

Neutral Citation Number: [2004] EWHC 2170 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 September 2004

Before :

MR NICHOLAS STRAUSS QC (sitting as a Deputy Judge of the High Court)

Between :

ROMANO BARCA (MALE)

Appellant

- and -

MALCOLM JOHN MEARS
Trustee of the Estate of
Romano Barca (Male)

Respondent

The appellant appeared in person.

Mr Andrew Westwood (instructed by Ronaldsons) appeared for the respondent
on 21 July 2004; Mr. Michael Gibbon appeared on 29 July 2004

Hearing dates: 21 and 29 July 2004

Approved Judgment

Mr Strauss QC :

1. This is an appeal against an order made by Deputy Registrar Agnello on 29 April 2004, in which she ordered the appellant (“Mr. Barca”) to give vacant possession of a house at 10 Prioress Road, West Norwood, London, SE27 and further ordered that the house should be sold and the net proceeds of sale held until determination of the beneficial interests in it.

2. Mr. Barca was declared bankrupt on 9 August 1995. The respondent was appointed Trustee in Bankruptcy with effect from 9 December 2003. I will refer to him as “the Trustee”.

3. As at November 2003, Mr. Barca’s known creditors were owed approximately £135,595 plus statutory interest. The amount due to Halifax Plc on the mortgage of the house was £52,342.19 as at 21 August 2003. The Trustee relies on a valuation of the house of £140,000; Mr. Barca has obtained valuations of £120,000. On any view, there should be a substantial surplus available for the creditors.

4. On 8 December 2003, the Trustee applied for a declaration that he had an absolute beneficial interest in the property and for an order for possession and sale.

5. In his evidence in support of the application, he stated that he was aware that at some time in the past Mr. Barca had lived at the property with his former partner, Ms. Beatrice de Cock, and that they had had a child. He further stated that, whilst Mr. Barca had asserted that Ms. de Cock had an interest in the property, he had not been notified of any such interest and none was recorded on the title deeds.

6. In Mr. Barca's first witness statement, he said that he had had a long-term relationship with Ms. de Cock and that their son, Lorenzo, who was born on 10th August 1991, currently lived with him between Thursday and Monday morning in each week and that he had a bedroom in the house and spent more time there than at his mother's home. He further stated that Ms. de Cock had a beneficial interest in the property because she had, between 1990 and 1995, paid the mortgage and contributed to household bills. In his second witness statement, he repeated that his son spent 4 out of every 7 days in the property, and explained in some detail why an order for possession and sale would cause him considerable hardship.

7. There was also a short witness statement by Ms. de Cock, in which she confirmed that she had a financial interest in the property as a result of contributing to the mortgage, and supported Mr. Barca's evidence that Lorenzo spent 3-4 nights a week there albeit only in term time, and that he received assistance from his father with his educational difficulties. However, counsel instructed by Mr. Barca indicated that he placed no reliance on this statement, at least in relation to the claim that Ms. de Cock had a beneficial interest in the property, because he was not in a position to call her and the statement gave no figures.

8. In these circumstances, the Deputy Registrar was not prepared to proceed with the application for a declaration as to the beneficial interests in the property without joining her as a party to the proceedings and giving her an opportunity to put forward her case. However, she was prepared to proceed with the application for possession and sale of the house, notwithstanding Ms. de Cock's claim.

9. I was not referred to the transcript of the hearing in any detail by either side, but it appears that the matter proceeded on the basis that the principal issue between the parties was whether the court should make an order for sale pursuant to section 14 of the Trusts of Land and Appointment of Trustees Act 1996 and section 335A of the Insolvency Act 1986 (which was applicable if but only if Ms. de Cock did have an interest, so that there was a trust for sale): see pp. 11-2 of the transcript.

10. The main ground on which counsel for Mr. Barca resisted an order for possession and sale was that such an order would disrupt the education of his son, who had special educational needs. He had difficulty in concentrating, resulting from the fact that his mother's first language was French, and poor physical co-ordination. He stayed with his father in the house between Thursday and Monday, and the assistance which his father had been able to give him with respect to both problems had led to considerable improvement; he was now making much better progress at Harris City Technology College, which was an excellent school. Mr. Barca feared that, if he was rendered homeless, the help which he would be able to give his son would be severely curtailed, and that his son's progress would cease. Counsel for the Trustee did not cross-examine Mr. Barca.

