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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **20/09/18**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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2015 No. 86820

BETWEEN:

ORLA WALLACE AS TRUSTEE IN BANKRUPTCY OF EAMON MALONE

Appellant;

-and-

EAMON MALONE, CATHERINE MALONE, EMIR MALONE AND AIODIN MALONE

Respondents.

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McBRIDE J

Application

[1] This is an appeal by Orla Wallace, trustee in bankruptcy ("the trustee") of Eamon Malone ("the bankrupt") of a decision by Master Kelly dated 12 October 2017 when she dismissed the trustee's application, filed on 15 September 2015, which sought the following relief:-

(i) Leave pursuant to Article 310(2)(a)(i) of the Insolvency (Northern Ireland) Order 1989 for the eviction of the first named respondent from the premises known as 22 Riverview Street, Belfast, BT9 5FD ("the premises").

(ii) That each of the respondents shall deliver to the applicant vacant possession of the premises.

(iii) That the applicant shall be entitled to sell the premises, having sole conduct thereof, and to the full proceeds of sale for such further

and/or other relief as the court shall see fit by providing for the costs of these proceedings.

(iv) For such further and/or other relief as the court shall see fit.

(v) Costs.

[2] The trustee was represented by Mr John Coyle of counsel. The second named respondent Catherine Malone was represented by Mr Wayne Atchison of counsel. The other respondents did not appear and were not represented. I am grateful to both counsel for the assistance they provided to the court in their well marshalled skeleton arguments and oral submissions.

Background

[3] The second named respondent is the bankrupt's wife. The third and fourth named respondents are the children of the bankrupt and the second named respondent.

[4] In May 2013 the bankrupt purchased a dwelling house at 22 Riverview Street, Belfast ("the premises") in his sole legal name. He was then adjudicated bankrupt on 24 October 2013.

[5] On 19 May 2015 Orla Wallace was appointed trustee in bankruptcy.

[6] On 15 September 2016 the trustee filed the present application.

[7] The matter was case managed by the Master who directed the filing of affidavits and then listed the case for a substantive one day hearing on 20 December 2016.

[8] The second named respondent attended court and was made available for cross-examination on the date of hearing. In the event the trustee decided not to cross-examine her and the case was conducted "on the papers" and lasted approximately one hour. Mr Coyle submitted that he did not cross-examine the second named respondent due to 'an excess of humanity in light of her mental health difficulties'. This was a rather surprising approach given the fact the trustee disputed a number of facts which were alleged by the second named respondent in her affidavit evidence and also in the affidavit evidence of her supporting witness Mr Gerard McGeown. As a result of the approach taken by the trustee the only evidence before the Master was the affidavit evidence.

[9] Following the hearing on 20 December 2016 the Master delivered a preliminary judgment dated 22 March 2017, but deferred making a final order at that stage to allow the parties to enter into negotiations. The parties were unable to

resolve the matter and the Master then delivered final judgment on 12 October 2017 when she dismissed the trustee's application. By notice dated 7 November 2017 the trustee appeals the Master's decision.

Preliminary application by the trustee to cross-examine Mr McGeown

[10] On the morning of the appeal hearing Mr Coyle applied for leave to cross-examine Mr McGeown on the basis that it was in the interests of justice to do so. He submitted that the crux of the second named respondent's case was that she had borrowed £25,000 cash from her brother Mr McGeown. The trustee wished to cross-examine him because there were no documentary proofs to support the loan and it had been given in cash and in these circumstances he submitted that it is important for the court to see and hear this witness to assess his credibility.

[11] Mr Atchison objected to the trustee's application on the basis that no such application had been made to the Master. He submitted that the onus was on the trustee to put her case fully before the court at first instance as indicated by a number of authorities including *Ulster Bank Limited v Esmali* [2017] NICA 63, *Bailie v Cruickshank* [1995] 6 BNIL 79, *Lough Neagh Exploration v Morrice* [1999] NIJB 43 and *AIB Group v McElroy* [2011] NICh 8.

