Fraud unravels all

Professional advisers must be aware that advice given for the purpose of sheltering assets from care home fees will have to be disclosed in court, says *Christine Cooper*

With care homes costing at least £20,000 per year, many people will have to realise that they must spend their own money to pay the charges. At present, all but the last £14,250 of capital must be paid towards these charges.

Unsurprisingly, many people look for ways to protect assets and preserve them from being used to pay for care.
It is important that those advising private clients in this area are aware that the advice given is unlikely to be privilege, and may have to be disclosed in the event of a dispute with the local authority.

The precedent

This was established in the recent case of *London Borough of Brent v Kane and Others* [2014] EWHC 4564 (Ch). The local authority had provided residential care for the mother first, then a few years after her death, the father. The property that the parents had jointly owned had been transferred in to the joint names of the father and his two sons, and mortgages had been registered in favour of both sons. When the property was sold, the father received very little of the proceeds of sale.

The local authority determined that both the transfer into joint names and the creation of the mortgages had been made with the intention of avoiding or reducing the amount payable for the father's residential care, and brought proceedings to recover the sums it claimed were owed.

The proceedings sought payment from the father and from the sons, personally pursuant to the anti-avoidance provisions in section 21 of the Health and Social Services and Social Security Adjudications Act 1983 (transfer of liability). And also section 423 of the Insolvency Act 1986 (transactions to defraud creditors).

The local authority sought disclosure of the files of the firm that had acted for the family in the impugned transactions. These were: the administration of the mother's estate; the transfer of the property into joint names; the creation of the mortgages; and sale of the property.

The court applied the long-standing principle that there were exceptions to the rule that legal advice was privileged, which includes circumstances where the advice had been obtained for an iniquitous purpose.

The iniquity principle

The Court of Appeal explained this principle in *Barclays Bank Plc v Eustice* [1995] 4 All ER 511:

"Where the dominant purpose of legal advice was not to... structure a transaction which had yet to be carried out but which had plainly been devised to prejudice the interests of a creditor, the purpose of seeking the advice was sufficiently iniquitous for public policy to require that the communications between the legal advisers and their client in relation to the setting up of the

transaction should be discoverable."

There is a further discussion of what has since become known as the 'iniquity principle' in *BBGP Managing General Partner Ltd v Babcock and Brown Global Partners* [2011] 2 All ER 297, at paragraphs 61-62.

The principle is applied so as to exempt from privilege documents "where the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy."

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If the party alleging that the client's purpose (whether or not known to the professional advisor) was improper or underhand can establish a prima facie case, disclosure of the relevant legal advice can be ordered. In this case, the court held that the evidence demonstrated a prima facie case that there had been transactions at an undervalue, which were designed to prejudice the local authority's interests and to put assets beyond its reach. The court listed the primary facts that gave rise to that inference as being:

- All of the transactions had been made at a time when the father had lacked the capacity to make decisions for himself.
- They had also been made at a time when the sons knew that it was likely that their father might need residential care.
- The sons knew that the amount that their father would be charged depended on his financial circumstances because their mother had needed residential care.
- The mother's will had been dealt with in an extraordinary way, bypassing the probate process, the payment of debts, and the requirements of HMRC
- There was no evidence of either son loaning his a father large sum, as they had alleged, or of any agreement that loans would be secured against the property.

The case is due to be tried in April and it remains to be seen what effect the disclosed files will have on the outcome.

Implications

It is vital that those advising private clients understand the anti-avoidance provisions so that they can advise appropriately. Where a client is overt in expressing a desire to shelter assets from care home charges, it is important that he or she understands that any scheme devised may not be effective at achieving that result, and their reasons for taking those steps could be exposed.

Any transaction entered into for the purpose of protecting assets from care homes fees falls within the anti-avoidance provisions. Consequently, schemes or transactions devised solely for that purpose will be ineffective. It should be noted that although the Brent case was concerned with the 1983 Act which is repealed with effect from 1 April 2015, the Care Act 2014 has a similar anti-avoidance provision in section 70.

To obtain disclosure, the local authority needs only to show a prima facie case that the purpose of a transaction at an undervalue was to avoid or reduce the amount payable for care or to put assets out of the reach of the local authority. Even where the scheme, or transaction has been devised for several purposes, only one of which is to protect assets from care home fees, it will still fall within the anti-avoidance provisions. The intention to avoid care home fees need only be a significant part of the reason for the transaction (rather than a mere side effect).

In *Inland Revenue Commissioners v Hashmi and another* [2002] EWCA Civ 981, the court commented that there would often be more than one operative reason for transferring assets to another person, and that it would "often be the case that the motive to defeat creditors and the motive to secure family protection will co-exist in such a way, that even the transferor himself may be unable to say which was uppermost in his mind."

The local authority only has to show that the purpose of avoiding the charges was one of the reasons for the transfer and not simply a by-product.

Further, although the local authority bears the burden of proving the requisite intention, it can be satisfied by establishing primary facts, where, in the absence of some other reasonable explanation, an intention can be inferred. In *Yule v South Lanarkshire Council* [2001] SC 203 it was held:

"The local authority cannot look into the mind of the person making the disposition of capital or of others who may be concerned in the transaction. It can only look at the nature of the disposal within the context of the time at which and the circumstances in which that disposal took place".

> **"To obtain disclosure, the local authority needs only to show a prima facie case"**

The court added: "It is open to a local authority to reach a view as to the purpose of a transaction such as the present, without any specific finding as to the exact state of knowledge or intention of the applicant, so long as the primary facts are such as reasonably to lead to the inference that the purpose was at least in part that specified in regulation 25(1)."

The same principle will apply to the equivalent regulation under the Care Act.

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