

**THE HIGH COURT  
BANKRUPTCY  
IN THE MATTER OF THE BANKRUPTCY ACT (AS AMENDED)**

**BETWEEN**

**CHRISTOPHER D. LEHANE IN HIS CAPACITY AS THE OFFICIAL ASSIGNEE IN  
BANKRUPTCY**

**APPLICANT**

**AND**

**A.R. (A DISCHARGED BANKRUPT NO. 3040) AND J.L.R**

**RESPONDENTS**

**JUDGMENT of Mr. Justice David Barniville delivered on the 12th day of November, 2019**

**Introduction**

1. This is my judgment on an application by the applicant, the Official Assignee in Bankruptcy, for an order pursuant to s. 61(4) of the Bankruptcy Act, 1988 (as amended) (the "1988 Act (as amended)") and s. 31 of the Land and Conveyancing Law Reform Act, 2009 (the "2009 Act") sanctioning and directing the sale of a dwelling house and property in Tallaght, Dublin 24 (the "property") and for certain consequential orders.

**Factual Background**

2. The property is jointly owned by the first respondent, A.R. (a discharged bankrupt), and by the second respondent, J.L.R., Mr. R's estranged wife. In this judgment, for ease of reference, I will refer to the discharged bankrupt as "Mr. R" and to his estranged wife as "Ms. L". While the property is jointly owned by Mr. R and Ms. L (with each having a 50% interest) Mr. R does not currently reside in the property and is the subject of a barring order (the legality of which Mr. R contests and he apparently intends to challenge the legality of that order in High Court proceedings which he says he intends to bring in the near future). Ms. L continues to reside in the property. The respondents have four children ranging in ages from 10 to 20. Three of the children reside in the property. The eldest (the 20-year-old) resides abroad but considers the property to be his family home.
3. The property is the subject of a mortgage in favour of IIB Homeloans Ltd (now KBC Bank Ireland plc) ("KBC"). On the date on which the Official Assignee's application was issued (7th February, 2018), the sum of approximately €275,000.00 was due under the mortgage. As of the date of the hearing of this application on 21st October, 2019, approximately €261,000.00 was outstanding under the mortgage (including a sum of approximately €53,000.00 by way of arrears). The Official Assignee exhibited to his grounding affidavit a valuation in respect of the property of €400,000.00 (as of 19th September, 2017). Mr. R does not accept that this represents the current value of the property in light of what he says are falling property prices. However, no other valuation has been put before the court.

**Mr R's Bankruptcy**

4. Mr. R was adjudicated a bankrupt on his own petition on 23rd February, 2015. On the date of adjudication, all his property became vested in the Official Assignee for the benefit of his creditors (by virtue of s. 44(1) of the 1988 Act (as amended)). The property so vested in the Official Assignee included Mr. R's 50% interest in the property. By virtue of

s. 85 of the 1988 Act (as amended), Mr. R was discharged from bankruptcy on the first anniversary of the date of the making of the adjudication order (i.e. on 23rd February, 2016). However, under s. 85(3), subject to s. 85(3A), where Mr. R's bankruptcy was discharged pursuant to s. 85, his unrealised property remained vested in the Official Assignee for the benefit of his creditors. Under s. 85(3A), on the third anniversary of the date of the making of the adjudication order, Mr. R's interest in the property would have stood re-vested in Mr. R if the Official Assignee had not applied to the court for an order for the sale of the property. The property is a family home and Mr. R's unrealised property includes an estate or interest in what was, at the date of the making of the adjudication order, the family home. The Official Assignee brought his application for an order for the sale of the property on 7th February, 2018 (the application was issued on that date and was made returnable for 19th February, 2018). The Official Assignee, therefore, applied for an order for the sale of the property prior to the third anniversary of the date of adjudication. In those circumstances, Mr. R's 50% interest in the property remained vested in the Official Assignee and did not re-vest in Mr. R under s. 85(3A) of the 1988 Act (as amended).