11. Mr. Barca's evidence on these matters was directed at section 335A(3) which provides that, on an application made after the end of the period of one year beginning with the first vesting 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 submission made on behalf of Mr. Barca was that the hardship caused to his son by an order for possession and sale constituted “exceptional circumstances”. Mr. Barca was not cross-examined and his evidence was thus not challenged.

12. One point which has troubled me, although not raised in Mr. Barca's notice of appeal, is that - if Ms. de Cock has or may have a beneficial interest in the property - then it may be said that she was also entitled to be heard on the question of whether there were exceptional circumstances justifying a lengthy postponement of the order for possession and sale. As was said in the leading case of re Citro [1991] Ch. 142, to which I refer in more detail below, no distinction is to be drawn between cases in which the property is still a matrimonial home and cases in which it is not.

13. The Deputy Registrar made an order on 29th April 2004 that Ms. de Cock should be joined, and she gave certain further directions as to the hearing of the issue as to beneficial entitlement, which were subsequently slightly varied. In the end, Ms. de Cock wrote to the Trustee's solicitors on 14th July 2004 in the following terms:-

“Beneficial interest for 10 Prioress Road, West Norwood

I would like to withdraw my Beneficial Interest for 10 Prioress Road, West Norwood, London SE25 0NW as I do not qualify for Legal Aid.”

14. This letter is open to two possible interpretations. The more likely interpretation is that Ms. de Cock understands that she could make an application for a declaration that she has a beneficial interest in the property, but because of her inability to obtain legal aid does not wish to pursue it. There is however in my view a possibility that she believes that, because she does not qualify for legal aid, she is not able to pursue her claim. Possibly, an explanatory letter should be written to her, and she should be asked to make it clear whether she is abandoning her claim in the knowledge that she is entitled to pursue it without obtaining legal aid. This is a matter which the Registrar can no doubt consider when hearing that part of the application.

15. The question however remains whether I should allow the appeal in this case simply on the basis that the order for possession and sale should not have been made without first joining Ms. de Cock and giving her the opportunity to be heard on this part of the application. I do not think that it would be right to do so. Even though Ms. de Cock was not formally joined as a party to the application, she made a statement which supported Mr. Barca's evidence on their son's educational needs but without adding any substantial detail. It therefore does not seem that there is anything more that she could say, and I do not think that any useful purpose would be served by allowing the appeal merely so that she could be formally joined for the purposes of this part of the application.

16. As I have said above, the matter seems to have proceeded before the Deputy Registrar on an assumption that there was a trust for sale, but even if there was not, substantially the same question might well have arisen under section 337 of the Act, which applies where any person under the age of 18 with whom the

bankrupt has at some time occupied the dwelling house has his/his home with the bankrupt at the time when the bankruptcy petition is presented and at the commencement of the bankruptcy. In such circumstances, the court must make a similar assumption, that the interests of the bankrupt's creditors outweigh all other considerations unless the circumstances of the case are exceptional. It is clear on the evidence that Lorenzo now has his home with Mr. Barca, but it is not clear whether this was so at the time when the bankruptcy petition was presented or at the commencement of the bankruptcy. If Ms. de Cock had no beneficial interest in the property, and if Lorenzo did not have his home with his father at the relevant times, then neither section 335A nor section 337 applies, and the Trustee would in those circumstances have an absolute right to possession.

17. It is clear from the transcript that the Deputy Registrar heard argument on both sides on the issue as to whether there were exceptional circumstances, and considered the evidence carefully. At the end of the submissions made by counsel for Mr. Barca, she indicated to Mr. Westwood, who appeared for the Trustee, that she did not need to hear from him on the issue as to whether there were exceptional circumstances which would justify her in dismissing the application, or postponing the sale for six months or more. She did however seek his submissions as to whether she had a discretion as to the timing of any order for possession and sale and if so as to how she should exercise that discretion. As a result of that, following a discussion between counsel, it was agreed that Mr. Barca should give vacant possession of the property by 29 July 2004, and the Deputy Registrar so ordered.

18. On 13 May 2004, Mr. Barca appealed, giving as his grounds for appeal that counsel had failed to argue unspecified points of significance and that the decision was incompatible with his human rights. The decision sought on appeal was a substituted order giving possession “when my son completes his education”. This has been considerably expanded upon in Mr. Barca’s Draft Skeleton Argument; the main point relied upon is still the disruption to his son’s education which the sale of the house would cause. Mr. Barca stated in the Notice of Appeal that he would be representing himself, as he has in fact done; however, he told me that he had expected his solicitors to act until about a week before the hearing, when they said they would not.

