

Neutral Citation No. [2015] NIMaster 5

Ref:

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 11th March 2015

2013/33043

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

**Mary Frances Kearney
As trustee in bankruptcy of Jim Allen (a bankrupt)**

Applicant

and

**(1) Jim Allen
(2) Mary Jane Allen**

Respondents

MASTER KELLY

[1] This is an application by Mr Allen's trustee in bankruptcy ("the trustee"), seeking, inter alia, leave to evict him from premises known as 36 Fair Road, Greencastle, Kilkeel, County Down ("the premises") pursuant to Article 310 of the Insolvency (Northern Ireland) Order 1989; sale in lieu of partition of the premises, and possession of the premises. The premises are held in the joint names of Mr and Mrs Allen, and comprise the marital and family home.

[2] The trustee contends that the premises are held in equal shares by Mr and Mrs Allen and that she as trustee is required to realise Mr Allen's interest in the premises for the benefit of his creditors. Mrs Allen resists the relief sought by the trustee by her contention that she is the full beneficial owner of the premises.

[3] Mr and Mrs Allen remain married and living in the premises. Mrs Allen is a district nurse by profession. There are three children of the family. The youngest child is still in full-time education and lives at home. He will shortly turn 18. The older two children have left home and are in third level education.

[4] At the hearing the trustee was represented by Mr McCausland and Mrs Allen by Mr Dunford. I wish to record my thanks to learned counsel for their helpful skeleton arguments. But I must, I think, also stress that this application including Mrs Allen's oral evidence took just over an hour to hear. In the circumstances, this judgment should be read and interpreted within that particular context.

[5] The following facts are not in dispute:

1. The premises were purchased in the joint names of Mr and Mrs Allen;
2. The premises were purchased with the assistance of joint monies and a joint mortgage;
3. The joint tenancy was severed by the bankruptcy of the first respondent and thereafter held by them as tenants in common;
4. The starting point for the determination of Mr and Mrs Allen's beneficial interests in the premises is the legal title, per Lady Hale **Stack v Dowden [2007] UKHL 17**; also **Jones v Kernott [2011] UKSC 53** at 10;
5. The legal title is a presumption, capable of being rebutted if there is evidence of contrary intention **Jones v Kernott [2011] UKSC 53**;
6. The burden of proof that Mr and Mrs Allen's interests are held other than the legal title rests with the party so contending. (Lord Hope: **Stack v Dowden [2007] UKHL 17**). In this case that is Mrs Allen.

[6] In the course of the proceedings, Mrs Allen swore one short affidavit. In essence, she resists the relief sought in the application on two grounds:

- (1) She disputes the trustee's valuation of the premises at £485,000 arguing that her own valuation of £255,000 is more accurate (paragraph 5 of her affidavit); and
- (2) She argues that she is entitled to the full beneficial ownership of the premises (paragraph 7 of

her affidavit) and that the trustee is not entitled to anything.

[7] The first limb of Mrs Allen's dispute was not addressed substantively at the hearing so I will not dwell on that particular issue any further, save as to say that as the amount due on foot of the mortgage for the premises appears to be around £70,000 there is substantial equity in the property on either valuation.

[8] The trustee on the other hand contends that Mrs Allen's evidence does not discharge the burden of proof placed upon her as per Stack v Dowden and Jones v Kernott. She argues that Mrs Allen has simply built a case around the content of her bank statements because Mrs Allen's bank statements purport to show that Mrs Allen alone paid the mortgage and associated household expenses from at least 2003 to 2014. But while it is clear that Mrs Allen's salary is lodged into this account, and that her salary is sufficient to discharge the household expenses, her statements disclose that her salary is not the only funds lodged into that account. The account also shows cash payments over and above her salary being regularly lodged into the account. The trustee submits that these lodgements when totted up exceed £10,000 a year for the period covering Mrs Allen's bank statements (2003 -2014) and that the true source of these additional payments was in all likelihood Mr Allen given that his trade as a publican was probably largely cash based. If the trustee is correct about that, then in truth Mrs Allen's account contains mixed and joint monies.

[9] Secondly, the trustee argues that evidence given by Mr Allen in the course of his bankruptcy and two IVA proposals does not support Mrs Allen's case.

