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VIVIENNE JOAN AVIS

v

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- 1. CHARLES HAMILTON TURNER (trustee in bankruptcy of the property of EDMUND CHARLES AVIS)**
- 2. EDMUND CHARLES AVIS**

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Court of Appeal (Civil Division)
 On appeal from the High Court of Justice (Chancery Division)
 Lord Justice Ward
 Lord Justice Chadwick
 Lord Justice May

Neutral citation: [2007] EWCA Civ 748

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Hearing: 20 June 2007
 Judgment: 19 July 2007

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Trustee in bankruptcy's application for sale of former matrimonial home; trust for sale; consent order postponing sale; whether wife had absolute right under consent order; whether power of court to order sale restricted

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A trustee in bankruptcy (T) applied under the *Trusts of Land and Appointment of Trustees Act 1996 (TOLATA)* and under the *Insolvency Act 1986 (IA)* for an order for sale of the bankrupt's (H) former matrimonial home, so as to realise his one-third interest therein for the benefit of H's estate. H and his wife (W) were joint registered proprietors of the property.

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In the course of matrimonial proceedings between them in 1985, there was a consent order which provided that the trust for sale upon which they held the property be varied so as to provide that the proceeds of sale be held as to one third for H, and as to two thirds for W. Paragraph 2 of that order provided that the trust for sale should be postponed until the happening of certain events such as W's death or remarriage, bankruptcy not being one of the specified events.

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H and W opposed T's application, relying on para 2 of the property adjustment order to argue that T's interest was fettered by and subject to W's right that the property should not be sold until the occurrence of one of the specified events. At first instance, the district judge rejected that argument, and adjourned the matter for evidence to be filed as to whether there were 'exceptional circumstances' within s336 IA.

On the first appeal, the judge declared that s335A IA applied to the case, and remitted the matter to the district judge for determination as to whether there were 'exceptional circumstances' within s335A(3). The judge held that any agreement between co-owners of land held upon a trust for sale as to postponing such sale did not limit the right of one co-owner to apply to court under s14 TOLATA for an order for sale. The court would take into account any agreement between them under s15 TOLATA. He held that para 2 of the

1985 consent order had not created any absolute rights (proprietary or personal) for W, but that she only had a right to occupy until sale, and not to have the property sold other than on the occurrence of one of the specified events, or the making of an order by the court under *s14 TOLATA*.

W appealed. She contended that the effect of *s6(6) TOLATA* was that it was not open to the court to make an order under *s14* directing herself and H (as proprietors) to sell the property, because to do so would be to direct them to exercise their powers in contravention of the 1985 order.

Held (dismissing the appeal – paras [37], [39], [40])

1. It was not in doubt that T took the one-third interest in the property subject to the equities and liabilities to which it was subject in the hands of H. The question was whether, absent bankruptcy, H could have made an application under *s14 TOLATA*. Where property is held on trust for sale (as in the present case), a person who has an interest in that property can apply for an order for sale. Therefore, unless the 1985 consent order had some special force beyond representing the parties' agreement, the judge had been right to hold that W's rights under the order were always subject to the possibility that the court might make an order under *s30 Law of Property Act 1925* – later *s14 TOLATA* (para [24]).
2. The 1985 consent order had no such special force. It did not, of itself, confer upon W an absolute right that the property remain unsold unless and until one of the specified events occurred. Her right to resist a sale was qualified by the right of her husband, and later T, to apply for an order for sale (para [24]).
3. In the present case, the power conferred upon the court by *s14 TOLATA* was not cut down by the restriction in *s6(6)* of that Act. H and W held the property upon an express trust for sale, but with power to postpone that sale. The power to postpone was not conferred by *s6 TOLATA*, but by *s4*. The restriction in *s6* only applied to 'the powers conferred by this section'. *Section 14* enabled the court to direct trustees to execute the trust for sale or (put differently) to direct them to concur in a decision that they will no longer exercise their power to postpone sale. The court would not be directing the trustees to exercise a power conferred by *s6*, and therefore the restriction had no application. Absent a statutory restriction, *s14* enabled the court to override the need for the consent of any person (paras [34]-[35]).
4. Therefore, it was open to the court to make an order for sale on an application by a trustee in bankruptcy under *s14 TOLATA* (para [36]).