#### **The Official Assignee's Application**

5. As noted earlier, the Official Assignee issued his application for an order under s. 61(4) of the 1988 Act (as amended) sanctioning the sale of the property on 7th February, 2018. The application was adjourned by the court on several occasions between 19th February, 2018 and 29th April, 2019. On various of the adjourned dates, one or both of Mr. R and Ms. L attended in court. Neither was legally represented, although for a period, New Beginnings appear to have been advising Mr. R. Ms. L swore an affidavit on 6th December, 2018 in response to the affidavit sworn by the Official Assignee on 6th February, 2018. Mr. R swore a document purporting to be an affidavit (albeit not in the correct form) on 24th April, 2019.
6. On 24th April, 2019, the Official Assignee's application was listed for hearing on 21st October, 2019. The Official Assignee obtained liberty to file a further affidavit in advance of the hearing. That affidavit was sworn by Peter Kearney on behalf of the Official Assignee on 14th October, 2019. It exhibits correspondence and emails, mainly of a procedural nature, between the Official Assignee's solicitors and the respondents in the period from February, 2018 to April 2019. It also exhibits a copy of family law proceedings issued by Ms. L against Mr. R in the Circuit Court in Dublin which had previously been sent by the Official Assignee's solicitors to Mr. R on 11th March, 2019.

#### **The Hearing: Adjournment Application**

7. At the hearing on 21st October, 2019, the Official Assignee was represented by solicitors and by senior counsel. Ms. L and Mr. R both appeared and were unrepresented. On the application of the Official Assignee, and with the agreement of Mr. R and Ms. L, I directed that the application would be heard in private in accordance with s. 134 of the 1988 Act (as amended).
8. Mr. R sought an adjournment of the Official Assignee's application. The grounds on which Mr. R sought the adjournment were that he said that he had instructed solicitors to

challenge the barring order previously made against him which prevented him from residing in the property. He stated that he was hopeful that that application could be dealt with before Christmas and that, if successful, he would be able to return to reside in the property and to make an offer to the Official Assignee to purchase his interest in the property. He was also hopeful that if the Official Assignee's application was adjourned, he would have legal representation on the next occasion. Finally, he contended that he only received a copy of Mr. Kearney's affidavit on the day of the hearing.

9. Counsel for the Official Assignee opposed the application for the adjournment and sought to press ahead with the Official Assignee's application but indicated that, if granted, the Official Assignee would be agreeable to a postponement of the sale of the property for up to two years under s. 61(5) of the 1988 Act (as amended).
10. The application for the adjournment was made by Mr. R in the course of his submission in response to the substantive submissions made on behalf of the Official Assignee and by Ms. L. I indicated at the conclusion of the hearing that I would rule on the application for the adjournment and, if appropriate, on the substantive application together in this reserved judgment.
11. I am satisfied that it was appropriate for the application to proceed and that Mr. R did not have good grounds for an adjournment. Having heard of the issues between Mr. R and Ms. L and of Ms. L's apparent intention to pursue the family law proceedings commenced by her in 2017 (which seek (amongst other things) a decree of judicial separation), and having heard Ms. L state that it was her wish that the barring order would not be overturned, I could not see any prospect or reality to Mr. R being in a position to move back into the property in the short or medium term. Nor could I see any prospect or reality of Mr. R being in a position to make an offer to purchase the Official Assignee's interest where previous offers made by him have not been accepted.
12. I should make clear, however, that I am in no way prejudging whatever application Mr. R may wish to bring, whether to the High Court or otherwise, in relation to the barring order against him or any issue in the family law proceedings.
13. As regards the suggestion that the application should be adjourned on the basis that he only received a copy of Mr. Kearney's affidavit and exhibits in court on the date of the application, I do not regard that as sufficient to justify an adjournment of the Official Assignee's application. Mr. Kearney's affidavit exhibits correspondence between himself and the Official Assignee's solicitors and Mr. R and Ms. L. Mr. R would already have been in possession of much, if not all, of that correspondence. No prejudice was relied upon by Mr. R in relation to any of that correspondence. Mr. Kearney's affidavit also exhibits a copy of the purported affidavit sworn by Mr. R which he clearly already has. It also exhibits a statement of personal information prepared and signed by Mr. R which was filed by him with the Insolvency Service of Ireland in December, 2015. No prejudice arises as a result of the exhibiting of that statement to Mr. Kearney's affidavit. Finally, Mr. Kearney's affidavit exhibits a copy of the family law proceedings issued by Ms. L against Mr. R in the Circuit Court as well as a copy of a letter from the Law Centre in Wicklow

dated 19th September, 2017 informing Ms. L that the family law proceedings had been served on Mr. R by way of personal service but that the Law Centre would be unable to represent Ms. L in the proceedings as she had been found financially ineligible for legal services. It appears that although Ms. Smyth, the solicitor in the Law Centre in Wicklow acting for Ms. L, came off record for Ms. L in the family law proceedings, the proceedings remain live although they have not been progressed. Ms. L informed the court that she intends to progress the proceedings and informed me that she had engaged a solicitor to do so on her behalf. Mr. R appeared to be under the misapprehension that once Ms. L's solicitor came off record, that was the end of the proceedings. Clearly that is not so. The family law proceedings remain in existence. In any event, there is no particular prejudice to Mr. R in receiving a further copy of the family law proceedings by way of Mr. Kearney's affidavit. A copy of those proceedings was provided to Mr. R by the Official Assignee's solicitors on 11th March, 2019. I am not satisfied that any of these afford good grounds for an adjournment of the application and, consequently, I refuse that application.

