



**THE COURT OF APPEAL**

**Neutral Citation Number: [2020] IECA 71**

**Appeal No.: 2017/489**

**2017/522**

**2018/152**

**Baker J.  
Noonan J.  
Power J.**

**IN THE MATTER OF THE BANKRUPTCY ACT 1988-2016 (AS AMENDED)  
IN THE MATTER OF O.S.  
(A BANKRUPT)**

**BETWEEN/**

**O.B.**

**APPELLANT**

**- AND -**

**CHRISTOPHER LEHANE AS OFFICIAL ASSIGNEE  
IN BANKRUPTCY IN THE ESTATE OF O.S.**

**RESPONDENT**

**JUDGMENT of Ms Justice Baker delivered on the 5th day of March, 2020**

1. O.B. has appealed orders made in the bankruptcy of her husband, O.S. ("the Bankrupt"), sanctioning the sale of their principal private residence or family home.
2. The relevant orders under appeal are as follows:
  - (a) the order of O'Connor J. made on 9 October 2017 directing that both the Bankrupt and the appellant allow access to the Official Assignee or his agents to the dwelling house at Davidstown, Castledermot, County Kildare, comprised in Folio 38675F of the Register of Freeholders, County of Kildare, for the purpose of obtaining a valuation of the premises. The appeal of that order was filed on 27 October 2017 and bears appeal record number 2017/489;
  - (b) the order of Costello J. made on 6 November 2017 directing the Bankrupt and the appellant that they, within twenty-one days of the date of the order or such further period as might be agreed, allow access to the said dwelling house for the purposes of obtaining a valuation thereof. That order is substantively in the same form as the order made on 9 October 2017 by O'Connor J. The appeal of that order was filed on 16 November 2017 and bears appeal record number 2017/522;
  - (c) the order of Costello J. made on 12 March 2018 following delivery of a reserved written judgment on 21 February 2018 by which she *inter alia* sanctioned the sale of the premises. The notice of appeal was filed on 18 April 2018 and bears appeal record number 2018/152.
3. For the purpose of this judgment, I propose dealing with the third of the three orders set out above, the substantive order by which the sale of the dwelling house was sanctioned

by the court pursuant to s. 61 of the Bankruptcy Act 1988, as amended ("the Bankruptcy Act").

**Bankruptcy**

4. The Bankrupt was adjudicated bankrupt on 4 July 2016.
5. As a result of the adjudication, all property of the Bankrupt vested in the Official Assignee pursuant to s. 44 of the Bankruptcy Act:
  - "(1) Where a person is adjudicated bankrupt, then, subject to the provisions of this Act, all property belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt.
  - (2) – (3) [...].
  - (4) The property to which subsection (1) applies does not include—
    - (a) property held by the bankrupt in trust for any other person".
6. At the time of the bankruptcy, the Bankrupt was registered as sole owner of the dwelling house and lands comprised in Folio 38675F, County Kildare, and the Folio shows that he became registered as full owner on 15 August 2002. Christopher Lehane, the Official Assignee in bankruptcy, is shown as registered on 27 September 2016, and it is safe to assume that his registration as owner was made pursuant to the statutory provisions and following the adjudication in bankruptcy.
7. Certain facts are not in dispute. The appellant resides in the dwelling house with three young children. She was not, at the time of the High Court hearing, but asserts that she is now separated from the Bankrupt to whom she is married since 2009. The couple have small children. The appellant herself is not a bankrupt nor was she a borrower from Danske Bank the petitioning creditor or to any other relevant creditor. She never created any security over the dwelling house and, save for the judgment mortgage of Danske Bank, the property is unencumbered.
8. The appellant describes herself as a homemaker and says that she does not have gainful employment outside of the home. She claims to have a beneficial interest in the dwelling house in which she and her husband resided with their children until the matters later here explained. She commenced proceedings against her husband on 12 May 2015 in the High Court, record number 2015/3633 P, seeking a declaration that she is entitled to a 50% interest in the premises. At the date of the hearing of the motion before Costello J. and at the date of the hearing of the appeal those proceedings have not progressed further than the institution of a plenary summons. The pleadings were not exhibited or otherwise made available at the hearing of the appeal.
9. Registered burdens appear on the Folio, including a *lis pendens* registered on 26 May 2015 on account of the proceedings of the appellant.

