Radcliffe Chambers

Fred & Mabel; a probate case study

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Fred and Mabel

Difficult estates: a probate case study with a hint of insolvency

Fred and Mabel were an elderly married couple with no children. Their only other surviving relatives were two nephews of Mabel's, both in their thirties. Fred died in November 2018. Mabel died soon after in February 2019. There had been questions about Mabel's capacity for some time.

Between them Fred and Mabel owned substantial assets. Their London house (£1.5 million) and their investment portfolio (£1m) were jointly owned and passed by survivorship to Mabel on Fred's death. Fred owned little else of value in his sole name (a car and £50k in bank accounts). Mabel owned some valuable artworks and jewellery worth £250k in her sole name.

In their later years Fred and Mabel had taken out an equity release mortgage on their London home to fund their living expenses. The sum owed to the lender at the date of Mabel's death was c. £750k.

Fred and Mabel had a housekeeper. She was employed by Fred. In the last year of his life, Fred had summarily dismissed her for alleged theft. She brought a claim for unfair dismissal. Fred compromised the claim by agreeing to pay the housekeeper £20k. However, this sum remained unpaid at the date of Fred's death.

Fred and Mabel also used a chauffeur regularly. After Fred's death the chauffeur claimed that he had been Fred's employee and that Fred had not been properly

contributing to his pension. The chauffeur has intimated a potential claim against Fred's estate. The merits of that claim are unclear.

Fred and Mabel were the trustees of a registered charitable trust (a will trust established under the will of Mabel's late father) whose objects were for the relief of poverty. In the last few years they had "borrowed" £50k from the charity's substantial assets to help them pay the wages of the chauffeur and the housekeeper.

Fred's liabilities at the date of his death amounted to at least c £150k

- Settlement sum to be paid to housekeeper - £20k
- Solicitors' fees relating to the housekeeper's claim - £20k
- BUPA medical fees - £30k
- Credit card debts - £15k
- CGT liability - £10k
- £50k (or perhaps £25k) owed to the charitable foundation
- Other liabilities - £5k
- chauffeur's potential claim - unknown

Fred and Mabel's wills

Fred made a will leaving everything to Mabel, naming an old business friend, Mr Smith, as his executor. If Mabel predeceased him, Fred left his estate to the charitable foundation. (Fred did not like the nephews).

Mabel had made two wills. In her penultimate will (made in 2014) she left her estate to Fred, but if he predeceased then to her two nephews.
In her final will, made in August 2018 (prepared by solicitors but executed at home), she left her estate to Fred, but if he predeceased her then her jewellery and artworks

to the nephews and the residue to the charitable foundation. In both wills she named an old accountant friend, Mr Jones, as her executor.

The two nephews have lodged a caveat, claiming that Mabel did not have the capacity to make her 2019 will.

Mabel's estate

Mabel's estate is comprised of:

- the joint tenancy property co-owned with Fred (house and investment portfolio) (total £2.5m)
- valuable artworks and jewellery (£250k)

Mabel's liabilities are:

- the equity release mortgage £750k
- £50k (or perhaps £25k) owed to the charitable foundation
- Other liabilities £30k

Problems – stage 1

Fred's solely owned property amounts to only c. £70k. The co-owned property passes to Mabel by survivorship. Fred's liabilities are £150k. His estate is technically insolvent. How are his debts to be paid? What should Mr Smith do? He is a loyal old friend with a strong sense of responsibility, but should he take out a grant or renounce? If he doesn't do anything, who will?

Some of Fred's creditors are pressing Mr Smith for the payment of their debts. Assuming Mr Smith decides he will act, should he pay them?

Fred and Mabel were the only trustees of the charitable foundation. Now they are dead who will represent the charity's interests? The charity is owed £50k. It is also the residuary beneficiary of Mabel's last will which the nephews wish to challenge.

Which will should Mr Jones seek to admit to probate? He saw Mabel a few months before she executed her 2018 will and thought she was bright and alert. The nephews, however, say they have compelling evidence of cognitive decline. Mr Smith also believes she no longer had capacity by the time Fred died in November 2018.

While Mr Jones is pondering what to do, the nephews enter a caveat. Mr Jones wonders how he can move the situation on given that there is no one representing the charity who might be able to negotiate the probate dispute with the nephews.

Problems – stage 2

Mr Smith decides to takes out a grant in Fred's estate believing that to be the right thing to do. There is no IHT to pay because Fred left everything to Mabel under the will and by survivorship. He instructs solicitors to advise him on the apparent insolvency of Fred's estate. He signs a retainer agreement in the usual way agreeing to be liable for the firm's fees. (But was this a good idea?)