19. The first point taken by Mr. Westwood on behalf of the Trustee is that the order made by the Deputy Registrar was a consent order made as a result of the agreement reached between the parties. He therefore contended that the only way in which this can be attacked is by a separate action, alleging valid grounds to set aside the contract to give vacant possession at the end of the three month period: see Purcell v. Trigell [1971] 1 Q.B. 210. Because of the agreement, he submitted, the Deputy Registrar did not give a judgment, and there is nothing to appeal against.

20. As I indicated at the outset of the hearing, I do not think that this is right. As I read the transcript, the Deputy Registrar clearly stated her conclusions (1) that, by virtue of section 335A(3) of the Insolvency Act, which reflects earlier case law, the creditors’ interests were to be preferred save in exceptional circumstances and (2) that on the authorities, especially the decision of the Court of Appeal in Re Citro, whilst an order in the present case would result in the usual consequences to

be expected on the bankruptcy, there were no exceptional circumstances: see the discussion ending at p. 34E-G of the transcript. Once these conclusions had been indicated to the parties, what they reached agreement on was merely the period of grace to be given to Mr. Barca before the order took effect. I do not consider that there was any agreement between the parties on the question as to whether there were exceptional circumstances.

21. I therefore think that I must treat this case as being one in which the Deputy Registrar decided the issue. Whilst the absence of a formal judgment might have given rise to difficulty, in fact it does not since her reasons are clear from the transcript; she accepted Mr. Westwood's submission that the present case could not be distinguished from other cases in which disruption of this kind to the family was held not to constitute exceptional circumstances.

22. Mr. Westwood's second submission, which I accept, is that this is a "true appeal". It follows that it is limited to a review of the decision, which must be upheld unless it was wrong or there was some serious procedural error: see CPR 52.10 and Rule 7.49 of the Insolvency Rules 1986.

23. Section 335A(3) of the Insolvency Act 1986, which applies if Ms. De Cock has an equitable interest in the property, requires me to assume in the present case that "unless the circumstances of the case are exceptional ... the interests of the bankrupt's creditors outweigh all other considerations". This gives statutory effect to the previous case law, which was reviewed in re Citro. In that case, the Court of Appeal (Nourse and Bingham L.JJ., Sir George Waller dissenting) reversed the decision of Hoffman J. to postpone orders for possession in two cases for several

years, until the youngest child had reached the age of 16, on the ground that the disruption to the children's education if they had to move outweighed the interests of the creditors. The Court of Appeal held that, in a case in which both the bankrupt and his or her spouse had a beneficial interest in the matrimonial home, the creditors' interest in achieving a sale of the property within a short period would usually prevail over the interests of the spouse: no distinction was to be made between a case where the property was still the matrimonial home and one where it was not. Such an order might well produce a situation in which the children would have to move to a different neighbourhood with consequential problems over schooling, but such circumstances, not being exceptional, did not provide a sufficient reason for departing from the usual course.

24. The leading judgment was given by Nourse L.J.. He reviewed the earlier authorities and noted that there was only one case, re Holliday [1981] Ch. 405, in which the decisive feature of the case was that, even if the sale was postponed for the period of 5 years requested by the wife, the creditors would at the end of the period be likely to receive the full amount of their debts and statutory interest: see 157D-158A. Leaving that case aside, in all other previous reported decisions, the interests of the creditors had prevailed. Nourse L.J. summarised the position as follows at 157A-D:-

“The broad effect of these authorities can be summarised as follows. Where a spouse who has a beneficial interest in the matrimonial home has become bankrupt under debts which cannot be paid without the realisation of that interest, the voice of the creditors will usually prevail over the voice of the other spouse and a sale of the property ordered within a short period. The voice of the other spouse will only prevail in exceptional circumstances. No distinction is

to be made between a case where the property is still being enjoyed as the matrimonial home and one where it is not.

What then are exceptional circumstances? As the cases show, it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable home in the same neighbourhood, or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.”

25. Nourse L.J. further at 159B-D held that Hoffmann J. had not correctly applied the law to the facts which were before him:-

“First, for the reasons already stated, the personal circumstances of the two wives and their children, although distressing, are not by themselves exceptional. Secondly, I think that the judge erred in fashioning his orders by reference to those which might have been made in the family division in a case where bankruptcy had not supervened. That approach, which tends towards treating the home as a source of provision for the children was effectively disapproved by the earlier and uncontroversial part of the decision of this court in *In re Holliday*. Thirdly, and perhaps most significantly, he did not ask himself the critical question whether a further postponement of payment of their debts would cause hardship to the creditors. It is only necessary to look at the substantial deficiencies referred to earlier in this judgment in order to see that it would. Since then a further 18 months’ interest has accrued and the trustee has incurred the costs of these proceedings as well.”