10. The appellant represented herself before Costello J. or on appeal, and the Bankrupt took no part in the proceedings. Three affidavits from her comprised her evidence for the purposes of the hearing of the motion dated 20 June 2017 by which the Official Assignee sought an order pursuant to s. 6(4) of the Bankruptcy Act to sanction the sale of the dwelling house and ancillary orders seeking possession for the purpose of facilitating the sale, directions in regarding to the sale, and an order seeking access for the purpose of a valuation. The motion also sought consequential orders including an order for the taking of accounts and enquires as to encumbrances and priorities.

**The statutory provisions**

11. Section 61 of the Bankruptcy Act 1988 in its material parts provides as follows:

“61 (1) This section applies to every bankruptcy matter and vesting arrangement.

...

- (4) Notwithstanding any provision to the contrary contained in subsection (3), no disposition of property of a bankrupt, arranging debtor or person dying insolvent, which comprises—
- (a) a family home (within the meaning of the Family Home Protection Act 1976) of the bankrupt or the bankrupt’s spouse, or
  - (b) a shared home (within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010) of the bankrupt or the bankrupt’s civil partner (within the meaning of that Act),

shall be made without the prior sanction of the Court and any disposition made without such sanction shall be void.

- (5) On an application by the Official Assignee under subsection (4) for an order for the disposition of a family home or shared home, the Court, notwithstanding anything contained in this or any other enactment, shall have power to order postponement of the disposition of the family home or shared home, as the case may be, having regard to the interests of the creditors, spouse or civil partner (within the meaning of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010), and any dependants, of the bankrupt, arranging debtor or person dying insolvent, as the case may be, as well as to all the circumstances of the case.”

**The judgment of the High Court**

12. Having reviewed the evidence, and the argument of the appellant that she was an “innocent party” and that the sale of the property in which she lives with her two young children would be “disproportionate” and would render them homeless, the trial judge noted that s. 61(4) and (5) of the Bankruptcy Act provided that the Official Assignee may not dispose of a family home of a bankrupt spouse without the prior sanction of the court and that any disposition made without such sanction is void (at para. 8). She went on to note that s. 61(5) of the Bankruptcy Act provided for the consideration by the court of the interests of the creditors, spouse, or civil partner, and any dependents of the bankrupt.

13. At para. 10 of her judgment, Costello J. described the statutory purpose as:

“to balance the interests of the creditors against the interests of the spouse and dependents of the bankrupt”.

14. Having reviewed the case law, which I will do more fully below, Costello J. set out at para 21 a detailed list of fifteen factors relevant to the exercise of her discretion, and it is useful to set these out in full as they demonstrate the broad range of factors in the discretionary exercise:

“On the facts in this case the following factors are relevant to the exercise of the court's discretion on this application.

- (1) It involves the sale of a family home
- (2) The spouse of the bankrupt is not bankrupt
- (3) It is the home of the spouse and young dependant children of the bankrupt.
- (4) The spouse was not a party to any of the loans of the bankrupt.
- (5) The spouse instituted proceedings against the bankrupt in 2015 seeking a declaration that she is entitled to a 50% interest in the lands comprised in the family home. Since the institution of the proceedings, they have not been progressed in any fashion.
- (6) Despite being afforded a number of opportunities so to do, the spouse has adduced no evidence at all as to her interest in the family home or the value of that interest. The Official Assignee is the registered full owner of the lands. In the absence of any evidence to the contrary he is the 100% owner of the family home.
- (7) The spouse (and the bankrupt) has refused to allow a valuer appointed by the Official Assignee access to the family home in order to provide a valuation for the court. The Official Assignee obtained orders on 9th October and 6th November, 2017 directing that his valuer be granted access to the family home for the purpose of carrying out a valuation. O.B. appealed each of these orders and refused to afford the valuer access to the family home despite the fact that there was no stay on either order.
- (8) The house has been valued at €275,000.
- (9) The family home is unencumbered and therefore provides a real prospect of recovery for the benefit of creditors.
- (10) While the spouse currently does not work outside the home and is the carer of her young children, she is not to be equated to the spouse in Duddy's case. She is a young woman and she confirmed to the court that she previously worked in a bank and, on her own case, had in the past earned sufficient monies to generate savings which allowed her to renovate and restore the house as set out above.
- (11) No offer has been made to purchase the Official Assignee's interest in the family home.

