

Problem of ownership

Ensure that ownership of business property is fully understood before tax planning takes place, say **FRED BUTLER** and **JULIE BUTLER**.

A recent tribunal case has helped to highlight the importance of keeping evidence of *how* property is owned – something of key importance for many family businesses. The judge in *Lidher v CRC* [2017] UK FTT 153 (tinyurl.com/ycwt2flo) considered whether a property was in the sole beneficial ownership of the deceased. There were also debates around money held in bank accounts, but the focus here is on property ownership.

Mr Baldev Singh Lidher (Lidher) was the executor and trustee of the estate of his father, Bahall Lidher, who died on 6 March 2007. HMRC determined that inheritance tax was due after a deemed chargeable transfer on Bahall's death. Lidher appealed on the basis that his father was not the sole beneficial owner of a freehold property in Southall, London, rather he owned only half of it. This case provides some guidance on how the ownership of business property is evidenced.

Understanding versus evidence

With any business property, it is essential that the ownership is understood and the legal position of all parties is clearly protected. In this case, the appellant's representative submitted that the deceased's wife (who died intestate in August 2006) had been the beneficial owner of half of the property and it had been her intention to transfer her share to her son, Lidher. He said: 'The property ... was a family home. Although the property was held in the deceased's name, Mrs Lidher had a half share of the property. She predeceased the husband and it was her wish that her share should be given to Mr Baldev Lidher. Unfortunately, before the situation could be regularised, Mr Bahall S Lidher passed away.'

KEY POINTS

- The importance of evidence when determining property ownership.
- The executor argued that his mother owned half of a property in his father's name.
- The onus on the person seeking to show that the beneficial ownership is different from the legal ownership.
- An intention to transfer, even if evidenced is inadequate.
- Business property ownership should be subject to forensic analysis before tax planning takes place.



Many business families have an 'understanding' of how property is held which can be very different from the evidence relating to the ownership. Problems can arise if one of the family is seeking to protect their interests over those of the other partners. As shown in *Lidher*, it is vital that the clear legal and beneficial interest is established in writing. Looking to the judgment, and on behalf of HMRC, we are told that 'Mr Leyland's starting point was the Land Registry record, which stated that the property had been registered in Mr Lidher's sole name since 1962. He then relied on *Stack v Dowden* [2007] UKHL 17 where Lady Hale, giving the leading judgment, said: "Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

Here, there was no reliable evidence that the beneficial ownership was different from the legal ownership. For HMRC, Mr Leyland went on to say that, even had Mrs Lidher beneficially owned part of the property, she would have done so either as a joint tenant or as a tenant in common. If the former, Mr Bahall Lidher would have become the sole owner on his wife's death. If the latter, he would have become the owner of the property by reason of his wife's intestacy. In other words, even if the taxpayer had been right on the beneficial ownership point it would have made no difference to the final outcome.

By way of comparison to business property it is always key to check that the evidence of the ownership is in place where there is any form of beneficial interest.

Agreements in writing

Mr Leyland concluded by referring to the Law of Property Act 1925, s 53 ('Instruments required to be in writing'), under which, subject to provisions on the verbal (parol) creation of interests in land, it is not possible to transfer an interest in land other than in writing. That section reads:

- (1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol:
 - (b) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
 - (c) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
 - (d) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.
- (2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

As a result, Mr Leyland argued that an intention to transfer, even if evidenced (which was not the position in that case), was inadequate. It followed that no share of the property had been transferred to Mr Lidher at any time.

Joint and partnership property

In practical terms, business partners do not always understand the difference between jointly held property and partnership property. Likewise, many solicitors have experienced concerns over the understanding of ownership. Historically, it has been seen that, for example, the legal profession might have incorrectly relied on the accounts as evidence of partnership property without carrying out diligent and forensic tests. *Ham v Bell* [2016] EWHC 1791 (Ch) also shows the concerns over using accounts without understanding the legal position and the danger of assumptions and presumed familial intentions. Again, looking at the judgment with regard to ownership:

“The legal position where, as here, a property is registered in the sole name of one person who forms part of a couple is helpfully summarised by *Halsbury’s Laws of England: matrimonial and civil partnership law: property rights in the family home* as follows: “Where the house is taken in only one of the two names, there is no scope for a legal presumption that the parties intended a joint tenancy both in law and in equity. It may be necessary to inquire into the circumstances and reasons why a house or flat has been acquired in a single name. The claimant whose name is not on the proprietorship register has the burden of establishing some sort of implied trust, normally what is now termed a ‘common intention’ constructive trust. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership, but the parties’ common intention has to be deduced objectively from their conduct.”

In the absence of any compelling evidence to the contrary, the First-tier Tribunal held that there was no basis on which it could conclude that Mrs Lidher owned any part of the property under a common intention constructive trust. Thus, it was owned entirely by Mr Bahall Lidher, beneficially as well as legally.

Ascertaining ownership

There are similarities to the *Lidher* case when business property is purchased in one name but is believed to be in joint names or even in trust for the partnership. The subject of exact ownership has been made very topical in light of the £2m limit for the inheritance tax residence nil-rate band.

For many couples, useful tax planning can be the gifting of property to a dying spouse to benefit from a tax-free uplift to market value when that person dies. HMRC guidance states specifically that this would not be caught by the general anti-abuse rule. However, as stressed by *Lidher*, exact legal ownership must be ascertained before such transactions are undertaken. For example, are land or buildings partnership property or non-partnership property and in single or joint ownership?

If a value at the date of death has been ‘ascertained’ for inheritance tax purposes, the same value is generally adopted for capital gains tax purposes (TCGA 1992, s 274). Here, ascertained means that HMRC has examined the value and tax rests on it. Even if this has not happened, there would be every expectation that a value included in an inheritance tax return would be the one adopted for capital gains tax. Any argument to the contrary would suggest that the inheritance return was incorrectly made.

Forensic analysis of ownership

Business property ownership may be historically complex. Experience dictates that tax planning cannot be carried out until all the basics of legal ownership are understood and evidence scrutinised. Likewise, legal documents such as partnership agreements must be fully researched and verified as valid. If these documents have been produced or adjusted without the full understanding of ownership and tax implications there can be serious problems in future. For tax purposes, the worry would be only 50% inheritance tax business property relief for partnership property.

Now is the time to consider future events and eventualities. Work carried out on business property ownership several decades ago when values were lower and research was perhaps not as ‘professional’ will affect property ownership now. If there are actual or perceived underlying problems, cases such as *Lidher* and *Ham v Bell* clearly show the need to sort out legal and beneficial ownership concerns before a major problem arises. This might be the death of the legal owner, planning permission being obtained for future housing development or a family dispute.

Advisers should subject business property ownership to forensic analysis before they are overtaken by events.

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