Neutral Citation No. [2010] NICh 17 | *Ref:* **DEE7833**

*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **05/03/10**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

OFFICIAL RECEIVER

-v-

PATRICK McANULTY

DEENY J

[1] This is an application brought by the Official Receiver for Northern Ireland against Patrick Joseph McAnulty. The Official Receiver's interest is in regard to the bankruptcy of Mr McAnulty on 2 August 1984 when his predecessor became responsible as trustee for the bankruptcy property. It is not necessary for me to go into statutory provisions at that time as there is no dispute that the bankrupt's property then vested in the Official Receiver. Although the bankrupt Mr McAnulty was later discharged from that bankruptcy the debts have never been paid. He was discharged by effluxion of time. The Official Receiver seeks by his application on 21 January 2009 to evict Mr McAnulty from premises at 25 Balmoral Mews, Belfast occupied by Mr McAnulty. He seeks to do so both under Article 310 (having amended a typographical error in the originating summons which cited Article 312) of the Insolvency (Northern Ireland) Order 1989, at Article 310(2)(a)(i) but also at common law requiring the respondent to deliver up vacant possession of the premises and also for such other relief as the court deems just. This becomes relevant on subsequent analysis. The court has had the benefit of very helpful written and oral arguments from Mr Alistair Devlin on behalf of the plaintiff and from Mr John Coyle on behalf of the defendant or respondent for which the court is obliged.

[2] The chronology is slightly involved and it is important keep it clear in one's mind. The respondent despite being adjudicated bankrupt on 2 August 1984, in September 1984 acquired the premises in question at 25 Balmoral Mews for some £32,000 with the assistance of a mortgage for 95% of that amount from the Abbey National Building Society as it then was. The propriety of such a transaction need not concern the court now; what is

agreed is that in September 1987 the Official Receiver exercised his powers under the statutory provisions with regard to property acquired after a bankruptcy to have the premises vested in him. He is therefore the legal owner of these premises and again that is not in dispute. What the respondent seeks to do is to oust that legal or paper title on foot of a claim for adverse possession and he does so in this way. He acknowledges that between 1984 and 1987 he could not be said to be running an adverse title; that can only by definition apply when there is a title against which he can run a possessory title and he therefore commences his claim to a possessory title from the Official Receiver's successful step to have the title vested in him in September 1987. He, that is Mr McAnulty, it appears, let the property from that date to September 1990, but Mr Coyle argues, successfully in my view, that that is not inconsistent with running a possessory title. I had occasion recently in Northern Ireland Housing Executive v Noel Gallagher [2009] Chancery to reflect on the law on this topic and I won't repeat what I said there; it was largely taken from the judgment of Carswell LCJ in the case of Re Faulkner but with some observations of my own. It will be recalled that the law in this area in modern times was largely set out by Mr Justice Slade in Powell and McFarlane [1977] 38 P&CR 452 at 470-2. On refreshing my memory of the terms of that judgment and the other matters there I am minded to accept Mr Coyle's submission that letting the property was an act of physical control that would be sufficient.

[3] In September 1990 Mr McAnulty moved into the apartment with his then partner, in modern parlance, Patricia McGrath and their child Nicole and Nicole was born on either 10 or 18 August 1985 - both dates are given in the papers and there is no birth certificate, but it is certainly common case that she was born in August 1985 and Mr McAnulty through his counsel then argues that the title continued to run, they were indisputably in possession; there cannot be any doubt of the factual possession because they were living in the apartment as a family.