- (12) The bankrupt is entitled to earn and is entitled to a living allowance in accordance with the Insolvency Service of Ireland Guidelines which includes cost of living expenses for himself and his family. This would include the cost of renting a family home. There was no evidence before the court regarding his income, though he remains in occupation of and is working a farm.
  - (13) Very substantial monies are due to the creditors.
  - (14) There has been no recovery to date despite the fact that the petitioning creditor obtained a judgment against the bankrupt on the 4th March, 2013. A receiver has been appointed by the judgment creditor over the farmlands of the bankrupt and he has experienced very considerable difficulties in obtaining possession of the lands and securing a sale of the lands. The bankrupt has indicated that he will not cooperate with the sale of any of the assets of the estate. The Official Assignee anticipates that it will be very difficult to realise any assets for the benefit of creditors.
  - (15) Postponement of the order for sale involves the family of the bankrupt living in the family home at the creditors' expense while interest on the substantial sums continues to accrue."
15. The trial judge came to her conclusion having balanced all of these material factors she had identified, and in my view, she did consider the arguments advanced by O.B. and counsel for the Official Assignee, and she did correctly identify and weight the evidence material to the exercise of her discretion.
16. These factors were expressly adopted by Barniville J. in *Lehane v. A.R.* [2019] IEHC 771.
17. From a reading of her judgment it would seem that the primary factors which influenced the decision of the trial judge to sanction the sale were that significant value would be added to the estate of the Bankrupt by the sale, and thus there would be a "real prospect of recovery" for the creditors. Costello J. was also influenced by her view that the appellant was in a position to earn a living, but more importantly that she had not made any offer to purchase the interest of the Official Assignee in the family home. I will return to a consideration of that last factor later in this judgment.
18. What also weighed in the consideration of the trial judge was that the Official Assignee anticipates that the realization of the balance of the Bankrupt's assets is likely to be difficult, having regard to the fact that he has failed to cooperate with the sale of any assets in his estate, nor has the petitioning creditor recovered anything since it obtained judgment on 4 March 2013. The Bankrupt is registered as owner of lands comprised in Folio KE976, KE5445, surrounding or adjoining the dwelling house, and described by the Official Assignee as "significant surrounding farmlands" said to have had in 2017 a value of €1m euro. No evidence had been made available by the Bankrupt to the Official Assignee regarding his income, notwithstanding that the Bankrupt himself remained in occupation of and is working these nearby lands. The appellant herself described the farm as a "substantial farm".
19. The appellant herself has not given any evidence of her income or other assets.

**Grounds of appeal**

20. The appellant appeals the substantial order on eight pleaded grounds which may conveniently be grouped as follows:
- (a) that the trial judge erred in law in failing to have regard to the provisions of the Family Home Protection Act 1976 ("the 1976 Act") from which the appellant claims to have derived rights (grounds no. 1, 2, 3, 4, 5);
  - (b) that the trial judge failed to afford the appellant her rights to reside in the dwelling house, as this is her "family home" and entitled to protection under the Constitution (grounds 1, 2, 3, 4, and 6);
  - (c) that the trial judge erred in her consideration of the registration of Danske Bank as owner of a charge under burden 5 on the Folio. (grounds 2,5,6,7 and 8).
21. The Official Assignee fully defends the appeal and argues that, as a matter of statute, he has standing under statute to bring an application under s. 61(4) of the Bankruptcy Act seeking an order for the sanction of the sale of the family home. Because he is now registered as owner of the dwelling house as is apparent from the Folio, he argues that, whilst Danske Bank is the petitioning creditor, the rights of the Official Assignee do not derive from any interest of Danske Bank. He also argues that the 1976 Act does not impact on the interest of the Official Assignee; and that there has been no denial of the rights of the spouse of the Bankrupt in the course of the hearing or in the judgment of the High Court.
22. I propose considering the grounds of appeal without following the sequence set out at para. 20 above as many of these grounds overlap.

**The argument that the loan or security contract with Danske Bank is unenforceable**

23. The appellant's first argument is that the original lender and the petitioning creditor, Danske Bank, who obtained summary judgment against the Bankrupt on 4 March 2013 in the sum of €1,296,114.47, failed to extend to her the rights she contends are derived from the provisions of the 1976 Act by virtue of her marriage to the Bankrupt because she is a mother residing in the dwelling house with her young children,
24. Danske Bank registered a judgment mortgage on the Folio against the interest of the Bankrupt on 15 April 2013. The judgment mortgage is registered also against Folios 5445 and CW18329F, but for the present appeal nothing turns on that fact. O.B. argues that the judgment mortgage registered against the family home is void and unenforceable, and that the court should adjudicate upon the validity of the loan and registration of the judgment mortgage.
25. The trial judge considered that O.B. had no standing to make that argument and she was, in my view, correct in this conclusion which she stated in a succinct fashion at paras. 6 and 7 of her judgment. As she correctly says, the motion may not be used for the purposes of seeking to set aside the bankruptcy, and the judgment mortgage was registered by Danske Bank on foot of judgment granted on a summary summons.