Cases referred to

Bendall v McWhirter [1952] 2 QB 466

Bradley-Hole v Cusen [1953] 1 QB 300

Re Citro [1991] Ch 142

Gotham v Doodes [2007] 1 WLR 86, [2006] BPIR 1178

- A** *Jones v Challenger* [1961] 1 QB 176, [1960] 1 All ER 785
Re Mayo, Mayo v Mayo [1943] Ch 302
Norman v Norman [1983] 1 WLR 295
Re Scheibler, ex parte Holthausen (1874) LR 9 Ch App 722
Re Solomon, Solomon's Trustee v Solomon [1967] Ch 573, [1967] 2 WLR 172
- B** *Thompson v Thompson* [1986] Fam 38

Statutes referred to

Civil Partnership Act 2004

Enterprise Act 2002

Family Law Act 1996, s30

- C** *Insolvency Act 1986, ss283, 283A, 306, 335A, 336*
Law of Property Act 1925, s30
Matrimonial Causes Act 1973, ss24, 24A, 31
Matrimonial Homes and Property Act 1981, s7

Trusts of Land and Appointment of Trustees Act 1996, ss1, 4, 6, 14-15, 17, 25, Sch 3

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JUDGMENT

LORD JUSTICE CHADWICK:

- E** [1] This is an appeal from an order made on 13 December 2006 by HHJ Pelling QC, sitting as a judge of the High Court in the Liverpool District Registry of the Chancery Division, on an appeal from an order made on 4 May 2006 by DJ Sykes in the Liverpool County Court on an application made in the bankruptcy of Edmund Charles Avis. Permission to appeal to this court was granted by Sir Martin Nourse on 23 March 2007.

- F** [2] The appeal raises a question as to the powers of the court on an application by a trustee in bankruptcy for an order for the sale of a former matrimonial home in which the bankrupt had an interest in circumstances where there is an existing order, made in matrimonial proceedings between the bankrupt and his former wife, that sale be postponed until the happening of specified events which have not yet occurred.

The underlying facts

- G** [3] Mr Avis and his former wife, Mrs Vivienne Avis, are registered at HM Land Registry as proprietors with title absolute to property known as 23 Malvern Close, Kirkby, Merseyside. In the course of matrimonial proceedings between them in 1985 it was ordered, by consent, that the trusts upon which they had formerly held the property be varied so as to provide that the proceeds of sale be held as to two thirds for Mrs Avis and as to one third for Mr Avis. On the bankruptcy of Mr Avis on 14 February 1989 – or, more accurately on the appointment of a trustee in bankruptcy to administer his estate – his one-third interest in the proceeds of sale of the property vested in the trustee under s306 of the *Insolvency Act 1986*. Mr and Mrs Avis remained the registered owners and the trustees of the trust for sale upon which the property is held.

- H** [4] The present trustee in bankruptcy, Mr Charles Turner, was appointed with effect from 14 October 2003. By application notice dated 18 November 2005, the

trustee sought (amongst other relief) an order for sale in relation to the property at Malvern Close. Mr and Mrs Avis were named as respondents to that application. The application was expressed to be made under both the *Trusts of Land and Appointment of Trustees Act 1996* and the *Insolvency Act 1986*.

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The Trusts of Land and Appointment of Trustees Act 1996

[5] The relevant provisions of the 1996 Act, in the present context, include those in ss14 and 15. Section 14 of the Act, so far as material, is in these terms:

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- ‘(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.
- (2) On an application for an order under this section the court may make any such order –
- (a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or
- (b) declaring the nature or extent of a person’s interest in property subject to the trust,
- as the court thinks fit.’

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That section must be read with s1(1)(a) and (2)(a) of the Act – a trust of land includes a trust for sale. The court has power under s14(2)(a) of the Act to direct trustees for sale of land to execute the trust and sell the land. The court may also give directions as to the disposal of the proceeds of sale to those interested – s17(2) and (3).

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[6] Section 15 of the 1996 Act sets out matters relevant in determining an application under s14. Section 15(1) requires the court to have regard to:

- ‘(a) the intentions of the person or persons (if any) who created the trust,
- (b) the purposes for which the property subject to the trust is held,
- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary.’

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But that requirement must be read with s15(4):

- A ‘(4) This section does not apply to an application if section 335A of the Insolvency Act 1986 (which is inserted by Schedule 3 and relates to applications by a trustee of a bankrupt) applies to it.’

The Insolvency Act 1986

- B [7] *Section 335A of the Insolvency Act 1986* – which, as *s15(4) of the 1996 Act* indicates, was inserted into the *1986 Act* when the *1996 Act* was enacted – is in these terms (following amendment by the *Civil Partnership Act 2004*):

- C ‘(1) Any application by a trustee of a bankrupt’s estate under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 (powers of court in relation to trusts of land) for an order under that section for the sale of land shall be made to the court having jurisdiction in relation to the bankruptcy.

- D (2) On such an application the court shall make such order as it thinks just and reasonable having regard to –

- E (a) the interests of the bankrupt’s creditors,
(b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt or the bankrupt’s spouse or civil partner or former spouse or former civil partner –

- F (i) the conduct of the spouse, civil partner, former spouse or former civil partner, so far as contributing to the bankruptcy,
(ii) the needs and financial resources of the spouse, civil partner, former spouse or former civil partner, and
(iii) the needs of any children; and

- G (c) all the circumstances of the case other than the needs of the bankrupt.