[12] This court enjoys a discretion to permit the admission of new evidence upon the hearing of an appeal from the Master. The authorities however make it clear that this court should be reluctant to admit new evidence unless some good reason is shown why it was not was adduced before the Master. In *Bailie v Cruickshank* McCollum J held:

> "… I must also bear in mind that the procedure of the court provides that applications of this kind shall be heard before the Master and it is only heard by a judge on appeal from the Master. Accordingly, it must be apparent that it is desirable that Masters should have all the material before them necessary to enable them to make the appropriate decision on the hearing of the case. It is well known that the Masters have a heavy list and numerous cases with which to deal and it is only right that they should be accommodated properly by having a full and complete statement of the relevant evidence before them when they hear the application at first instance.
>
> That is a factor tending to influence the judge on appeal against too lightly admitting evidence that was not made available before the Master.

In my view the onus is upon the person seeking to advance such evidence:

(i) To establish that the interests of justice will be better served by the admission of the additional evidence rather than by refusal to do so, and

(ii) That he can advance a sound reason to the court for the failure to exhibit such evidence before the Master …

Obviously with such a wide discretion one would be slow to lay down any general rules, but, I would suggest that the court will find as matters of considerable importance:

(i) Whether the evidence sought to be put before the court is based on information that has only recently come into the possession of the parties seeking to put it in evidence,

(ii) Whether it was possible or feasible for that party to have produced the evidence earlier, and

(iii) Whether it related to a matter which was clearly in issue between the parties at the hearing before the Master."

[13] Similarly in *Lough Neagh Exploration v Morrice,* Girvan J held:

"On an appeal from the Master to the judge in a case such as the present the matter comes by way of a rehearing and in the normal course of events is determined on the evidence put before the Master. Frequently the parties will seek to put before the court fresh evidence and not infrequently such further evidence is admitted either by agreement of the parties or by leave of the court in the exercise of its discretion.

…

Thus:

(i) Parties have a duty to put their case properly and fully before the Master and adduce all available evidence at that stage. This is just another aspect of the general principle that it is incumbent on parties to put their full case before the court at the material time.

(ii) A party seeking to adduce fresh evidence before the judge in chambers on appeal should advance a sound reason for the failure to adduce that evidence before the Master.

(iii) A party seeking to adduce such additional evidence carries the burden of establishing that the interests of justice would be better served by the admission of additional evidence rather than by refusing to admit it.

In this case the plaintiff had ample opportunity to set up its case before the Master and put before him the evidence which it now seeks to rely upon in the application before the judge.
…
I consider that the proper course of action in this case is to consider the plaintiff's appeal from the Master's decision based on the proceedings as they currently stand and without reference to the additional affidavit material which the plaintiff at this late stage seeks to introduce."

Deeny J in *AIB Group v McElroy,* cited the above cases with approval and stated that the general rule is that the matter must be put fully before the Master and in the absence of exceptional circumstances the general rule would apply.

[14] Mr McGeown swore his affidavit on 14 December 2016. The trustee therefore knew the case he was making and had ample opportunity to make an application to cross-examine him when the matter was heard before the Master on 20 December 2016. No such application was made and no explanation has been given why no application was made to cross-examine Mr McGeown when the matter was before the Master. This is particularly surprising given that the Master had set aside a full day in anticipation that witnesses would be called and cross-examined. Mr Coyle was unable to point to any reason why the trustee failed to apply to cross-examine Mr McGeown when the matter was listed before the Master.

[15] The issues Mr McGeown addressed in his affidavit were clearly matters of dispute between the parties at the hearing before the Master. In such circumstances it was incumbent upon the trustee to apply to cross-examine him at that stage or to now point to some reason why such an application could not or was not made. No such explanation has been given.

[16] In all the circumstances I considered that the trustee had ample opportunity to make the case she now wishes to make, before the Master, but simply failed to do so. I therefore considered that the good administration of justice required that the appeal should proceed on the same evidence as was before the Master. Accordingly, I dismissed the trustee's application to cross-examine Mr McGeown.

The evidence

[17] The trustee's case is set out in three affidavits filed by Orla Wallace. The grounding affidavit sworn on 11 September 2015 states that the trustee sought to realise the bankrupt's assets to enable her to pay a dividend to the creditors. The trustee averred that as of 13 May 2015 the total notified claims by unsecured creditors was £400,451.96. She further averred that the bankrupt was the sole legal owner of the premises where he resided with his two adult daughters. The trustee estimated that her interest in the premises was approximately £66,000. This was based on a valuation of the premises by CPS estate agents dated 21 April 2015 of £140,000, less the amount due and owing to the HSBC in respect of a mortgage of £69,174.82 as of 6 March 2015, together with sale costs of £4,000.