26. Critically, the title of the Official Assignee is not based on any charge or other interest of Danske Bank. It derives wholly from section 44 of the bankruptcy legislation.
27. O.B. argues that any contract by which the Bankrupt created a security interest against the family home in favour of Danske Bank is void by reason of the provisions of the Act of 1976. That argument must fail as Danske Bank did not become owner of a security interest by virtue of any contract, but rather by reason of registering a judgment mortgage on the Folio pursuant to the statutory power in that behalf. No consent of the non-owing spouse is required for registration of a judgment mortgage since the creation of the security interest is effected by operation of law and not by conveyance: *Containercare Ltd v Wycherley* 1982 I.R. 143. The judgment mortgage in its terms creates a security over the interest of the Bankrupt and does not affect any beneficial interest of O.B., should she have an interest. I deal further with the Act of 1976 later in this judgement.
28. The trial judge was, in my view, correct to decide that the appellant had no standing to make any collateral challenge to the bankruptcy or registration of the judgment mortgage. Insofar as she seeks to rely on those arguments to set aside the registration of the Official Assignee as owner of the Folio, that argument too must fail.
29. For completeness I should add that the fact that Danske Bank might have been aware of the appellant's presence in the house since 2003 or thereabouts, while it might be relevant to an argument, not made in the present motion, that the judgment mortgage took subject to her interest, it is not relevant to the matter which falls for consideration in the exercise of the discretion of the court to sanction or refuse to sanction a sale or to impose conditions on the sale. Her actual occupation may also be relevant to a consideration under s. 72 of the Registration of Title Act 1964 but does in itself not show she has an interest.

#### **The Family Home Protection Act 1976**

30. The next argument advanced by the appellant is that she has rights in the dwelling house derived from statute.
31. The appellant points first to the provisions of section 12 of the 1976 Act that a spouse or civil partner of any person may seek registration by the Property Registration Authority of the fact of marriage and seek that a notice to that effect be registered.
32. Section 12 of the 1976 Act provides for the registration of the fact of a marriage:
- “(1) A spouse may register in the Registry of Deeds pursuant to the Registration of Deeds Act, 1707 (in the case of unregistered property) or under the Registration of Title Act, 1964 (in the case of registered land) a notice stating that he is married to any person, being a person having an interest in such property or land.
- (2) The fact that notice of a marriage has not been registered under subsection (1) shall not give rise to any inference as to the non-existence of a marriage.”

33. The marriage of the appellant and the Bankrupt is not registered on the Folio. She is correct that the absence of registration of notification of a marriage on a folio or in the Registry of Deeds, as the case may be, does not in itself mean that the spouse or civil partner does not have a beneficial interest in the property or a right to claim such interest. She is also correct that merely on account of the fact that she is not registered as owner or co-owner on the Folio does not mean that she is to be regarded as not having a beneficial interest in the property. The Folio will not reflect the beneficial interest: section 92 Registration of Title Act 1964
34. She goes on to argue that under and by virtue of the 1976 Act she has rights and that these were not respected by the trial judge. She makes no positive assertion and offers no positive statement of what these rights might be but does rely on s.3 of the Act.
35. Section 3 of the 1976 Act, as amended by the Family Law Act 1995, makes void any alienation of any interest in a family home by the other spouse without the prior consent of the non-owning spouse. The dwelling house readily comes within the statutory definition in and it is accepted that it is "a dwelling in which a married couple ordinarily reside": s. (1) of the 1976 Act
36. Section 3(1) of the 1976 Act reads as follows:
- "Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2), (3) and (8) and section 4, the purported conveyance shall be void."
37. While the 1976 Act was enacted primarily with the view to providing protection for a non-owning spouse, its remit is broad. Henchy J. explained the purpose of s. 3 of the 1976 Act in his seminal judgment in *Nestor v. Murphy* [1979] IR 326, at p. 328, as follows:
- "The basic purpose of the sub-section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction. It ensures that protection by requiring, for the validity of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. The point and purpose of imposing the sanction of voidness is to enforce the right of the non-disposing spouse to veto the disposition by the other spouse of an interest in the family home.... The provisions of s. 3, sub-s. 1, are directed against unilateral alienation by one spouse."
38. Hedigan J., in *Irish Nationwide Building Society v. Rafferty* [2012] IEHC 352, followed that statement of the law.
39. The 1976 Act does not, in itself, confer a beneficial interest in a family home on a non-owning spouse, but has the effect that any purported sale or alienation of a family home by the other spouse is void, absent the consent of the non-owning spouse. The legislation offers an important protection to the non-owning spouse against the alienation by his or



her spouse of the family home, and prevents an alienation without engagement with, and active consent of, the non-owning spouse.

