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Citation: Goulding, S. J. (2016). Taking Survivorship Seriously and the Problem of Article 1 of the First Protocol. *The Conveyancer and Property Lawyer*, 2016(2), pp. 90-103.

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Taking survivorship seriously and the problem of Article 1 of the First Protocol

Introduction

The “inherent and distinctive characteristic of a joint tenancy”¹ is the right of survivorship under which the survivor or survivors of the co-owners takes all. This is as a result of the theory that under a joint tenancy no one co-owner owns a share but rather is entitled to the *whole*; the death of a joint tenant simply reinforces that fact since the survivor or survivors continue to enjoy the whole property.² Equally important though is the fact that during the lives of the joint tenants each only has a hope or expectation that they will outlive the others and enjoy the property as sole owner. The co-owners under a joint tenancy have no “legitimate expectation” or vested right that the right of survivorship will operate in their favour even if they outlive the others because of the possibility of severance while the other joint tenants are alive.³ Further, where the co-owned property is a periodic lease, one joint tenant loses everything if another joint tenant serves notice to quit and brings the lease to an end.⁴

All this changes, of course, once the right of survivorship operates. The interest of the deceased terminates⁵ and the economic position of the surviving joint tenant is enhanced. But there is no transfer of any interest to him or her. This is why there is no potential liability to capital gains tax. Under survivorship timing is everything. This is demonstrated by the lengths to which legislation goes to determine a sequential presumption of death where it

¹ Per Mummery LJ in *Walker v Birmingham City Council* [2006] 1 WLR 2641.

² This is the natural and regular consequence of the union and entirety of their interest.” The Commentaries of Sir William Blackstone on the Laws and Constitution of England, Book 2, Chapter 12.

³ Recently there has been recognition that severance of the joint tenancy can be restrained by contractual provision: *White v White* [2001] EWCA Civ 955; and see *Goyal v Chandra* [2006] NSWSC 239.

⁴ *Sims v Dacorum BC* [2015] AC 1336; *Hammersmith & Fulham LBC v Monk* [1992] 1 AC 478.

⁵ The interest of the deceased joint tenant is variously described as “evaporating” by Gray and Gray, “Elements of Land Law” 5th edition, (Oxford, 2009) at 7.4.10.

cannot be determined which of two joint tenants died first. The solution is not in these circumstances to share amongst the beneficiaries on the basis of what is fair or reasonable⁶.

Even though the above is an historically correct analysis there has been an almost irresistible temptation to use an alternative description of the operation of survivorship in some decisions of the higher courts but also encouraged by the Law Commission. Increasingly judges have referred to the interest of the deceased *passing* to the survivors as a result of survivorship.⁷ The Law Commission has recently referred to the deceased joint tenant's share being taken automatically by survivorship. A good example of the judicial ambivalence to the orthodox view is *Burton v Camden LBC*⁸ where the House of Lords held that a deed of release by one joint secure tenant to the other joint tenant was an assignment and therefore made ineffective by virtue of s. 91(1) of the Housing Act 1985 which prohibits assignments of secure tenancies. The argument put forward that there was no transfer because each joint tenant already owns the whole was, per Lord Nicholls, an

“esoteric concept ... remote from the realities of life. It should be handled with care, and applied with caution. “

Pushed to its logical conclusion, this alternative view makes the joint tenancy almost indistinguishable from a tenancy in common with an automatic and instantaneous transfer of the deceased co-owner's share on death without fiscal consequences. Further and importantly, this dualist view may not be as benign as it first appears because the greater the acceptance that survivorship involves some kind of passing the easier it becomes to support statutory provisions which interfere with this “passing”. There are now two important pieces of legislation which avoid the logical consequences of survivorship. It is submitted that both demonstrate the importance of changing the theoretical explanation of the operation of the right of survivorship because under the diluted version the adverse consequences for the surviving joint tenant are made more palatable. But it will be the contention of this article just as undesirable.

⁶ Law of Property Act 1925, s.184.

⁷ In the House of Lords in *Birmingham City Council v Walker* Lord Hoffman held that a secure tenancy can “pass by survivorship”.

⁸ [2000] 2 AC 399 at 404.

Section 9 of the Inheritance (Provision for Family Dependents) Act 1975 and the inroad into survivorship

The 1975 Act was enacted following the Law Commission's Second Report on Family Property: Provision on Death (1974).⁹ The Report proposed that in cases where property was held by a joint tenant justice required that the interest in that property should be available to assist in supporting the deceased person's family notwithstanding that the right of survivorship would ensure that the interest would not form part of the deceased's estate. Section 9 (as amended) provides:

“(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if [...]an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased's severable share of that property [...] shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased.”

