

THE HIGH COURT

BANKRUPTCY

[2566]

IN THE MATTER OF THE BANKRUPTCY ACTS, 1988 TO 2016

AND IN THE MATTER OF MICHAEL BURKE, A FORMER BANKRUPT

AND IN THE MATTER OF AN APPLICATION BY CHRISTOPHER D. LEHANE, THE OFFICIAL ASSIGNEE IN BANKRUPTCY, SEEKING SANCTION OF THIS HONOURABLE COURT TO THE SALE OF THE FAMILY HOME PURSUANT TO S. 61 (4) OF THE BANKRUPTCY ACT, 1988 (AS AMENDED)

BETWEEN

CHRISTOPHER D. LEHANE (THE OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF MICHAEL BURKE, A FORMER BANKRUPT)

APPLICANT

AND

MICHAEL BURKE AND JACQUELINE BURKE

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 30th day of June, 2017

1. Michael Burke, the first named respondent, was adjudicated bankrupt on the 31st March, 2014 whereupon, pursuant to s. 44 of the Bankruptcy Act 1988 (as amended) all of his property was vested in the applicant in his capacity as the Official Assignee. On the 29th July, 2016, the first named respondent ("the bankrupt") was discharged from bankruptcy.

2. The bankrupt and the second named respondent are husband and wife (collectively, "the respondents"). The estate of the bankrupt included *inter alia* a dwelling-house and property known as Slievecorragh, Hollywood, County Wicklow comprised in Folios 30201F and 3077 of the Register of Ownership of Freehold Land in the County of Wicklow ("the property"). The property is the family home of the respondents and the second named respondent is a co-owner of the property. Upon his adjudication, the interest of the bankrupt in the property was transferred to the Official Assignee pursuant to the provisions of s.44 of the Act and the joint tenancy of the respondents was severed.

3. By virtue of the operation of amendments to s.85 of the Bankruptcy Act, 1988 effected by s.10 of the Bankruptcy (Amendment) Act, 2015, the interest of the former bankrupt, which was transferred to the Official Assignee, would, as a matter of law, re-vest in the former bankrupt as of the 31st March, 2017 unless the Official Assignee applied to the High Court for an order permitting him to sell the family home pursuant to the provisions of s. 61 (4) of the Act as amended prior to the third anniversary of the date of adjudication, in this case 31st March, 2017.

4. On the 27th March, 2017 the Official Assignee issued a motion returnable for the 3rd April, 2017 seeking an order pursuant to s. 61 (4) of the Act sanctioning the sale of the property and further ancillary relief. The notice of motion was grounded upon an affidavit sworn by the Official Assignee on the 27th March, 2017.

5. Niall Hayes, bankruptcy inspector, swore an affidavit stating that at 3.55 pm on the 28th March, 2017 he called to the property but neither of the respondents were at home. He left two envelopes addressed to the bankrupt and the second named respondent at the front door of the property containing the notice of motion dated 27th March, 2017 and the grounding affidavit of Christopher D. Lehane sworn on the 27th March, 2017 together with the exhibits. He subsequently texted the bankrupt at 6.57 pm the same day confirming that he had left the envelopes at the front door of the property.

6. The 31st March, 2017 was the third anniversary of the adjudication of the first named respondent as a bankrupt.

7. On the 3rd April, 2017 the motion was adjourned to the 22nd May, 2017 and the return date on the notice of motion was amended by the substitution of the 22nd May for the 3rd April, 2017.

8. On the 4th April, 2017 Mr. Hayes attempted to effect personal service of the notice of motion upon both the respondents. He telephoned the first named respondent with a view to arranging a meeting with the respondents but without success. He called to the property at 7 pm on the 4th April, 2017 but neither of them were at home. He again left two envelopes at the front door of the property, one addressed to each respondent, containing a copy of the notice of motion dated 27th March, 2017 together with the grounding affidavits and exhibits. As he was leaving the driveway, the second named respondent arrived home in her car. Mr. Hayes spoke with her and directed her to the envelope containing the documents and she acknowledged receipt of them and confirmed that she would review them. Fifteen minutes later the bankrupt returned Mr. Hayes's telephone call and Mr. Hayes explained that he had left papers in relation to the matter and the bankrupt confirmed that he would review the matter.

