

USING THE HUMAN RIGHTS ACT TO SAVE THE FAMILY HOME

by

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When bankruptcy strikes it is most often the family home which becomes the prime target of the trustee in bankruptcy because it is usually the most valuable and certainly the most visible asset the family possesses. Therefore, not only the bankrupt but also his or her family is affected with impending homelessness as a result of bankruptcy. Whilst the trend in the early nineties, as exemplified by the case Re Citro (Bankrupts) [1991] Ch. 142, C.A., was to have little sympathy for the family victims of bankruptcy, the courts now seem increasingly willing to exercise a greater discretion to enable the family, as well as the bankrupt, to continue to reside in the family home. The question remains: in the usual circumstances, should the interests of the creditors be paramount to the interests of the family or should the interest in preserving the family home under the principles of the Human Rights Act 1998 supercede creditors rights? The current law is dictated by the provisions of sections 335A (formerly section 336(3)), 336 and 337 of the Insolvency Act 1986 as amended by the Family Law Act 1996, s. 66(1), Sched. 8, Pt. 111, para. 57. This article looks at these sections of the Insolvency Act 1986 and how the Human Rights Act 1998 might be effectively utilised to allow the family to remain in their home for as long as necessary.

¹The author wishes to thank Ms Nicolle Allen, a student at Syracuse University Law School, for her research on this article.

Sections 335A, 336 and 337 of the Insolvency Act 1986 as Amended

Section 335A of the Insolvency Act provides that a trustee in bankruptcy can apply to the court having jurisdiction in relation to the bankruptcy under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 for an order for the sale of the family home. The court is to have regard to: (1) the interests of the bankrupt's creditors; (2) the conduct of the spouse or former spouse in contributing to the bankruptcy; (3) the needs and financial resources of the spouse or former spouse; (4) the needs of any children; and (5) all the circumstances of the case other than the needs of the bankrupt.

Under section 335A(3) of the Insolvency Act 1986, after one year has passed since the vesting of the bankrupts estate in the trustee, "the court shall assume, unless the circumstances of the case are exceptional, that the interest of the bankrupt's creditors outweigh all other considerations".

Sections 336 and 337 mirror the provisions of section 335A. Section 336 applies to spouses who have rights of occupation called matrimonial home rights under Part IV of the Family Law Act 1996. Section 337 applies to rights of occupation of bankrupts themselves. The rights of creditors are considered to be paramount to these rights after the end of the period of one year from the appointment of the trustee in bankruptcy under section 306 of the Insolvency Act 1986.

In essence, the court presumes that the first year of bankruptcy is the most difficult for the family but that after the first year the family gets used to poverty so that a move to

usually less salubrious accommodation will not cause overwhelming anguish. Hence when the one year period expires, the presumption shifts so that it is the creditors whose interests become paramount because, presumably, their needs suddenly become more acute the longer their debts are outstanding. The reason for this artificial limitation on the protection afforded to the families of bankrupts is that in 1985 when the Insolvency Act 1986 was going through the House of Commons the government of the day thought that one year would afford enough time for the family to adjust. The Insolvency Law Review Committee, to its credit, had recommended that the interests and welfare of the children, wives and dependent parents residing in the family home of bankrupts be given primary consideration. The Act, whilst taking account of the views of the Committee, was a compromise between the competing interests of the family and the creditors and the creditors won.

Unfortunately, by creating a one year presumption, Parliament had failed to take a realistic account of the needs of most families and particularly the needs and wants of the children and perhaps the infirm and elderly relatives who are the innocent victims of adult misfortune.

The Courts Interpretation of What Constitutes “Exceptional Circumstances”

Since promulgation of the Insolvency Act 1986, the courts have largely taken a narrow view of what constitutes “exceptional circumstances.” Until the middle to late 1990s, family hardship caused by bankruptcy was not considered an exceptional circumstance. In the case Re Citro (Bankrupts) [1991] Ch. 142, C.A., for example, the hardship suffered by the wife and children of the bankrupt when the family home was taken was deemed “distressing, but not

exceptional.” In Salmon’s Trustee v. Salmon, a Scottish case, it was held that the fact that the children’s education was going to be affected because of the loss of the family home did not constitute an exceptional circumstance. Homelessness, family hardship, and detrimental disruption in children’s education were considered the inevitable and even natural consequences of bankruptcy.

