

The perils of parting with relationship property

SHARON CHANDRA

The Supreme Court has recently considered the application of section 44 of the Property (Relationships) Act 1976 (PRA). Section 44 permits the court to make certain orders if a disposition of property has been made in order to defeat the claim of a person under the PRA.

Factual background

Mr Horsfall was a commercial property developer who, during his relationship with Ms Potter, acquired a property (College Street) in their joint names. Mr Horsfall funded the purchase from the sale of shares paid to his personal bank account, which he claimed were his separate property. College Street was subsequently sold, Mr Horsfall paid \$50,000 to Ms Potter and the remaining proceeds were paid to Mr Horsfall's company, 168 Group Limited (formed prior to the parties' relationship). This occurred four years prior to separation.

Upon the parties' separation, Ms Potter claimed College Street was relationship property and Mr Horsfall intentionally transferred the proceeds of sale to 168 Group in order to defeat her interest, pursuant to section 44.

First issue: Was College Street relationship property?

In determining whether College Street was relationship property, the Supreme Court was first required to determine beneficial ownership of College Street. If College Street was beneficially owned by the parties, it would be relationship property by virtue of section 8 (1)(c). Mr Horsfall's claim, however, was College Street was beneficially owned by 168 Group and the parties were merely

holding the property on resulting trust for the benefit of the company.¹

The Supreme Court held the view that beneficial ownership must be examined on the basis of the common intention of the parties. If there was no common intention to hold College Street on trust, Ms Potter held a joint beneficial interest.

Ms Potter's position was College Street was purchased in order to build an apartment which would become the family home. The \$50,000 payment to her upon the sale of College Street was to compensate for her disappointment in not being able to utilise the property as a family home.

Mr Horsfall's evidence, however, was College Street was beneficially owned by 168 Group and title was taken in the parties' joint names to conceal 168 Group's involvement and limit tax implications. Mr Horsfall denied Ms Potter's assertion that College Street was to be used as a family home and the \$50,000 payment to Ms Potter was for the use of her name on the title.

The majority of the Supreme Court were not impressed with Mr Horsfall's evidence and favoured Ms Potter's position that there was a common intention for College Street to become the family home. The Supreme Court therefore held College Street was beneficially owned by the parties and it, along with any proceeds of sale, was relationship property.

Second issue: Were the payments made in order to defeat Ms Potter's rights?

The Supreme Court accepted the findings of fact made by the Family Court, including that Mr Horsfall was aware of Ms Potter's

rights when he transferred the proceeds of College Street to 168 Group.

Mr Horsfall's evidence demonstrated he conducted his affairs in order to be able to benefit from his assets whilst still protecting those assets from future claims by others. Whilst this was largely focussed on protection from the Inland Revenue Department, it also included potential claims from others, including Ms Potter.

On that basis, the Supreme Court majority held Mr Horsfall must therefore have been aware that his actions would defeat Ms Potter's rights to the proceeds of sale.

Approach to section 44

The approach taken by the majority of the Supreme Court demonstrates a two-step process in assessing a section 44 claim.

The first step is to ascertain whether the property that was disposed of is relationship property. In making this assessment, it will be necessary to determine beneficial ownership of the property in question. Such an assessment must be based on the common intention of the parties, not solely on the intention of the party who disposed of the property.

The second step is to examine whether the party who disposed of the relationship property was aware of the other party's rights under the PRA. If this was the case, it must follow there was an intention to defeat the other party's rights.

¹ A resulting trust is the creation of an implied trust where property is transferred to someone without consideration and they are implied to hold the property for the benefit of another.

ON THE HORNS OF A DILEMMA, *Continued...*

have access".

The Supreme Court noted that Mr Horsfall did not try to suggest that he and Ms Potter had agreed to pretend that an apartment was to be built and become their home.

The conclusion was that when the property was placed in joint names, there was

no resulting (or other) trust in favour of the company or other party and Ms Potter's section 44 claim succeeded.

It is to be expected that de facto or married couples will want to structure their property affairs in a way that will achieve the best tax outcome or provide creditor

protection. However, it is also important to give consideration to the relationship property consequences in the event of a separation to ensure that there are no unintended outcomes.

¹ *Tinker v Tinker* [1970] P 136 (CA).