- H (3) Where such an application is made after the end of the period of one year beginning with the first vesting under Chapter IV of this Part of the bankrupt’s estate in a trustee, the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt’s creditors outweigh all other considerations.’

The application for an order for sale

[8] The position when the application of 18 November 2005 was made was, and (so far as I am aware) remains, that Mrs Avis occupied and occupies the property at 23 Malvern Close as her home. Mr Avis has not lived there since the property

adjustment order was made in 1985. By his application of 18 November 2005, the trustee in bankruptcy sought a declaration that he was beneficially interested in and entitled to a one-third interest in the property. Subject to the qualification that his interest is in the proceeds of sale of the property and that that interest vests in him not beneficially but as trustee upon the statutory trusts applicable to the administration of the bankrupt's estate, there can be no answer to that claim.

[9] By para 4 of his application notice, the trustee in bankruptcy sought an order that the property be sold. There were claims to further relief for the purpose of giving effect to a sale – para 2 sought an order vesting the property in the trustee in bankruptcy and para 3 an order that the respondents deliver up vacant possession. But the principal issue between the parties arises from the wish of the trustee in bankruptcy to have the property sold so that the proceeds can be applied to discharge the bankruptcy debt and, no doubt, to pay his proper fees and expenses incurred in connection with his office.

[10] In the present case the bankrupt's estate – which included the one-third interest of Mr Avis in the proceeds of sale of the property at 23 Malvern Close – had first vested in a trustee in bankruptcy, at the latest, on 14 October 2003 when the present trustee was appointed. The application under the 1996 Act was made some two years after that date. At first sight, therefore – in giving effect to s335A of the 1986 Act in conjunction with s14 of the 1996 Act – the court was required to assume (unless the circumstances of the case were exceptional) that the interests of the bankrupt's creditors outweighed all other considerations.

The 1985 property adjustment order

[11] Mr and Mrs Avis opposed an order for sale. Their opposition was founded on the 1985 property adjustment order. As I have said, that order (at para 1) directed that the terms of the trust for sale upon which they held the property be varied so as to provide that the proceeds of sale be held as to two thirds for Mrs Avis and as to one third for Mr Avis. Paragraph 2 of the order is in these terms:

- '2. Such trust for sale shall be postponed until the happening of any one of the following events:
 - (a) the re-marriage of the Petitioner.
 - (b) the Petitioner's cohabitation with another man in a stable relationship.
 - (d) the Petitioner serves notice upon the Respondent in writing that she requires the property to be sold.
 - (e) the death of the petitioner.'

Paragraph 5 of the order provides that, until the property is sold, the petitioner (Mrs Avis) shall have the exclusive right to occupy the property, but that she will be responsible for the mortgage repayments and for the day-to-day maintenance of the property. Her obligation in respect of the mortgage is reflected in para 3 of the order,

A which requires that, in the event of the property being sold, the net proceeds of sale shall be divided between the parties in the proportions mentioned in para 1 'save and except that the petitioner shall be given credit for any capital payments made from the date of this Order in respect of the Mortgage Debt'. Paragraph 9 of the order gives the parties liberty to apply.

B **The proceedings before the district judge**

C [12] The application made by the notice of 18 November 2005 came before the district judge on 4 May 2006. Her task was not made easier by the contention – which seems to have been adopted both by counsel for the trustee in bankruptcy and by counsel for Mrs Avis in their respective skeleton arguments – that the relevant provision in the *Insolvency Act 1986* was not s335A, but s336. That contention – wherever it originated – was misconceived. Section 336 of the 1986 Act is concerned with 'home rights' under Pt IV of the *Family Law Act 1996* – that is to say, rights of occupation which do not arise by virtue of a beneficial interest in the property occupied – see s30 of the *Family Law Act 1996*. But the underlying question under each of ss335A and 336 of the 1986 Act is not dissimilar – s336(5) of that Act is in the same terms as s335A(3).

D [13] The district judge's judgment must be read with the contention that had been advanced before her in mind. Having referred (at para [3]) to a dispute between counsel as to the nature and effect of the order made in the matrimonial proceedings, she went on to say this:

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[4] I was invited by the applicant's counsel to find that it was not necessary to construe the nature of that order, because the essential issue could be determined by an analysis of the Family Law Act of 1996 and the Insolvency Act of 1986. I adopted the reasoning of counsel for the applicant, which was as follows: that, irrespective of any beneficial interest which may have arisen by virtue of that order made in November 1985, the essential issue in this case was the second respondent's right to occupy the former matrimonial home. Her right to occupy, it was submitted, falls within s30 of the Family Law Act 1996, and I am satisfied, having read that section, that that must be right. Section 33 of that Act regulates the right of a party to occupy. The Insolvency Act 1986, by virtue of s336, applies insolvency law to those rights of occupation, and by virtue of s336(2) the trustee is bound by those rights of occupation but can apply to vary them under s336(4), and I accept that this is the effect of that section. It follows, therefore, that under s336(5) there is an assumption by the court that after one year from the beginning of the period of first vesting of the bankrupt's estate in the trustee, the interests of the bankrupt's creditors outweigh all other considerations.

