



resolve

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in practice

High Court awards trustee in bankruptcy an occupation rent re. a jointly owned property

At a hearing in the High Court Chancery Division in July, The Honourable Mr Justice Blackburne awarded a trustee in bankruptcy an occupation rent in respect of the bankrupt's equal share in a property jointly owned with the bankrupt's wife.

The background to the case of **Re Peter Francis Barcham [2008] EWHC 1505 (Ch)** was that Mr and Mrs Barcham jointly owned a bungalow in Brentwood in Essex. On 10th June 1994 a bankruptcy order was made against Mr Barcham and the Official Receiver was appointed his trustee in bankruptcy until replaced in August 2004 by the appellant in the case, a Mr Jeremy French who sought orders for sale and possession of the property with a declaration that the net proceeds of sale be divided 50:50 with Mrs Barcham.

It was not disputed that Mrs Barcham was entitled to a credit for payments of the mortgage, insurance and for improvements to the property, so Mr French's appeal revolved around the issue whether or not he was entitled to an occupation rent from Mrs Barcham re. the Trustee's 50% share in the bungalow held on behalf of Mr Barcham's creditors.

In awarding Mr French an occupation rent equal to one half of the property's letting value since Mr Barcham's bankruptcy, Blackburne J distinguished the case from earlier authorities which suggested that a Claimant would have to have been excluded from the jointly-owned property, and from the 2007 case of *Stack v Dowden [2007] 2 AER 929* which considered how to determine the respective property rights of an unmarried couple in the home they occupied.

The judge held that it was still possible for a trustee in bankruptcy to claim an occupation rent even though he had no statutory right of occupation under the Trusts of Land and Appointment of Trustees Act 1996 since, as a matter of common sense, it was not reasonable to expect the Trustee in bankruptcy to exercise the right of occupation which attached to his interest in the property and vested in him on appointment as trustee of the bankrupt co-owner.

The judge accordingly found that, even without a statutory right of occupation, or any sense that the trustee had been excluded, he was nevertheless entitled to receive an occupation rent from the date of Mr Barcham's bankruptcy.

This may turn out to be a landmark decision for trustees in bankruptcy and other insolvency practitioners as it appears to go against the grain of some earlier decisions given not only in insolvency cases, but also cases in a domestic environment.

"In practice" is a regular column about recent developments in litigation and dispute resolution. For further information please contact Richard Dugdale on 020 7873 1000

What to do if you are sold a white elephant - or a "pup"

In the case of **4 Eng Ltd v Harper & Simpson**, the Claimant was a company established by two of its directors to acquire companies in the engineering sector. A company called Excel was its first and - as a result of the true state of its finances - the Claimant's only acquisition. It is normal when one company acquires another to carry out a due diligence exercise, but where there are matters which this exercise might not reveal, it is usual for the directors of the company being bought to give warranties. The purchase price for Excel was £1.2m with £550,000 payable on completion of the sale and the balance by instalments over three years. The Claimant claimed deceit, misrepresentation and breach of contract in respect of fraudulent representations and warranties from the Defendants who were directors of Excel.

Shortly after completing the acquisition of Excel, the Claimant found that Excel's business was built on inflated or bogus invoices to its main customer Mars UK Ltd, but it took several years after the sale of Excel to unravel the full extent of the Defendants' fraud.

Under the terms of the sale contract, the Defendants represented that they were not aware of any reason which would cause Mars to terminate its requirements for Excel's products. As the Defendants knew, because of the scam involving the inflated or bogus invoices, this representation was completely untrue and instead of buying a company worth £1.2m, 4 Eng acquired a company which, as the result of this corrupt system, was potentially liable to Mars for a large amount and liable also to lose its principal source of business. In the words of the former Master of the Rolls, Lord Denning, in another case, 4 Eng had been "sold a pup".

However, the Defendants attempted to strike out some of the Claimant's allegations by relying on a typical limitation clause in contracts for the sale of one company to another to the effect that the Claimant was obliged to provide written particulars of any claim within two years of the sale of the business.

What the court found

On the hearing of the Defendant's application to strike out the Claimant's claims of breach of contract and misrepresentation, Mr Justice Briggs said this type of limitation clause was not applicable to warranties where they were given fraudulently in circumstances where the true position and therefore the breach of warranty is deliberately concealed.

