

Avis v Turner [2007] EWCA Civ 748

This interesting case relates to an application brought under s.14 of the Trusts of Land and Appointment of Trustees Act 1996 (“TOLATA”) by a trustee in bankruptcy. When such an application is made, s.15(4) of TOLATA provides that instead of taking into account the factors outlined in s.15, the court must instead consider s.335A of the Insolvency Act 1986.

Under s.335A(3), where the application is made more than one year after the bankruptcy, the interests of the bankrupt’s creditors will outweigh all other considerations, save in exceptional circumstances. In this case, the application was made almost 20 years after the bankruptcy.

Facts

Mr and Mrs Avis were the joint registered proprietors of a property in Merseyside. Following their divorce in 1985, in accordance with an order of the court, Mr Avis left the property and Mrs Avis continued to live there alone. The court order provided that a sale of the property was to be postponed until Mrs Avis either remarried, cohabited, died, or served notice on Mr Avis that she wished to sell the property. The order also specified that (by consent), the beneficial interests in the proceeds of sale were to be 2/3 to Mrs Avis and 1/3 to Mr Avis, and that Mrs Avis was to be credited with all subsequent mortgage payments.

Soon after their divorce, Mr Avis was made bankrupt. Many years later, in 2005, a new trustee in bankruptcy was appointed to try to recover Mr Avis’s outstanding debt. He made an application to the court under s.14 of TOLATA, as the house was still registered in joint names.

Mr and Mrs Avis objected to the application. Following some activity in the High Court, Mrs Avis appealed to the Court of Appeal on the grounds that no order for sale of the property could be made since the events specified in the 1985 order had not yet occurred. This would mean that the trustee in bankruptcy could not ask for the house to be sold. The Court of Appeal unanimously dismissed the appeal, holding that the trustee in bankruptcy could legitimately apply for an order for sale despite the earlier order and confirming that as the bankruptcy was more than a year ago, then s.335A applied, which meant that the court would make an order for sale unless there were exceptional circumstances. The Court remitted the case to the High Court for a decision as to whether there were indeed such circumstances.

Comment

The practical implications of this decision are significant. Many people have made similar consent orders to Mr and Mrs Avis, which often give one of the couple the right to occupy the property for life, or until remarriage or cohabitation. It now appears that a trustee in bankruptcy, using the s.14 mechanism of TOLATA, can overturn the earlier order often made in family proceedings. Even more significantly, this can apparently be done many years after divorce.

Although there is no statutory definition of “exceptional circumstances”, few would argue that the circumstances surrounding this case are certainly far from usual. It is surely to be hoped that a delay of almost 20 years by his creditors to pursue the sale of a property solely occupied for that period by the bankrupt’s ex-wife may well weigh in her favour. In addition, Mrs Avis’ ex-husband’s bankruptcy (and therefore, it seems likely, at least some of his debts) occurred around 3 years after the couple’s divorce. The High Court will in due

course make its decision on whether such circumstances are so exceptional as to prevent an order for sale.