[5] Before I deal with those important words "unless the circumstances of the case are exceptional", I turn to deal with the second respondent's counsel's submissions. The fundamental point made by the second

respondent's counsel is that the court must look at s283(5) of the Insolvency Act which, of course, defines the bankrupt's estate. Under s283(5) it is the position that the trustee acquires rights in a property, subject to third party rights, and it is the submission of the second respondent that the trustee therefore acquires Mr Avis's beneficial share in the former matrimonial home subject to the rights of Mrs Avis. Those are rights, he submits, under the 1985 order, not to have the property sold. Therefore, the trustee has acquired a fettered interest, fettered because it is subject to the rights of Mrs Avis. That, it is submitted, is inconsistent with and contrary to the provisions of s336.

[6] I rejected that argument because, in my judgement, Mrs Avis's rights cannot be greater than those provided for under s30 of the Family Law Act 1996, and I accepted the applicant's counsel's submissions in that regard. I also reject the second respondent's submissions because it seems to me that that would override s336, and that cannot, in my judgement, have been the intention of the statute.

[7] What is, in my judgement, significant, is the provision in s336(5) that the presumption that the interests of the bankrupt's creditors outweigh all other considerations, is subject to that important wording "unless the circumstances of the case are exceptional". That, it seems to me, is the central issue in this case...'

[14] The district judge was persuaded that she should not address that central issue at the hearing on 4 May 2006. She adjourned the application for a further hearing to enable Mrs Avis to file evidence on the question whether there were, in this case, such exceptional circumstances as should displace the assumption which the court would otherwise be required to make (under s336(5) of the 1986 Act) that the interests of the bankrupt's creditors outweighed all other considerations. At para [10] of her judgment the district judge said that she was invited by counsel for Mrs Avis to make a declaration that s336(5) of the 1986 Act applied. In the light of subsequent events it is, perhaps, surprising that the invitation came from Mrs Avis (if it did), but nothing turns on that. A declaration that s336(5) of the 1986 Act applies is incorporated in the order of 4 May 2006.

The appeal to the High Court

[15] The adjourned hearing of the application before the district judge was fixed for 24 August 2006. That hearing was overtaken by events and was vacated. By an appellant's notice filed on 18 May 2006 Mrs Avis appealed to the High Court. She sought to discharge the whole of the district judge's order. In substance, the basis of that appeal was that no order for sale could be made on the trustee in bankruptcy's application because none of the events specified in the 1985 order had occurred. Accordingly, there was no purpose in a further hearing of the adjourned application – the application should have been dismissed *in limine*.

[16] His Honour Judge Pelling QC rejected that contention. The misconception that the relevant section of the 1986 Act was s336 – rather than s335A – had been

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A corrected in the skeleton argument filed on her behalf – see paras 5.7 and 5.8. Accordingly, when the judge held that the appeal should otherwise be dismissed, he varied the order of 4 May 2006 so as to substitute a declaration that it was s335A – and, in particular, s335A(3) – of the 1986 Act that was applicable in the present case. He remitted the matter to DJ Sykes for the remaining issues (outstanding under her order of 4 May 2006) to be determined. He identified those issues as:

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- (i) whether there were exceptional circumstances to displace the statutory assumption; and
- C (ii) whether Mrs Avis was entitled to credit for capital repayments under the mortgage.

D [17] The judge reached his conclusion for the reasons set out at paras [11]-[15] of his judgment. It is, I think, sufficient to summarise those reasons. After setting out the relevant provisions in the *Insolvency Act 1986* and the *Trusts of Land and Appointment of Trustees Act 1996*, he observed that the effect of those provisions was that, whilst it was open to co-owners of land held upon trust for sale to agree that a sale be postponed until the happening of one of a number of specified events – and to agree which of them was to occupy the property pending sale – the terms on which they had agreed to postpone the sale were not necessarily determinative.

E Where one co-owner desired that the property be sold (notwithstanding the terms as to the postponement of sale which had been agreed) he was entitled to apply to the court under s14 of the 1996 Act. In a case where there had been no intervening bankruptcy, the court would determine that application by reference to all relevant matters, including those set out in s15 of the 1996 Act. Those matters included the intentions of the parties creating the trust, as evidenced by the agreement which they had made. But, where one co-owner had been adjudged bankrupt and the application under s14 of the 1996 Act was made by the trustee in bankruptcy, s15 of the 1996 Act was displaced by s335A of the 1986 Act. In those circumstances the matters to which the court was to have regard were those set out in s335A(2) of the Act. Those matters would include the intentions of the co-owners when they created the trust, as one of the circumstances of the case to which the court must have regard under s335A(2)(c). But, in a case where s335A(3) applied, the intentions of the co-owners when they created the trust must yield to the interests of the bankrupt's creditors, save in exceptional circumstances.