The parties' case

[10] As I say, Mrs Allen contends that she is the sole beneficial owner of the premises. She submits that her affidavit evidence together with the copy bank statements I have referred to is sufficient evidence to discharge the burden of proof she bears. Accordingly, she invites the court to accept that evidence. She also expressly contends that Mr Allen made no financial contribution to the running of the family home, or the family, throughout the marriage.

[11] In support of Mrs Allen's case, Mr Dunford relies principally on an earlier decision of this court i.e. the Official Receiver -v- Snodden & McShane [2014] NI Master 5. In that case I concluded from the facts and looking at the matter in the round and in the course of the whole dealing between the parties (per Chadwick LJ in Oxley v Hiscock [2005] Fam 211 para 69.) that there was sufficient evidence of contrary intention in that case, and I ultimately held that Ms McShane was entitled to the full beneficial interest of the subject premises. Mr McCausland however submits that while the two cases do have certain features in common, namely bank statement evidence and background IVAs, the material facts of the two cases otherwise do not compare. He summarises these at paragraph 11 of his skeleton argument thus:

“(i) The Respondents {in OR -v- McShane} to that action did not purchase the property together.

(ii) The second Respondent owned the property in her sole name prior to the transfer to joint names.

(iii) The only common intention as at the date of the impugned transfer was to facilitate the second Respondent in raising finance.”

I accept that submission.

Mrs Allen's evidence

[12] Mrs Allen sets out the basis for her claim that she is the sole beneficial owner of the premises in paragraph 7(1)-(8) of her affidavit. I am setting out the opening subparagraphs in full because Mrs Allen placed great emphasis on the particular circumstances referred to therein in the course of her oral evidence. She says:

“7. (1) The First Respondent and I were married on 19th March 1988. Our original intention was to emigrate to Australia - in fact, we saved towards that project, and gathered together nearly £5,000 for that purpose intending to leave on 13 June 1988;

(2) The First Respondent's father was a publican, and had owned the Archways Bar in Newry Street, Kilkeel (“the Pub”). He died on 7 May 1988. He did not leave a Will and his estate was administered by his widow who wished to pass the Pub to the First Respondent who was the eldest son in his family (and give other assets to his siblings). Our plan though as I have said was to move to Australia. However, the First Respondent's family made it clear that they thought the First respondent should stay and take responsibility for the running the Pub (they were not interested in buying him out, or coming to some other arrangement over it);

(3) This family pressure carried the day, and meant that our plans to move to Australia fell through. I was extremely disappointed by this (in fact we both were), but we bowed to the inevitable, and looked to establish ourselves in the Kilkeel area;”

[13] It is unclear where the parties lived after their marriage in 1988 but Mrs Allen goes on to say at 7(5) that the first matrimonial home was purchased two years later in 1990. That property was purchased in joint names using joint monies including

the joint savings Mr and Mrs Allen had built up for their move to Australia. Pausing there, I have to say that I am unable to see the connection between Mr & Mrs Allen's cancelled emigration plans in 1988 and Mrs Allen's claim as to full beneficial ownership of any subsequent marital and family homes. If Mrs Allen is inferring that the abandoned emigration plans somehow led to an agreement between her and Mr Allen over ownership of any future home, she has made no such case. Nor has Mr Allen - yet I would expect both to be able to recall with ease any such agreement arising from such a momentous change in events. Accordingly, I reject the evidence in sub-paragraphs (1),(2),(3) as irrelevant to Mrs Allen's case as to sole beneficial ownership. I do however consider that it is relevant for other reasons and I will turn to those and sub-paragraph (5) in due course.

[14] It is apparent from Mr Allen's two IVA proposals that he does not agree that Mrs Allen holds the full beneficial interest in the property. In the statement of affairs for his first IVA proposal in March 2009, Mr Allen avers that he and Mrs Allen have a 50/50 interest in the premises. This evidence accords with the legal title.