40. It does not prevent alienation by a person other than the spouse, and therefore in the present case the provisions of s.3 cannot prevent the sale by the Official Assignee of the dwelling house and is not a factor that would have a bearing on the exercise by the High Court of its statutory discretion to sanction the sale.
41. The appellant argues that nonetheless the trial judge was not entitled to disregard the 1976 Act in considering whether to make an order under s. 61(4) or s. 61(5) of the Bankruptcy Act.
42. Reliance is placed on the decision of *Muintir Skibbereen Credit Union Ltd v. Crowley* [2016] IECA 213, [2016] 2 IR 665 where Hogan J. considered *inter alia*, the effect of the 1976 Act:

“The 1976 Act itself reflected a fundamental policy choice made by the Oireachtas which – reflecting constitutional values embraced in both Article 40.5 (inviolability of the dwelling) and Article 41 (protection of family life) – sought to prevent the sale or disposal of the family home by the unilateral act of one spouse at the expense of the other. That objective would be seriously compromised if a family home which the couple co-owned could be effectively sold by court order over the heads of the wives in the present cases given that they had no involvement in the business affairs of their respective husbands and, critically, where they had never been given a prior opportunity to consent to such loan transactions. The situation would, of course, have been very different had the wives in question been parties to such transactions or if they had otherwise consented to the loan agreements which had given rise to the judgment mortgages in the first place. This never occurred in either of the present cases.” (para. 27)
43. The appellant argues that that judgment is authority for the proposition that the court ought not to sanction the sale of a family home on an application under s. 61(4) of the Bankruptcy Act against the wishes of the non-owning spouse, when that spouse was not a party to the debt and can be described therefore as “innocent” of the events that gave rise to bankruptcy of his or her spouse. She argues it has relevance also because she is not a debtor and did not positively consent to the alienation of the family home whether by way of security or otherwise.
44. In essence, the argument made by the appellant is that the rights of the creditors could not “prevail as against the rights of the two innocent parties [...] who had nothing to do with these transactions and who did not give formal consent to them”, the proposition stated by Hogan J. in *Muintir Skibbereen Credit Union Ltd v. Crowley*, at para. 30.
45. I am unable to read the judgment of the Court of Appeal as supporting these broad propositions. The Court was there dealing with an application by a judgment mortgagee, a “volunteer” as a matter of law (s. 117(3) Land and Conveyancing Law Reform Act 2009)

for the sale and partition of property jointly owned at law and as part of a process of execution, and where what were in consideration were the rights of the non-debtor spouses who were registered as co-owners. The position of the appellant is materially different, and she has no ascertained beneficial interest and no discernible legal interest in the dwelling house.

46. Hogan J. was considering an application pursuant to s. 117 and/or s. 31 of the Land and Conveyancing Law Reform Act 2009 partitioning the co-owned lands and providing for their sale for the purposes of discharging the amount secured by the judgment mortgage. While the judgment of the Court of Appeal, and that in the High Court of White J., in *Muintir Skibbereen v. Crowley* state the broad proposition of fairness and proportionality regarding the exercise of the court's discretion, and while the judgment of Keane J. in *Quinns of Baltinglass v. Smith* supports that approach, the question of feasibility was a primary guiding factor as the partition of the family home was not a realistic possibility, and the sale of an undivided moiety in a family home was effectively not marketable or probably not even possible.
47. I do not consider that *Muintir Skibbereen* assists the appellant. She is not a co-owner and the realisation of the dwelling house which is unencumbered, apart from the judgment mortgage which Danske Bank has agreed to release, would produce a substantial sum toward the debts of the Bankrupt.
48. But more important in my view is the fact that the statutory scheme does provide express protection for a spouse by reason of the requirement for court sanction of a sale and the authorities are clear that factors relating to the occupancy of the property by a family are relevant. There is no lack of statutory or court protection.

