Recovery against insolvent estates

Introduction

Local authorities frequently have cause to seek recovery of sums owing from the estates of deceased persons, particularly (but not exclusively) in relation to care home fees owed by the deceased.

Not infrequently, there are cases where the estate has, or appears to have, insufficient assets to meet the liability, either at all or in full. In some such cases, there are methods of enforcing a liability, or part of it, against assets formerly belonging to the deceased's estate or even against other persons, such as the deceased's personal representatives. This article explores some of those methods.

Basic principles

Where an estate's liabilities exceeds its assets, it is insolvent. The personal representative(s), if any, of that estate have a duty to the creditors in the administration of that estate to distribute those assets strictly in accordance with the *pari passu* principle (i.e., that the assets of the estate should be apportioned among the creditors in proportion to the estate's liability to each, subject to some specific provisions about, e.g., preferential debts): **Article 4** of the **Administratio of Insolvent Estates of Deceased Persons Order 1986**. Creditors must be paid in full before any distributions can be made

to beneficiaries in their capacity as such. An important exception is that reasonable funeral, testamentary and administration expenses take priority over preferential debts.

If an estate has been distributed by a personal representative otherwise than in accordance with these principles, then the personal representative is liable to the creditors to make up the difference between what they ought to have received had the estate been administered properly and what they will now receive from the assets of the estate (*Ministry of Health v. Simpson, sub nom Re: Diplock* [1951] A. C. 251). The personal representatives may, in turn, reclaim the money incorrectly distributed from any beneficiaries (*Re: Yorke* [1997] 4 All E. R. 907). This liability does not depend on the fault of the personal representative.

However, if the personal representative acts properly, neither the personal representative, nor the beneficiaries, can be made personally liable for the deceased's debts, and any liability that they do have in cases of error is limited to rectifying their incorrect distributions/receipts (or other wrongful conduct), and does not extend to full liability for the deceased's debts.

Administration by creditors

Perhaps not surprisingly given the onerous liability and lack of reward (the beneficiaries have nothing to gain from administering such an estate), non-professional personal representatives tend to be reluctant to take a grant in the case of an insolvent estate. The law cannot compel a person who has not intermeddled in the assets of the deceased's estate after death to take a grant. Thus, the law provides the option for a creditor to administer an estate.

Under **Rule 20(f)** of the **Non-Contentious Probate Rules 1987**, a creditor of the deceased may apply to be appointed as an administrator of the deceased's estate (whether or not the deceased left a valid will) if the creditor has first cleared off all persons higher in priority to a grant (e.g. named executors, spouses, etc., and even the Crown where the deceased has no known kin) by citing them to accept or

refuse a grant. This can be done administratively without the need for an application to go before a judge.

Once a creditor has assumed the role of personal representative, all of the onerous liabilities associated with being the personal representative of an insolvent estate will fall upon the creditor who takes that office, and the only reward will be the ability to take steps to secure such part of the debt owed to the creditor that can be obtained from the assets of the estate consistent with the *pari passu* principle. Thus, careful consideration will need to be given as to whether this is a worthwhile step to take in any given case.

Administration orders

In the alternative to administration by creditors, it is possible in principle for creditors to apply to court for an administration order: see **CPR Part 64**. In modern times, general administration orders are extremely rare because they are enormously expensive; they were much more common in Victorian times when clerical labour was much cheaper. Thus, in a usual case, this is not the appropriate way to proceed. There may be some cases, however, where it is known in advance that only one or two very specific and limited steps need to be taken in the administration of an estate (such as the sale of one particular property). This is more likely to be the case where the estate has been partially administered already but the personal representative has committed a *devastavit* (an act of wrongdoing in the administration of the estate) which can be corrected in a straightforward way.

In such cases, it may be in order to apply for a general administration order stayed on terms that specific, identified steps be taken. In such cases, this can be a way of forcing a specific step to be taken in respect of the assets or administration of the estate without taking full responsibility for the administration; but a court will not do this where there remains substantial work to be done in general administration. Generally, if a single court order cannot spell out completely all the remaining steps

that need to be taken in the administration of the estate reasonably simply, then this sort of order is unlikely to be appropriate.