Since the late 1990s the courts have showed a greater willingness to consider family hardship when deciding what constitutes “exceptional” under sections 335A, 336 and 337 of the Insolvency Act 1986. In 1998, Re Raval [1998] B.P.I.R. 384, held that the mental illness (schizophrenia) of a spouse was an exceptional circumstance. In Re Bremner [1999] B.P.I.R. 185, Jonathan Sumption Q.C. (sitting as a deputy High Court judge) found that the bankrupt’s wife’s interest in looking after her 79 year old terminally ill husband was an independent consideration to which he was entitled to have regard and to which he found to be determinative. These cases demonstrate, however, that whilst certain types of family suffering may be considered to be exceptional circumstances by the court, the trend has still been to favour creditor’s rights without regard to ordinary family suffering.

One bright light has been the February 25, 2000 ruling by Mr Justice Neuberger in Mortgage Corporation v. Shaire (Times Law Reports) 21 March 2000. This case concerned an application for sale under section 14 of the Trusts of Land and Appointments of Trustees Act 1996 made by equitable chargees. Mr Justice Neuberger held that under section 15 of the Trusts of Land and Appointment of Trustees Act 1996, the court could exercise a wide discretion in favour of families and against banks and other chargees. Whilst he found that a different approach was appropriate to bankruptcy cases, he did not

delve deeply into why this should be so inasmuch as this was not a bankruptcy case. In consequence, and in view of Lloyds Bank v Byrne (1993) 1 FLR 369 wherein it was held that an application by a trustee and an application by a chargee should be treated similarly, perhaps this case can be a spearhead for further inroads into the development of an interpretation of exceptional circumstances under the Insolvency Act which substantially favours the family in all domestic circumstances and not just unusual and tragic circumstances such as acute and/or chronic debilitating sickness and death.

The Human Rights Act 1998

The Human Rights Act 1998 has the potential to redefine a bankrupt's family's rights, and to possibly save the family home. It applies to dealings between private individuals through the duty of public authorities, including courts and tribunals, not to act in a way which is incompatible with Convention rights and to protect individuals against breaches of their rights (section 6 (1) of the Human Rights Act 1998) .

Article 8 of Schedule 1 of the Human Rights Act 1998 concerns the right to respect for private and family life. Article 8 (1) states: "(e)veryone has the right to respect for his private and family life, his home and his correspondence." The European Convention on Human Rights has not provided definitions for the terms "family", "respect", and "respect for the home". The concept of what a family is continues to change and is determined by the social and legal context in which it is considered (relationships are not accorded the same status in immigration cases as they are in matrimonial and/or childrens cases) It would appear that for there to be family life, and thus a family, there must be a "real existence in practice of

close personal ties” (Application 11468/85 K v United Kingdom (1986) 50 DR 199 at 207). Relationships which constitute a family include (1) husband/wife; (2) unmarried adults as long as the relationship shows significant commitment; (3) parent/child, including adopted children as long as there has been a formal adoption, grandparent/grandchild, and possibly other relatives such as aunts and uncles (Application 16580/90 Boyle v United Kingdom (1994) 19 EHRR 179). While these sections have expanded family life to include unmarried couples, the Convention does not extend the definition so as to include homosexual relationships, rather these relationships are to be provided respect under the term “private life.” Hence whilst a homosexual relationship would be considered to constitute a family under the Insolvency Act 1986 (section 385(1) defines the family of the bankrupt as “the persons (if any) who are living with him and dependent on him”), it will not be accorded the identical protection under the Human Rights Act 1998.