In effect this provides a form of retrospective severance but only for the limited purposes of the Act. Other beneficiaries of the deceased who may have benefitted if the joint tenancy had been severed before death will not participate in the net amount after the provision for the family has been removed.

On the basis that in the interests of justice the survivor should know with certainty how his rights were going to be affected with the least possible delay, applications in the original section required the application to be made within six months from the date, not of the death, but when representation with respect to the estate of the deceased was first taken out. Just how long that can be in practice was shown in *Dingmar v Dingmar*.¹⁰ Here a section 9 application was initiated after the claimant failed to establish a beneficial interest in the property of her deceased partner under a constructive trust and a possession order was then sought against her. Only then did this prompt the claimant to obtain the grant of letters of

⁹ Law Com No 61.

¹⁰ [2007] Ch 109.

administration and the section 9 claim was brought some seven years after the death. The defendant did not appear and was not represented. The Court of Appeal held, by a majority, that a 50% share of the property was to be transferred to the claimant.

Following the Law Commission's more recent project, Intestacy and Family Provision Claims on Death,¹¹ section 9 has been amended to allow claims under the section to be brought at any time. The view that a time limit was "a trap for the unwary" had persuasive force with concern being expressed that this may "prevent meritorious applicants from accessing a major asset of the estate"¹² Technically this is not what the section is about. It allows the court to *create* the asset for the applicant, one which was never part of the estate.¹³ Admittedly the previous time limit which was related to the grant of representation rather than the date of death, which would be when most potential applicants would realise the need for a claim, was arbitrary. But to replace that with no time limit at all puts the applicant in an unduly advantageous position, better than all other potential litigants in legal proceedings which fall under the provisions of the Limitation Act 1980. Even the quite reasonable suggestion that a notice of a potential claim be served on the survivor in conjunction with a longer time limit was rejected. Underpinning the section is the notion that it is an interest which passes to the survivor and, in a contest of competing interests, namely the survivor and the family which needs support, the balance will always come down in favour of the latter. Equivalence is made with section 8 of the Act under which gifts by the deceased in contemplation of death can be unpicked to recover assets for family provision¹⁴. But since the right of survivorship does not involve a transfer of property as envisaged by section 8, it is submitted that this analogy is inappropriate.

In the era of home improvement, where there is the potential to extract up to 50% of the present value of a property¹⁵ and combined with no time limit for doing so, it is quite conceivable that a claimant would delay proceedings in order to reap the fruits of

¹¹ Consultation Paper No 191.

¹² Para. 7.75.

¹³ *Re Palmer* [1994] Ch 316.

¹⁴ Inheritance Provision for Family and Dependents Act 1975, s. 8(2).

¹⁵ This amount was the majority view of the Court of Appeal in *Dingmar v Dingmar*, now supported by a further amendment to section 9.

expenditure on the property made by the survivor. This expenditure would be made in the reasonable and justified belief that this was to improve the survivor's solely owned property and possibly, in ignorance even of the existence of the claimant. The section makes no distinction between claimants who are or were living on the property in issue, such as in *Dingmar v Dingmar*, and those who have never lived there or treated it as their home. The survivor has no statutory right to, in effect, buy out the deceased's interest from the claimant shortly after death thus achieving certainty and preclude a future claim under s.9.

Justice between all affected parties is to be achieved under the court's discretionary powers under s. 9 and the court *may* make an order that property be brought into account:

"to such extent as appears to the court to be just in all the circumstances of the case."

This would enable the courts to take into account the impact of any order on those "who have benefitted from the deceased's estate (whether as beneficiaries or surviving joint tenants)". Whilst this may be true in a general sense, there is little evidence that this is the case, and the only authority which the Law Commission cited to support this is *Re Salmon*¹⁶ where the plaintiff attempted to appeal to the court's discretion to allow proceedings under the 1975 Act to be brought out of time to claim against monies which had already been distributed under the deceased's will. This is a quite different scenario from that where a survivor benefits by survivorship. This demonstrates a continued and underlying confusion; surviving joint tenants do not benefit from the deceased's estate.

The very least the survivor could expect in this position is that the court would, by analogy, apply the kind of passive equity concept which was utilised in *Re Pavlou*¹⁷ so that any expenditure or increase in value (whichever is the lesser) as a result of the survivor's efforts is automatically subtracted from the present value of the property before the court makes its order as to the claimant's entitlement.

¹⁶ [1981] Ch 167.

¹⁷ [1993] 1 WLR 1046.

Section 421A of the Insolvency Act 1986 and the assault on survivorship

Survivorship can have severe consequences for unsecured creditors of the deceased joint tenant.¹⁸ The interest of the deceased joint tenant in the co-owned house will not have formed part of the deceased's estate which will be the only resource for payment of outstanding debts and there may be insufficient other assets in the estate of the deceased to meet those debts.