[18] The trustee further averred that the bankrupt had advised her that the second named respondent had an equitable interest in the premises, as she had facilitated essential maintenance work to the property after he was adjudicated bankrupt. The wife and children were all joined as parties to the proceedings. The trustee sought an order to evict the bankrupt from the premises and in addition sought sale of the premises, retention of the entire proceeds of sale, and such further order as the court deemed fit. The second named respondent filed replying affidavit evidence setting out details of her claim that she had an equitable interest in the premises and the trustee replied to this claim by way of rejoinder affidavit evidence.

[19] The second named respondent filed affidavits dated 10 November 2015 and 11 January 2016. In these she claimed that she had a beneficial interest in the premises. She averred that she was married to the bankrupt for 31 years and that they had three children. She stated that after they sold the former matrimonial home at Sans Souci in Belfast they lived in rented accommodation in Armagh. As the children did not like living there she and the bankrupt then decided to purchase the premises with a view to them being their matrimonial home. The premises were then purchased. They were purchased in the bankrupt's sole name and the mortgage was taken out in his sole name because the second named respondent was

suffering from mental health problems at that time. The bankrupt and one daughter moved into the premises in June 2015. His other daughter upon her return from Australia in August 2015 also resided in the premises. The second named respondent remained living in Armagh as it was close to her family. She averred that she only resided intermittently at the premises.

[20] The second named respondent averred that she and the bankrupt intended that the beneficial interest in the premises was to be shared equally by them and that this agreement was evidenced by the fact they continued to live as a married couple; pooled their resources and paid the mortgage from a joint account.

[21] The second named respondent further asserted that she expended approximately £25,000 in carrying out works of maintenance, repair and improvement to the premises. She averred that she obtained a loan of £25,000 from her brother Gerard McGeown which she used to carry out these works. The works were carried out in or around Christmas 2014 to 2015. She exhibited a number of invoices to her affidavit which totalled approximately £19,100. The second named respondent stated that she carried out these works as she considered the premises were the matrimonial home.

[22] As a result of these circumstances, the second named respondent claims a 50% interest in the premises together with a claim for repayment of her investment of £25,000.

[23] Gerard McGeown filed an affidavit on 14 December 2016 in which he averred that he loaned £25,000 approximately to the second named defendant by way of five cash instalments between February 2015 and April 2015, to assist her to undertake works of repairs to the premises.

[24] In her rejoinder affidavit sworn on 20 November 2015 the trustee disputed the second named respondent's claim that the premises were to be the matrimonial home and therefore she had a 50% beneficial interest in the premises. In so doing she relied on the following facts:

(i) The undisputed evidence was that none of the sale proceeds of the previous matrimonial home at San Souci were used to purchase the premises.

(ii) The premises were registered in the bankrupt's sole name.

(iii) The second named respondent only lived in the premises intermittently and resided in Armagh as her principal residence on foot of a five year lease.

(iv) The mortgage was in the bankrupt's sole name.

(v) The bankrupt paid the deposit of £12,000 on the premises from a legacy he received from his father's estate.

(vi) The bankrupt in his affidavit evidence averred that he alone paid the mortgage of £601.26 per month and discharged the rates since the date of bankruptcy.

(vii) In correspondence with the Official Receiver the bankrupt stated that he was separated from the second named respondent and referred to the premises as "my house".

[25] In relation to the alleged investment of £25,000 the trustee averred that none of the invoices exhibited by the second named respondent were marked paid and further stated that they showed the works were carried out in early 2015 which was after the date of bankruptcy. She further averred that there was no evidence the alleged works of repair enhanced the value of the property and submitted that works of repair would not normally enhance value. She therefore submitted that any increase in the value of the property was due to an improving market.

[26] The other evidence before the court consisted of valuation reports. The trustee obtained a valuation from CPS dated 1 May 2015 which valued the premises at £140,000. On 30 January 2016 CPS updated this valuation to £155,000. On 7 December 2016 CPS provided a "drive by valuation" which placed a value of £170,000 on the premises.

[27] The second named respondent referred the court to the mortgage valuation carried out by Connells Survey and Valuation dated 8 April 2013 which valued the premises at £85,000. She further relied on a full access survey carried out by Chambers Property Services on 4 August 2015 in which they valued the premises at £135,000. On 18 February 2016, UPS carried out a full access survey and valued the property at £145,000.