Some of Fred's creditors are pressing Mr Smith for the payment of their debts. The solicitors who are owed fees are threatening to apply for an Insolvency Administration Order. Mr Smith decides to pay them to get them off his back (total £20k) before telling his solicitors what he has done. Meanwhile, the solicitors seek specialist employment advice within the firm on how to deal with the chauffeur's claim.

One of the nephews is proactive and is concerned about the accruing interest on the equity release mortgage. He takes out an *ad colligenda* grant in Mabel's estate so that the house can be sold and the equity release mortgage paid off.

Once this occurs Mr Smith, on the advice of his solicitors, decides to approach the nephew, hoping to persuade him to authorise the payment of all Fred's liabilities from Mabel's assets (specifically from the proceeds of sale of the house) citing the availability of a potential "clawback" remedy under s. 421A Insolvency Act 1986 (see below).

The nephew agrees. All Fred's liabilities are paid off, with the exception of the administration expenses that Mr Smith has run up instructing solicitors. These now amount to in excess of £50k. The nephew refuses to pay this final item, stating (1) he is now unsure whether he had the necessary authority to pay off any of Fred's liabilities from Mabel's assets under the scope of limited grant; (2) given the dispute over Mabel's will and the possibility that the charity may inherit, he had neither sought nor obtained approval from the charity because it is still without trustees; he believes he may have been too hasty; (3) he considers that the amount Mr Smith has incurred with solicitors is excessive in any event and that Mabel's estate should not have to bear these costs; (4) he questions whether in fact there is a potential remedy under s. 421A after all, given the wording of that section (see below).

Solutions: moving the situation forward

How to deal with the fact that the charity has no trustees?

(a) Appoint new trustees? Who is entitled to exercise the statutory powers of appointment under s. 36 Trustee Act 1925? The PRs of the last surviving trustee. Mr Jones has so far not been able to find anyone who might be willing to act as a trustee.

(b) Contact the Charity Commission? The Commission may appoint new charity trustees under s. 80(2) of the Charities Act 2011. Mr Jones has written to the CC but no reply has been forthcoming.

(c) Contact the Attorney General (as the protector of charities and charitable interests) at the GLD? The AG could then take a view on the merits of the nephews' intended probate claim and either defend or compromise that claim. The AG could also take a view on the potential clawback remedy proposed by Mr Smith.

Is there a remedy under s. 421A IA 1986 as Fred's executor claims?

This remedy, if available, would be two stage process. Fred's executor would apply for an Insolvency Administration Order (under an SI made under the Insolvency Act 1986[1]). The trustee appointed (the role is similar to that of a trustee for a living bankrupt) would then apply under s. 421A IA 1986 against Mabel's estate for survivorship assets from Mabel's estate to be clawed back into Fred's estate to the extent necessary to settle all Fred's liabilities. S. 421A specifically concerns

[1] The full title of which is the Administration of Insolvent Estates of Deceased Persons Order 1986 (SI 1986 No. 1999); often referred to as the Deceased Persons Order or "DPO".

insolvent estates where the deceased died co-owning property under a joint tenancy. The relevant provisions are these:-

> (1) This section applies where—
> (a) an insolvency administration order has been made in respect of the insolvent estate of a deceased person,
> (b) the petition for the order was presented after the commencement of this section and within the period of five years beginning with the day on which he died, and
> (c) immediately before his death he was beneficially entitled to an interest in any property as joint tenant.
> (2) For the purpose of securing that debts and other liabilities to which the estate is subject are met, the court may, on an application by the trustee appointed pursuant to the insolvency administration order, make an order under this section requiring the survivor to pay to the trustee an amount not exceeding the value lost to the estate.
> (3) In determining whether to make an order under this section, and the terms of such an order, the court must have regard to all the circumstances of the case, including the interests of the deceased's creditors and of the survivor; but, unless the circumstances are exceptional, the court must assume that the interests of the deceased's creditors outweigh all other considerations.
> (4) The order may be made on such terms and conditions as the court thinks fit.

There are three conditions to be satisfied before the clawback remedy s. 421A can apply. First, the section applies only where an IAO has already been made. (The remedy is therefore not directly available to Fred's executor, or to creditors, if Fred's estate is administered outside formal bankruptcy, or if an application for administration by the court is made under Part 64.[2])

Second, the petition for the IAO must have been made within five years of death.

Third, immediately prior to his death the deceased must have been beneficially entitled to an interest in any property as a joint tenant.