#### **Exceptional circumstances**

49. The appellant argues in a broad way that the fact that she and her young children reside in the dwelling house and have no visible means of acquiring another place to live, whether by renting or otherwise, creates an exceptional circumstance giving rise to the imperative that the order be refused. She argues that a sale would be unjust and would fail to recognise her constitutional rights and those of her young children.
50. Her arguments echo those made to McCracken J. in *Rubotham v. Young* (Unreported, High Court, McCracken J., 23 May 1995):

"[The defendant] claims that if the house was sold it would be very traumatic for her and that it would be almost impossible for her to manage in a three or four bedroomed house, in view of the number of children still living at home. It is obvious from her evidence that she feels that her husband was wronged in some way in the course of the bankruptcy, and I think in particular in the agreement entered into by the Plaintiff in relation to the partnership accounts", (at pp. 4 and 5)

51. The sale of a family home in the course of the realisation of the assets of a bankrupt must as a matter of law be sanctioned by the High Court. To that extent the Act recognises that a family home is to be given special consideration and the discretionary nature of the power vested in the court to stay or postpone, or even refuse to sanction, a sale requires that all relevant factors be weighed in the decision. The statutory scheme requires the sanction of the High Court and permits a broad range of solutions including the postponement of the sale and to have regard to "all the circumstances of the case". I accept to that extent the argument of the appellant that special protection is to be afforded to her because she resides in the dwelling house with her young children. The protection is the oversight of the High Court.

52. The High Court has considered the factors that should be taken into account by a court in considering whether to exercise the discretion contained in s. 61(4) and (5) of the Bankruptcy Act in *Rubotham v. Young*. McCracken J. noted at p. 5 the matters to be taken into account by the court in exercising its discretion to postpone a sale:

"I must have regard to the interests of the creditors on the one hand and the interests of the spouse and dependants of the Bankrupt on the other hand, and to all the other circumstances of the case. As far as the creditors are concerned, the Bankrupt was adjudicated almost seven years ago, and the creditors have been paid nothing, and will be paid nothing unless and until the family home is sold. Even then, they will not be paid in full, and there will be no funds available to meet any claim they might have in relation to interest to compensate them for the long delay. On the other hand, the spouse and dependants have lived in the house, in reality at the expense of the creditors, for almost seven years, and while at the time of the adjudication, some of the children were minors, they are now all of full age, although two of them are unemployed".

53. The court in that case ordered a postponement of the sale for four months from the date of the order.

54. The relevant factors to be gleaned from *Rubotham v. Young* and which are also found in the present case is that there is a substantial equity in the dwelling house and the appellant has made no offer to purchase her husband's interest in the dwelling house from the Official Assignee.

55. In the later case of *Rubotham v. Duddy* (Unreported, High Court, Shanley J., 1 May 1996) the bankrupt and his spouse had lived in the premises for thirty-eight years. Both husband and wife suffered from ill health. An offer was made by the spouse to purchase the interest of the Official Assignee in the family home but was rejected. Shanley J. noted the decision of the English Court in *In re Mott* [1987] CLY 212 and at p. 5 stated as follows:

"There was no particular legal principle in *Re Mott* but the facts just happened to bear some similarity to the facts of the present case. The approach of the court in that case is one which I propose to adopt. In this case there are exceptional

circumstances which justify me in exercising the power to order a postponement of the sale of the family home. I shall not however order the postponement to extend beyond ten years”.

56. The decision of Shanley J. was made in the light of what he considered to be exceptional circumstances, including the fact that the couple had lived in the house for thirty-eight years and that both of them suffered from serious ill health. He also took account of the fact that the creditors could take comfort from the likely prospect that the property would appreciate in value.
57. These were some of the matters identified by Costello J. at para. 21 of her judgment when she set out the fifteen factors that fell for consideration in the present case.
58. The judgment of Costello J. was quoted with approval and expressly adopted by Barniville J. in *Lehane v. A.R.* where he described the process as the balancing of “the interests of Mr R’s creditors on the one hand, and the interests of Ms L and their young dependent children of Ms L and Mr R on the other hand”. The Official Assignee had agreed that the sale should be postponed for a period of two years and Barniville J. regarded this as a “fair and reasonable postponement” in all the circumstances. Certain factors were relevant in that case including that Ms L, the estranged wife of the bankrupt, was a co-owner and each spouse was considered to have a 50% interest. The children resided with their mother and the bankrupt resided elsewhere. The valuation evidence showed that some not insignificant equity would be derived from a sale.
59. In my view, s. 61(4) of the Bankruptcy Act does make provision for the separate treatment by the court of the family home of a bankrupt. The Official Assignee has power under s. 61(3)(a) of the Bankruptcy Act to sell the property of a bankrupt, which becomes vested on adjudication. However, the sale of the family home may not occur without the sanction of the High Court, and that court, in deciding whether to sanction or refuse to sanction the sale, must have regard to the interest of the spouse or dependent children of the bankrupt, but also to other interests, including, in a suitable case, the interest of the bankrupt, and the interests of the creditors.
60. The caselaw relied on and the express statutory provisions in 61(4) and (5) show that the High Court may *inter alia* order postponement of the sale or may sanction a sale subject to conditions. A very long postponement may sometimes be warranted, and that might arise where very young children are residing in the house, or where the sale of the property is unlikely to produce much financial contribution to the estate of the bankruptcy for distribution to creditors. The judgment of Shanley J. in *Rubotham v. Duddy* is a case on point and Shanley J. postponed the sale for a period of no longer than ten years.
61. That no or very little dividend would be available to creditors following the sale of a family home would be a factor that might weigh heavily against the making of an order for immediate sale, as might the fact that, where a rise in property prices is anticipated, a creditor is not wholly prejudiced by the delay in realisation.