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William Sturges & Co is a member of the Association of Independent European Lawyers

William Sturges & Co assist individuals and businesses to resolve disputes via all forms of alternative dispute resolution and court proceedings.

Topics covered in this issue:

- Warranties given on the Sale of a Business
- Debt Recovery and the Credit Crunch
- Criminal Injuries Compensation
- New Facility to offer After-the-Event Insurance
- Occupation Rent for Trustees in Bankruptcy

Important: The purpose of this newsletter is to give an overview of some current issues. No decision should be made in reliance on the contents of this publication as it is not intended to replace the need to seek expert legal advice.

Debt recovery and the credit crunch

It is sad that, as a result of the credit crunch, more and more customers are not paying as promptly as they used to.

At William Sturges we aim to preserve the relationships you have with your customers, whilst improving your cash flow.

We have a proven track record of recovering debts quickly and efficiently. Our experienced team combine the gentle art of persuasion with all the litigation tools available, including:

- Letters before action
- Negotiated payment plans
- County Court actions
- High Court actions
- Statutory demands
- Winding up and bankruptcy petitions
- Guidance on credit management
- Advice on customer insolvency

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This echoes s.32 of the Limitation Act 1980 which provides that the normal limitation period for a claim will not start to run where any fact relevant to the claim has been deliberately concealed by the Defendant from the potential Claimant, where the claim is based on the Defendant's fraud or the claim is for relief from the consequences of mistake until the Claimant has discovered the concealment, fraud or mistake, or could have done with reasonable diligence.

The assessment of damages

The damages due to 4 Eng were assessed at a hearing in April 2008 by Mr Justice David Richards sitting in the High Court, Chancery Division. Judgment was handed down on 29th April 2008 and the court awarded the Claimant damages in excess of £8m. The majority of these were for its lost opportunity to invest in a business other than Excel. The Claimant was an entrepreneurial company set up to acquire engineering companies. The Claimant produced evidence that it was also interested in buying a company called Tarvail and - if it had not bought Excel - would have invested its money in Tarvail which it was able to show would have helped it to make a lot of money. The Claimant proved this by reference to Tarvail's actual profits and value.

The case demonstrates that vendors of a business cannot rely on a limitation clause which seeks to limit the time for claims arising out of warranties given on the sale of a company where the true financial position of the company being sold has been concealed and the warranties have been given fraudulently.

William Sturges & Co specialise in all types of business dispute and our Litigation Department is currently dealing with four separate cases arising from warranties given on sales of companies.

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Compensation success for bomb victim

In a case in which William Sturges & Co were acting pro bono for a victim of a terrorist bombing at the Territorial Army Centre, White City in West London, Richard Dugdale, Partner in the Litigation and Dispute Resolution Department helped secure on review an increase of the award paid to our client by the Criminal Injuries Compensation Authority ("CICA") to the maximum of £500,000. The CICA pay compensation to eligible applicants who have been the victim of a violent crime

Our client was a 14 year-old cadet attending an evening's training with the Territorial Army when he found a torch in the grounds of the White City TA Centre. The torch contained a bomb and our client suffered extensive injuries and burns to his left ear, eye, hand and forearm in the ensuing explosion.

One of the critical issues on the successful application for review was that our client had lost the sight of his right eye through illness at the age of four months and the CICA held in making their original award of compensation that the loss of use of the victim's left eye in the bombing did not merit the usual award for loss of sight in both eyes, because the loss of sight in the victim's right eye was not due to any criminal activity.

However, on review, William Sturges helped to persuade the CICA that the bombing had deprived the victim of what eyesight he had and he should therefore receive the full award corresponding to the loss of sight in both eyes, which CICA allowed. They also increased the care component of the award so the total award was increased on review to the maximum permissible under the CICA scheme.

Our client had always wanted to become an instructor in the armed forces but the extensive injuries he suffered in the explosion put paid to that dream and instead he has had to contemplate a career in IT for which he has started training. The increased award has secured his future.

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- William Sturges & Co now have delegated authority from one of the leading legal expenses insurers Temple Legal Protection to issue After-the-Event insurance to our clients in order to assist the funding of most types of personal injury and clinical negligence claims.