The procedure introduced by section 421A of the Insolvency Act 1986,¹⁹ provides a mechanism for extracting some value from the property and what was in section 9, an inroad into the principle of survivorship for the benefit of a discrete and limited class of persons, becomes a much broader assault on the principle in favour of unsecured creditors generally. Its enactment followed the Court of Appeal decision in *Re Palmer*,²⁰ which had taken the ordinary and face value meaning of the words "estate of the deceased person". This decision demonstrated that the Administration of Insolvent Estates of Deceased Person Order 1986, made under the Insolvency Act 1986,²¹ was not going to extend what was available to the trustee in bankruptcy so as to include an interest under a joint tenancy which remained unsevered at the time of death.²² The avowed intention of Parliament behind s.421A was to provide a level playing field for the treatment of the estates of all insolvents, whether they are living or deceased.²³ Now if a petition for an insolvency administration order (IAO) is made within five years after the death of a deceased who was, before his or her death, a joint tenant of any property an application by the trustee appointed pursuant to the IAO can be made and the court can make an order under the section requiring the surviving joint tenant or joint tenants to pay to the trustee an amount not exceeding the value lost to the estate²⁴ by the operation of the right of survivorship.

¹⁸ See *Lord Abergavenny's Case* (1607) 6 Co Rep 78b.

¹⁹ Which was added by the section 12(1) of the Insolvency Act 2000, and came into force on 2nd April 2001,

²⁰ [1994] Ch 316.

²¹ Under the powers conferred in s.421.

²² For the technicalities and a discussion of the decision in *Re Palmer* see (1995) 54 CLJ 52 Louise Tee.

²³ Hansard HL Deb 04 April 2000 vol 611 cc 248-73.

²⁴ Insolvency Act 1986, s. 421A(2).

A key concern in the operation of the section is going to be the maximum amount which the court can require the survivor or survivors to pay to the trustee. The form of words “an amount not exceeding the value lost to the estate” in itself would have been difficult because strictly speaking no property was ever in the estate or destined for it in respect of the land held by a joint tenant. The section²⁵ defines the “value lost to the estate” as the amount which if paid to the trustee would in the court’s opinion restore the position to what it would have been if the deceased had been adjudged bankrupt immediately before his death. This means that the amount potentially available to the trustee will be 50% of the current value of the relevant property where there were previously two joint tenants. During the debates on the Bill when it made its progress through the House of Lords, the view was expressed that only so much as would be needed to pay off the creditors and the costs of the proceedings would be recovered and further, that any money or other assets in the insolvent’s estate would be used to pay debts before an application is made under s.421A. Whilst the latter of these claims is likely because the trustee will use up the more readily available resources first, the former is less obvious.²⁶ Given that the costs of defending the proceedings are likely to be substantial and where a trustee is successful they will be automatically added to the order, the survivor is likely to be under pressure to settle early.

It is true that the order which the court can make on a successful application under s.421A will not inevitably be the full equivalent amount of the deceased joint tenant’s interest and under subsection 4, the court can make an order on such terms and conditions as the court thinks fit. But subsection 3 provides:

“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 ominous words used in this subsection are reminiscent of those in s.335A of the Insolvency Act 1986. In that context, the application is made by a trustee in bankruptcy for an order for sale of property in which the insolvent has an interest and where the sale is resisted by an “innocent” co-owner. The crucial difference here is that the interest of the bankrupt already exists because of the bankruptcy and it has now been vested in the

²⁵ Ibid, s.421A(9).

²⁶ A comparison with the orders made on successful applications under s.9 of the I(PFD)A might be instructive where despite the discretion given to judges the award appears to be a half share of the value of the property.

trustee.²⁷ Section 421A on the other hand, allows the court to create a sum of money the value of which is related to an interest which has ceased to exist. The likelihood is that where the insolvent deceased has large unpaid debts the court will be making an order to the full value “lost to the estate” and this will result in a forced sale of the property. A similar interpretation of exceptional circumstances to that in s.335A will mean that the survivor will have to be seriously ill to invoke the court’s discretion, but even that will only result in a delay to the loss of the property.²⁸

Another issue is the period under which the surviving joint tenant is subject to uncertainty in relation to their property. The petition for an IAO has to be presented within five years of the date of death. But, of course, this only means that there is then the potential for a later application under s.421A. The grant of an insolvency administration order almost five years after the operation of the right of survivorship simply provides a window of opportunity and serves to put the survivor on notice that an application under s.421A might happen at a later date.