9. The issue for consideration by the court is whether the application before the court is out of time. This turns on the provisions of s. 85(3A) of the Act of 1988. Section 85 (3A) provides:

"Subject to subsections (3B) to (3F), where on the 3rd anniversary of the date of the making of the adjudication order in respect of a bankruptcy —...

(b) in the case of the family home ... the Official Assignee has not applied to the Court for an order for sale of that home,

that estate or interest shall, on that 3rd anniversary, stand re-vested in the bankrupt without the need for any conveyance, assignment or transfer."

10. Mr. Lynch, solicitor for the respondents, argued that the Official Assignee's application was out of time because on the third

anniversary of the date of the making of the adjudication order in respect of the bankruptcy of the bankrupt, the Official Assignee had not applied to court for an order for sale of the family home. On that basis he submitted that the estate or interest of the bankrupt in the family home stands re-vested in the bankrupt as of 31st March, 2017.

11. Central to his argument was the question of whether the notice of motion was an originating notice of motion. If it is an originating notice of motion, then personal service of the notice of motion is required by the provisions of O. 52 r. 2 and O. 9 r.2 and 16.

12. On the other hand, if the notice of motion is not an originating notice of motion, then personal service of the notice of motion is not required. Order 121, rule 1 says that a document includes a pleading, notice, affidavit or order and r. 2 states that the service of any document under the rules for which personal service is not required shall be effected by leaving the document or a copy thereof (as may be appropriate) at...the residence in the state of the person to be served. It is common case that the motion papers were left at the residence of the respondents on the 28th March, 2017.

13. In *Reilly v. Director of Public Prosecutions & anor* [2016] IESC 59 the Supreme Court construed the words "application made" in s. 39 (1) of the Criminal Justice Act, 1994 (as amended). Dunne J. giving the judgment of the court concluded that an application was made pursuant to that section once the originating notice of motion was issued and served within the two-year time limit provided by that section. She stated that:

"I am satisfied that the application is made pursuant to s. 39(1) once the motion has been issued and served on the parties requiring to be notified within the relevant time period. I do not accept the contention that in order for the application to be made it is necessary that an application be made in open court as suggested [by the applicant]"

14. It is therefore clear that if a motion is issued and served before a time limited for making an application, even if it has not yet been moved in court, nonetheless this constitutes an application made to court or other tribunal (as the case may be).

15. There is no doubting the fact that the motion was issued prior to the third anniversary of the date of adjudication. The issue for resolution therefore in this case is whether the motion was properly served upon the respondents on or before the 30th March, 2017. On the facts of this case, this can only have been so if service in accordance with O. 121, r. 2 was sufficient and personal service was not required. This in turn depends upon whether the notice of motion is an originating notice of motion.

16. The Official Assignee submitted that the motion was not an originating notice of motion but was a motion brought within the bankruptcy proceedings and bearing the record number of the bankrupt's bankruptcy proceedings. Originating notices of motion are used to initiate proceedings. This indicated that this motion was not an originating notice of motion within the meaning of the rules. It was submitted that an originating notice of motion is only permissible when it is provided for by the rules and an application under s. 61 (4) of the Bankruptcy Act 1988 as amended is not one of those applications which may be brought by way of originating notice of motion. The respondents submitted that these were new proceedings seeking the sale of their family home and it could only be regarded as an originating notice of motion.

17. I believe the answer to the question may be found in a true construction of the Bankruptcy Act 1988 (as amended). Part III of the Act deals with the administration of the property of a bankrupt. It starts with s. 44 where the property of a bankrupt vests in the Official Assignee. This part of the Act is replete with references to "an application made to court" (s. 44B (1), 45 (3), 56, 57 (2) (c)). Section 61 is included in Part III of the Act. It applies to every bankruptcy matter and deals with the functions of the Official Assignee. The relevant parts of s. 61 provide as follows: -

(3) In the performance of his functions the Official Assignee shall, in particular, have power—

(a) to sell the property by public auction or private contract...

