



## Trustee Must Be Aware of Interest Before Three-Year Clock Commences

The recent decision of *Khilji* [2023] EWHC 298 (Ch) examines Section 283A of the Insolvency Act 1986, more commonly known as the ‘use it or lose it’ provision. Our Northern Ireland equivalent is Article 256A of the Insolvency (NI) Order 1989.

Under this provision, a bankruptcy trustee must deal with a bankrupt’s interest in their primary residence within three years, failing which the property re-vests in the bankrupt. If, however, the Bankrupt does not declare his or her interest in such a property within three months of the date of the Bankruptcy Order, the three-year period begins to run on the date the Trustee or Official Receiver became aware of the Bankrupt’s interest, a qualification that became relevant in this case.

### BACKGROUND

Mr. Khilji died intestate in August 2014, survived by his wife, Mrs. Khilji. The matrimonial home was registered in his sole name. Mr. Hartwell was appointed as Administrator of the deceased’s estate in October 2015.

In July 2018, a Bankruptcy Order was made against Mrs. Khilji. Mrs. Khilji was interviewed by Official Receiver’s Office in September 2018 and declared that the property was in her late husband’s sole name and she was not a joint owner, however she did disclose to the examiner that she had made contributions to the mortgage payments following the death of her husband.

In April 2019, Mr. Hartwell commenced proceedings for vacant possession of the property on behalf of the deceased’s estate, an application which was supported by the Trustee in Bankruptcy.

In her defence to those proceedings, Mrs Khilji claimed a one-third beneficial interest in the property, arising under a common intention constructive trust. The argument was made by Mrs. Khilji that the three-year time period from the date of bankruptcy had expired, and consequently her beneficial interest had re-vested in her. Subsequently, Mrs. Khilji’s Trustee applied to the Court seeking a declaration that her interest had not in fact re-vested.

The Court had to decide whether or not Mrs. Khilji had done enough to make the Official Receiver aware of her interest in the Property back in September

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- 1. The nature of the Bankrupt’s interest in the property for the purposes of s283A; and*
- 2. The quality of the knowledge required to trigger the three-year period.”*

2018. If the Court decided that she had, the three-year period from when the bankruptcy order was made would have expired in July 2021 and her interest in the property would re-vest in her, and therefore put it beyond the Trustee's reach.

## **DECISION**

The Court considered two primary points in coming to its conclusion:

1. The **nature of the Bankrupt's interest** in the property for the purposes of s283A; and
2. The **quality of knowledge required** to trigger the three-year period.

### **Nature of Interest:**

The Court rejected Mrs. Khilji's argument that her interest in her deceased husband's intestacy or her registered matrimonial home rights constituted interests in the property within the meaning of s.283A(1).

This section clearly defines that interest as being an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of the bankrupt, their spouse / civil partner or a former spouse / civil partner. The interests declared by Mrs Khilji essentially amounted to interests in the estate of a deceased and matrimonial home rights.

Furthermore, the Court rejected the argument that the Trustee's awareness of these interests, as well as Mrs. Khilji's contributions to the mortgage after her husband's death, should have alerted the Trustee to the fact that Mrs. Khilji must have an interest that falls within s283A(1).

In order to come to that finding, the Court had to consider the quality of knowledge.

### **Quality of Knowledge:**

The Court concluded that neither the Trustee nor the Official Receiver had been adequately informed or become aware of Mrs. Khilji's interest in the three-month period from the beginning of her bankruptcy in accordance s283A.

The Court considered that to 'inform', or for the Trustee or Official Receiver to 'become aware' of the interest, something more than notice of a potential claim is required. The Trustee or Official Receiver must have some sort of knowledge of the interest.

The Court declared that it 'will be slow' to find that the Trustee or Official Receiver has become aware or been informed through 'inference from equivocal facts' in cases where the bankrupt has not told the Trustee or Official Receiver in clear terms. Her failure to assert the full extent of her interest – as she saw it - at the

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time had the effect that the Official Receiver was not on notice of her interest in the property.

The Court rejected the argument that by being aware of the mortgage payments, the Official Receiver was put on notice of a potential claim for an interest in the property over and above that which is created by the intestacy regime. The requirement at sub-section 5 is to 'inform' the Trustee, and the Court found that the wording of the statute doesn't permit that notice of a potential claim is a sufficient trigger for the clock to commence.

Even though she declared her mortgage contributions, the Official Receiver could not have become aware of the interest under common intention constructive trust based on this information alone. As a result, the Trustee and Official Receiver had not been made aware of the relevant interest within the meaning of s283A(1) until service of the defence and counterclaim, and so the Property had not re-vested in Mrs. Khilji.

## CONCLUSION

This case serves as a warning to any individual in bankruptcy of the important need to be clear in informing the Official Receiver or Trustee of a property interest in order to be able to take advantage of the interest re-vesting after three years. A Trustee will also need to examine very carefully any indications of a property interest so as to ensure that they are not considered as notice or becoming aware such as to start the three years running against him or her. The awareness of the Bankrupt's interest therefore will only be in cases where clear statements have been made and where the nature of the interest falls within the meaning of s283A.

## Guidance:

If you require further information about anything covered in this briefing, please contact **Shane McVeigh** or your usual contact at the firm on **+44 (0)28 9099 8207**. This publication is not designed to provide legal or other advice and does not deal with every important topic or cover every aspect of the topics with which it deals. Publication date: August 2023.



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