[15] However Mr Allen's IVA failed. He was subsequently adjudicated bankrupt on or about 13th October 2010. On 25th October 2010 Mr Allen completed a Preliminary Examination Questionnaire ("PEQ") for the official receiver. This is a document which requires the bankrupt to make full disclosure of all matters relating to his financial affairs. And, as Mr McCausland rightly observes, it is a document completed by the bankrupt under Article 10 of the Perjury (Northern Ireland) Order 1979. At section 8 of the PEQ Mr Allen discloses that he is the joint owner of the premises, and although he states that Mrs Allen makes the relevant mortgage payments, his disclosure as to ownership again accords with the legal title.

[16] Mr Allen then attempted a second IVA in or about September 2013. By then the bankruptcy was three years old and these proceedings had issued against Mr and Mrs Allen. In this second IVA proposal Mr Allen now claimed that Mrs Allen has a beneficial interest in the premises of approximately 2/3. This does not accord with the legal title. Nor does it accord with his previous IVA evidence or the PEQ completed by him under caution. Mr Allen simply attributes this claim to legal advice apparently given to Mrs Allen. At 3.7 of the proposal he states:

"My wife has been able to obtain a re-mortgage offer which will enable her to purchase **my share of the equity (which currently vests in the Trustee)** for £38,000." (my emphasis)

[17] It follows therefore that, even after the issuing of these proceedings, Mr Allen's third piece of evidence fails to support Mrs Allen's argument that the common intention of the parties is/was that she held full beneficial ownership of the premises. Nor can I overlook the fact that Mr Allen's evidence does not indicate any change in the parties common intention that their beneficial ownership of the premises would be held other than the legal title.

[18] Returning to paragraph 7 of her affidavit, Mrs Allen goes on to say at (4) and (5):

“(4) The Pub was to be entirely the First Respondent’s responsibility – its finances were entirely separate from our general family finances, and I was not in any way financially involved with it. “

(5) I was therefore responsible for the matrimonial home – that was my realm, whilst the First Respondent concerned himself with running the Pub. Our first matrimonial home was at 32 Tullyframe Road Kilkeel, a property which we bought for £45,000 in or about 1990. £40,500 of this sum was borrowed; the balance was met from joint savings which we had made with a view to our emigration to Australia.

I observe here that the expressions used by Mrs Allen refer to ‘responsibility’, rather than ownership. But there is still no evidence that the parties’ interests in either the first or second matrimonial home were to be held other than the legal title.

[19] It is only in the remaining sub-paragraphs (6) to (8) that Mrs Allen proceeds to make what seems to me to be the real essence of her case. Simply put, Mrs Allen contends that she alone paid all the outgoings in relation to the premises (and the previous family home) and that Mr Allen made no financial contribution to either the home or the family throughout the marriage, and I will come back to that particular issue in a moment. But, in addition, Mrs Allen also claims to have paid for repairs and home improvements on both properties from her earnings and savings. Yet despite the production of bank statements covering the period 2003 to 2014, there is no evidence of savings or the funding of repairs and home improvements on the properties. This unfortunately leaves Mrs Allen’s evidence on this particular issue open to doubt.

[20] It will now be apparent that I consider that Mrs Allen’s affidavit evidence lacks substance. But it was in her oral evidence that the real weaknesses in her case in my view arose, and it is to that evidence that I will now turn.

[21] Given the trustee’s concerns regarding cash lodgements into Mrs Allen’s account, she was inevitably robustly cross-examined on her bank statements by Mr McCausland. I have to say that in addition to the issues regarding Mrs Allen’s affidavit evidence which I have already touched upon, the following issues arose in her oral evidence which I consider raise general credibility issues.

[22] First, it transpired that the monthly standing order of £550 to cover the mortgage was not paid from Mrs Allen’s sole account directly to the relevant mortgage account, but it was in fact paid into a joint account held in the names of Mr & Mrs Allen. No statements were put in evidence regarding this account.

[23] Secondly, I have to say that I had my doubts about the veracity of Mrs Allen's claim that she "had consistently been the only financial means of support for {the} family" and that Mr Allen's income "was never used to contribute in any way to the running of the family home" in what is almost 30 years of marriage. That seemed to me to be most improbable because from her own evidence it appears that both Mr and Mrs Allen come from, and are, a close family. First of all Mrs Allen describes how Mr Allen felt it was his duty as eldest son to take over the family pub after the death of his father despite plans to start a new life in Australia. Mrs Allen then refers to how she and her sons would help out in what was, after all, the *family* pub from time to time if needed - even if reluctantly. She also describes how when Mr and Mrs Allen built the current matrimonial home, they made provision for suitable living accommodation for Mrs Allen's elderly parents to live with them should their health deteriorate leaving them unable to live independently. All of this suggested to me that Mr and Mrs Allen share a keen sense of family.