[4] Mr Devlin on behalf of the Official Receiver argued that a subsequent finding by this court on consent in favour of Patricia McGrath negatived that possessory title. There is a judgment of Master Redpath, a learned judgment in my view, delivered 3 September 2009 in the case of Patricia McGrath with Ian Finnegan as trustee in bankruptcy of Patrick Joseph McAnulty,(that was his trustee on foot of his second bankruptcy to which I will return in a moment) against Mr McAnulty himself and against the Official Receiver and that records a consent order between those parties including Mr McAnulty of 5 October 2007 in which it was acknowledged by all the parties that Patricia McGrath was entitled to 15% of the net equity of the subject premises after the costs of the sale and her costs were deducted. I am persuaded again by Mr Coyle that that is not inconsistent with Mr McAnulty's claim to adverse possession. As is clear both from my own summary in Noel Gallagher and as

Mr Devlin argued as Mr Justice Slade said in the third paragraph of his summary of the law to be found at page 4 of my judgment in Gallagher:

> "Actual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession though there can be a single possession exercised or on behalf of several persons jointly."

I think clearly that covers a situation where two people were living as man and wife and Patricia McGrath was making some contribution to the household perhaps in indirect ways which the other parties later acknowledged to create an equitable interest in her favour. So I do not think that Mr McAnulty's claim is defeated for that reason.

[5] However, he faces a greater difficulty in my view. On 11 June 1991 he was discharged from his first bankruptcy though that was by effluxion of time as I have said - not by payment of the debts. On 24 January 1994, unhappily, he was adjudicated a bankrupt for the second time and that bankruptcy was not discharged until 10 September 2004. Mr Coyle's submission is that as he continued in physical possession of the premises which is not in dispute with Patricia McGrath and their child until it would seem 2003 he had by September 1999 run a possessory title, albeit it might have been in common with Patricia McGrath to the extent of 15%. He had been in exclusive possession for 12 years. But to establish that he must establish a range of matters, the two most important of which are as follows. First of all the law in this case is of course of the most ancient kind and running back into Roman times and the Roman law on the topic is not binding in this court but is to like effect as the modern law that the squatter must hold the land nec vi, nec clam, nec precario; neither by force nor secretly nor with the permission of the owner. Mr Devlin relied on this strongly because he said that from the time of the second bankruptcy in 1994 he submitted that the respondent was living in the premises by virtue of the provisions of Article 310 of the Insolvency (Northern Ireland) Order 1989 which had come into effect in 1991. Article 310(1) reads as follows:

> "This article applies where:-
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> (a) a person who is entitled to occupy a dwelling house by virtue of a beneficial estate or interest is adjudged bankrupt, and
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> (b) any persons under the age of 18 with whom that person had at some time occupied that dwelling house had their home with that person at the time when the bankruptcy

> petition was presented and at the commencement of the bankruptcy."

Counsel diverged on this point. Mr Coyle said that as 12 years had not run at that time Mr McAnulty had no beneficial interest or estate in the property and so he does not come within Article 310(1)(a) of the order and therefore that this statutory permission to remain in the property simply does not apply to him. Mr Devlin argues either that he had a beneficial interest as a bankrupt, but does not quote any authority for that proposition or in the alternative that as the court has subsequently found that Patricia McGrath had an interest in the property the court found on consent as her partner he therefore had a beneficial estate or interest. I am not going to rule on those competing arguments though I have to say at the moment I prefer the approach commended to the court by Mr Coyle and I am not currently persuaded that Article 310 did apply and therefore I propose to continue on that basis ie. that the preferable view without finally ruling on the point that preferable view might be that Mr McAnulty was not there on foot of an occupation authorised by statute. But I say that without having been expressly addressed by counsel and this is no reflection on them on the point that the possibility of a bankrupt having a beneficial interest in property while it is vested in his trustee. Certainly it doesn't re-vest in him once the bankruptcy is discharged and the authority for that is that of my brother Weir in Rooney v The Official Receiver[2008] Northern Ireland Chancery 22 et al. So without ruling finally on that we therefore move forward to the other aspect of the matter i.e. there is no express permission to Mr McAnulty to live in the property though arguably an implied permission from the Official Receiver inasmuch as he was not seeking to evict him. If that is not the case Mr McAnulty is entitled to succeed if he can prove not only the factual possession but the requisite intention to possess or animus possidendi and there I feel that he has a formidable obstacle to overcome.