#### **Substance of Official Assignee's Application**

14. I will now deal with the substance of the Official Assignee's application. That application was grounded upon an affidavit sworn by the Official Assignee on 6th February, 2018. That affidavit set out the information which I have summarised earlier. Mr. R and Ms. L are joint-owners (50:50) of the property which is subject to a mortgage in favour of KBC. Mr. R no longer resides in the property. According to Mr. R's statement of affairs, his indebtedness on 28th January, 2015 was €565,200.00 which included secured creditors of €554,000.00 and unsecured creditors of €11,200.00. The Official Assignee explained that Mr. R's interest in the property is an asset available for the benefit of his creditors and that the property was (at that stage) valued at in the region of €400,000.00 and subject to a mortgage in favour of KBC. A valuation was exhibited. The Official Assignee calculated the positive equity in the property which vested in him at €65,818.85 and invited Mr. R or Ms. L to make an offer in respect of the Official Assignee's interest. Mr. R made an offer to the Official Assignee on 25th January, 2018. He offered to pay a lump sum of €5,000.00 together with twelve monthly payments of €833.00 per month to the total value of €10,000.00. In the event that KBC allowed Mr. R to remortgage the property for €15,000.00, he would pay that sum over to the Official Assignee. He also agreed that if he were permitted to keep his 50% share in the property, he would sign over 15% – 20% of his share of the profits on a resale of the property whenever he and Ms. L decided to sell the property. That offer was unacceptable to the Official Assignee.
15. Ms. L swore an affidavit in response to the Official Assignee's application on 6th December, 2018. In that affidavit, Ms. L explained that as at the time of that affidavit, she was residing in the property with her four dependant children. She stated that she had no alternative accommodation and that if the order for sale were granted by the court, it would have the effect of making Ms. L and her children (then aged between 9 and 19 years of age) homeless. Ms. L further stated that Mr. R resided elsewhere and that he was prohibited from entering the property by court order, that she and Mr. R were involved in matrimonial proceedings before the Circuit Court in Dublin and that it was not possible to determine Mr. R's interest in the property until such time as those proceedings

had been disposed of. She stated that she was discharging mortgage payments on the family home and paying all outgoings and, as a consequence, would be seeking orders in the family law proceedings transferring all of the interest in the property to her.

16. Mr. R swore a purported affidavit on 24th April, 2019. It was in an incorrect format and attached, by way of an email sent to himself, a response to Ms. L's affidavit. That attachment contains sensitive personal information which it is unnecessary to record in this judgment. In his response, Mr. R indicated his intention to seek to discharge the barring order and expressed his wish to rebuild the relationship with Ms. L and to move back into the property where there would then be two salaries available to discharge the household commitments. He also sought the revesting of his 50% ownership in the property back into his name on the payment of €5,000.00 which he states he was informed by his previous advisors, New Beginnings, would be the cost of doing so. He then indicated that as a "gesture of good will", he would pay 5% of the profits of the resale of the property in the future if he and Ms. L agreed to sell the property after all of the children completed their "college years". That offer was understandably not accepted by the Official Assignee.
17. The final affidavit was Mr. Kearney's affidavit to which I have already referred.
18. At the hearing, counsel for the Official Assignee sought sanction for the sale of the property under s. 61(4) of the 1988 (as amended). He indicated, however, that, in recognition of the difficult circumstances in which Ms. L and the children found themselves in particular, the Official Assignee would be prepared to agree to a postponement of the sale of the property under s. 61(5) for a period of up to two years. He emphasised that under s. 61(5), the balance to be struck was as between the interests of the creditors and the spouse and any dependants of the discharged bankrupt, in this case, Mr. R.
19. Counsel also observed that if the court were prepared to make the order sought and to grant a postponement of the sale, it would be open to the court, under s. 135 of the 1988 Act (as amended) to review, rescind or vary the order made during the period of postponement, in the event that circumstances were to change. As matters stood, it appeared that Ms. L was not in a position to make an offer for the Official Assignee's interest in the property. Nor had any acceptable offer been made by Mr. R. He confirmed that in light of the current outstanding indebtedness under the mortgage, the equity reflecting Mr. R's 50% interest in the property vested in the Official Assignee was still valued at approximately €65,000.00. However, he accepted that certain contributions to the property which Ms. L mentioned in her submissions to the court, but which were unvouched and unsupported on the evidence before the court, could, if they were vouched and supported in evidence, be taken into account in calculating the ultimate value of the Official Assignee's equity.
20. The Official Assignee contended that on the law the order should be made, albeit with a postponement of the sale of the property for up to two years. Counsel drew my attention to three potentially relevant Irish decisions: *Rubotham v. Young* Unreported High Court (McCracken J.), 23rd May, 1995 ("*Young*"), *Rubotham v. Duddy* Unreported High Court