A case which is instructive of the consequences of the section for survivors in practice is *Wicks v Russell*.²⁹ Here following the death of a joint tenant, S, an IAO was improperly made on the request of S’s personal representative who had incurred S’s funeral and testamentary expenses. It was improper since these were not “bankruptcy debts” as defined by s.382(1), because they were not incurred before the deceased’s time of death. Nevertheless, after the order was made, the trustee in bankruptcy appointed under the order accepted the expenses claimed by the personal representative and sought an order that half of the value of the house be paid to him by the survivor, W. The court declined to exercise its discretion under s.282 to annul the IAO on the basis that the collective interests of the creditors outweighed the interests of W in having the IAO annulled. It was at the time of the hearing, more than five years from the date of death so a fresh valid application could not be made. The court took into account the impact of continuing the s.421A application on W and that it might eventually either fail or, if successful, cause her to be homeless but gave primacy to the creditors’ interests. So, although this is not a case directly on s.421A, it demonstrates the

²⁷ Re Dennis [1993] Ch 72

²⁸ *Re Citro* [1991] Ch 142; *Re Raval* [1998] 2 FLR 718; *Cloughton v Charalamabous* [1999] 1 FLR 740.

²⁹ [2008] EWHC 2713 (Ch).

length of time to which the survivor can be subject to uncertainty and the dramatic consequence for them of making an order.³⁰

Subsection 8 deals with the situation where there were more than two beneficial joint tenants and one of them dies. The subsection provides that:

(a) an order under this section may be made against all or any of them, but

(b) no survivor shall be required to pay more than so much of the value lost to the estate as is properly attributable to him.

This is a difficult provision and reveals the conceptual problems of what is trying to be achieved. Even the use of the word “attributable” seems odd since it is normally associated with causation and the implication is that the survivor has caused the value lost to the estate. Further, there appears to be a curious mix of property principles and personal liability. So, if there are three joint tenants and one dies, the section means that the two survivors would only be individually be liable for one sixth of the value of the property. If an order is made against one survivor who is ordered to pay one sixth and the following day the other survivor dies before an order is made against him or her, the right to pursue to other one sixth is lost. The survivor will then be entitled to at least 5/6ths of the value of the property. No insolvency order could be made against the estate of the second joint tenant to die unless he or she was otherwise also insolvent. The emphasis here is on the fact that an order under the section imposes a charge on landowners personally rather than retrospectively severing the shares of the deceased.

After the new insolvency regime was introduced in the 1986 Act the position of a deceased former joint tenant’s property can now be divided into three scenarios. First, where a joint tenant dies *after* a bankruptcy petition is served and a bankruptcy order is made, then the making of the order will have severed the joint tenancy by vesting deceased joint tenant’s newly created share into the hands of the official receiver which is then passed onto the trustee in bankruptcy, if and when one is appointed. Secondly, where a joint tenant dies

³⁰ A feature of this case which makes it all the worse is that the property was previously wholly owned by W following an inheritance, and which she transferred into the joint names of herself and S.

before a bankruptcy petition is served, a petition can be presented³¹ for an insolvency administration order to be made within five years of the date of death. If one is made, then the person appointed as trustee under the order can apply to the court under s.421A to require the survivor to pay to the trustee an amount “lost to the estate” by the operation of survivorship. Thirdly, where a joint tenant dies *after* a bankruptcy petition is presented but *before* the bankruptcy order is made, then the right of survivorship operates and the survivor enjoys the whole property free from the claims of the deceased’s creditors.³² No application can be made in this last scenario for a transfer of value from the survivor since the s.421A orders only apply in the context of insolvency administration orders. There is then a lacuna as a result of s.421A. Creditors who are owed money by a joint tenant who appears unlikely to be able to pay his or her debts have an incentive to wait until the debtor is dead and the right of survivorship has operated before serving a bankruptcy petition.

Is there a conflict between s.9 and s.421A?

It is quite conceivable that there will be successive applications under the sections presently under consideration. So, for example, an application is made by a dependent under s.9 which is successful and the applicant is awarded the deceased joint tenant’s 50% share in the relevant property. Subsequently, an IAO is obtained and the trustee applies for an order under s.421A. The court can order the survivor to pay an amount to the trustee up to the “value lost to the estate” but the definition of this amount relies on what would, in the court’s opinion, restore the position to what it would have been if the deceased had been adjudged bankrupt immediately before his death. Expressed in the subjunctive, this clearly posits a hypothetical, notional amount unaffected by anything which has subsequently occurred. Therefore, the survivor might be subjected to an order under s.421A eating well into their “own” 50%. Further, section 421A does not require any person who has been successful

³¹ Normally by a creditor or creditors jointly, or the deceased’s personal representatives. For more on the procedure see: <https://www.insolvencydirect.bis.gov.uk/casehelpmanual/D/DeceasedInsolvents.htm>

³² See *Re Palmer* [1994] Ch 316 at 325 the position which Vinelott J referred to. The proceedings themselves will continue, unless the court otherwise directs, as if the debtor were alive: Administration of Insolvent Estates of Deceased Persons Order 1986/1999, article 5.

under s.9 to contribute to the amount awarded under this section. To that extent the dependents of the deceased will be treated more favourably than the deceased's creditors.