H [18] At para [13] of his judgment, the judge referred to the submission, made on behalf of Mrs Avis, that s283(5) of the 1986 Act had the effect that the trustee in bankruptcy took the bankrupt's interest in the property subject to the right conferred on Mrs Avis by paras 2 and 5 of the 1985 order. Section 283 of the 1986 Act defines the bankrupt's estate. Section 283(5) is in these terms, so far as material:

- '(5) For the purposes of any... provision in this Group of Parts [relating to the property of a bankrupt], property comprised in a bankrupt's

estate is so comprised subject to the rights of any person other than the bankrupt (whether as a secured creditor of the bankrupt or otherwise) in relation thereto, but disregarding –

- (a) any rights in relation to which a statement such as is required by section 269(1)(a) was made in the petition on which the bankrupt was adjudged bankrupt, and
- (b) any rights which have been otherwise given up in accordance with the rules.’

Neither of the two disregards is in point in the present case. I should add that s283A of the 1986 Act – introduced by the *Enterprise Act 2002* – provides that, at the end of the period of three years beginning with the date of bankruptcy, any interest of the bankrupt in a dwelling house which, at the date of bankruptcy, was the sole or principal residence of the bankrupt’s spouse, ceases to be comprised in the bankrupt’s estate. But that provision came into force subject to transitional provisions, and it is common ground that Mrs Avis cannot rely on it in the circumstances of the present case.

[19] The judge rejected the submission founded on s283(5) of the 1986 Act. At para [15] of his judgment he said this:

‘[15] In my view, the agreement between the parties contained in Paras 2 and/or 5 of the Consent Order does not give rise to any absolute rights (proprietary or personal). In my view, the only “rights” that the Appellant has in relation to the property (other than her right to the share of the proceeds of sale of the property identified in Para 1 of the Consent Order on sale) is a right (contained in Para 5 of the Consent Order) to occupy until sale and a right not to have the Property sold other than either on the occurrence of one of the events identified in Para 2 of the Consent Order or the making of an Order by the Court pursuant to TLATA s14 (applying the criteria and assumptions set out in either TLATA s15 or IA s335A as applicable) directing a sale. Understood in this way, there is no conflict between IA s283(5) and s335A because the Appellant’s rights concerning sale are qualified rights and no question arises of those qualified rights being violated by an Order for sale made by the Court on the application of the Trustee, nor does any question arise of the Trustee purporting to take property comprised in Mr Avis’s estate otherwise than subject to Mrs Avis’s rights so understood.’

This appeal

[20] Mrs Avis appeals to this court from the whole of the order made by HHJ Pelling on 13 December 2006. The issue raised by the grounds of appeal attached to her appellant’s notice – albeit under a number of heads – is whether the judge was correct to decide that s335A – and, in particular, s335A(3) – of the 1986 Act was

A applicable in the context of the application made by the notice of 18 November 2005. But, in substance, her appeal to this court is founded on the contentions which she had advanced before HHJ Pelling: that no order for sale could be made on the trustee in bankruptcy's application because none of the events specified in the 1985 order had occurred; there was no purpose in a further hearing of that application; and it should be dismissed without consideration under s335A of the 1986 Act (or otherwise) of whatever merits it might have had if the 1985 order had not been made.

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C [21] Mrs Avis has set out her grounds of appeal under eight paragraphs. When giving permission for an appeal to this court, Sir Martin Nourse observed that it was a possible view of this case that it bristled with important points of principle, but that it was enough to single out para 8 of those grounds. Paragraph 8 relies on the argument based on s283(5) of the 1986 Act which had been deployed before HHJ Pelling.

Section 283(5) of the 1986 Act

D [22] For my part, I am satisfied that, unless the 1985 property adjustment order has some special force which goes beyond the agreement of the parties as reflected and recorded in that order, the argument based on s283(5) of the 1986 Act must be rejected for what are, in substance, the reasons given by the judge. It is said that the section expresses the historic principle of bankruptcy law that the trustee in bankruptcy takes the bankrupt's property subject to all equities and liabilities which affected it in the hands of the bankrupt, and that, in the circumstances of the present case, the effect of the terms agreed at the time of the 1985 order is that Mr Avis could not have sought an order for possession and sale of the property until one or other of the events for which para 2 of that order provides had occurred. Reference is made to *Re Scheibler, ex parte Holthausen* (1874) LR 9 Ch App 722, *Bendall v McWhirter* [1952] 2 QB 466 and *Bradley-Hole v Cusen* [1953] 1 QB 300.