[28] The court did not have the benefit of any evidence in respect of the estimated costs of sale. Correspondence by the second named respondent's solicitors dated 28 April 2017 estimated sale costs at £5,000 whilst the trustee's solicitors estimated costs at £4,000.

Master's decision dated 22 March 2017

[29] Following the hearing on 20 December 2016 the Master delivered a preliminary judgment dated 22 March 2017. The trustee had submitted that the only application before the court was under Article 310(2)(a)(i) and in these circumstances the court should not adjudicate on the question whether the second named respondent had an equitable interest in the premises and if so its extent, but rather

should make an immediate order for sale of the premises. Thereafter the second named respondent could initiate proceedings claiming an interest in the proceeds of sale. The Master rejected this submission on the basis that such an approach would be in breach of the second named respondent's Article 6 rights and was contrary to the overriding objective.

[30] After considering all the affidavit evidence and legal submissions the Master accepted the evidence of the second named respondent on the basis it was inherently credible. She found as a fact that the bankrupt and the second named respondent agreed that the premises were to be beneficially owned jointly by them. She further held that the second named respondent had made significant personal financial contributions to the premises consistent with this agreement. Her conclusions were set out at paragraph [14] as follows:

> "I accept her unchallenged evidence that she and the bankrupt had a common intention to hold the property in equal shares. Indeed, they had done so before and for a great many years. Moreover it is also clear that significant monies were expended on the property which cannot be attributable to the bankrupt and do not appear to be attributable to anyone other than the second named respondent. I am therefore minded to further credit her share and debit the bankrupt share with an appropriate amount which reflects the works carried out to the property."

[31] The Master deferred making a final order at that stage to allow the parties to enter into negotiations. To assist the parties the Master set out her view in respect of the valuation evidence.

[32] The parties were unable to resolve the matter and the Master then delivered her final judgment on 12 October 2017 to reflect the case presented and heard by her on 20 December 2016.

[33] In her judgment she set out that the two questions she had to determine were:

(a) whether the second named respondent had an interest in the premises; and

(b) if so the extent of that interest.

At paragraph [6] she set out the relevant legal principles to determine these questions.

[34] In determining whether the second named respondent had an interest in the premises she applied the "long established legal principle" of viewing her affidavit

evidence objectively. In a context where the trustee had not cross-examined her, the Master stated she would therefore only reject the second named respondent's affidavit evidence if it was inherently incredible.

[35] The Master concluded that the second named respondent's affidavit evidence was credible and she made the following findings of fact:

(a) The premises were placed in the bankrupt's sole name as the second named respondent had mental health problems at the time of purchase. This averment was corroborated by the fact that the previous matrimonial home had been held jointly; the bankrupt and the second named respondent had been married for over 30 years; the mortgage for the premises was paid from joint names and it therefore made no sense for the second named respondent to invest substantial monies into the premises if she did not have an interest in it.

(b) She did not regard the rental of the property in Armagh as a matter of note. She considered that it was logical that the family would have to rent somewhere until the necessary works were carried out to the premises.

(c) She did not regard the fact that the Armagh property was subject to a five year lease to be a matter of suspicion or that the inference could be drawn from this that the parties were separated. She concluded that it was unlikely that the second named respondent would make direct financial contributions to the premises if the parties were living separately and she had no reason to disbelieve the second named respondent in relation to the status of her marriage. She further accepted her explanation that the Armagh property was rented with a five year lease because that was the only available suitable rental property at the time.

(d) She accepted the second named respondent's evidence that the inability of the children to settle in Armagh created a need to carry out the renovations works to the premises quickly so the family could relocate to Belfast without delay.

(e) She held that there no dispute that the premises were in serious disrepair when purchased and required substantial works to be carried out. She noted the uncontroverted affidavit evidence from both the second named respondent and her brother Mr McGeown that the second named respondent expended £25,000 on that work.

Taking all these matters into account she found on the balance of probabilities that the premises were purchased on the mutual understanding that they would be

owned jointly by the bankrupt and the second named respondent. She further held on the balance of probabilities that the second named respondent made additional direct financial contributions of £25,000 to the premises. She therefore concluded that the second named respondent was entitled to a 50% share of the equity and in addition repayment of the £25,000 invested by her. In determining what order to make the court had to assess the equity in the premises, which necessitated an assessment of the valuation, the existing mortgage and notional sale costs.