[24] In the circumstances, I asked Mrs Allen while she was still under oath if it was really true Mr Allen had made no financial contribution to the family whatsoever throughout the marriage. In response to that question, Mrs Allen conceded that Mr Allen had always given her a weekly housekeeping allowance which he paid to her in cash. The amounts she referred to - although I found her to be vague on the detail - are admittedly modest (£100-£120 sometimes more per week). But that is immaterial. In any event the household expenses are also modest. What is material is that on affidavit Mrs Allen expressly denies that Mr Allen made any financial contribution whatsoever to the family or the home throughout the marriage when that is not the case. These contradictions in Mrs Allen's evidence, in my view serve only to add impetus to the concerns expressed by the trustee that the true source of cash payments being made into Mrs Allen's account was Mr Allen. While Mrs Allen endeavoured to provide explanations under cross-examination for some of those cash payments, her focus was on what the money was used for, rather than the source of the cash for which she offered no convincing evidence.

[25] Thirdly, according to her bank statements Mrs Allen's net monthly income appears to have been around £1200 in 2003 rising to around £2000 in 2014. By contrast the bankrupt's income according to his most recent IVA proposal was around £3,000 per month. While I accept that mortgage payments on the premises were relatively modest, and therefore could have been met by Mrs Allen herself, her late admission that Mr Allen gives her weekly cash payments and her failure to satisfactorily explain the cash lodgements into her account leads me to conclude that in all likelihood the funds in Mrs Allen's account included monies from Mr Allen as well. I also reject as incredible her evidence that she had no idea what the bankrupt did with his income.

[26] Taking all those matters into account, the question I now must decide is whether on the evidence Mrs Allen has discharged the burden of proof that lies upon her.

[27] When considering the important question as to whether the burden of proof as to common intention has been discharged by the party on whom it rests the court in my judgment can only arrive at its conclusion after weighing up all the evidence, and deciding on the appropriate weight to be given to it. I have already referred to the weaknesses in Mrs Allen's affidavit and oral evidence and Mr Allen's contradictory evidence. But even if Mr Allen had given evidence supporting the case being made by Mrs Allen, the court would still have to decide what weight should be given to that evidence, and in doing so be astute to the fact that the parties are likely to have the same vested interest in the outcome of the case – namely keeping the family home as far as possible out of the hands of the bankruptcy trustee. It is not surprising therefore that the party contending that the common intention of the parties as to beneficial ownership is other than the legal title bears a heavy burden of proof.

Conclusions

[28] In summary, it is clear that Mr Allen does not agree that Mrs Allen is the sole beneficial owner of the premises. It is also now clear that Mr Allen gives Mrs Allen weekly cash payments and that only Mr and Mrs Allen know the actual amounts involved. Finally, it has also been established that over the years regular cash payments were being lodged into Mrs Allen's account and she does not appear to be the source of that cash. Thus while I accept that Mrs Allen's bank statements indicate that she discharged financial responsibility for the household expenditure, I do not accept that her bank statements and short affidavit are in this case sufficient to discharge the heavy burden that the law places on her in seeking to rebut the presumption of joint ownership.

[29] In any case, as far as the management and organisation of household finances is concerned, I suspect that in many households it is not unusual for the parties to agree to divide up the financial responsibilities between them, and arrange their finances in a manner suited to their agreement. This may even mean that the parties might without a second thought agree between them that one of them will assume sole responsibility for the management of the household finances – in which case, bank statements may do no more than reflect such an agreement. Therefore it seems to me that evidence in the form of bank statements, while relevant, may not necessarily in any case tell the whole story or even any story at all.

[30] For the reasons set out above and elsewhere in this judgment, I am led to conclude that Mrs Allen's evidence is lacking in substance. Based on the evidence before me I have found no persuasive evidence of contrary intention. Accordingly I find that the parties' beneficial interests are held in accordance with the legal title. I will now turn to the terms of the order.