(Shanley J.), 1st May, 1996 ("*Duddy*") and *Re O'Shea* [2018] IEHC 181 (Costello J.) ("*O'Shea*"). I consider that the most relevant of those cases is the decision of Costello J. in *O'Shea* and I will apply the principles set out in that case below.

21. Ms. L opposed the application primarily on the basis that she resides in the property with three of her four children (the eldest is now living abroad but still considers the property as the family home). She referred to her intention to prosecute the family proceedings against Mr. R and stated that she had recently instructed a solicitor to do so. She also mentioned making mortgage contributions and entering into a payment plan with KBC to pay monies every month in discharge of the mortgage. She mentioned having made certain contributions to the mortgage and to the household which were not vouched or otherwise mentioned in the evidence before the court.
22. As indicated earlier, Mr. R sought an adjournment of the application which I have now refused. He sought to oppose the Official Assignee's application on the basis that he had instructed a solicitor to seek to discharge the barring order in the expectation that he would then be in a position to return to reside in the family home, an offer to purchase the Official Assignee's interest could then be made by him. He mentioned having contributed to the mortgage repayments and that he hoped to be in a position to make an offer for the Official Assignee's interest. He stated that it would be wrong for the property to be sold in circumstances where the maximum extent of the Official Assignee's interest was in the region of €65,000.00 and that it would be wrong for the property to be sold in those circumstances. Mr. R also submitted that his creditors should not get a benefit of the sale of the Official Assignee's interest where they are financial institutions which have already been "bailed out" by the State.
23. Ms. L disputed the contributions to the mortgage which Mr. R indicated that he had made and also expressed her desire that the barring order would not be discharged.
24. Clearly, I am not in a position to resolve any of these family law issues which will be dealt with in the course of the relevant family law proceedings or in the course of any application which Mr. R is advised to bring in relation to the barring order made against him. However, I do not believe that those issues are directly relevant to the application that I have to determine in the course of this judgment.

#### **Conclusions on the Official Assignee's Application**

25. I am satisfied, for the reasons explained below, that it is appropriate to make an order for sale of the property under s. 61(4) of the 1988 Act (as amended). The equity representing the interest in the property (vested in the Official Assignee under s. 44(1) of the 1988 Act (as amended)) of approximately €65,000.00 is an asset available for the benefit of Mr. R's creditors. However, it is necessary to consider not only the interests of Mr. R's creditors but also the interests of his spouse (Ms. L) and his dependants (being his and Ms. L's children, three of whom continue to reside in the property). I am expressly required to have regard to their interests under s. 61(5) of the 1988 Act (as amended). Under that provision, the court has the power to order postponement of the disposition of the relevant family home having regard to the interests of the creditors, the spouse and

the dependants of the bankrupt. The Official Assignee has confirmed that he does not oppose a postponement of the disposition of the property of up to two years. I believe, having regard to the factors which must be taken into account, as appears from the *O'Shea case*, that it is appropriate having regard to the respective and competing interests of the creditors and of Ms. L and her and Mr. R's dependants, that there should be a postponement or stay on the sale of the property for two years.