[36] In assessing the value of the premises the court accepted only the formal valuations carried out by each party. The Master then took the medium value giving a valuation of £150,000. From this she deducted 10% to reflect the fact that it would be a forced sale. This figure was based on the court's experience and the practice generally adopted by other insolvency practitioners in the valuation of property in a forced sale scenario. This gave rise to a valuation of £135,000.

[37] The Master then deducted a figure of £80,000 in respect of the mortgage. This was based on the fact that there were Order 88 proceedings before the court which indicated a redemption figure of £71,000 plus interest as of 26 April 2016. The Master accepted this figure was historic and noted that to it would have to be added additional interests and arrears together with the lenders' legal costs. In these circumstances she considered that the true redemption figure would be in or around £80,000.

[38] In respect of estimated costs of the sale the Master considered that the estimated figure of £5,000 for the second named respondent was an under-estimation and considered in light of the multiple professional fees which would be involved in the event of a forced sale a more accurate figure would be in the region of £7,500.

[39] Applying these figures the second named respondent's interest in the equity meant that this was a low value home pursuant to Article 286 of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order"). Accordingly the Master dismissed the application.

Grounds of appeal and submissions by the trustees counsel

[40] The trustee appealed the Master's decision by notice dated 7 November 2017. The notice did not set out any grounds of appeal but Mr Coyle made the following submissions to the court. He submitted that the Master erred in refusing to make an immediate order for possession. This was because the only application before the court was one under Article 310 of the 1989 Order namely, an order for eviction of the first named respondent. It was therefore not open to the Master to make an order determining the beneficial interest held by the second named respondent, if any, as the second named respondent had made no such claim to the court. He submitted that it was open to the second named respondent to make such a claim

once the order for possession was made and she could then make a claim on the proceeds of sale if she had an interest in the premises.

[41] If contrary to that submission the court was entitled to determine whether the second named respondent had a beneficial interest in the premises he submitted that the Master erred in finding that the second named respondent had such an interest and erred in the assessment of the extent of the interest held by her. He accepted that the Master had applied the correct legal principles, but submitted that, in light of the following undisputed evidence she had erred in her finding of fact that the premises were purchased as the matrimonial home:

- the premises were purchased in the bankrupt's sole name;
- the bankrupt paid the deposit alone of £12,000 from a legacy he had received from his father's estate;
- the bankrupt alone paid the mortgage and rates post-bankruptcy;
- the second named respondent resided in the property in Armagh as her principal residence and only resided intermittently in the premises;
- she lived in the Armagh property subject to a five year lease;
- the parties were separated;
- the mortgage was taken out in the bankrupt's sole name;
- the bankrupt referred to the premises as "my house" in correspondence with the official receiver;
- no monies were contributed to the purchase of the premises from the proceeds of sale of the former matrimonial home; and
- the bankrupt in his statement to the Insolvency Services stated that Armagh was his wife's principal residence.

[42] In respect of the alleged investment made by the second named respondent he submitted that none of the invoices exhibited were marked paid. He further submitted that all the works were done post-bankruptcy and there was no evidence that they had enhanced the value of the property.

[43] He therefore submitted that the second named respondent had no beneficial interest in the premises and therefore the court should order immediate sale.

[44] He finally submitted that if contrary to this submission the second named respondent had an interest in the premises such an interest was limited to the payment of the mortgage for a number of months from the joint account.

[45] In respect of the calculation of the equity in the property he submitted that the Master had erred in reducing the valuation by 10% to represent a forced sale as there was no evidential basis for doing this. He further submitted that her estimation of sale costs at £7,500 was unsupported by evidence.

[46] In addition he challenged a number of specific findings of fact made by the Master. In particular he challenged her finding of fact that the works of repair had to be carried out quickly so the family could relocate to Belfast and her finding that there was no evidence to controvert the second named respondent's denial that the parties were not separated.

Submissions on behalf of the second respondent

[47] Mr Atchison, on behalf of the second named respondent submitted that although there was no formal application by the second named respondent for a determination of her beneficial interests in the premises the court had power to make this determination as the trustee's application sought an order not only for sale but also an order for retention of the entire proceeds of sale. In light of this the court would have to determine whether the bankrupt was entitled to the entire equity in the property and consequently would have to determine whether the second named respondent had a beneficial interest in the premises and if so its extent. He further submitted that the case was case managed on the basis that the court would determine the question whether the second named respondent had a beneficial interest in the premises and if so the extent of that interest. To this end the trustee had joined the second named respondent as a party to the proceedings and all the affidavit evidence dealt with the question of beneficial interest.