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F [23] It is not, I think, necessary to refer to the passages in those cases to which we were taken. The principle is not in doubt. The trustee in bankruptcy takes the bankrupt's property subject to the equities and liabilities to which it was subject in the hands of the bankrupt. The relevant question is whether, absent bankruptcy, the bankrupt could have made an application under s14 of the 1996 Act. If he could, then the trustee in bankruptcy can make such an application. And, if the trustee in bankruptcy can make application under s14 of the 1996 Act, then s335A of the 1986 Act must apply to that application. That is what s335A(1) - read with s15(4) of the 1996 Act - requires. It is pertinent to keep in mind, in this context, that s335A was introduced into the 1986 Act by s25(1) of, and para 23 of Sch 3 to, the 1996 Act.

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H [24] Put shortly, it is said that Mr Avis could not have made an application under s14 of the 1996 Act, and so the trustee in bankruptcy cannot make such an application. But, unless the 1985 property adjustment order has some special force which goes beyond the agreement of the parties as reflected and recorded in that order, that submission cannot be sustained. The statutory scheme now enacted in

ss14 and 15 of the 1996 Act replaces that formerly enacted in s30 of the *Law of Property Act 1925* – see the observations of Sir Andrew Morritt C in *Gotham v Doodes* [2007] 1 WLR 86, 90-91. And, as Nourse LJ observed in *Re Citro* [1991] Ch 142, 150G-H:

‘One of the consequences of the 1925 property legislation is that the legal estate in any property which is beneficially owned jointly or in common is necessarily held on trust for sale and is thus subject to the jurisdiction of the court under s30 [of the 1925 Act].’

It remains the position, under the 1996 Act, that, where property is held upon trust for sale (as in the present case), a person who has an interest in that property (or in the proceeds of sale) may apply for an order for sale: s14 of the 1996 Act. Unless the 1985 order has some special force which goes beyond the agreement of the parties, the judge was right to hold (as he did at para [15] of his judgment) that the rights conferred on Mrs Avis by the 1985 order were always subject to the possibility that the court might make an order for sale pursuant to s30 of the 1925 Act (or, since 1996, pursuant to s14 of the 1996 Act). The agreement recorded in the 1985 order did not, of itself, confer on Mrs Avis an absolute right that the property remain unsold unless and until one or other of the events specified in para 2 had occurred. As the judge observed, Mrs Avis’s right to resist a sale was qualified by the right of the other person interested in the property (whether that were Mr Avis or his trustee in bankruptcy) to apply to the court for an order for sale. As he put it, correctly in my view, the present application does not raise any question ‘of the Trustee purporting to take property comprised in Mr Avis’s estate otherwise than subject to Mrs Avis’s rights so understood’.

[25] It is important to keep in mind that the relevant question, in this context, goes to jurisdiction – could Mr Avis have made an application under s14 of the 1996 Act? The question is not whether, as a matter of discretion, the court would or would not have made an order for sale on the application of Mr Avis, the question is whether the court would have had jurisdiction to make an order for sale. It is immaterial that, on an application by Mr Avis, the court might well have decided, as a matter of discretion, not to make an order for sale. The factors to which the court must have regard, in exercising its discretion on an application by the trustee in bankruptcy and the weight to be given to those factors, are not the same as those to which it would have had regard, or to which it would have given weight, on an application by Mr Avis. A helpful review of the authorities and the practice before the enactment of the 1996 Act is found in the judgment of Goff J in *Re Solomon, Solomon’s Trustee v Solomon* [1967] Ch 573, 586-589 and (in this court) in the judgment of Nourse LJ in *Re Citro* (*supra*, 150-157). The approach to an application made by a trustee in bankruptcy – in contrast to the approach to an application by the debtor (not in bankruptcy) beneficially interested in the property – which (as those authorities show) the court would have taken before the 1996 Act is now replicated in the provisions of s335A of the 1986 Act and s15 of the 1996 Act.

A *Section 6(6) of the 1996 Act*

[26] I turn, therefore, to the question whether the 1985 order has some special force which goes beyond the agreement of the parties as reflected and recorded in that order. *Section 6(1)* of the *1996 Act* provides that, for the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner. But that section must be read with *s6(6)* and (7):

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'(6) The powers conferred by this section shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity.

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(7) The reference in subsection (6) to an order includes an order of any court...'

The jurisdiction conferred by *s14* of the *1996 Act* empowers the court to make any such order as it thinks fit:

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'... relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions).'

E

At first sight those words confer an unrestricted power. But it is said the judge failed to appreciate that the effect of *s6(6)* of the *1996 Act* was that it was not open to the court to make an order under *s14* of that Act directing Mr and Mrs Avis (as the trustees of the property) to sell the property. To direct them to sell would be to direct them to exercise their powers in contravention of the 1985 order.

