



**THE COURT OF APPEAL
CIVIL**

Neutral Citation Number: [2020] IECA 2

Record No. 2019/103

**Costello J.
Faherty J.
Haughton J.**

IN THE MATTER OF SECTION 61 OF THE BANKRUPTCY ACT 1988 (AS AMENDED)

IN THE MATTER OF PATRICK J. DALY A BANKRUPT (3379)

IN THE MATTER OF ANNE DALY, A DISCHARGED BANKRUPT (3713)

BETWEEN/

ANNE DALY, A DISCHARGED BANKRUPT

APPELLANT

- AND -

CHRISTOPHER LEHANE, THE OFFICIAL ASSIGNEE IN BANKRUPTCY

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on the 23rd day of January 2020

1. This is an appeal by the discharged bankrupt against the order of Pilkington J. of 28 January 2019, sanctioning the sale of the family home of Patrick J. Daly, a bankrupt, and Anne Daly, a discharged bankrupt, at Ballinagore House, Ballinagore, County Westmeath, being the property comprised in Folio 21625F of the Register of Freeholders of the County of Westmeath, pursuant to s.61(4) of the Bankruptcy Act 1988 (as amended). The trial judge postponed the sale for six months from the date of the order and ordered the bankrupt and the discharged bankrupt to deliver up to the official assignee, or his duly authorised agent, vacant possession of the property.

Background

2. On 30 July 2012 in proceedings entitled *The Governor and Company and the Bank of Ireland v. Patrick J. Daly and Anne Daly* [High Court Record No. 2012/2353S], the High Court granted judgment against Ms. Anne Daly (“the appellant”) and Mr. Patrick Daly (“the bankrupt”) for the sum of €4,435,278.61 on consent. Neither the appellant nor the bankrupt appealed that consent order within the time provided for under the Rules of the Superior Courts. On 29 August 2014 the appellant applied to the Supreme Court for an order extending the time within which she might appeal the order (and an order in related proceedings *The Governor and Company of the Bank of Ireland v. Patrick J. Daly, James B. McDonnell and Malachy Stephens* [High Court Record No. 2011/4178S]). The application to extend the time was transferred by order of the Supreme Court on 28 October 2014 to the Court of Appeal in accordance with Article 64 of the Constitution. On 15 May 2015 the Court of Appeal refused the relief sought and, therefore, the appellant may not appeal the judgment of the High Court entered on consent. The judgment, therefore, stands and effect must be given to it by all courts.

3. The judgment creditor petitioned for the bankruptcy of the bankrupt and the appellant. The bankrupt was adjudicated on 23 November 2015 and his bankruptcy was extended for a period of ten years for non-cooperation. He remains in bankruptcy. The appellant was adjudicated on 27 June 2016 and was discharged by operation of law on 26 June 2017. Upon their adjudication as bankrupts the assets of the bankrupt and the appellant vested in the official assignee pursuant to s.44 of the Bankruptcy Act 1988.
4. Ballinagore House is an asset of the bankrupt and the appellant and was their family home. On or about 1 July 2012 the appellant and the bankrupt purported to transfer Ballinagore House to Ms. Devon Anne McNeill, an American citizen who resided in the United States, and, on the date of their respective adjudications Ms. Devon Anne McNeill was registered as full owner of the property and had been so registered since 23 August 2012. However, in proceedings brought by the official assignee, the transaction whereby the property was allegedly transferred to Ms. McNeill was subsequently, on 9 March 2018, declared by the High Court (O'Connor J.) to be void by reason inter alia of s.50 of the Bankruptcy Act 1988 and O'Connor J. declared that the official assignee was the legal and beneficial owner of Ballinagore House. The order of the High Court was not appealed. Thus, Ballinagore House was confirmed to be the joint property of the bankrupt and the appellant and their respective interests, therefore, vested in the official assignee pursuant to s.44 of the Act of 1988 upon their respective adjudications as bankrupts.
5. By originating notice of motion, dated 2 October 2018, the official assignee sought orders pursuant to s.61 of the Bankruptcy Act 1988 for the sale of the family home of the bankrupt and the appellant, together with ancillary reliefs. Subsections 61(4) and (5) of the Act provide as follows: -
 - “(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 the 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. In this case, the property was jointly owned by spouses who were both adjudicated bankrupt. It follows that there is no interest of a non-bankrupt spouse in the family home which has not vested in the official assignee. It was accepted by the official assignee that the property is a family home within the meaning of the Act of 1976 and, therefore, of s.61(4). The appellant resides at the property, but the bankrupt has not done so for a number of years as the appellant and the bankrupt are separated. There are no dependants of the bankrupt or the appellant residing in the family home within the meaning of s.61. Thus, for the purposes of subsection (5) of the Act of 1988, neither the

interests of the non-bankrupt spouse nor dependants of the bankrupt arise. As of December 2018, DNG Duncan advised the official assignee that the property was valued in or around €400,000.

