Neutral Citation Number: [2018] EWHC 48 (Ch)

Case No: CH-2017-000105

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE COUNTY COURT AT CAMBRIDGE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th January 2018

Before :

MR JUSTICE FANCOURT

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Between :

LOUISE GENDROT	**Appellant**
- and -	
(1) MATTHEW CHADWICK	**Respondents**
(2) SUSAN BERRY	
(Joint trustees in bankruptcy of Edward Hagan)	

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Mr Cameron Maxwell Lewis (instructed by direct access) for the **Appellant**
Mr Graham Sellers (instructed by **Freeths LLP**) for the **Respondents**

Hearing date: 6th December 2017

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Judgment

Mr Justice Fancourt:

1. Mrs Gendrot appeals, with permission from Morgan J, against the Order of District Judge Capon, sitting in Bankruptcy, made on 4th April 2017 in the County Court at Cambridge. In the county court Mrs Gendrot was the second respondent to the application of the Respondents, the trustees in bankruptcy of Edward Hagan, Mrs Gendrot's husband. The application was for a declaration that any transfer of Mr Hagan's beneficial ownership or interest in two residential properties, including a transfer effected by a Deed of Trust made on 10th September 2011, was a transaction at an undervalue, within the meaning of section 339 of the Insolvency Act 1986, and for consequential relief.

2. The Deed of Trust recites, among other things, that Mr Hagan seeks to make financial provision for his wife and their son Michael; to secure, as far as possible, financial security for them, and that Mr Hagan will pay or cause to be paid the monthly amounts due on the mortgages secured on the two properties, 7 Hill Close, London NW2 (their matrimonial home) and Flat 1, 269A West End Lane, London NW6. The Deed of Trust then provides:

> "1. The husband declares that he holds on trust for the wife absolutely all his interest in the properties known as and situate at 7 Hill Close, London NW2 6RE, Basement Premises, 269 West End Lane, London NW6 1QS and Flat 1, 269A West End Lane, London NW6 1QS;
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> 2. The Husband will be solely responsible for the payment of the charges registered on the above properties and will keep the wife indemnified in respect thereof."

3. The Basement Premises there referred to are commercial premises of which Mr Hagan was the tenant, under a rack-rented lease. No relief was sought by the Respondents in relation to that property.

4. The hearing before District Judge Capon proceeded as a trial of the Respondent's claim to set aside the Deed of Trust. All parties were represented by Counsel.

5. In a careful and clear judgment the District Judge held that:

   i) There was no consideration given by Mrs Gendrot for the declaration of trust, and if there was any consideration it was substantially less in value than the financial value of the property transferred to Mrs Gendrot by Mr Hagan under the Deed of Trust.

   ii) On the date of the Deed of Trust, Mr Hagan was insolvent, or alternatively he became insolvent as a consequence of the transfer effected by the Deed of Trust.

iii) There was no valid reason why the Deed of Trust should stand, and a restorative order should be made setting aside the Deed.

6. There was no issue raised at the trial in the county court about the following matters:

i) Whether the transfer of the beneficial interest in the three properties was effected at any earlier date than the date on the Deed of Trust;

ii) Whether the transfer of the beneficial interests should be treated for the purposes of section 339 as three separate transactions, one for each of the three properties;

iii) Whether the equity in Mr Hagan's share of 7 Hill Close was either nil or very small in monetary value;

iv) Whether in aggregate the value of his interests in the three properties was nil or very small in monetary value;

v) Whether the District Judge should exercise his discretion under section 339(2) not to make a restorative order, or

vi) Whether, having made such an order, the Court should refuse to order the immediate sale of 7 Hill Close and Flat 1.

7. The main live issues at the trial were whether Mrs Gendrot had given consideration for the transfer, 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.

8. On appeal, Mrs Gendrot seeks to advance the following arguments and grounds of appeal:

i) The declaration of trust in relation to Mr Hagan's share of 7 Hill Close has to be considered separately from the declarations of trust of Flat 1 and the commercial premises;

ii) Considered in that way, the only evidence (which the District Judge should have accepted) was that Mr Hagan's equity in 7 Hill Close was at most £12,000, and possibly less than that;

iii) 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 7 Hill Close;

iv) The District Judge failed to exercise his discretion under Section 339 (2) and should have exercised it in favour of not setting aside the Deed of Trust as regards 7 Hill Close, and

v) The District Judge should alternatively have deferred making, or stayed, any order for sale of 7 Hill Close.

