Brake and others v Swift and Cheddington [2020] EWHC 1810 (Ch)

This lengthy and complex judgment deals with a dispute between two of three former partners, and their trustee in bankruptcy and the company which bought property from that trustee.

The two applicants, Mrs and Mrs Brake, entered into a holiday letting partnership with a third partner, which was a limited partnership operated by Mrs Brehme. The applicants contributed a farm (including a farmhouse) owned by Mrs Brake, though it remained subject to a bank charge. The limited partnership contributed cash, which was used to purchase a cottage in the names of the two applicants and the Mrs Brehme, in which the applicants eventually lived. Mrs Brake also owned two parcels of land adjacent to the cottage. After the partnership was dissolved, the applicants were declared bankrupt and the partnership itself went into administration and then liquidation.

The trustee in bankruptcy, Swift, sold the two parcels of adjacent land to Cheddington. He also bought the cottage from the partnership liquidators and sold that to Cheddington. The farm was sold by the bank's receivers to a purchaser who sold it to Cheddington.

The Brakes brought proceedings against the trustee and the liquidators to unwind these transactions, and establish that their pre-existing interests in the cottage and the parcels of land had revested in them under s283A of the Insolvency Act. The court dismissed their application.

Section 283A of the Insolvency Act 1986 provides that a bankrupt's estate comprised, inter alia, all property belonging to or vested in the bankrupt with the exception of property held by him on trust for any other person.

Section 283A provides that on the expiry of three years from the date of bankruptcy, the bankrupt's interest in a dwelling-house which was his sole or principal residence at the date of bankruptcy would revest in the bankrupt.

The issues before the court were:

1) whether the applicants' claim in proprietary estoppel to the cottage as against the liquidators was "an interest in a dwelling-house" within s283A;
2) whether the parcels of land adjacent to the cottage were within the definition of "dwelling-house" in s283A; and
3) whether the cottage and the adjacent parcels were the applicants' "sole or principal residence" at the date of bankruptcy.

On the first claim, the court held that because the legal estate in the cottage was owned by the applicants and Mrs Brehme on trust for the partnership, it fell within the exclusion from s283 of property held on trust for another. Since it had never been comprised in the bankruptcy estates, it could not revest under s283A but continued to be owned by the three joint tenants as before. As to the beneficial estate, this belonged to the partnership (*Popat v Shonchhatra* [1997] 1 WLR 1367) and so a partner (and consequently his trustee in bankruptcy) was not entitled to require any share in it to be vested in him. All that vested in the trustee was the contingent right to receive a cash payment in respect of partnership capital if there was a surplus. As to the applicants' allegation that they had agreed with Mrs Brehme to transfer the cottage to them, the alleged agreement was not in writing and signed by the parties so as to comply with the requirements of s2 of the Law of Property (Miscellaneous Provisions) Act 1989, and so was not a valid agreement in law. It could therefore not be relied on to produce an interest in the cottage so as to give rise to a claim for specific performance of the agreement or the transfer of the partnership's beneficial interest in the cottage to the applicants. However, the court accepted that the applicants' claim by way of proprietary estoppel equity could amount to an "interest" within s283A. A proprietary estoppel claim arose here because there was alleged to be a promise made or expectation created about the future legal position, which was intended to be relied on and was relied on by another person to his detriment; and that claim was to a recognised property right enabling the applicants to occupy a dwelling-house which was their home at the date of their bankruptcy.

Despite this, the application under s283A failed because, on the third claim, the court held that the cottage was not the applicants' "sole or principal residence" at the date of bankruptcy in 2015. The applicants had lived in the main farmhouse before the cottage was acquired in 2010, they continued to live there until the cottage was made habitable in 2012, and until 2014-2015 they only stayed in the cottage when the main house was let. After that date, nothing occurred which a "reasonable onlooker" (in the court's words) would accept as demonstrating that the cottage had become their sole or principal residence; their change of electoral address, the insurance of the cottage for private use only and for the main farmhouse as a guest house, the movement of small items but not large and valuable furniture to the cottage, the use of the cottage by Mrs Brake's son for study purposes, and the reception of visitors there were all insufficient. Furthermore, either property might have been sold at any time by the receivers (who had been given the power to include the sale of the cottage in the sale of the farm), and the proportion of time spent by the applicants at each property was not the sole determinant of their main residence (*Frost v Feltham* [1981] 1 WLR 452).

As to the second claim, the court held that Mrs Brake's fee simple estate in the adjacent parcels of land was an "interest" in land for the purposes of s283A, but it was not an interest in a "dwelling-house" since the parcels of land were not a dwelling-house.

Revenue & Customs Commissioners v Inverclyde Property Renovation LLP and another [2020] UKUT 161 (TCC)

Two LLPs filed partnership tax returns claiming business property renovation allowance. HMRC opened enquiries into their returns under the income tax provisions in s12AC of the Taxes Management Act 1970 (TMA). It subsequently issued closure notices concluding that, as neither was carrying on a business with a view to profit, neither was entitled to the allowance. On appeal by the LLPs, the first-tier tribunal held that the enquiry should not have been made under the corporation tax provisions in Sch 18 of the Finance Act 1998, and that the closure notices under the TMA were therefore invalid. HMRC appealed on this point.

The upper tribunal noted that s863 of the Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005) provided for an LLP which carried on a trade, business or profession with a view of profit to be treated for income tax in the same way as a general partnership, so that the LLP was tax transparent and its profits taxed the hands of its members according to their profit allocations. However, if it was not carrying on a trade, business or profession, these provisions did not apply, and as a body corporate it would be chargeable to corporation tax and not treated as tax transparent.

The tribunal held that s863(1) and (2) must be read together as a coherent structure for the income tax treatment of LLPs. The difference in wording simply reflected their different purposes. Section 863(1), which provided that the activities of an LLP which carried on a trade, profession or business were to be treated as carried on by the members and not by the LLP, was concerned with the imposition of liability and therefore was stated to apply only 'for income tax purposes'. In contrast, s863(2), which deemed legislative references to a partnership to be references to an LLP, was concerned with interpretation and was therefore stated to apply 'for all purposes…in the Income Tax Acts'. Neither subsection was intended to be wider or narrower than the other, and the reference to 'the Income Tax Acts' in s863(2) was capable of including the TMA. Thus the TMA provisions on partnership returns applied to LLPs.

It was true that if the LLPs were held not to be carrying on a trade, profession or business, s863(1) would not apply and the LLPs would be liable to corporation tax. However, the tribunal accepted that if an LLP had submitted a return under the TMA, the fact that that LLP was subsequently found not to be carrying on business did not invalidate the use of the procedure under the TMA, including notice to submit a return, the submission of the return, the opening of an enquiry and the issuing of a closure notice. The upper tribunal therefore upheld the appeal and found that the first tier tribunal had erred in law by finding that the closure notices issued under the TMA were invalid. The cases were remitted to the first-tier tribunal on the remaining grounds of appeal.

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July 2020