7. In August 2018, the official assignee's solicitors notified the bankrupt and the appellant that he intended to realise his interest in the property for the benefit of the creditors of the estate. The appellant wrote on 22 August 2018 to the official assignee's solicitors requesting them to grant her more time to respond to his proposed application "as [she had] a new solicitor coming on record." On 28 August 2018, she wrote stating that she wished to make a proposal to purchase the official assignee's interest in the property. The official assignee's solicitors responded on 4 September 2018 stating that in the event a satisfactory proposal was not made by close of business on 7 September 2018, the intended proceedings would issue the following week. On 5 September 2018 the appellant responded stating that she would confirm back to them within the required time. On 6 September 2018 she wrote: -

"Please note I am not going to be able to make a proposal at this time and I am going to seek legal advice."

8. The notice of motion issued on 2 October 2018 and on 31 October 2018, Messrs. Anthony Joyce & Company entered a notice of appointment as solicitor for the appellant in the matter. On 28 November 2018 the appellant swore a short replying affidavit for the purposes of seeking an adjournment of the motion. At paras. 3 and 4 of the affidavit she averred: -

"3. I say that my Solicitors, Anthony Joyce & Company, of Augustine House, Oliver Bond Street, Dublin 8 have been engaging with the Solicitors for the applicant in respect of my family home at Ballinagore House, Ballinagore, Co. Westmeath. I say that I have agreed to allow a valuer for the applicant to assess the property on Thursday 29th November 2018. I say that my Solicitors require time to continue to engage with the Applicant's Solicitors to clarify the value of the property.

4. I pray that I am granted the adjournment for the purpose of continuing to engage with the Official Assignee to provide a more structured resolution to the sale of the property which is both my Family Home and Principal Private Residence."

9. In the event, the appellant made no offer to purchase the interest of the official assignee in her family home and the matter came on for hearing in the High Court on 28 January 2019.

The hearing in the High Court

10. When the matter opened before the High Court Mr. Joyce, the appellant's solicitor, informed the court that he was on record and he had been instructed by his client that she no longer wished to be represented by him. Mr. Joyce informed the trial judge that he was notified of this "just late last week." Later the appellant informed the judge that she had dispensed with the services of her solicitor "because he was not fully advised and

[she] was not able to give him proper advice". She also said that she could not afford to pay him.

11. The appellant asked the trial judge to adjourn the application to enable her to seek legal aid. In response to questions of this court, it emerged that she had applied for legal aid in respect of the s.61 application listed for hearing on Monday, 28 January 2019, on Friday, 25 January 2019.
12. The trial judge refused the application for an adjournment on the grounds that the appellant had legal representation and that it was entirely a matter for herself whether she discharged her solicitor.
13. The trial judge heard the application. The appellant opposed the application on the basis that the order adjudicating her a bankrupt should be set aside. This was based on a challenge to the order of 30 July 2012 which grounded her bankruptcy.
14. The trial judge rejected the submissions of the appellant. She held that the question of a challenge to the order of the High Court of 30 July 2012 was a matter to be dealt with elsewhere, as the appellant had not informed her of the fact that the Court of Appeal had refused to extend the time in which to appeal that order. She held that the official assignee had established that he was entitled to the primary relief sought, that is the sale of the family home, and that the issue for her was whether she ought to exercise her discretion to postpone the sale. She noted that both co-owners had been adjudicated bankrupt and that there were no dependants living at the family home. She took into account the fact that the appellant suffers from a disability and she, therefore, decided to postpone the sale of the family home for a period of six months.

Grounds of appeal

15. The appellant advanced two grounds of appeal: -
 - (1) that the trial judge erred in law by refusing her application for an adjournment when she had discharged her solicitor and had made a valid application for legal aid in respect of the application. As such, she said, she was not able to access justice effectively;
 - (2) the order made was disproportionate. As the Official Assignee is an officer of the State he was bound by the jurisprudential authorities of the CJEU requiring that decisions made by emanations of the State be proportionate.