“Respect,” and “respect for the home”, are defined by the Convention through the notion of what constitutes interference with respect of the home. In order to be considered a home the family must have a sufficient degree of connection with the dwelling (Gillow v United Kingdom (1986) 11 EHRR 335 - failure to live in home for 18 years while travelling abroad extensively compensated by long standing intention to return). The concept of a “home” includes a settled residence, professional office, and possibly even a holiday home, camper van or temporary hostel as long as there are sufficiently strong links to the family (Buckley v United Kingdom (1996) 23 EHRR 101, E Ct. HR - caravan constituted home).

Interference with respect for the home can take place at the home or by affecting the continued enjoyment of the home itself (Howard v United Kingdom 52 DR 198 (1985) -

compulsory purchase of the home). It will be justified if it is in accordance with the law of the country and is necessary in a democratic society in the interest of national security, public safety and the economic well-being of the country, for the prevention of disorder and crime, for the protection of health and morals, or for the protection of the rights and freedoms of others (second paragraph of Article 8). It is arguable that the interference with the family home caused by an order for possession is not necessary in order for the protection of the rights of creditors because they have or can acquire a charge securing the asset until such time as the interference can be affected without harm or no such interference would occur because the family home is sold by choice when the need of the other family members to reside in the home no longer exists. It is also possible to construe the second paragraph of Article 8 as mandating that the protection of the rights and freedoms of others can only justify an interference if such protection is necessary in the interest of national security, public safety or the economic well-being of the country. Under this construction, in order for the creditor to argue against the application of Article 8, the creditor would need to show that his rights concern one or more of these three interests.

Under section 3 of the Human Rights Act 1998, all primary and subordinate legislation must be read and implemented in a way which is compatible with the rights protected under the Act. Applying this principle to sections 335A, 336 and 337 of the Insolvency Act 1986, it can be argued that the term “exceptional circumstances” must include all instances where the family home and the rights of children are in issue. The doctrine of proportionality, which is fundamental to the interpretation and implementation of the Act, must also be considered not just in relation to the rights of the family and children but also the creditors. The key point

which must be brought home to the courts is that the impairment of the creditors rights to realise the bankrupt's assets is necessary to accomplish the legitimate objective of protecting the family home and is in the best interests of the children. It is, therefore, justified.

Thus, it should be argued for a construction of sections 335A, 336 and 337 of the Insolvency Act 1986 which protects the family so that whenever the family home is involved in an application for an order for possession and sale, this will always be an exceptional circumstance which will enable the courts to exercise the broadest discretion in refusing its sanction. It may also now be an appropriate time for Parliament to consider amending the Insolvency Act accordingly.

Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms can also be raised to provide a bankrupt's family with a defence against creditors. Article 1 states: "every natural or legal person is entitled to the peaceful enjoyment of his possessions and no one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law." It follows that possession of the family home should only be interrupted if it is in the public interest. It may be argued that leaving a family homeless in order to pay a bankrupt's creditors is not in the public interest and that the public interest does not dictate the paramountcy of creditors' rights to the interests of a family in not being thrust into the street. Certainly the public receives no benefit from increased homelessness and severe interferences with family stability and, conversely, it may argued that the public suffers no real harm in requiring creditors to collect debts through assets other than the family home or by obtaining a charge on the home not to be enforced until, say, the children reach adulthood and sick

relatives are no longer a dependency on the family.

Besides effecting family rights under the Insolvency Act 1986, the Human Rights Act 1998 may also have an impact on applications for sale of land under section 14 of the Trusts of Land and Appionment of Trustees Act 1996. Schedule 1, Article 8 and Article 1 of the First Protocol of the Human Rights Act suggests that in many if not all instances where the family home is involved, discretion should be exercised in favour of preserving the family home.

Whether or not the courts in applying Sections 335A, 336 and 337 of the Insolvency Act 1986 in a manner compatible with the Human Rights Act 1998 will treat the circumstance of a family about to lose their home to a creditor as exceptional and, it follows, will routinely refuse to order a sale, and/or Parliament sees fit to revisit the question of whether creditors rights should be paramount to the rights of the family, it is fervently hoped that the enactment of the Human Rights Act 1998 will redefine a bankrupt family's rights and that practitioners will use it on every possible occasion where the defence of the family home is at stake.

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