[48] Mr Atchison submitted that the appeal should be dismissed unless the Trustee could show that the Master had exercised her discretion under a mistake of law or in disregard of principle or under a misapprehension as to the facts or had taken into account irrelevant matters or failed to take into account relevant matters or the conclusion she reached was outside the generous ambit within which a reasonable disagreement is possible.

[49] In light of the evidence he submitted the Master was entitled to find that the premises were to be the matrimonial home as the parties remained married. Their previous home had been held in joint names, the mortgage was paid from the joint account until the date of bankruptcy and the parties continued to pool their resources. In addition he submitted that her investment of £25,000 had significantly increased the value of the asset. In all the circumstances he submitted that she was therefore entitled to a 50% interest in the home together with the return of her £25,000 investment.

Consideration

Has the court jurisdiction to determine the question whether the second named respondent has an equitable interest in the premises and if so, its extent? If so, should the court determine this question?

[50] There is no formal application by the second named respondent seeking a determination of her beneficial interest in the premises. The only application before the court is the one brought by the trustee. The trustee's application seeks an order for eviction under Article 310 of the 1989 Order, an order that the trustee be paid the entire proceeds of sale and such further order and or other relief as the court shall see fit.

[51] I am satisfied that the court has jurisdiction to determine whether the second named respondent has an equitable interest in the premises and to determine the extent of any such interest. This is because the trustee's application empowers the court to make such other order as it sees fit. Further, the court is asked to order that the trustee is entitled to the entire proceeds of sale. To determine whether the trustee is entitled to the entire proceeds of sale, the court of necessity, must determine whether any person other than the bankrupt has a beneficial interest in the premises. Consequently the court has jurisdiction to determine whether the second named respondent has an equitable interest in the premises. Thirdly, this case was case managed and affidavits were filed on the basis that the court would determine the question whether the second named respondent had a beneficial interest in the premises and if so its extent. The trustee in her grounding affidavit raised the issue that the bankrupt had averred that the second named respondent had a beneficial interest in the dwelling. The second named respondent was joined as a party to the proceedings notwithstanding the fact she had no legal interest in the premises. She then filed an affidavit setting out the basis of her claim. The ensuing replying affidavits then all dealt with this very issue in great detail. I am therefore satisfied the parties agreed that the court should determine the question of beneficial interest.

[52] In all these circumstances I am satisfied that the court ought to determine the question whether the second named respondent has such a beneficial interest and if so its extent. Such an approach is in accordance with the over-riding objective. The approach advocated by the trustee would lead to a proliferation of litigation with attendant costs.

[53] I therefore consider that the Master correctly refused the trustee's application to make an immediate order for sale without considering the question of the second named respondent's claim to have an equitable interest in the premises.

[54] Accordingly, I also refuse the trustee's application that this court should simply determine the matter under Article 310 and not adjudicate on the question whether the second named respondent has an equitable interest in the premises.

Does the second named respondent have a beneficial interest in the premises and if so what is the extent of this interest?

[55] Mr Atchison submitted that this court should only interfere with the decision of the Master if it found that she erred in the exercise of her discretion. In

circumstances where the case was conducted on the papers I consider that this court would only overturn the Master's decision if she erred in the exercise of her discretion or there were other exceptional circumstances. Nonetheless an appeal from the Master is by way of rehearing and I have therefore decided to hear and determine this matter de novo by way of a rehearing.

[56] The relevant legal provisions in determining a beneficial interest were set out by the Master at paragraph [6] of her judgment. Mr Coyle, properly in my view, accepted that the Master set out and applied the correct legal principles. I also consider that she set out and applied the correct legal principles. I therefore adopt the principles set out by her at paragraph [6] of her judgment.

[57] The central dispute in this case is whether on the evidence before the court the second named respondent has proved on the balance of probabilities that she has a beneficial interest in the home and whether she has proved that her interest is equal to or exceeds the equity in the property.