F

[27] With those matters in mind, the narrow issue for decision on this appeal can be identified – whether, having regard to the terms of para 2 of the 1985 property adjustment order and the provisions of *s6(6)* of the *1996 Act*, it is open to a court as a matter of jurisdiction to make an order for sale of the property, as sought by the trustee in bankruptcy in his application of 18 November 2005, in the exercise of powers conferred by *s14(2)(a)* of that Act. It is accepted on behalf of the trustee in bankruptcy – and, if it were not, I would so hold – that, notwithstanding that he is, plainly, a person with an interest in the property subject to a trust of land within *s14(1)* of the *1996 Act* (and so a person who can apply to the court under that section), the application is not properly made (and so should be dismissed *in limine*) if the order sought is not an order which the court has power to make. It is, I think, accepted on behalf of the appellant – and, again, if it were not I would so hold – that, if the application is properly made under *s14* of the *1996 Act*, then it is an application to which *s335A* of the *1986 Act* applies, and, in deciding whether to make the order sought, the court must have regard to matters in *s335A(2)* and to the mandatory terms of *s335A(3)*. As I have said, that is what *s335A(1)*, in terms, requires.

G**H**

[28] In addressing the issue which I have just identified it is convenient, first, to note three features of the 1985 order. First, para 2 – which directs that the trust for sale to which the property is then subject ‘shall be postponed’ until the happening of one of the specified events – is ineptly drawn. On a true analysis there was an existing trust for sale (as acknowledged in para 1 of the order). The direction in para 2 has effect as a direction that the trustees exercise their power to postpone execution of that trust until one of the specified events has occurred. Secondly, although not expressed, the direction in para 2 that the sale of the property be postponed must be subject to any further agreement between Mr and Mrs Avis, as trustees for sale, that the property be sold notwithstanding the fact that none of the specified events had happened. It seems to me necessary to imply a term to that effect – it could not have been intended that Mr and Mrs Avis (if agreed upon a sale) would have to return to the court for a formal variation of the 1985 order. Thirdly, the order itself confers liberty to apply.

The liberty to apply under the 1985 order

[29] I was, at first, attracted to the view that the answer to the jurisdictional issue which I have identified could be found in the liberty to apply conferred by the 1985 order. On further reflection, I am persuaded that that would not be a correct view. It is, I think, clear that the 1985 order was made under s24(1)(c) of the *Matrimonial Causes Act 1973*. The limited power to vary an order made under that provision, conferred by s31(1) of that Act, could not be exercised in circumstances such as those in the present case – see s31(2)(e) and (4) and the observations of Oliver LJ in *Thompson v Thompson* [1986] Fam 38, 46G.

[30] Section 24A of the 1973 Act, introduced by s7 of the *Matrimonial Homes and Property Act 1981*, enables the court, where a property adjustment order had been made in respect of property in which either or both the parties to the marriage had a beneficial interest, to make a further order for the sale of such property. The scope and effect of s24A of the 1973 Act was considered by this court in *Thompson*. In that case, the property adjustment order itself had been made in January 1981, at a time when the new section had not come into force. Nevertheless, this court held (*ibid*, 53D) that s24A of the 1973 Act did enable a court, on an application made under a liberty to apply conferred by the original property adjustment order, to make an order for sale of the property. But, in reaching that conclusion, the court drew a distinction (*ibid*, 46H, 47A-H), between a sale which had the effect of varying the terms of the original property adjustment order (which was impermissible in the light of s31 of the 1973 Act) and a sale which could be regarded as implementing, or working out, the original order as a response to changed circumstances. Lord Justice Oliver expressed the view (*ibid*, 51E) that the liberty to apply in a property adjustment order of this nature:

‘... is a liberty to apply to supplement the order as a matter of working it out in unforeseen circumstances. It is not inserted to enable application to be made for a variation prohibited by section 31.’

A [31] It is clear that the court in *Thompson* would have regarded an application made by the trustee in bankruptcy of the party who was out of possession (that is to say, the party other than the party for whose benefit the postponement of sale was directed) as falling into the former category (*ibid*, 50B-E). It was not an application which the court having jurisdiction in the matrimonial proceedings could entertain under the power conferred by s24A of the 1973 Act. On that point, Oliver LJ (with whom the other members of this court agreed) expressly approved the decision of Wood J in *Norman v Norman* [1983] 1 WLR 295: (*ibid*, 50F-51B). It follows, as it seems to me, that the liberty to apply conferred by the 1985 order provides no assistance in the present case.

C **Jurisdiction under s14 of the 1996 Act**
 [32] It seems to have been common ground in *Thompson* that (absent jurisdiction in the matrimonial proceedings under the powers conferred by s24A of the 1973 Act) an application for sale could have been made under the general equitable jurisdiction conferred by s30 of the *Law of Property Act 1925*. That view received some encouragement from the court (*ibid*, 43G). The problem, in that case, was that the value of the property put it outside the equity jurisdiction of the county court (*ibid*, 44C-D). That problem does arise in the present case.