9. There was, in the end, no challenge to the District Judge's finding that Mr Hagan was insolvent on the relevant date.

10. Section 339 of the Insolvency Act 1986 provides;

> "(1) Subject as follows in this section and section 341 and 342, where an individual is adjudged bankrupt and he has at a relevant time (defined in section 341) entered into a transaction with any person at an undervalue, the trustee of the bankrupt's estate may apply to the Court for an order under this section.
>
> (2) The Court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not entered into that transaction.
>
> (3) For the purposes of this section and sections 341 and 342, an individual enters into a transaction with a person at an undervalue if –
>
> a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration,
>
> b) he enters into a transaction with that person in consideration of marriage or the formation of a civil partnership, or
>
> c) he enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less that the value, in money or money's worth, of the consideration provided by the individual."

11. It is not in dispute that the Deed of Trust was made at a "relevant time" in relation to Mr Hagan's bankruptcy.

12. The first difficulty that Mrs Gendrot faces is that the arguments or grounds numbered (i), (ii), (iv) and (v) above were not advanced at the trial. Ground (iii) was advanced, though only in relation to the value transferred under the Deed of Trust in aggregate, rather than by comparison with the value of Mr Hagan's equity in 7 Hill Close alone.

13. I remind myself that the Court of Appeal has repeatedly stated that new arguments should 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] EWCA Civ 514 at paras [38] & [52]; Crane v. Sky In-Home Limited [2008] EWCA Civ 978 at para [21].

14. In my judgment had arguments (i) & (ii) been advanced at trial, it is quite likely that the Respondents would have sought (without prejudice to their case that there was no consideration provided) to adduce evidence of the open market value of and the debt secured on 7 Hill Close at the date of the Deed of Trust. The oblique reference to those matters in a statement of case of Mrs

Gendrot in other proceedings in the First-tier Tribunal, which was in the bundles at trial though not specifically referred to, was not agreed as evidence. The matter appears to have proceeded before the District Judge on the basis of a tacit agreement and understanding that the aggregate value of the three properties subject to the Deed of Trust was substantial, and that the real issue was whether any valuable consideration was given by Mrs Gendrot in return for the transfer of the beneficial interest. Mr Hagan accepted in cross-examination that in monetary terms he got absolutely nothing in return for the Deed of Trust, but that by keeping Mrs Gendrot "sweet", as he put it, as a consequence of the transfer he got to see her once a week and his son twice a week.

15. In any event, in my judgment Mrs Gendrot faces insuperable difficulties in sustaining the argument that she seeks to advance. First, I cannot see any basis on which the Deed of Trust could properly be interpreted as effecting three separate transactions, for the purposes of Section 339 or otherwise. By the Deed of Trust Mr Hagan transferred to Mrs Gendrot his beneficial interest in the real property that he owned other than a flat in Suffolk. Section 436(1) of the 1986 Act defines "transaction" as including "a gift, agreement or arrangement"; but Mr Hagan did not enter into three separate agreements or dispositions, nor did he make three separate gifts. He declared a trust of his beneficial interest in three properties. In my judgment, there was only one transaction effected by the Deed of Trust.

16. Even if it were possible to chop up the Deed of Trust into three separate transactions for these purposes, the Respondents appear to me to have a clear answer in that 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. Mr Hagan's hope that Mrs Gendrot might not proceed to petition for a Decree of Judicial Separation came to nothing when, in November 2011, she did so. But even that is not the point: 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 such a petition in consideration of the transfer effected by the Deed of Trust.

17. Mrs Gendrot seeks to argue, as she did in the county court, that there was valuable consideration moving from her, in that Mr Hagan did, in fact, obtain some reassurance that he could continue to see his wife and his 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.

18. As a matter of law, giving up a right to pursue a claim can be valuable consideration: see Re Abbott [1983] Ch 45 and Haines v Hill [2008] Ch 412. But there is 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 in the event simply being not exercised

subsequently: see Re Kumar (a bankrupt) [1993] 1 WLR 224 and Trustee in Bankruptcy of Gordon Robin Claridge v Claridge [2011] EWHC 2047 (Ch), particularly at paras [33] to [40].

19. In this case, there is 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 of Trust. 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 of Trust was executed.

20. The District Judge was therefore right to find that no consideration was given by Mrs Gendrot for the property that was transferred under the Deed of Trust. The transfer therefore falls within Section 339 (3) (a). That being so, the true value of the assets transferred to Mrs Gendrot becomes irrelevant. Even if Mrs Gendrot had been able to argue and had succeeded on grounds (i) and (ii) that were argued before me, the transfer of Mr Hagan's share of 7 Hill Close would still be a transaction at an undervalue.