This position is plainly illogical and irrational, demonstrating not only how poorly thought through and implemented s. 421A actually is but also how dangerous it is to tinker with basic property law principles without a comprehensive reform.

The Human Rights Act 1998 (HRA) and Article 1 Considerations

Given that the common law gives the joint tenant the whole of the property jointly from the outset and then solely by operation of the right of survivorship, are statutory provisions which interfere with or reverse the effect of survivorship to create an interest or impose a charge on the survivor compatible with "Convention Rights" in particular, with article 1 of the First Protocol (A1P1)³³? Courts are required to interpret legislation in way which is compatible with A1P1³⁴ and if that cannot be done then make a declaration of incompatibility.³⁵ Property lawyers have expressed concern about the prospect of human rights values and reasoning producing what to them is an anathema, namely uncertainty. As Howell has stated³⁶ in Land Law certainty is "almost always justice". But here the use of A1P1 should have precisely the contrary effect. As Thompson suggests,³⁷ given that the judges have a powerful inclination "to vindicate property rights",³⁸ "the defenders of property rights and the proponents of human rights would march hand in hand". The intervention of the human rights considerations here would strengthen and clarify the property rights and position of a surviving co-owner. So at least in this context, certainty of proprietary rights is not compromised by the resort to human rights jurisprudence, but rather, maintained.

³³ Which the HRA makes part of English domestic law.

³⁴ HRA, s. 3. See, for example, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

³⁵ HRA, s. 4.

³⁶ (2007) LQR 618 at 634.

³⁷ (2011) Conv 421 at 423.

³⁸ As discussed by Kevin Gray in "Land Law and human rights" in *Land Law: Issues, Debates and Policy* (Willan Publishing, 2002) Edited by Tee at p.211.

Successful applications under section 9 and s.421A will in most cases cause the survivor to sell his or her home and this then may raise article 8 considerations. But the focus of the consideration here will be on A1P1 since the sections strike at the more fundamental guarantee of peaceful enjoyment of possessions and the right of non-deprivation provided by A1P1, and upon which the right to home here is based. If the A1P1 argument fails it is largely too late to invoke Convention rights.³⁹

(i) Is article 1 engaged?

A successful challenge to the sections has to show that there been an interference with the peaceful enjoyment of possessions or a deprivation of property. A claim which failed to clear even this hurdle was *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,⁴⁰ which at one level appears similar to s. 421A because it involved a charge imposed on landowners by reason of them owning a particular estate. Here the freehold owners were held liable to comply with a chancel repair liability obligation and failed to establish that the enforcement of this liability infringed their A1P1 rights. In approving the arguments of the first instance judgment of Ferris J, namely that this liability was analogous to a situation where land is purchased subject to a mortgage, restrictive covenant or other incumbrance, and so presumably was reflected in the purchase price, Lord Hope of Craighead stated:⁴¹

“[t]he liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges. I do not think that in this case the right which article 1 of the First Protocol guarantees, ... is being violated.”

³⁹ *Horsham Properties v Clark & Beech* [2009] 1 WLR 1255. The question of whether the HRA has horizontal effect and therefore whether it can be raised by private parties against each other is still evolving particularly in the context of article 8 claims. The rejection by the Court of Appeal in *McDonald v McDonald* [2014] EWCA Civ 1049 of such an effect in the context of a private landlord's possession action appears highly context specific, distinguishing private claims against squatters, *Malik v Fassenfelt* [2013] 3 EGLR 99, see para. 57, and article 1 claims against offending legislation, see para 39. No issue of horizontality was taken either in *Wilson v First County Trust (No 2)* [2004] 1 AC 816 or *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

⁴⁰ [2004] 1 AC 546.

⁴¹ At para 72.

But the operation of the sections now under consideration is quite different. Each one imposes a new obligation or creates a new interest out of property rather than enforces an existing incumbrance created by a predecessor in title. Co-owning land with another joint tenant is not an incumbrance.

In *Sims v Dacorum BC*⁴² there was no infringement of a joint tenant's A1P1 rights where the other joint tenant brought the periodic tenancy to an end by serving notice to quit because it was an inherent feature of the property right which the claimant enjoyed and part of the bargain which he had entered into when the tenancy was granted to him. But it is one thing to have to accept the destruction of the "use value"⁴³ of a periodic tenancy in circumstances which were always foreseeable⁴⁴, it is quite another to face losing the "capital value" of property after the right of survivorship has operated for a substantial period of time. The survivor did not bargain for the uncertainty that that would entail.