D [33] I return, therefore, to the issue which I identified earlier in this judgment – having regard to the terms of para 2 of the 1985 property adjustment order and the provisions of s6(6) of the 1996 Act, is it open to a court as a matter of jurisdiction to make an order for sale of the property in the exercise of powers conferred by s14(2)(a) of that Act? On a true analysis that issue, as it seems to me, raises a short question of construction – to what extent, if at all, is the power of the court to make ‘any such order relating to the exercise by the trustees of any of their functions... as the court thinks fit’ cut down by the restriction, in s6(6), that ‘the powers conferred by this section shall not be exercised in contravention of... any order made in pursuance of any other enactment’.

E [34] In my view, the answer to that question is that, in the present case, the power conferred by s14(2)(a) of the 1996 Act is not cut down by the restriction in s6(6) of that Act. It is, I think, important to keep in mind that the property held by Mr and Mrs Avis is held by them upon an express trust for sale. As I have said, that is acknowledged in para 1 of the 1985 order. The true position is not that they hold the property with a power to sell – the property is held upon trust to sell, but with power to postpone sale (see the observations of Simonds J in *Re Mayo, Mayo v Mayo* [1943] Ch 302, 304, approved in this court by Devlin LJ in *Jones v Challenger* [1961] 1 QB 176, 181). Furthermore, it is important to keep in mind that the power to postpone sale is not conferred by s6(1) of the 1996 Act – in so far as not expressed in the original conveyance, it is conferred by s4(1) of the 1996 Act. And, furthermore, it is important to keep in mind that the restriction in s6(6) applies only to the ‘powers conferred by this section’ – that is to say, the restriction applies, in terms, to powers conferred by s6, not to powers conferred by s4(1) or by the original disposition.

H [35] Section 14(2)(a) of the 1996 Act confers on the court power to make any such order as it thinks fit relating to the exercise by trustees of any of their functions.

That enables the court to direct trustees to execute the trust for sale or (to put the point another way) to direct trustees to concur in a decision that they will no longer exercise their power to postpone sale. But, in neither case will the court be directing trustees to exercise a power conferred by s6 of the Act. The restriction in s6(6) can have no application in such a case. It must follow, as it seems to me, that, notwithstanding para 2 of the 1985 order, an order made under s14(2)(a) directing Mr and Mrs Avis to sell the property cannot be said to be inconsistent with the restriction in s6(6) of the Act. It is to be kept in mind that, absent a statutory restriction, s14(2)(a) enables the court to override the need for the consent of any person.

[36] For those reasons, I would hold that, notwithstanding para 2 of the 1985 order, it would have been open to the court, on an application made by Mr Avis (if he had not been adjudged bankrupt) under s14 of the 1996 Act, to make an order for the sale of the property. It is immaterial, in this context, that on an application by Mr Avis, the court might well have decided, as a matter of discretion, that it would not order a sale. It follows that it is open to the court to make an order for sale on an application made by the trustee in bankruptcy under s14 of the 1996 Act. It is not, I think, open to doubt that, on an application made by the trustee in bankruptcy under s14 of the 1996 Act, s335A of the 1986 Act requires:

- (i) that that application must be made to the bankruptcy court - s335A(1);
- (ii) that the approach of that court to the application is prescribed by s335A(2), displacing s15(1)-(3) of the 1996 Act; and
- (iii) that - in circumstances where s335A(3) applies - the interests of the bankrupt's creditors outweigh all other considerations unless the circumstances of the case are exceptional.

Conclusion

[37] For those reasons I would hold that the judge was right to make the order that he did. I would dismiss this appeal.

[38] I should add, for completeness, that the effect of dismissing this appeal is that the application made by the trustee in bankruptcy by the notice of 18 November 2005 will now proceed to a hearing on the merits, as both the district judge and HHJ Pelling intended. On that hearing, the court will need to decide whether the circumstances of this case are exceptional, so as to displace the assumption that the interests of the bankrupt's creditors outweigh all other considerations. Nothing in this judgment should be taken as an indication that I have formed any view on that point. The procedural history of this application - which, in common with HHJ Pelling, I regard as unfortunate - has had the result that that point is not before this court on this appeal. But the circumstances of this case lead me to think (without intending any criticism of the district judge) that consideration should be given to listing the adjourned application for hearing in the High Court. I would be minded to include an appropriate direction in the order which this court will make.

A

LORD JUSTICE MAY:

[39] I agree that this appeal should be dismissed for the reasons given by Chadwick LJ.

LORD JUSTICE WARD:

[40] I also agree.

B

Counsel

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C

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The second respondent did not appear and was not represented.

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