Intermeddling executors

A named executor under a valid will who has intermeddled in the estate (in other words, treated assets of the estate as if they were her/his own) can be ordered by the court to accept a grant of probate if more than 6 months have passed following the deceased's death and there are no pending probate claims contesting the validity of the will (**Rule 47(3)** of the **Non-Contentious Probate Rules 1987**).

However, care should be taken: a reluctant executor is at risk of maladministering the estate. Whilst the law provides remedies in a case where an executor does so, where there is a significant risk of this occurring, it is likely to be more economical to obtain a grant of letters of administration as creditor or apply for an Insolvency Administration Order (see below), especially when an executor is in a position to conceal her or his wrongdoing.

Deceased bankrupt

Note that there are specific provisions that apply where the deceased was bankrupt at the time of death or where a bankruptcy petition has been presented before death. This situation is relatively unlikely to arise in this context, and I omit full coverage of this topic for brevity, but it should be noted that different considerations apply in such cases.

Insolvency Administration Orders

Where a creditor is owed a debt above the bankruptcy threshold (currently £5,000) and the deceased was not already bankrupt or in the process of being made bankrupt at the time of death, a creditor can apply for an Insolvency Administration Order in respect of the deceased's estate. This is equivalent to a bankruptcy order as applied to the estate of a deceased person.

In such a case, the estate is administered by a trustee in bankruptcy appointed in the same way as when a living person has been made bankrupt. Thus, the creditor can avoid the onerous liabilities of administering the estate itself, but at the cost that the fees of the trustee in bankruptcy will erode the assets of the estate.

There is a special advantage of an Insolvency Administration Order in certain cases. This is that, if the deceased owned land on a joint tenancy on her or his death, and an Insolvency Administration Order has been made, the court has the power under **Section 421A** of the **Insolvency Act 1986** to order that a person who acquired the deceased's interest in the property held under a joint tenancy by survivorship to pay to the estate the value of property lost to it by the operation of the doctrine of survivorship.

Only the trustee in bankruptcy may apply for such an order, and the court has a discretion to refuse it, but the court must start from the assumption that the interests of creditors outweigh other considerations, so it is likely to be relatively rare that a court refuses to make an order under **Section 421A** if the circumstances permit this.

Note that there is a 5 year time limit, starting with the date of the death of the deceased, within which such applications must be made.

Security

Where the creditor has a security (such as a charge on the deceased's property), this is enforceable against the specific asset in relation to which the security is held in the usual way and the right to do so is generally unaffected by the deceased's death. The enforcement of securities generally is outside the scope of this article.

Mesne profits

An often overlooked asset of a deceased's estate is the estate's entitlement to mesne profits. This can arise where a person was residing as a licensee in a dwelling owned by the deceased immediately before the deceased's death and continues to live there after the death. Because a licence is automatically revoked by death, once a reasonable time after the deceased's death has expired, the former licensee becomes a trespasser. A trespasser occupying property is generally liable to the owner of the property for mesne profits, that is, damages for trespass assessed by reference to the market rate for letting the property in question. In an insolvent estate, it matters not if the former licensee is a or even the sole beneficiary of the deceased's estate.

In an apparently insolvent estate in an area such as London with high letting costs, this can be an asset of significant value and should not be overlooked. It might affect the economics of whether to proceed against the deceased's estate or not, and might even in marginal cases affect whether the estate is insolvent at all.

Conclusion

Where there be assets in a deceased's estate (including the estate's entitlement to mesne profits), there are effective ways of enforcing any debt lawfully due from it. In cases where the available assets are limited or the debt owed is small, it may be uneconomic to pursue the amounts in question owing to

the costs and/or onerous responsibilities involved and consideration will have to be given to the economics in individual cases.

Sometimes, a compromise with the beneficiaries in which the beneficiaries agree to administer the estate in return for a reduction in the amount owed such that they can receive a small distribution can be more economic than pursuing the full amount: the beneficiaries' work in administering the estate in such cases may in practice be cheaper (measured by the distribution that the compromise would allow them to take) than an insolvency practitioner's hourly rate. The economics of each course of action should be computed as precisely as possible in every case. A standardised model for computing the economics of debt recovery against apparently insolvent estates is recommended.

Not covered in this article are the myriad enforcement mechanisms in cases where assets have been improperly removed from the estate, including the court's powers under **Section 423** of the **Insolvency Act 1986**; but it is worthwhile being aware that there are remedies in such cases.

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