62. In the present case, a substantial dividend is likely to be paid to creditors from the sale of the property and the drive-by valuation conducted in 2017 showed a value of €275,000. No evidence was adduced that the current value would be materially less than this.
63. Where a non-bankrupt spouse has an interest in the property, the extent of that interest may have an impact on the exercise by the court of its discretion to either postpone or stay the sale, and I consider below the practice that has evolved of offering the non-bankrupt co-owning spouse an opportunity in a suitable case to purchase the interest of the bankrupt.

**The claim to a beneficial interest**

64. The appellant has no ascertained beneficial interest in the family home. She states in her submission and avers at paras. 4 and 5 of her affidavit of 24 July 2017 that she has made contributions by way of renovation of the property, but she does not adduce any evidence of the amount of these contributions, or more important of any matters that might arguably give her a beneficial interest in the dwelling house.
65. In her first affidavit of 24 July 2017, the appellant describes the dwelling house as “incomplete” and says that she invested all her “savings and earnings” in renovating what was formerly a derelict old farm house on the farmyard in order to made it habitable. She says that her husband made no contributions towards that renovation. She says she was unaware of any loans or any mortgage registered against the house, that she did not sign any mortgage deed or any loan agreement or any other document which might have put the family home at risk in any way whatsoever. She says she cannot afford to leave the house or to rent other property.
66. In her second affidavit sworn on 31 January 2018, the appellant offers letters, receipts, and bills to support her residency in the family home since early 2003. She makes no similar offer of vouching documentation with regard to her savings and the manner in which they were expended on the alleged renovation works, nor any documentary or other evidence regarding the extent to which the premises might have increased in value as a result of those works. The vouchers show she resides in the dwelling, but no more than that.
67. This vouching documentation therefore might go to show that the appellant did live in the dwelling but does not establish an argument that she has a beneficial interest. The fact of her residence in the dwelling is not challenged by the Official Assignee.
68. She has, and had been afforded, a right to be heard prior to any sale. She also has, and has availed of, an entitlement to assert by action a claim to a beneficial interest. But the claim has not been prosecuted and remains incomplete and, at best, inchoate.
69. There are a number of difficulties with her assertions. First, the statement in her submissions and in her affidavit are no more than bare assertions which, in the absence of some concrete evidence, could not be treated as sufficient to displace the presumption

that the Folio reflects the beneficial interest. She did not explain the nature of the refurbishments, their cost, and whether and how they added to the value of the dwelling.

70. Furthermore, the expenditure of monies on renovation to a property does not, in itself, give rise to a resulting or other trust such that the legal owner can be said to hold the property on trust for the person who has so expended that money. See the discussion in Biehler *Equity and the Law of Trusts in Ireland*, 6th ed at pp. 205ff.
71. Nothing was adduced by way of evidence or argument which would have enabled the trial judge to form any view as to whether a trust might even arguably have come into existence in her favour by reason of her alleged contributions to the renovation of the dwelling, or as to the extent of the beneficial interests to which the legal estate could be subject.
72. This aspect of the appeal must fail in my view as the appellant has not raised any credible legal or factual basis on which a postponement of the sale could be justified on account of her claim to have a beneficial interest in the dwelling.

#### **Changed circumstances**

73. In the course of the appeal and without objection from counsel for the Official Assignee the appellant sought to adduce argument based on an asserted change in her personal circumstances since the High Court delivered its judgment. The approach adopted by counsel was practical and prudent as it might avoid a further application to the High Court were the appellant to refuse to deliver vacant possession for the purpose of a sale.
74. The appellant says that she is now separated from her husband and that he lives in a separate house on the adjoining lands and provides her and their children with some financial assistance.
75. She says she now has a new baby born since the High Court decision, and since she commenced proceedings for judicial separation, but refused to say whether that child is the child of the marriage, and expressly refused to produce the matrimonial civil bill.
76. She offered no explanation for her refusal to explain the circumstances of her separation, other than her desire for privacy in her family life. It should be noted that whilst the hearing of the appeal commenced in open court a direction was made that it be heard *in camera* in the light of the matrimonial factors which evolved in the argument, but that nonetheless the appellant still refused to answer the questions raised by the Court.
77. The approach of the appellant and the lack of progress in the equity proceedings since they were commenced in 2015, and the vague assertion in argument regarding her current family circumstances make it difficult to allow any degree of flexibility in the approach to the appeal. What flexibility that could be and was afforded will appear later in this judgment.