Discussion

16. In my opinion, the trial judge had discretion whether or not to adjourn the hearing on 28 January 2019. This court is slow to intervene in the exercise of a trial judge's discretion in relation to matters of this kind, and the power to do so should be exercised sparingly. In this case, the appellant had instructed Mr. Joyce to represent her in or around October 2018. Mr. Joyce came on record on her behalf on 31 October 2018. When she filed a replying affidavit on 28 November 2018, it was filed, on her behalf, by Mr. Joyce. The reason advanced for seeking an adjournment on that occasion was to enable her solicitor

to engage with solicitors for the official assignee in relation to providing “a more structured resolution to the sale” of the family home to her. Mr. Joyce informed the court on 28 January 2018 that the appellant had dispensed with his services on the preceding Friday. The appellant did not dispute this fact. It is thus clear that up to the date of the hearing of the application the appellant had the benefit of legal representation. As the trial judge said, it was a matter for her whether she discharged her solicitor.

17. The appellant indicated that she was applying for legal aid. She informed this court that she had applied for it on the same day that she discharged Mr. Joyce as her solicitor. There was no information before the High Court as to when the application for legal aid might be determined by the Legal Aid Board. Indeed, at the hearing of the appeal, the appellant could not inform the court whether or not her application had yet been decided. The bankrupt was adjudicated on 23 November 2015 and the appellant on 27 June 2016. The creditors had long waited for the realisation of this valuable asset of the bankrupt estates, and there was no indication how long an adjournment would be required in order to await the outcome of the application for free legal aid. In those circumstances, it was entirely within the discretion of the trial judge to refuse the appellant a second adjournment of the application. I see no basis for this court interfering with this exercise by the trial judge of her discretion in the matter, and I would refuse this ground of appeal.
18. The appellant referred the court to a considerable amount of material and authorities which were directed to show that she ought never have been adjudicated a bankrupt as the order of 30 July 2012 should be impugned for a variety of reasons. This order was an order entered by consent. The appellant did not appeal within the time allowed, as I have explained, and the Court of Appeal refused to extend time for her to appeal the order. Subsequently, the judgment creditor petitioned for her adjudication and she was adjudicated bankrupt on foot of that order.
19. It is simply not open to her to defend the present application on the basis that she ought not to have been adjudicated a bankrupt by reason of an alleged flaw in the judgment of 30 July 2012.
20. That being so, it seems to me that the appellant has failed to advance any ground as to why the High Court erred in law in sanctioning the sale of the family home.
21. Pursuant to subsection (5), the court has the power to postpone the sale of the family home “having regard to the interests of the creditors, spouse...and any dependants of the bankrupt...as the case may be, as well as to all of circumstances of the case.”
22. In this case, both spouses to the marriage were adjudicated bankrupt. The appellant, alone, resides in the family home. There are no dependants of either bankrupt residing in the family home; their daughter is now twenty-three years old and no longer resides at Ballinagore House. It follows that, on the facts of this case, the relevant factors that the trial judge was required to take into account, in deciding whether to postpone the disposition of the family home, were the interests of the creditors and all of the

circumstances of the case. It was clearly in the interests of the creditors that a valuable, unencumbered property be realised for their benefit. The only countervailing circumstance advanced by the appellant which was relevant to the exercise of the trial judge's discretion, pursuant to subsection (5), was her disability. It is true, as is pointed out by counsel for the official assignee, that there was no evidence whatsoever of the claimed disability before the court, however, the trial judge was prepared nonetheless to take the appellant's apparent disability into account. There was no cross-appeal in relation to this by the official assignee.

23. The appellant argued that the special circumstance applicable in her case was that she ought never to have been adjudicated a bankrupt. I agree with the submission of counsel for the official assignee that this cannot amount to special circumstances and was not a factor which ought properly to have been taken into account by the trial judge.
24. In my judgment, s.61(5) imposes an obligation on a trial judge to balance, in a proportionate way, the interests of the creditors and any non-bankrupt spouse, or any dependants of a bankrupt, together with all the circumstances of the case. In my opinion, the trial judge did this in an appropriate fashion and I see no basis upon which to interfere with the exercise of her discretion to postpone the sale for six months.

Conclusion

25. The appellant has not established that the trial judge erred in the exercise of her discretion when she refused to adjourn the application for orders, pursuant to s.61 of the Bankruptcy Act, 1988, to await the outcome of her application for free legal aid. The family home was an asset in both bankruptcy estates which had vested in the official assignee and it was open to the High Court to sanction the proposed sale of the property for the benefit of the creditors. The trial judge had regard to the relevant factors in this case in exercising her discretion to postpone the sale of the family home for six months. She did not take into account matters which ought not to have been considered. The appellant advanced no arguments on appeal which would justify this court intervening in relation to this exercise of her discretion. For these reasons, I would not allow the appeal.
26. In view of the fact that the appellant is residing in the family home and the date for the delivery up of vacant possession has passed, it is appropriate to hear the submissions of the parties on the date upon which vacant possession of Ballinagore House should be surrendered to the official assignee.