There is no question that the state can pass A1P1 compatible legislation which actually deprives an individual of their possessions by a transfer of them from one private person to another. This was confirmed as far back as *Bramelid & Malmstrom v Sweden*⁴⁵ where the ECHR upheld Swedish legislation allowing the compulsory purchase of minority shareholders' shares and, perhaps the best known example, *James v United Kingdom*⁴⁶ where the ECHR upheld the Leasehold Reform Act 1967 enabling the tenant of a long lease of a house to acquire compulsorily the freehold estate of the landlord. But that deprivation or interference has to be for a legitimate purpose and there must be a fair balance, in particular involving a reasonable relationship of proportionality between the means employed and the aim sought.⁴⁷ In both these cases not only were there legitimate social or economic policies being pursued but the property owner was being compensated as a result of the compulsory

⁴² [2015] AC 1336

⁴³ Article 8 would have been the more appropriate protection for the claimant in these circumstances but that claim also failed partly on the ground that the claimant could not be evicted without judicial proceedings in which the proportionality of any possession order could be considered.

⁴⁴ Just as a joint tenant cannot complain about the loss of the right of survivorship if there is a severance by the other joint tenant.

⁴⁵ (1983) 5 EHRR 249.

⁴⁶ (1986) 8 EHRR 123.

⁴⁷ *Mellacher v Austria* para 48.

acquisition by the relevant domestic law.⁴⁸ The relevance of this will be discussed further below.

(ii) In the general interest

Once it is shown that A1P1 is engaged, an investigation must be made as to whether the legislation falls within the wide margin of appreciation which a state is given to promulgate legislation which is in the general or public interest. Generally this is shown by reference to social or economic policy in which it is acknowledged that the state is in the best position to take a view and its judgment will be respected unless it is manifestly without reasonable foundation⁴⁹. It is here where there is a difference between the sections and they should be considered separately. It is much more likely that s. 9 is in the general interest because it would be argued that it meets a legitimate social policy of providing support for families and dependents. Section 421A, on the other hand, although appears to be part of an economic policy, is simply re-balancing the rights of creditors and debtors. But under commercial law, an unsecured creditor takes its debtor as they find them. The onus should be on the creditor to ensure the person they are contracting with has the means to pay. So the case for interference with property rights becomes weaker in the context of unsecured debt. It would, for example, level the playing field for creditors if they were all unsecured, but the state destruction of secured credit would be unthinkable and also in itself a breach of secured creditors' A1P1 rights. Section 421A is in effect giving to the unsecured creditor more power to recover their debts than they otherwise bargained for. It is true that in *Wilson v First County Trust Ltd (No 2)*⁵⁰ Lord Nicholls stated:

“the fairness of a system of law governing the contractual or property rights of private persons is a matter of public concern. Legislative provisions intended to bring about such fairness are capable of

⁴⁸ See also *Håkansson and Sturesson v Sweden* (1991) 13 EHRR 1 where the Court found that the price received by the applicants under a sale compelled by Swedish legislation was reasonably related to the value of the agricultural land.

⁴⁹ *Jahn v Germany* (2006) 42 EHRR 49.

⁵⁰ [2004] 1 AC 816.

being in the public interest, even if they involve the compulsory transfer of property from one person to another”⁵¹

But this was in the context of consumer protection legislation and as Lord Hobhouse stated:

“[t]he relevant provisions of the Act are a legitimate exercise in consumer protection. Borrowers are vulnerable and not on an equal footing with lenders.”

So the legitimate general interest here was in the redressing of an imbalance to achieve fairness between the parties to a consumer credit agreement. The problem is that the borrower is as a class in a weaker position needing protection at the time the transaction is entered into. Section 421A is enhancing the debt recovery process for unsecured creditors and it is not obvious why that process needs to encroach upon the property rights of third parties who are not debtors and have not taken property in a transaction designed to defraud creditors.⁵²

(iii) Fair balance and proportionality

Even if it is accepted that both sections do fall within the state’s margin of appreciation to legislate for social or economic reasons in the general interest, the question then focuses on whether the means taken to achieve these aims is proportionate or whether the burden of achieving the state’s otherwise legitimate aims falling disproportionately on the affected property owner⁵³. From the jurisprudence on A1P1, the following can be extrapolated to provide guidance as to how the issue of proportionality would be approached and it is here where, it is submitted, that both sections again look vulnerable.