(d) to institute, continue or defend any proceedings...

(4) Notwithstanding any provision to the contrary contained in subsection (3), no disposition of property of a bankrupt ... which comprises a family home (within the meaning of the Family Home Protection Act, 1976) 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 this section for an order for the sale of a family home, the Court, notwithstanding anything contained in this or any other enactment, shall have power to order postponement of the sale of the family home ... having regard to the interests of the creditors and of the spouse and dependants of the bankrupt as well as to all the circumstances of the case.

(6) The Official Assignee may in case of doubt or difficulty seek the directions of the Court in connection with the affairs of any bankrupt..."

18. It seems to me that it is very clear therefore that an application brought pursuant to s.61 (4) is an application brought in the bankruptcy proceedings themselves. It is one of a number of applications which may be brought in the bankruptcy. It was specifically inserted to cover issues which might arise in the context of the sale of the family home. It follows that it is not an originating notice of motion in respect of which personal service is required in accordance with the provisions of O. 52, r. 2 and O. 9 r. 2 and 16. It further follows that the service of the motion papers effected by Mr. Niall Hayes on the 28th March, 2017 was good and valid service and accordingly the proceedings had been issued and served on all respondents to the motion as of that date. That being so, applying the decision of the Supreme Court in *Reilly v. DPP*, the Official Assignee had applied to court for an order for the sale of the family home prior to the third anniversary of the date of the making of the adjudication order in respect of the bankrupt, notwithstanding the fact that the return date for the notice of motion was the 3rd April, 2017 i.e. after the 3rd anniversary. As it does not arise on the facts of this case, I am not deciding whether the Official Assignee was correct in submitting that the requirements of s. 85 (3A) are met simply by the issuing of a notice of motion seeking the sale of the family home of the bankrupt. That is best decided in a case where the issue actually arises.

19. On the basis of this conclusion many of the other arguments advanced on behalf of the respondents by Mr. Lynch fall away and do not arise for consideration. Some were issues which require to be determined at the hearing of the motion in the event that it was not out of time and therefore by agreement of the parties they each reserved their positions with respect to those points. One other point was argued before me. It concerned the jurisdiction of the court in relation to the second named respondent.

20. Secondly, and entirely separately from his first point, Mr. Lynch argued that as the second named respondent was not merely a spouse of the former bankrupt but was also a co-owner the court had no jurisdiction to make an order for sale under s.61 (4) of the Bankruptcy Act 1988 in respect of her interest in the property. Rather, the Official Assignee must obtain an order pursuant to s.31 of the Land and Conveyancing Law Reform Act 2009 for the sale of the property which is jointly owned by the second named respondent. It follows that she is not a party to this application and no order for sale can be made in respect of her interest.

21. The answer to this submission also is to be found in the true construction of s.61. Section 61 applies to every bankruptcy matter and subs. 2 provides that the functions of the Official Assignee are to get in and realise the property and to ascertain the debts and liabilities and to distribute the assets in accordance with the provisions of the Act. Subsection 3 confers powers on the Official Assignee for the performance of those functions. As quoted above, the first such power is the power to sell any property. This includes the power to sell the family home of a bankrupt, as is clear from the provisions of subs. 4. It expressly requires the Official Assignee to apply to court for an order for the sale of the family home of the bankrupt or the bankrupt's spouse. If he fails to obtain the prior sanction of the court the purported disposition is void.

22. There is nothing in either ss.61 (4) or (5) or s.85 (3A) to indicate that the sale of the family home referred to in those provisions does not include a family home co-owned with a spouse of the bankrupt. Section 61 (4) refers to a family home within the meaning of the Family Home Protection Act, 1976. A family home is defined in s.2 (1) of the Family Home Protection Act, 1976 as "... *primarily, a dwelling in which a married couple ordinarily reside.*" It also comprises a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided in before leaving. The definition does not on its face exclude a property jointly owned by the spouses. It is true that in *Nestor v. Murphy* [1979] I.R. 326 the Supreme Court held that the provisions of s.3 of the Act did not apply where the co-owning spouses each signed the contracts for the sale of the family home. This affects the application of the Act in practice but it does not limit the definition of a family home.