[58] There are a large number of factual disputes before the court. In particular:

- whether the parties were separated;
- whether the premises were purchased as a matrimonial home especially as the second named respondent never lived there and continued to live in Armagh on foot of a five year lease;
- the reason why the premises were placed in the bankrupt's sole name;
- why the mortgage taken out in the bankrupt's sole name;
- why the bankrupt referred to the premises as his home;
- why the bankrupt alone paid the mortgage and rates post-bankruptcy
- why the bankrupt paid the deposit of £12,000 and
- why no monies were contributed to the purchase of the premises from the sale proceeds of the former matrimonial home.

[59] Like the Master this court did not have the benefit of hearing and seeing the witnesses. It is therefore left to resolve these factual disputes on the basis of the affidavit evidence alone.

[60] In resolving the factual disputes I have taken into account the credibility of each witness's version of events in light of all the evidence and in light of the other available documentary evidence by taking into account whether it corroborates or undermines the case being made.

[61] After carrying out this exercise I am satisfied that having regard to the whole course of dealings between the bankrupt and the second named respondent there was a common intention that the beneficial interest in the premises was to be shared equally. I make this finding on the basis that the parties were married for 30 years and their previous matrimonial home was owned in joint names. Although the

bankrupt stated in November 2014 they were separated there is no evidence that they were separated when the premises were purchased. Indeed the uncontroverted evidence of the second named respondent is that they remained married and viewed the premises together with a view to the premises being purchased as a matrimonial home. All of this points to the premises being purchased as a matrimonial asset to be held equally by them.

[62] I further accept the second named respondent's explanation that due to mental health problems she did not wish to be involved in the actual purchase and mortgage arrangements. For this reason her name did not appear on the legal title or the mortgage. I accept that this is a credible explanation for her name not appearing on the title or mortgage. I further accept that she only stayed intermittently at the premises and remained living in Armagh as her principal residence. This was because she wanted to be close to her family at that time as she had health difficulties. I do not find however that the fact she lived in Armagh means she was either separated from the bankrupt or that the premises were not purchased as a matrimonial home. Her residence in Armagh arose as a result of her health difficulties which were temporary. Further her residence in Armagh was time limited as the lease was only for a period of 5 years.

[63] I further find that the fact the bankrupt paid the deposit from a legacy received from his father does not necessarily show that the premises were not being purchased as the matrimonial home. At the time of purchase the parties remained married and in such circumstances it would not be unusual for parties to use such an asset towards the purchase of a joint asset.

[64] I accept that none of the proceeds of sale of the former matrimonial home were used to purchase the premises. I do not find however that this indicates the premises were not to be a joint asset. The proceeds were used by the parties to rehouse them in Armagh and there were simply no further proceeds left over to pay towards the purchase of the premises. It is not a case where the proceeds of sale of the former matrimonial home were divided between the bankrupt and his wife so that each received a distinct share.

[65] I further find that the bank statements exhibited illustrate that at the time of purchase the parties continued to pool their resources as a married couple. The joint account was used to transfer money each month to the HSBC mortgage account. I find, in light of the figures, that the money transferred from the joint account to the HSBC account was most likely used to discharge the mortgage.

[66] I further find that the fact the bankrupt referred to the premises as his home does not mean it was his understanding his wife had no interest in the premises. In fact it was the bankrupt who voluntarily informed the trustee that his wife did have an equitable interest in the premises.

[67] Therefore, in light of my findings I am satisfied that the bankrupt and the second named respondent had a common intention to share the beneficial interest in the premises equally.

[68] In relation to the alleged investment in the premises I have considered the invoices provided by the second named respondent. I note that none of these is marked paid and I further note that they relate to a period in early 2015 and therefore post-date the date of bankruptcy.

[69] Therefore I agree with the trustee that these works were not carried out to make the premises habitable as they were clearly completed long after the bankrupt and his daughter moved into the premises.

[70] Notwithstanding this however there is the unchallenged evidence of Mr McGeown that he loaned £25,000 approximately to the second named respondent to carry out works to the premises. In addition a condition survey carried out by J McGinnity in May 2013 set out a schedule of defects to the property together with the repairs required and the estimated costs for carrying out these works. The invoices provided relate to the carrying out of works which were identified by J McGinnity.