26. Nourse L.J. then referred at 159G to section 336(5) of the Insolvency Act 1986 which applies to cases where the spouse of the bankrupt has a beneficial

interest and has wording which is identical to the wording in sections 335A and 337 referred to above, and stated that he had no doubt that the wording was intended to apply the same test as that which had been evolved in the previous bankruptcy decisions.

27. Bingham L.J. agreed with the judgment of Nourse L.J.. He referred to a number of matters underlying the earlier decision of the Court of Appeal in re Holliday and continued as follows at 161D-G:

“None of these matters was mentioned by Hoffmann J. As I read his judgment, he treated *In re Holliday* as entitling or obliging him simply to balance the interests of the creditors against those of the wife, the creditors’ prima facie entitlement to their money being simply one element in the scales - and not a particularly weighty one at that. I would willingly adopt this approach if I felt free to do so. It is in my view conducive to justice in the broadest sense and it reflects the preference which the law increasingly gives to personal over property interests. I do not, however, think it reflects the principle which, as I conclude, clearly emerges from the cases, that the order sought by the trustee must be made unless there are, at least, compelling reasons, not found in the ordinary run of cases, for refusing it. I find it impossible to reach that conclusion on the present facts, which I would expect to be substantially repeated in many other cases of this kind.

As I have, I think, made clear, I regret this conclusion. But we must apply the law as we understand it, and where authority has indicated how a discretion should be exercised, in the unexceptional case it is desirable that it should be followed, unless overruled, if arbitrariness is to be avoided. I do not think we are free to overrule the authority relevant to these appeals, and indeed it would be improper given the terms of section 336(5) of the Act of 1986.”

28. Whilst the categories of exceptional case are not circumscribed by the statutory wording or by the previous case law, the only subsequent cases in which orders for possession and sale have been withheld for substantial periods are cases in which either the bankrupt or his or her spouse was terminally or very seriously ill: see Cloughton v. Charalambous [1998] BPIR 558 and re Bremner [1999] BPIR 185. This is not surprising, since the majority judgments in re Citro indicated that only circumstances which were inherently *unusual* qualified as ‘exceptional circumstances’.

29. In the present case, the evidence before the Deputy Registrar on this point consisted of the second witness statement of Mr. Barca, supported by Ms. de Cock’s statement. Mr. Barca refers to his son as a “special needs child” who had had learning difficulties whilst at primary school, and who had initially not been accepted at Harris City Technology College, although he was eventually accepted there in September 2002. Mr. Barca then states:-

“... from the onset as is clear from his teachers’ reports he suffers from a lack of organisational skills ... he lacks concentration and is quite scatty and in my opinion seriously absent-minded at times. Therefore his school work reflects this problem. I believe that the main cause relating to his academic under-achievement is due to his mother being a French national. His mother’s first language is French and her English conversational level is below the norm which is disadvantageous ... he can only improve and fare much better in his education through his continued contact with me when he is able to use English as his first language in the home.”

30. He then goes on to say that, with his assistance, Lorenzo had improved considerably since starting his second year at the college (presumably September

2003), but that if the property were to be repossessed he, as a single unemployed man, would find it difficult to find suitable accommodation for Lorenzo's needs, and that lacking the necessary constant attention he would fall behind with his school work.

31. At the hearing before me, Mr. Barca expanded on these matters and (Mr. Westwood having no objection) produced Lorenzo's latest school reports, which show that he has been making good progress at least in some subjects although the picture may be said to be patchy, especially with regard to the completion of homework. Having seen and heard Mr. Barca, I have no doubt that he is an extremely caring father who has been doing his best for his son and that his concern for the future is entirely genuine.

32. Nevertheless, I do not think that the view taken by the Deputy Registrar can be faulted on the basis that the law is as stated in re Citro. It is true that the 'special needs' aspect of the matter is a feature which was not present in this case, but Lorenzo's problems cannot be said to be extreme. Further, unlike re Citro, this is not a case in which there would be any question of his having to leave his present school, since he would be able to live in his mother's home, if necessary throughout the week. But for one submission made by Mr. Barca, I would have had no hesitation in dismissing this appeal.

