to move "out of catchment" and it is likely that the only choice of school will be one of several undersubscribed "bog standard" comprehensives on the outskirts of the city;
- (e) furthermore, that a narrow construction of "exceptional circumstances" within the meaning of section 335A is an infringement of Mrs Smith's/the children's rights under article 8 of the ECHR to a private & family life;
- (f) that even prior to Mr & Mrs Smith's break-up, Mrs Smith had herself paid all the mortgage instalments (capital & interest) herself. It appears that she paid the mortgage instalments directly from her own bank account into which she paid her salary. Mrs Smith seeks an equitable account for the entirety of her mortgage repayments;
- (g) that of the mortgage debt of £80,000, £20,000 of the mortgage debt related to additional borrowing in 1993 to support Mr Smith's business;
- (h) that in 1996 Mr Smith paid £40,000 for the construction of a swimming pool at Greenacre for the benefit of Mrs Smith;

What is the appropriate order? Would it make any difference if the trustee's share of the equity in Greenacre was more than sufficient to pay the bankruptcy debts, expenses & interest thereon, including future interest up to the end of the children's schooling?

Materials for consideration (for guidance only)

The interrelation of matrimonial orders & bankruptcy

Burton v Burton [1986] 2 FLR 419

Re Flint [1993] 1 FLR 763

Beer v Higham [1997] BPIR 349

Harper v O'Reilly and Harper [1997] 2 FLR 816

Mountney v Treharne [2002] EWCA Civ 1174, [2002] 3 WLR 1760

Avis v (1) Turner (2) Avis 15/11/06 HHJ Pelling QC (Ch D)

re Sharpe [1980] 1 WLR 219

Exceptional circumstances

re Bailey [1977] 1 WLR 278 at 284

re Holliday [1981] Ch 405

re Citro [1991] Ch 142

Judd v Brown [1998] 2 FLR 360

Re Raval [1998] 2 FLR 718

Cloughton v Charalambous [1999] 1 FLR 740

Re Bremner [1999] 1 FLR 912

Hosking v Michaelides [2004] All ER 147, [2006] BPIR 1192 (Ch D)

Dean v Stout [2005] BPIR 1113

Awoyemi v Bowell [2006] BPIR 1

Re Karia [2006] BPIR 1226

Martin-Sklan v White [2007] BPIR 76

Article 8

Jackson v Bell [2001] EWCA Civ 387

Barca v Mears [2004] EWHC 2170 (Ch D), [2005] BPIR 15

Hosking v Michaelides [2004] All ER 147, [2006] BPIR 1192 (Ch D)

Harrow LBC v Qazi [2003] UKHL 43, [2004] 1 AC 983

Price v Leeds City Council [2005] EWCA Civ 289, [2005] 1 WLR 1825, [2006] UKHL 10, [2006] 2 WLR 570

Donohoe v Ingram [2006] BPIR 417

Nicholls v Nicholls [2006] EWHC 1255, [2006] BPIR 1243 (Ch D)

Foyle v Turner [2007] BPIR 43

Article 6

Holtham v Kelmanson [2006] EWHC 2588 (Ch)

Foyle v Turner [2007] BPIR 43

Equitable accounting

Leake v Bruzzi [1974] 2 All ER 1196

Re Pittertou [1985] 1 All ER 285

re Gorman [1990] 1 WLR 616

Re Pavlou [1993] 1 WLR 1046

Byford v Butler [2003] EWHC 1267 (Ch)

Holtham v Kelmanson [2006] EWHC 2588 (Ch)

Wilcox v Tait [2006] EWCA Civ 1867

Clarke v Harlowe HHJ Behrens 12/8/2005 (Ch D)

**Matthew Wales, Guildhall Chambers
District Judge Brian Watson**

12 April 2007