[6] The issue of the beneficial ownership of this property was before the court in the case I have mentioned brought by Patricia McGrath. In that case, albeit with different counsel acting on his behalf, he did not assert any possessory title to the land. Now while one counsel is entitled to argue a point that did not occur to another counsel it seems to me that the natural inference that it wasn't argued at that time is that it never occurred to Mr McAnulty that he was running a possessory title ie. he had no intention to run such a title in the period in question or he would have mentioned it to his counsel at that time. It is not merely silence. At paragraph 3 of the consent order of 5 October 2007 one finds the following:

> "The second named defendant give vacant possession of the premises on completion of the sale."

There was to be a sale of these premises and the applicant Patricia McGrath was to give 15% of the net equity and the remaining proceeds were to be held in joint deposit receipt pending further order of the court. But the giving up by him of vacant possession without any admission for the other parties that he had run a possessory title would have terminated that possessory title. It seems to me almost inconceivable if he had animus possidendi that he would have agreed to that. The two aspects are wholly inconsistent. This is particularly so when one bears in mind the dicta referred to by me in the Gallagher case to the effect as Mr Justice Higgins said in the Faulkner case quoting Lord Justice Slade that the trespasser seeking to dispossess the legal owner "should be required to adduce compelling evidence that he had the requisite animus possidendi in any case where its use of land was equivocal, in the sense that he did not necessarily, by itself, be token an intention on his part to claim the land as his own and exclude the true owner" and that is from paragraph [4] of my judgment in Gallagher. As I point out in the subsequent paragraphs that dictum found favour with high authority, for example, Lord Hutton subsequently in Pye in his judgment at paragraph 74 to 80 expressly quoted with approval the same passage from the judgment of Mr Justice Slade regarding the need for compelling evidence. In Buckinghamshire County Council v Christopher Mourn [1991] Chancery 623 Lord Justice Slade sitting then in the Court of Appeal and affirming Mr Justice Hoffman quoted the need "for very clear evidence in the factual context existing there". There is no doubt that the onus in law is on Mr McAnulty to prove his possessory title. It seems to me that he has failed to do so. In the circumstances I don't have to rule expressly on Mr Devlin's alternative argument that the matter is in fact res judicata : that the court by consent on 5 October 2007 ruled on that. In favour of his argument is the fact that the parties now before the court were parties to that and consented to the Order and as I pointed out that the premises of course are the identical premises. He further can draw sustenance from the decision, the long established decision in Henderson and Henderson (1843) and the judgment of Vice Chancellor Wigram in that case and I think it very likely that he is right in saying that but again I don't have to make a final ruling on that point in the circumstances nor therefore do I need to make any final ruling on his point that it constituted an abuse of process to allow Mr McAnulty to now establish this title, though again I do not dismiss that and it may be he is right in law on that point. But for the reasons mentioned Mr McAnulty has failed to prove a possessory title because it seems to me on the probabilities it is quite clear that he did not have an intention to run a possessory title between 1987 and 1999 and that this never occurred to him. He does not succeed. His affidavit which was carefully drafted in the light of the facts at paragraph 9 does set out the aspects of his ownership but I think it very properly does not make the express averment which I think would have been wholly lacking in credibility if it had been made, that at the time in question between 1987 and 1999 he was intending to dispossess the legal owner. It is not necessary for me therefore to refer to the decision of Campbell L.J. in the Haughey* case,

not opened to me, where I think the same point played a role. I therefore find in favour of the Official Receiver on the common law right to possession of the premises and to evict the defendant therefore.

*[In Scott-Foxwell v Lord Ballyedmond et alia [2005] NI Ch 5 the judge quoted J.A.Pye (Oxford) Ltd. v Graham [2003] 1 A.C. 419 to the effect that what was required was an intention to possess not an intention to own and my comment in the ex tempore judgment above must be read subject to that but it is important to note the terms in which this was set out in Pye by Lord Browne- Wilkinson (quoting Slade J) at para.43 and by Lord Hutton at paras 74 -77. Mr McAnulty consented to an Order acknowledging he was not an owner and helped the estate agent show the apartment to potential purchasers, actions inimical in my view to a retrospective claim.]