[2] And further note that once a Part 64 administration order has been granted it is no longer possible for an IAO to be made: see s. 271(2) of the Insolvency Act 1986 as modified by the DPO 1986, Sched. 1, Pt. II, para. 5, although the court hearing administration proceedings under Part 64 may, if satisfied that the estate is insolvent, transfer the proceedings to a court exercising jurisdiction in bankruptcy which court may make an insolvency administration order as if a petition had been presented.

What technical argument did the nephew raise?

The nephew sought to derive advantage from the definition of the word "survivor" in s. 421A(7) and to argue that because Mabel was already dead the clawback remedy was not available.

> *"(7) In this section, "survivor" means the person who, immediately before the death, was beneficially entitled as joint tenant with the deceased or, if the person who was so entitled dies after the making of the insolvency administration order, his personal representatives."*

This is an interesting and untested point. On one reading, the section appears to leave a lacuna by depriving the creditor of a remedy in circumstances where the survivor has died before the making of an IAO. There is a comment in Muir Hunter which appears to give credence to this analysis, based on a reference in Hansard. In my view this construction is illogical and wrong. Such a construction would defeat the purpose of the section, which is to provide a remedy for creditors where none previously existed. It would be perverse if parliament had intended a creditor's remedy to be defeated by an accident in timing of the survivor's death. That would risk creditors being treated in a highly arbitrary fashion, for no good or apparent reason.

An alternative remedy to the IAO route?

If all parties are represented and in agreement (and are presumably prepared to accept in principle the possibility that a remedy under s. 421A was capable of exercise) then a deed of variation in Fred's estate could be executed (involving a retrospective severance of the joint tenancy in some of the co-owned property to the extent necessary to cover all the liabilities).

Alternatively, Mabel's beneficiaries (i.e. the rival beneficiaries under both wills) could simply agree that Fred's liabilities should be satisfied from Mabel's estate as consideration for Fred's executors refraining from commencing legal proceedings under the IAO route.

Pushing on to mediation?

Success at mediation sounds like a tall order given the extent of the problems, but with the involvement of the AG, the charity's interests could be represented and there would be scope for reaching agreement in the probate claim between the AG and the nephews (perhaps as the first part of a two stage mediation). A further mediation could then determine the extent to which Mabel's beneficiaries were agreeable to settling the remaining liabilities in Fred's estate. Mr Smith, in particular, would be keen to avoid any personal liability for the administration expenses, and Mabel's beneficiaries would prefer to avoid the risk of any application under s. 421A being made, since the costs of that application, if properly brought, would also be payable from Mabel's estate.

Some further points of detail about insolvent estates

There are three ways in which an insolvent estate may be administered. The first and usually the most convenient is out of court and outside formal bankruptcy. The second, usually the least convenient and most expensive, is under the Court's direction following an application under CPR Part 64. The third is in formal bankruptcy after the making of an Insolvency Administration Order.

Where an order is made under s. 421A the court can require the surviving joint tenant (or in this case her executors) to pay to the trustee "an amount not exceeding the value lost to the estate". When making an order the court must:-

> *"have regard to all the circumstances of the case, including the interests of the deceased's creditors and of the survivor; but, unless the circumstances are exceptional, the court must assume that the interests of the deceased's creditors outweigh all other considerations."*

The procedure for obtaining an IAO is straightforward but does require preparation and knowledge of the requirements under the DPO 1986. Just as a person can petition for his own bankruptcy during his lifetime, so can proving executors petition for an IAO in respect of a deceased's estate after his death. Insolvency administration petitions by personal representatives are dealt with in the same way as debtors' petitions and are issued in the court that would have had bankruptcy jurisdiction during the deceased's lifetime. If the court is satisfied that the estate is insolvent it will make the IAO. Once the IAO has been made, the Official Receiver becomes receiver and manager of the estate and is under a duty to act as such until the estate vests in a trustee. The deceased's funeral, testamentary and administration expenses have priority over the preferential debts listed in Schedule 6 to the Insolvency Act 1986. The duties of the executors in relation to the Official Receiver and the trustee are the same as those imposed on a living bankrupt (i.e. delivering to the Official Receiver within 56 days all necessary information, statement of affairs etc). The administration of the estate then proceeds as in the case of a living bankrupt. Following appointment of the trustee, the application under s. 421A may then be made.

If Fred's executor decided to administer the estate outside formal bankruptcy he would nonetheless be required to do so in accordance with the DPO. Strictly speaking Mr Smith was therefore wrong to prefer some creditors over others – this was a risky strategy.

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