

Chapter 14

Question 1: Compare and contrast the rules applicable to applications for sale made by creditors and those made by trustees in bankruptcy. Do you consider differences between the applications to be justified by the status of the applicants?

As we have noted in part 1, the effect of TOLATA is that applications for sale by creditors and trustees in bankruptcy are treated differently. This is a change from the previous law, under which the courts had held that no difference should be drawn between such applications but that, in both cases, sale should be ordered unless there were exceptional circumstances. This question requires you to consider how each application is now dealt with and to assess whether the differences are justified. To answer this question you should review the discussion of these applications in parts 3 and 4. We have seen in part 3 that applications by creditors are dealt with under section 15 of TOLATA. This appears to give the court greater discretion in deciding applications, a point apparently confirmed by *Mortgage Corporation v Shaire* [2001] 4 All ER 364 and you should refer to the extract from that judgment in part 3. However we have also seen that subsequent cases cast doubt on the extent of any change. Applications by trustees in bankruptcy are considered under section 335A of the Insolvency Act 1986 (inserted into that Act by TOLATA and extracted in part 4).

In relation to the applications by trustees in bankruptcy, after an initial one year adjustment period the court is directed to order sale unless there are exceptional circumstances. Differentiating between creditors and trustees in bankruptcy may be considered justifiable as the latter alone are under a statutory duty to realise the bankrupt's assets in order to pay their creditors. We have seen in chapter 13 part 2.3.2 that bankruptcy effects severance of a joint tenant's share through an involuntary disposition. However, both creditors and trustees in bankruptcy share the same purely economic interest in the land. Ultimately, as we have seen in part 3.3, it has become apparent that the attempt to differentiate between these applications may be futile. Creditors who feel that they may be prejudiced by bringing an application under section 15 may circumvent that provision by seeking the debtor's bankruptcy and, in this way, obtaining access to the more favourable provisions (from the perspective of creditors) of the insolvency regime.

Question 2: In considering applications for sale by creditors, have the courts paid sufficient regard to the interests of beneficiaries who wish to prevent sale of their home? In what circumstances do you consider beneficiaries to be most vulnerable to a sale of their home being ordered?

This question requires you to analyse the case law discussed in part 3 concerning applications for sale by creditors. You will find it useful first to consider the extract from the judgment in *Shaire* in part 3 and then to consider how the approach of Neuberger J in that case compares to the outcome in subsequent case law. As we have seen, the desire of beneficiaries to remain in their home has not appeared persuasive unless the welfare of minors has been in issue and the courts have been satisfied that postponing sale will not prejudice the creditors. However, the question asks whether "sufficient" regard has been had to the interests of beneficiaries. This necessitates an assessment of what the courts have in fact decided against a benchmark of what you consider would be "sufficient". The fact that the interests of beneficiaries has not fared well does not mean that "sufficient" regard has not been paid to them. What we regard as sufficient may be informed by the policy of the Act. As we note in part 2 (and discuss more fully in chapter 13 part 5) the policy of TOLATA was to provide a form of regulation of trusts of land which recognised that the land was often used as a home. Against this is the point discussed by Pascoe (in the extract in part 3) that the Law Commission's stated aim was to "consolidate and rationalize" the prevailing approach, rather than provide a new one. In the extract in part 2, Fox outlines the different concerns of creditors and beneficiaries and highlights the difficulties of pitting the more nebulous interests of the beneficiaries in the home against the purely financial and quantifiable interests of the creditors. Arguably, the approach taken by the courts can operate to alleviate or exacerbate these difficulties. Consider, for example, whether a beneficiary's interest in the maintenance of a home for themselves or for themselves and children is as readily evidenced as a creditor's financial interest in obtaining sale. We have noted in part 3.3 the court's refusal to attach much weight to the occupation by grandchildren in *First National Bank v Achampong* [2003] EWCA 487 in the absence of evidence as to *how* their welfare would be affected by a sale.

The circumstances in which beneficiaries appear most vulnerable emerge from an analysis of the case law in part 3.1 and is highlighted in the extract from Probert. Section 15 of TOLATA (which is extracted in part 1) provides the court with a non-exhaustive list of factors to take into account in deciding applications. These factors are the intentions of the settlors of the trust; the purposes for which the land is now held; the welfare of children; and the interests of secured creditors. Current decisions indicate, however, that in the absence of occupation by minor children the purpose of providing a home is unlikely to be considered to remain once one party has left the property. In such cases there seems little that a beneficiary can argue against the interests of the creditors in obtaining a sale. This leaves most vulnerable a beneficiary who remains in occupation (other than with minor children of the relationship) following the departure of the other co-owner.

Question 3: Assess the view that arguments founded on human rights have had little practical impact on the courts' jurisdiction to order sale of the home on an application by a creditor or trustee in bankruptcy.

The human rights implications of applications for sale by creditors and trustees in bankruptcy is addressed in parts 3.2 and 4.2. In relation to creditors, we have seen in part 3.2 that the courts are satisfied that the discretion conferred by section 15 already ensures that the court has the opportunity to balance the creditors' rights under Article 1, Protocol 1 of the ECHR with the article 8 rights of those affected by a sale. We have noted that it was suggested by Arnold J in *National Westminster Bank plc v Rushmer* [2010] 2 FLR 362 that it will not usually be necessary for the court specifically to refer to the parties' human rights – they are necessarily protected by the balance drawn by the court in an application under section 15. If this is correct, then the clear implication is that human rights arguments will have little impact.

In relation to applications by a trustee in bankruptcy, as have seen in part 4.2 that the compatibility of section 335A of the Insolvency Act 1986 with the Human Rights Act 1998 has been doubted since, in the absence of finding “exceptional circumstances,” the courts are unable to balance the beneficiary's right to respect for private and family life against the interest of the trustee in bankruptcy. Currently, the test of exceptional circumstances has been narrowly defined. It requires something beyond what Nourse LJ described in *Re Citro* [1991] Ch 142 (in the extract in part 4.1) as the “melancholy consequences of debt and improvidence”. In *Barca v Mears* [2004] EWHC 2170, in the extract in part 4.2, Judge Strauss QC suggested that it may be sufficient to interpret exceptional circumstances as including consequences of the usual kind which have an exceptionally severe impact. In this respect, human rights arguments may lead to an alteration of the definition of “exceptional circumstances”. But will this result in different outcomes in the cases?

Under section 335A of the Insolvency Act (extracted in part 4) the courts are directed to assume, on an application for sale made by a trustee in bankruptcy after an initial one year adjustment period, that the interests of the creditors outweighs all other considerations. In practice, the courts have postponed sale where exceptional circumstances have been found to exist. Hence, a change in the definition of exceptional circumstances should lead to a different outcome in cases. However, it is doubtful that the change suggested in *Barca v Mears* would bring a significant number of additional cases within the scope of exceptional circumstances. Indeed, we have noted that there is no reported case in which the wide interpretation of exceptional circumstances advocated in *Barca v Mears* has led to sale being postponed. In the case itself the bankrupt argued that loss of his home would prejudicially affect his ability to provide support for his son who had special educational needs. The court considered that even on a broad approach to exceptional circumstances, sale would still be ordered; the prejudice to the creditors caused by a postponement would have been too severe, while the son's educational needs and the extent to which the bankrupt's ability to give support would be impaired by a sale had not been sufficiently proved. The courts appear resistant to adopting a more pro-active approach to human rights arguments in respect of section 335A. In part 4.2 we cite Baker's conclusion that the case law ‘evidences only a variety of alluring yet ultimately unpersuasive defences of the status quo, intended to keep the *Barca* objection at bay’.