26. As explained earlier, Mr. R's 50% interest in the property vested in the Official Assignee for the benefit of his creditors on the date of adjudication in February, 2015. Since the Official Assignee applied for sanction for the sale of the property within three years of the date of the adjudication order, Mr. R's interest remains vested in the Official Assignee having regard to the provisions of s. 85(3) and s. 85(3A) of the 1988 Act (as amended). The interest did not revest in Mr. R on the third anniversary of the date of the making of the adjudication order which would have happened if the Official Assignee had not brought his application within that period.
27. In terms of the factors to be taken into account in determining whether sanction should be given for the sale of the property by the Official Assignee, I have derived most assistance from the judgment of the High Court (Costello J.) in *O'Shea*. In that case Costello J. held that s. 61 of the 1988 Act (as amended) applies whether or not the spouse of the bankrupt has an interest in the family home, provided the family home is part of the property of a bankrupt (per Costello J. at para. 17 of her judgment in *O'Shea*). I accept that and follow *O'Shea* on that point.
28. Having referred to the earlier judgments in *Young* and *Duddy*, Costello J. set out a number of factors which she felt were relevant to the exercise of the court's discretion as to whether to sanction the sale of a family home of a bankrupt and, if so, ask for the postponement of that sale. A number of the factors identified by Costello J. are relevant to the present case. It is unnecessary to set out all of the factors identified by Costello J. (which are to be found at para. 21 of her judgment in *O'Shea*). The factors identified by Costello J. in *O'Shea* which are relevant to the present case include the following:
  - The application involved the sale of a family home.
  - Ms. L, the spouse of the discharged bankrupt, is not herself bankrupt.
  - The property is the home of Ms. L and young dependant children of Ms. L and Mr. R.
  - It is accepted that Mr. R and Ms. L are co-owners of the property to the extent of 50% each.
  - The property has been valued at in or about €400,000.00 (as of the most recent and only valuation before the court).
  - However, the property is encumbered, as there is an outstanding mortgage in favour of KBC. The equity in the property net of the mortgage is likely to be in the region of €130,000 / €140,000 depending on current property prices. The value of the equity in respect of the interest vested in the Official Assignee is in the region of €65,000, although this figure may change

depending on proof of contributions made by Ms. L, as mentioned by her in her submissions to the court.

- There is a real prospect of recovery of monies for the benefit of creditors after the discharge of the mortgage.
- While Ms. L does work as a social care worker, on the evidence, she is not in a financial position, as things stand, to make an offer for the Official Assignee's interest in the property.
- The offers made by Mr. R were, in my view, properly rejected by the Official Assignee. Having regard to the submissions I heard from Mr. R and from Ms. L, it would be difficult for the Official Assignee to accept an offer from Mr. R, given the current state of relations between Mr. R and Ms. L.

29. I have considered these relevant factors and have sought to balance the interests of Mr. R's creditors, on the one hand, with the interests of Ms. L and the young dependants of Ms. L and Mr. R, on the other hand. In all the circumstances and with considerable sympathy, in particular, for the position of Ms. L and the dependant children, I am satisfied that, first, sanction should be given for the sale of the property under s. 61(4) of the 1988 Act (as amended) and, second, that the sale should be postponed for a period of two years under that Act. That is the maximum period of postponement which the Official Assignee indicated he could agree to. It seems to me that this would be a fair and reasonable period of postponement taking into account the interests of Mr. R's creditors and the interests of his spouse and dependant children.
30. Consequential reliefs have also been sought by the Official Assignee. He seeks an order granting carriage of the sale of the property to the Official Assignee. I will make that order but subject to the postponement or stay for the period of two years to which I have referred. The Official Assignee also seeks an order that certain accounts and enquiries be taken and made in the Examiner's Office. However, I query whether it is necessary for such an order to be made having regard, for example, to the provisions of s. 61(3)(j) of the 1988 Act (as amended). I understand that no such order has been made in previous similar applications, to the knowledge of the Bankruptcy Registrar. Indeed, I have reviewed the order made by Costello J. in *O'Shea*. She made an order sanctioning the sale of the dwelling house at issue pursuant to s. 61(4) and ordered that the sale be postponed for 1 year pursuant to s. 61(5). No order for accounts and enquiries was made by Costello J. in that case. However, I will hear counsel for the Official Assignee further in that regard. In the event that such an order is made, I will also hear from counsel as to whether any stay should be imposed on such an order.
31. Finally, the Official Assignee also seeks an order for possession of the property. While it is appropriate that an order for possession be made, it seems to me that there should also be a stay on that order for a period of two years from the date of the making of the order.
32. I will make orders to give effect to this judgment, the precise terms of which can be discussed with counsel and with the respondents. It should also be pointed out, however, that in the event of a change in circumstances or any other developments, the court does have jurisdiction under s. 135 of the 1988 Act (as amended) to review, rescind or vary an



order made by it in the course of a bankruptcy matter (other than an order of discharge or annulment). Counsel for the Official Assignee has accepted that the court would have jurisdiction under that provision to review, rescind or vary the order which I have decided to make on this application. I agree with that.