#### **Established practice to engage with spouse of a bankrupt**

78. The appellant argues that the Official Assignee has failed to communicate with her since her husband was adjudicated bankrupt and that she has thereby been denied established practices by the Official Assignee to engage with a spouse with regard to his or her title to, or the continued occupation of, a dwelling house of the bankrupt.
79. The appellant makes reference to the document published by the Insolvency Service of Ireland in "Debtor's Guide to Bankruptcy" and to the statement therein that:
- "If there is equity (i.e. surplus in value of property above amount of mortgage) in the family home the Official Assignee will firstly seek to sell his half share to the Bankrupt or his/her spouse or civil partner once the purchase funds are proven not to be the Bankrupt's".
80. While the trial judge made no finding in this regard, the evidence on affidavit from the Official Assignee threw some doubt on the assertion made by the appellant that no communication had been received by her from the Official Assignee or his legal representatives since her husband was adjudicated bankrupt. She has not, however, denied receipt of the letters exhibited in the affidavit. By way of example, two letters from the solicitors of the Official Assignee, one of 4 October 2017 and another of 25 October 2017, sought evidence that might "quantify these contributions" and evidence as to the source of the funds said to have been contributed by the appellant to the renovation and refurbishment of the family home.
81. In a clear letter of 5 December 2017, the solicitors for the Official Assignee reminded the appellant that more detail had already been sought in regard to her alleged financial and/or other contributions towards the dwelling house and that Costello J. had on previous occasion reminded the appellant of this fact and why it was needed.
82. The appellant does not deny that she received these letters and makes no comment regarding their content. Her assertion therefore that she was denied fairness in the process is not supported by the evidence, and in the absence of any assertion from her regarding the contents of this correspondence, I am of the view that the appellant well knew the difficulty she was likely to face without vouching documentation or other explanation regarding the claim that she had made for a declaration as to her beneficial interest in the property.
83. Further, it is clear, and uncontested on the facts, that no offer has been made by her to purchase her husband's interest in the property. The solicitors for the Official Assignee wrote to the appellant on 21 April 2017 before the motion issued, and later in a letter of 19 June 2017, having noted the fact that a *lis pendens* had been registered on the Folio, asked that the appellant would identify the basis of the *lis pendens* and the facts underpinning her claim. The letter of 19 June 2017 made it clear that a motion seeking sanction of the court for sale would be brought.
84. In dealing with the question of purchase to the non-bankrupt spouse, Costello J., at para. 17, made the following observation with which I agree:

“A court may sanction the sale of a bankrupt's or a bankrupt's spouse's family home despite the prejudice suffered by the non bankrupt spouse and the dependants of the bankrupt It is within the contemplation of the subsection that the court would sanction a sale the effect of which would be to direct the sale of the family home over the wishes of the innocent spouse who is not a party to the incurring of the debts which gave rise to the bankruptcy of the other spouse in the first instance and who never formally consented to any judgment mortgage of the family home.”

85. That observation is correct, in my view, but I would add that the statutory discretion is one that does require the court to engage with the likely prejudice to a non-bankrupt spouse, and that whilst that prejudice is one of the factors that comes to be weighed, it is not, in itself, a determining factor in a decision whether to order or refuse to sanction a sale.
86. In the course of the hearing of the appeal and because of the appellant's persistent denial that there had been communication with her, and in order to ascertain whether some resolution to the matter might still be achieved, counsel for the Official Assignee suggested that he might be receptive to an offer by her to purchase the dwelling house. The appellant said she would consider this suggestion, and, in ease of her, the Court indicated that it would hold off giving judgment until after the end of January 2020 to give the parties this opportunity.
87. In the event we were informed that no progress had been made by mid-February and in those circumstances, it seems appropriate to now deliver this judgment.
88. The name of the appellant and other identifying details have been redacted because of the private matrimonial matters dealt with in the course of the judgment and I have for that purpose and insofar as it has been possible omitted identifying features of the published judgment of Costello J. who had no reason to redact, as these matters for the reasons explained were not part of the High Court hearing.

### **Conclusion**

89. For the reason stated I am of the view that the appellant fails on all the grounds of appeal advanced and I would dismiss the appeal.