First, unlike much of the legislation which has engaged A1P1 as a result of interfering with the possessions of one private person in favour of another private person and which has been held to be compliant, these sections operate without regard to any previous relationship between the applicant or the person representing the beneficiaries of any award,

⁵¹Ibid at para 68.

⁵² See the consideration and relevance of ss. 339 and 340 of the Insolvency Act 1986 below.

⁵³ *Hutten-Czapska v Poland* (2007) 45 EHRR 4.

and the survivor. Under both sections the survivor is a legal stranger to the person seeking an order under them. Potentially, in the context of section 9 applications, the survivor will not even know of the existence of the applicant until the application is made. In *James v United Kingdom*⁵⁴ there was a consensual relationship existing before and up to the time when the legislation was invoked, which in principle at least, would have been of benefit to the landlord. In *Wilson v First County Trust (No 2)*⁵⁵ there was a loan agreement which was entered into between the parties. In *Bramelid v Sweden*⁵⁶ it was the members of the same company who were compelled to transfer shares. Examples given in *Bramelid* where it would be legitimate to compel the surrender of possession to another private person are also distinguishable. So division of matrimonial assets on divorce obviously involves a pre-existing relationship. Seizure and sale of property in the course of execution pre-supposes it is the debtor's property which is being seized. The pursuit of the debts by the trustee under s.421A will not have arisen because of any obligation of the survivor. Even division of inherited property involves overriding testamentary dispositions where it is the disposition which is reversed or impugned, not an existing property right.

Planning laws, environmental regulation and rent control are also distinguishable because this type of legislation applies to every property owner in the jurisdiction even though presently it may negatively affect the applicant.

Secondly, these sections operate without fault on the part of the survivor or anything which the survivor could have done to avoid or reduce the risk of the sections being invoked. In *JA Pye (Oxford) Ltd v United Kingdom*⁵⁷ minimal effort on the part of the landowners would have prevented the provisions relating to adverse possession from operating. In *Wilson v First County Trust (No. 2)*⁵⁸ the defendant pawnbrokers had failed to state correctly the amount of credit in the loan agreement so were prevented from enforcing it or enjoying any

⁵⁴ (1986) 8 EHRR 123.

⁵⁵ [2004] 1 AC 816.

⁵⁶ (1986) 8 EHRR CD116.

⁵⁷ (2008) 46 EHRR 45.

⁵⁸ [2004] 1 AC 816.

contractual rights under it.⁵⁹ In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*⁶⁰ even if A1P1 had been engaged, the respondents were fully aware of the chancel repair obligation at the time of the purchase of the property in question and could have taken out insurance to protect themselves.

Thirdly, in *James* where legislation was held to be compatible, the tenant had a “moral entitlement” to the house subject to the lease. This moral entitlement lent weight to the proportionality and fairness argument. In order to be in a position to claim the benefit of the 1967 Act a tenant had to have been in possession of the relevant property for five years and in many cases, this period would have been considerably longer. During this time the tenant may have paid for repairs and possibly may even have built the house on the land. Similarly, in another context, an adverse possessor will have been in undisturbed possession of the land for many years.

Fourthly, the significance of the payment of compensation in assessing the issue of fair balance should not be underestimated. In *JA Pye (Oxford) Ltd v United Kingdom*⁶¹ it was stated that the taking of property, as opposed to the mere control of it, without paying an amount reasonably related to its value would normally constitute a disproportionate interference.⁶² It was even stated in *Jahn v Germany* that deprivation without compensation would only be justifiable in exceptional circumstances.⁶³ As mentioned above, the legislation in both *Bramelid* and *James* was upheld, but there may well have been a different view taken if the shareholders or the landlords in those cases were losing possessions without any compensation.

So whilst the decision in *James* is an example of the state’s wide margin of appreciation to legislate in the public interest to eliminate social injustice in the context of leasehold property, even where the transfer of property is from one private person to another and of no

⁵⁹In this case the statements in relation to the claimant’s argument as to article 1 were obiter because their contractual rights, which the majority held could be “possessions”, were acquired before the coming into force of the HRA 1998 and it was not intended to have retrospective effect.

⁶⁰ [2003] UKHL 37.

⁶¹ (2008) 46 EHRR 45.

⁶² Para 54.

⁶³ (2006) 42 EHRR 49.

direct benefit to the public as such, this was action which protected the home of the beneficiaries of the legislation and where compensation was paid. This is quite the opposite in relation to s.9 and s. 421A where the home of survivor is at risk and no compensation will be paid.