21. Mrs Gendrot's next ground of appeal is that the District Judge did not validly exercise the discretion that Section 339(2) gave him ("… such order as it thinks fit…"). The Court of Appeal in Re Paramount Airways Limited (No.2) [1993] Ch 223 confirmed that this wording gives the Court discretion not to make a restorative order "if justice so requires".

22. The District Judge was aware that the section gave him a discretion. The discretion was adverted to in the Respondents' skeleton in the county court. Further, paragraph 46 of his Judgment indicates that he was aware of it. However he did not evaluate whether or not to exercise his discretion against setting aside the Deed of Trust because no argument that he should do so was addressed to him.

23. Mrs Gendrot now seeks to argue that such a discretion should have been exercised in relation to 7 Hill Close, for two reasons. First, that the property was the matrimonial home still occupied by Mrs Gendrot and her 18-year old son (who was still in full-time education). Second, although that property now has very substantial equity, the equity at the time of the transaction at an undervalue was only very small, and Mr Hagan's share of it no more that £12,000.

24. I cannot see how the first reason can amount to circumstances in which justice requires the court to decline to make a restorative order. If that were so, every husband, wife or civil partner who was nearing insolvency would be incentivised to gift his or her beneficial interest to their spouse or partner, thereby putting it effectively beyond the reach of their creditors. It might, in exceptional circumstances, amount to a good reason to stay an order for immediate sale of the property.

25. The difficulty that Mrs Gendrot has with the second reason is that the Respondents have had no opportunity to seek to establish the extent of the equity in 7 Hill Close at the date of the Deed of Trust. The point was not taken below and the trial was conducted on the assumption that the properties together had substantial value. Mrs Gendrot can hardly be heard to argue, on appeal, that the District Judge should have exercised a discretion that he was not invited to exercise on the basis of evidence of value that he did not hear. At all events she cannot do so if the Respondents might reasonably have relied on other evidence to deal with the argument. In any event, I am not persuaded that, as a factor in the exercise of discretion, it is right to focus narrowly on the value of the equity at the date of the transaction if the property (or the amount of equity) is of a kind that is capable of appreciating in value with the passage of time.

26. What might be material, on the exercise of the discretion under section 339(2), is whether all creditors and the fees and costs of the bankruptcy would be paid in full if the transaction were set aside only in relation to the other properties. This point was not taken at trial either, and so the District Judge had no evidence of the value of the equity in Flat 1 or of the value (if any) of the commercial lease. I was told, on instructions only, that had the matter been gone into at trial, the debts, fees and costs would substantially have exceeded the estimated equity in Flat 1, and that at the date of the appeal the position was much worse. The sale of 7 Hill Close would therefore have been regarded as necessary to realise sufficient assets to repay Mr Hagan's creditors and discharge the fees and costs of his bankruptcy. In those circumstances, it is impossible to conceive that – had the District Judge addressed the question – he could have concluded that it would be just to exercise his discretion by not making a restorative order.

27. Finally, Mrs Gendrot argued that the District Judge should have exercised his discretion to postpone or stay the sale of 7 Hill Close. That was not a point that was argued before the District Judge. It is clear from a note subsequently prepared by Mrs Gendrot's trial Counsel (who did not appear before me), which was disclosed and included in the appeal bundle, that he considered that there were no factors that could result in Mrs Gendrot's interest in maintaining her home being given priority over the interests of Mr Hagan's creditors. Now that it is clear that there is very substantial equity in 7 Hill Close and that a sale of the other properties will not realise sufficient funds, that conclusion seems to me to be inescapable. Although the sale of the home of Mrs Gendrot and her son, which was the family home, is a serious and wretched outcome for them, these circumstances are regrettably commonplace in cases of bankruptcy. Without substantially more, these consequences do not amount to exceptional circumstances, which is what is required to be shown before a sale will be postponed or stayed: Re Citro (a bankrupt) [1991] Ch 142. There is no evidence of anything more in this case that would justify refusing an order for immediate sale of 7 Hill Close and Flat 1.

28. For these reasons, in my judgment the District Judge came to the right conclusion for the reasons that he gave. The new legal arguments that Mrs

Gendrot sought to raise on appeal, even if permitted, would not result in a different outcome. Accordingly, I dismiss the appeal.