

INSOLVENCY NEWSFLASH

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Team Specialists

The Court of Appeal overturns Lewis and Lewis v Metropolitan Property Realisations Limited

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As predicted by Dan Sejas at the 10th Annual SGH Insolvency Conference held on 10 June 2009, the Court of Appeal has overturned the High Court decision in *Lewis and Lewis v Metropolitan Property Realisations Limited* [2009] EWCA Civ 448. In a Judgment handed down on 12 June 2009 the Court of Appeal found that the word "realise" in section 283A(3)(a) of the Insolvency Act 1986 ("the Act") does not include a sale for future cash consideration paid more than 3 years after the date of the bankruptcy, and it closed the door on the type of transaction Mr Lewis's trustee had sought to carry out.

The facts of *Lewis* were straightforward. Mr Lewis was made bankrupt on 12 July 2004 and his share in the property he owned jointly with his wife as their home subsequently vested in his trustee. Metropolitan was the second largest creditor in the estate. Mrs Lewis claimed equity of exoneration which she said made her the sole beneficial owner of the property. There were insufficient funds in the bankruptcy estate to fund litigation to determine the issue, and rather than provide funding Metropolitan took an assignment of the Trustee's interest. The consideration for the assignment was £1 paid on the date of the transaction, and Metropolitan also agreed to pay the Trustee 25% of the net sale proceeds on completing a sale of the property. The question before the court was whether or not the Trustee had realised the property for the purpose of section 283A(3)(a) of the Act.

Section 283A of the Act provides that the bankrupt's home shall cease to form part of the bankruptcy estate at the end of the period of 3 years beginning with the date of the bankruptcy unless during that period the trustee ... [Section 283A(3)(a)] realises his interest in the property (or takes one of 4 other steps which were not relevant to the case). Had the Trustee realised his interest by effecting an assignment for a share of future sale proceeds? Mr and Mrs Lewis said no, and claimed that the Trustee's interest in the property, such as it was, had re-vested in Mr Lewis.

The Court of Appeal found that:

1. the word realise should be given its ordinary meaning. The Oxford English Dictionary definition was "convert into cash or money" and that definition was supported by the authorities;
2. when Parliament had enacted section 283A of the Act its purpose was to avoid the situation where trustees waited many years before resolving their rights in respect of the bankrupt's home. Therefore a rule was introduced that the trustee must realise his interest in the property within 3 years or creditors would lose all rights to it. The Court of Appeal noted that the other options available to the Trustee such as applying for an order for sale, applying for a charge or reaching an agreement with the bankrupt all fixed the value of the trustee's interest in the property at the then value;
3. the contingency of the obligation to pay the deferred consideration made this case look less like a realisation in everyday terms, and seemed to create the uncertainty that the scheme provided by section 283A of the Act sought to remove;
4. "... realisation should only take place when all the cash is in." [our emphasis].

Thus the Court found that "realisation" did not include effecting a sale for future cash consideration at the stage before the payment is received by the trustee. In *Lewis v Metropolitan* the Trustee had not realised his interest in the property within 3 years and it had re-vested in Mr Lewis. It was not the contingent nature of the sale that had fallen foul of section 283A, but the fact that the Trustee had not collected the cash due to the estate within 3 years.

The Court of Appeal went on to say that it saw no reason why payment for the trustee's interest could not be by way of instalments paid over more than 3 years providing the bankrupt consented to the transaction and agreed to waive the re-vesting. Thus its decision would not necessarily deprive the bankrupt and his spouse of their home simply because the spouse could not afford to pay all of the consideration due for the trustee's interest within the 3 year period.

As a result of this decision points that trustees must be aware of may be summarised as follows:

1. care must be taken when selling an interest in a qualifying property to ensure that all consideration is received before the three year period set by section 283A of the Act expires;
2. if the trustee sells his interest for instalments to be received after more than three years, in order to prevent re-vesting he/she must:
 - a. obtain both consent to the terms agreed and a waiver of re-vesting after 3 years from the bankruptⁱ; or
 - b. if the assignment is to the bankrupt, draft the sale agreement so that it satisfies the provisions of s283A(3)(e) of the Act;
3. where the trustee cannot "realise" his interest within 3 years, consideration should be given to applying for a charge under section 313 of the Act. Such charges currently attract statutory interest at the rate of 8% per annum.

If you have any questions on this please contact any of the core partners in the SGH Restructuring and Insolvency Group.

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ⁱ The ability to obtain such a waiver of re-vesting rights is expressly provided for in the Judgment at paragraph 32. However such a waiver is not one of the prescribed steps referred to at s283A of the Act, with the result that whether such a waiver is sufficient to prevent re-vesting under the three year rule is potentially subject to challenge.

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