Section 421A appears to be making an ill judged moral equivalence between the operation of the right of survivorship on the one hand and transactions at an undervalue⁶⁴ and preferences on the other.⁶⁵ In both of the latter cases the effect of transactions, dispositions and arrangements is being reversed for obvious and justifiable reasons, namely that they are designed to cheat, or have the effect of cheating, bona fide creditors out of assets from which to satisfy their debts.⁶⁶ Under survivorship the vast majority of cases a malign intent is not an issue and in any event there is no transfer.

As noted above, s. 9 does not distinguish between applicants who have lived in the property, as in *Dingmar v Dingmar*,⁶⁷ and those who have had no previous connection with it. Neither is there any concern under either section as to how the deceased came to be a joint tenant. If, as in *Wicks v Russell*, it was as a result of an earlier gratuitous transfer from the survivor, the survivor is being made to bear a huge personal burden as a result of unwise generosity.

In summary, it is submitted that the factors above have, if necessary cumulatively, enough weight to raise serious questions whether the sections under consideration are proportionate enough to achieve the purposes for which they were passed and whether a fair balance is being achieved between the interests involved.

(iv) An alternative argument

Even if it is not accepted that an order under either section does of itself deprive a survivor of their property under the second rule of A1P1, the fact that the survivor is subject to the uncertainty of an application under these sections could of itself constitute a breach under

⁶⁴ Insolvency Act 1986, s.339.

⁶⁵ Insolvency Act 1986, s.340.

⁶⁶ A similar equivalence has been noted above in relation to s. 9 of the 1975 Act with s.8 and gifts made before death.

⁶⁷ [2007] Ch 109.

the first rule. This was the finding of the court in *Sporrong and Lonroth v Sweden*⁶⁸ where the ECHR declared that expropriation permits issued by the Government for planning purposes which were never acted upon but lasted for many years, significantly reduced the possibility of a landowner exercising their normal rights as landowner. Although not amounting to a deprivation under the second rule, nevertheless this constituted interference under the first rule. The ownership rights were precarious and defeasible in the same way that a survivor's rights in their property are rendered by s.9 and s.421A.⁶⁹ For example, can a survivor, aware of the possibility of a s.9 application, invest in their property when the investment will increase their liability? The recent reform to s.9 has moved us into the opposite direction as regards compatibility since there is now no time limit for applications.

Conclusion

The argument put forward is that a jurisdiction cannot at one and the same time maintain co-ownership with a right of survivorship, introduce provisions which reverse the effects of survivorship and maintain compatibility with A1P1. The gouging out of interests or money from one private person's property to meet the statutory obligations and debts of another private person, without compensation, infringes the first person's rights to peaceful enjoyment of possessions. Even if the statutory provisions under consideration have been enacted for a legitimate public interest, serious questions can be raised as to their proportionality. It is suggested that the increasing use of the notion of an interest "passing" has anaesthetised us to this infringement of property rights.

Conferring discretion to a judge when it is unclear how that discretion is to operate to protect vested property rights is not an effective fig leaf to ensure compatibility. The survivor still has to live with the uncertainty of a possible application and then meet the cost of fighting legal proceedings. At the very least, a time limit should be introduced from the date of death by which proceedings under these sections should be initiated so that the survivor has certainty.

⁶⁸ (1983) 5 EHRR 35.

⁶⁹ And see *Matos E Silva, LDA. and Others v Portugal* (1997) 24 EHRR 573 where it was held that for approximately 13 years the applicants had remained uncertain as to what would become of their properties. The result was that their right over the possessions has become precarious.

Both s.9 and s. 421A could also be reformed so that an application cannot be brought under them unless there is evidence that the joint tenancy was entered into in contemplation of death or otherwise to either put funds beyond the reach of dependents or to defraud creditors within a specified time limit. That would bring the provisions into line with both s.8 of the Inheritance Act and ss. 339 and 340 of the Insolvency Act 1986. So, for example, in the case of s.9, survivorship could be impugned where there is a transfer by a dying provider or insolvent person of his or her main asset to themselves⁷⁰ and an associated person or current partner within one year of death. Or in relation to both sections, where property has been acquired from a third party as joint tenants shortly before the death of a joint tenant. But the provisions would not operate in the context of the purchase of a family house with a current partner some years before the operation of survivorship.

A more radical solution would be to abandon the beneficial joint tenancy altogether, at least prospectively. This would mean that deceased would always have had a share which would be available for the payment of dependents and creditors. This has been raised before⁷¹ but arguments that the beneficial joint tenancy be abolished have not gained traction. It maybe that it is time to look again at this option.

Simon Goulding

City Law School

London⁷²

⁷⁰ Made possible by section 72(2) of the Law of Property Act 1925.

⁷¹ Conv (2011) 421 at 423 (Thompson).

⁷² I would like to thank Professor Ian Loveland for reading an earlier draft of this article. Responsibility for any errors or views is my own.