[71] In light of the all the evidence I find, on the balance of probabilities that the second named respondent did carry out works of repair and improvement costing £25,000. This is based on the uncontroverted evidence that her brother loaned her £25,000 and her uncontroverted evidence that she alone paid for works of repair to the premises costing £25,000. Although the invoices only total £19,000 the second named respondent stated that she was unable to find all the invoices. I accept this explanation as credible as it is not unusual, especially when works are done by several contractors over a period of time, for invoices to be mislaid or lost.

[72] I am satisfied that the second named respondent would not have invested these monies in the premises if she had not believed she would have obtained a return for her investment. Therefore, I am satisfied she understood she had an interest in the premises and this interest would be enhanced by her investment in the premises.

[73] I therefore find that she is entitled to additional credit for the investment of approximately £25,000 in the premises. Whilst it is difficult to assess the extent to which these works enhanced the value of the premises it is clear that the premises increased in value from £88,00 to £140,000 between the date of purchase in 2013 and the date when they were valued in April 2015 by CPS estate agents on behalf of the trustee. Whilst such an increase in value is in no doubt part due to an improving market it is clear that the carrying out of these works of repair enhanced the value of the premises by at least £25,000. I therefore consider that it is fair and reasonable to

reflect the additional investment made by the second named respondent by repayment of the £25,000.

[74] I am therefore satisfied that the second named respondent's beneficial interest in the premises is 50% of the equity plus an additional figure of £25,000.

[75] To assess the equity in the premises it is necessary to value the premises and then deduct the mortgage and notional costs of sale. In assessing the value of the premises the court had the benefit of a number of reports prepared by estate agents. CPS on behalf of the trustee valued the premises on 31 January 2016 at £155,000. They also carried out a drive by valuation on 7 December 2016 when they valued the premises at £170,000. In contrast UPS valued the premises on behalf of the bankrupt on 18 February 2016 at £145,000. This valuation was confirmed in an e-mail by UPS dated 5 January 2017.

[76] None of the valuers was called to give evidence. In assessing the value of the premises I have decided to rely on the most up-to-date valuations which involved a proper inspection of the premises. I therefore discount the report of CPS conducted on 7 December 2016 as it was a drive by valuation. The two most up-to-date valuation reports value the premises at £155,000 and £145,000 respectively. In all the circumstances I consider a fair valuation is £150,000.

[77] All the valuations are based on a willing seller. If the premises are to be sold however it would be a forced sale. In such circumstances valuers normally make a deduction of 10% from the normal market value. Accordingly, I consider that the premises should be valued at £135,000.

[78] I note that the Master made a deduction of 10% from the valuation based on the fact it would be a forced sale. She did so on the basis of her specialised knowledge of such matters. Similarly this court has specialised knowledge arising from the expert evidence it regularly hears, given by a number of different experts, that a reduction of 10% is normally applied to market value to reflect the reality of a forced sale. In *Re Stewart* QBD NI, 12 January 1996 (Carswell LJ) at page 13 held that the court is entitled to take judicial notice of such matters if the judge has such specialised knowledge.

[79] The mortgage redemption as of 6 March 2015 was £69,174.87 and £71,000 as of 26 April 2016. On 28 April 2017 the solicitors acting for the second named respondent indicated, without proof, that it was now approximately £80,000. The trustee's solicitors in reply noted that there was no proof of this figure but did not dispute the figure. In the correspondence the trustee further appeared to accept that the bankrupt had defaulted in respect of payment of the mortgage. Given that the bankrupt had defaulted in payment of the mortgage and given that there were Order 88 proceedings before the court I consider that once arrears, interest and the

lender's costs were added to the redemption figure of 26 April 2016 the total figure would be in or around £80,000.

[80] The court had no evidence before it in respect of the costs of sale save the correspondence entered into by the parties' solicitors in which costs were estimated respectively at £5,000 and £4,000. The Master estimated costs at £7,500 because, in her view, a forced sale would involve a multiplicity of professional fees.

[81] I consider that £7,500 is a reasonable figure for sale costs, especially as the Master has specialised knowledge of these matters. As appears below however whether the figure for sale costs is £5,000 or £7,500 does not matter as it does not affect the outcome in this case.

[82] Applying a valuation of £135,000 less the mortgage at £80,000 and costs of £7,500 gives an equity of £47,500. In accordance with my findings the second named respondent is entitled to 50% of the equity plus £25,000. This means that there is no equity remaining. Accordingly, I dismiss the appellant's appeal.

[83] I will hear the parties in respect of costs.