23. Family homes are frequently, if not usually, held in the joint names of spouses. It is to be presumed that the Oireachtas was aware of this fact when enacting both the Bankruptcy Act 1988 and the various amendments to that Act including those effected in 2009 (s.8 (1) and schedule 1 of the Land and Conveyancing Law Reform Act 2009), 2011 (Part 3 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010), 2012 (the Personal Insolvency Act 2012) and 2015 (the Bankruptcy (Amendment) Act 2015). This means that the Oireachtas on several occasions had the opportunity to amend the Act of 1988, including the enactment of the 2009 Act, to exclude from the provisions of ss.61 and 85(3A) family homes where the spouse of the bankrupt was not bankrupt but was a co-owner of the family home, but chose not to do so.

24. The provisions of the Act of 1988 are to be read harmoniously and s.85 (6)(b) states that in s.85 (which includes s.85 (3A)) "family home" is to have the same meaning as it has in s. 61 of the Act. Section 61 (4) clearly states that the family home is a family home within the meaning of the Family Home Protection Act, 1976. I am satisfied therefore that the references to family home in respect of each of these sections includes a family home where the bankrupt and his or her spouse were co- owners of the property prior to the date of adjudication.

25. It was argued on behalf of the second named respondent that the jurisdiction of the court to order the sale was confined to the sale of the interest of the bankrupt in the family home. It did not extend to an order for sale of the interest of the non bankrupt spouse in the family home. If the Official Assignee wishes to sell the family home in circumstances where he is only a co-owner, he is obliged to obtain an order pursuant to s.31 of the Land and Conveyancing Law Reform Act 2009.

26. It seems to me that this construction is not correct. Subsection 5 relates to an application by the Official Assignee under subsection 4 for an order for the disposition of a family home. Subsection 4 relates to a disposition of property of a bankrupt which comprises a family home of the bankrupt. The interpretation advanced by the second named respondent would require construing this provision to relate solely to the share of the bankrupt in the family home. If that were indeed the intention of the Oireachtas, it would in effect mean that this provision would largely be unworkable. It could only apply to family homes where both spouses were bankrupt or in the sole ownership of the bankrupt. In either situation the alleged issue with the court's jurisdiction would not arise. It would mean that for the Official assignee to realise his interest in property jointly owned by a bankrupt and his or her spouse, he would have to make an application under legislation other than the Bankruptcy Act. This of course is not problematic in and of itself, but it is inconsistent in my opinion with the intention of the Oireachtas as expressed in the statute. Section 61 (5) provides that "... *notwithstanding anything contained in this or any other enactment...*", the court would have power to order postponement of the disposition of the family home having regard to *inter alia* the interests of the spouse and any dependants of the bankrupt. Thus, notwithstanding any other enactment, the bankruptcy court is to have power pursuant to an application to sell the family home of a bankrupt brought under s.61 (4) to postpone that sale in the interests of the spouse of the bankrupt. If the jurisdiction of the court does not extend to the sale of the family home (as opposed simply to the interest of the bankrupt in the family home), then the power in subsection 5 to protect the interests of spouses by postponing the sale likewise does not apply. This could result in co-owning spouses enjoying a lesser level of protection than non-co-owning or bankrupt spouses. No reason for this distinction in treatment of spouses of bankrupts was suggested.

27. I am satisfied that the Oireachtas intended to establish a special supplemental jurisdiction in relation to the sale of the family home or the interest of a bankrupt in a family home by enacting ss. 61 and 85(3A) of the Act. These provisions apply "*notwithstanding ... any other enactment*". There is nothing in either the wording of the sections or the legislative purpose in enacting the sections which leads to the construction advocated by the second named respondent. It is in ease of spouses of bankrupts that their interests in the family home should be protected by the requirements and provisions of ss. 61 (4) and (5).

28. I am not persuaded by the argument that the second named respondent is not a proper party to the application or that, on a hearing of the motion no order for sale in respect of her interest in the property may be made.

29. Accordingly, I refuse to dismiss the application as against the bankrupt or as against the second named respondent for the reasons set out in and I direct that the motion should proceed to trial in the normal way.