33. However, at paragraph 29 of his Draft Skeleton Argument, Mr. Barca invokes the European Convention on Human Rights. He submits that the Deputy Registrar failed to take account of his or his son's right to family life, home and privacy, stating that in the 8 year period since he became bankrupt his son had

grown to know him as his father and that his right to family life, home and privacy were important aspects of his development. He submits at paragraph 29.4 that “insolvency legislation in this area is particularly brutal and contrary to the average concept of fundamental freedoms and rights”. Mr. Barca further raised the point in the course of oral argument and, particularly in the light of the view expressed by Bingham L.J. in re Citro, I think that it is a point of some importance. Although it was not raised before the Deputy Registrar, it is a point which I am bound to consider on appeal since the court is itself a public authority which is bound to comply with the Convention: see HRA section 6.

34. Mr. Gibbons referred me to Article 8 of the Convention which provides:

- “1. Everyone has the right to have respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for protection of the rights and freedoms of the others” (my emphasis).

35. He also referred to Article 1 of the First Protocol, which provides:

“Every natural legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.

36. HRA section 3(1) provides:

“So far it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.

37. Mr. Gibbon submitted, in my view correctly, that where a court considers that a statutory provision, as interpreted before the Convention became part of English law, is incompatible with the Convention, it should seek to re-interpret the relevant provisions so as to achieve compatibility: only if this is not possible should a court consider granting a declaration of incompatibility. This submission is supported by what has been said extra-judicially by Lord Steyn in “Incorporation & Devolution – A Few Reflections on the Changing Scene” [1998] EHRLR 153, 155:

“Traditionally the search has been for the one true meaning of a statute. Now the search will be for a possible meaning that would prevent the need for a declaration of incompatibility. The questions will be: (1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with Convention Rights? In practical effect, there will be a rebuttable presumption in favour of an interpretation consistent with Convention Rights. Given the inherent ambiguity of language, the presumption is likely to be a strong one.”

See also per Lord Woolf C.J. in Poplar Housing Association v. Donoghue [2001] EWCA Civ. 595; [2002] Q.B. 48 at para. 75 and Lester and Pannick, Human Rights Law and Practice, 2nd ed., 2004 at pp.33-37.

38. Mr. Gibbon made the following further submissions, which I also accept:-

- (1) The right to “respect” for private and family life and the home is not absolute. The state must have regard “to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole Convention”: Cossey v. U.K. (1990) 13 EHRR 622 para. 37.
- (2) What is “necessary in a democratic society” requires an assessment of “whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued, [and] whether the reasons given by the national authorities to justify it are relevant and sufficient”: Sunday Times v. U.K. (1979) 2 EHRR 245 at 277-8.
- (3) This proportionality test is satisfied if:
 - (a) the legislative objective is sufficiently important to justify the limitation on the fundamental right;
 - (b) the measures designed to meet the legislative objective are rationally connected with it; and

- (c) the means used to impair the right or freedom are no more than is necessary to accomplish the legitimate objective.

See Germany v. Council of the European Union [1995] ECR-I-3723 at 3755-6 and de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1998] 3 W.L.R. 675, a decision relating to the Constitution of Antigua and Barbuda.

39. Clearly, in many or perhaps most cases, the sale of a bankrupt's property in accordance with bankruptcy law will be justifiable on the basis that it is necessary to protect the rights of others, namely the creditors, and will not be a breach of the Convention. Nevertheless, it does seem to me to be questionable whether the narrow approach as to what may be "exceptional circumstances" adopted in re Citro, is consistent with the Convention. It requires the court to adopt an almost universal rule, which prefers the property rights of the bankrupt's creditors to the property and/or personal rights of third parties, members of his family, who owe the creditors nothing. I think that there is considerable force in what is said by Ms. Deborah Rook in Property Law and Human Rights at pp.203-5 to which Mr. Gibbon very fairly referred me:

"It is arguable that, in some circumstances, [s.335A(3)] may result in an infringement of Article 8. The mortgagor's partner and children have the right to respect their home and family life under Article 8 even though they may have no proprietary interest in the house ... therefore it is possible that the presumption of sale in s.335A and the way that the courts have interpreted it, so that in the majority of cases an innocent partner and the children are evicted from the home, violates Convention rights ...

The eviction of the family from their home, an event that naturally ensues from the operation of the presumption of sale in s.335A, could be considered to be an infringement of the right to respect of the home and family life under Article 8 if the presumption is given absolute priority without sufficient consideration being given to the Convention rights of the affected family. Allen [Mr. T. Allen in *The Human Rights Act (UK) and Property Law in "Property and the Constitution"*, Oxford, Hart Publishing, 1999 at p.163] observes that:

‘As the law currently stands, the right to respect for family life and the home receives almost no consideration after the one year period. Whether such a strict limitation is compatible with the Convention is doubtful.’

...

... it may be that the courts, in applying s.335A ... will need to adopt a more sympathetic approach to defining what constitutes ‘exceptional circumstances’. If an immediate sale of the property would violate the family’s rights under Article 8, the court may be required in compliance with its duty under s.3 of the HRA 1988 to adopt a broad interpretation of ‘exceptional circumstances’ ... to ensure the compatibility of this legislation with Convention rights.”

40. In particular, it may be incompatible with Convention rights to follow the approach taken by the majority in *re Citro*, in drawing a distinction between what is exceptional, in the sense of being unusual, and what Nourse L.J. refers to as the “usual melancholy consequences” of a bankruptcy. This approach leads to the conclusion that, however disastrous the consequences may be to family life, if they are of the usual *kind* then they cannot be relied on under section 335A; they will qualify as ‘exceptional’ only if they are of an unusual kind, for example where a terminal illness is involved.

41. It seems to me that a shift in emphasis in the interpretation of the statute may be necessary to achieve compatibility with the Convention. There is nothing in the wording of section 335A, or the corresponding wording of sections 336 and 337, to require an interpretation which excludes from the ambit of ‘exceptional circumstances’ cases in which the consequences of the bankruptcy are of the usual kind, but exceptionally severe. Nor is there anything in the wording to require a court to say that a case may not be exceptional, if it is one of the rare cases in which, on the facts, relatively slight loss which the creditors will suffer as a result of the postponement of the sale would be outweighed by disruption, even if of the usual kind, which will be caused in the lives of the bankrupt and his family. Indeed, on one view, this is what the Court of Appeal decided in Re Holliday.

42. Thus it may be that, on a reconsideration of the sections in the light of the Convention, they are to be regarded as recognising that, in the general run of cases, the creditors’ interests will outweigh all other interests, but leaving it open to a court to find that, on a proper consideration of the facts of a particular case, it is one of the exceptional cases in which this proposition is not true. So interpreted, and without the possibly undue bias in favour of the creditors’ property interests embodied in the pre-1998 case law, these sections would be compatible with the Convention.

43. I do not need to reach a conclusion on this in the present case, because, even if this tentative view as to the proper approach to the interpretation of these sections is correct, I would still uphold the Deputy Registrar’s decision on the facts of this case. As was pointed out by Hoffmann J. in Re Citro it is difficult to balance the creditors’ interests in obtaining payment and the bankrupt’s family’s

personal interests, because they are different in kind. Nevertheless, even on the view of the law which is most favourable to Mr. Barca, and assuming in his favour that either 335A or section 337 applies, such an exercise would have to be undertaken, and on the facts of this case in my view the creditors' interests must prevail:-

- (a) As I have said above, on the evidence it is likely that a sale of the property would produce a substantial surplus. The postponement required by Mr. Barca to keep the house until his son's educational needs have been looked after is likely to be at least 3 years and perhaps longer. The prejudice to the creditors would therefore be substantial.
- (b) Lorenzo's educational problems are not extreme, and there is no question of his having to move school even if Mr. Barca's ability to help him were impaired.
- (c) It is unclear whether Mr. Barca's ability to help Lorenzo will be impaired, or if so to what extent. There was evidence before the Deputy Registrar that Mr. Barca's mother was willing to sell her own property, realising some £130,000, and to use the proceeds or part of them to assist her son, either by discharging his debts or (more probably) by assisting him to find other accommodation. One possibility is that she would be able to provide sufficient funds to buy the Trustee's equity in the property. Even if this does not happen, another is that she would be able to assist her son to find some other accommodation in the neighbourhood which would enable him to have Lorenzo to stay for some of the week, even if the accommodation

was by no means as satisfactory as the present accommodation. Even if this too proved to be impossible, it would not follow that Mr. Barca would be wholly unable to provide his son with any assistance, even though, I accept, it would be difficult without staying access.

44. Whilst I have every sympathy for Mr. Barca, I think that the balance comes down on the side of the creditors, even on a more generous interpretation of the statutory provisions. This appeal is therefore dismissed.

N. Strauss Q.C.
Deputy judge Ch. D.

September 2004