**Neutral Citation No: [2013] NIMaster 5**

| *Ref:* |
| --- |

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

| *Delivered:* **01/03/13** |
| --- |

2011/133265

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

---------

BETWEEN:

Walter Lismore as Trustee in Bankruptcy of James Joseph Davey

Applicant:

and

1. James Joseph Davey
2. Patricia Davey

Respondents:

------------

**MASTER KELLY**

**[1]** The trustee in this case seeks to realise the bankrupt's interest in his home more than 3 years from the date of bankruptcy. The current statutory provisions state that if certain steps are not taken to realise the bankrupt's interest in his home within 3 years of the date of the bankruptcy order, the bankrupt's home ceases to form part of the bankruptcy estate; and re-vests in the bankrupt automatically on the third anniversary of the bankruptcy. In this case the bankruptcy order was made on 13th October 2008, and the third anniversary was 13th October 2011. However the statutory provisions also state that a trustee may apply to substitute a longer period of time for the realisation of the bankrupt's home for the statutory 3 year period.

**[2]** On 10th November 2011 the trustee filed an application to substitute a longer period for the statutory period. However, the application was filed 28 days after the statutory 3 year period had expired. For the purposes of his application, the trustee argues that the 3 year

period is a time limit and that there exists in the legislation provision to extend time limits, even retrospectively. The trustee argues that if the application is not granted, the position of the bankrupt's creditors will be prejudiced as the realisation of the bankrupt's share in his home would pay them a dividend. The respondents on the other hand contend that the court has no jurisdiction to grant the trustee's application. They argue that the operation of the statute is such that the bankrupt's dwelling-house ceased to form part of his estate on 13th October 2011. At the hearing the trustee was represented by Mr McEwen and the respondents by Mr Warnock.

**[3]** The trustee's evidence is contained in the affidavits of his solicitor Mr Barbour, and Joanne McKeown, an Insolvency Manager in the trustee's office. Ms McKeown had the day-to-day responsibility for this particular case. Exhibited to her affidavit is correspondence with the bankrupt, and includes a report from the Deputy Official Receiver setting out the assets and liabilities of the bankrupt. This report shows the bankrupt's estate to be a solvent estate. Also included in the trustee's evidence is a section of the bankrupt's Preliminary Examination Questionnaire. I shall return to this later, but for the moment it is important to stress that the Preliminary Examination Questionnaire is a document completed by the bankrupt for the Official Receiver, and is an evidential document. Both respondents submitted affidavits for the case and, while there was an element of factual dispute between the parties, I am satisfied that nothing significant will turn on this. The question for the court to determine is a discrete one, and on that fact the parties are agreed.

Background.

**[4]** As stated previously, the bankruptcy order in this case was made on 13th October 2008. By virtue of that order, the bankrupt's interest in his dwelling-house vested in the trustee. The dwelling-house, which is situated at 52 Suffolk Crescent, Belfast, is held in the joint names of the respondents and not subject to charge. According to the Official Receiver's report, the bankrupt values the dwelling-house at £95,000. The bankrupt's creditors total £31,905, with the petitioning creditor (HMRC) the largest at £18,346.

**[5]** The trustee's case is that he was conscious of his obligation to realise the bankrupt's interest in the dwelling-house; and indeed that he had proceedings already drafted and ready for issue in February 2011. These draft proceedings are exhibited to Mr Barbour's affidavit. Mr McEwen argues that the trustee delayed issuing those proceedings as the bankrupt had consistently indicated an intention to annul his bankruptcy. While the bankrupt denies he ever expressed such an intention, he stated in his Preliminary Examination Questionnaire that:

> "My tax affairs shall be brought up to date and I shall apply to the court to set aside my bankruptcy."

In his affidavit the bankrupt also makes it clear that he disputes the petitioner's debt. He states that it was always his intention to regularise his tax affairs with the objective of reducing, if not expunging, the tax liability. For the bankrupt to do this for any purpose other than an annulment seems unlikely. The reduction of a bankrupt's tax liability while remaining

bankrupt, serves no discernible purpose; unless as in this case, the bankruptcy estate is solvent - in which case an annulment is advisable. Together with the statement in the Preliminary Examination Questionnaire, these issues are all consistent with the trustee's evidence that he withheld issuing re-possession proceedings in the belief that the bankrupt intended to bring an annulment application. In withholding proceedings for this reason, the trustee cannot be criticised. The trustee's costs are an expense of an annulment application, which must be discharged. By staying the issuing of proceedings, the trustee avoided unnecessary costs accruing to the bankruptcy estate which would have benefitted the bankrupt in the event of an annulment application.

**[6]** The trustee's evidence is that when no annulment application materialised, he re-visited the issue of the re-possession proceedings. According to Mr Barbour's affidavit, it was then discovered that, due to a diary error, the third anniversary of the bankruptcy had taken place on 13th October 2011. On 10th November 2011 the trustee filed an application to substitute a longer period for the realisation of the bankrupt's home for the statutory period. The question for the court to determine is whether it has the power to do this after the third anniversary of the bankruptcy, or whether the operation of the statute means that the bankrupt's home has now ceased to form part of the bankrupt's estate, and re-vested in the bankrupt on the third anniversary of the bankruptcy.

The legal framework

**[7]** The Insolvency (Northern Ireland) Order 1989 ("the Order"), as amended by the Insolvency (Northern Ireland) Order 2005, introduced a 3 year rule in the new Article 256A. The new Article 256A provides that, subject to the provisions of Article 256A (3), the bankrupt's interest in his dwelling-house ceases to form part of his estate on the third anniversary of the bankruptcy and re-vests in the bankrupt. For the purposes of this application, the relevant parts of Article 256A are paragraphs (1),(2),(3),(4) and (6) which state:

> **"256A. — (1) This Article applies where property comprised in the bankrupt's estate consists of an interest in a dwelling-house which at the date of the bankruptcy was the sole or principal residence of—**
>
> **(a) the bankrupt,**
>
> **(b) the bankrupt's spouse or civil partner, or**
>
> **(c) a former spouse or former civil partner of the bankrupt.**
>
> **(2) At the end of the period of 3 years beginning with the date of the bankruptcy the interest mentioned in paragraph (1) shall—**
>
> **(a) cease to be comprised in the bankrupt's estate, and**

**(b) vest in the bankrupt (without conveyance, assignment or transfer).**

**(3) Paragraph (2) shall not apply if during the period mentioned in that paragraph—**

**(a) the trustee realises the interest mentioned in paragraph (1),**

**(b) the trustee applies for an order for sale in respect of the dwelling-house,**

**(c) the trustee applies for an order for possession of the dwelling-house,**

**(d) the trustee applies for an order under Article 286 in Chapter IV in respect of that interest, or**

**(e) the trustee and the bankrupt agree that the bankrupt shall incur a specified liability to his estate (with or without the addition of interest from the date of the agreement) in consideration of which the interest mentioned in paragraph (1) shall cease to form part of the estate.**

**(4) Where an application of a kind described in paragraph (3)(b) to (d) is made during the period mentioned in paragraph (2) and is dismissed, unless the High Court orders otherwise the interest to which the application relates shall on the dismissal of the application—**

**(a) cease to be comprised in the bankrupt's estate, and**

**(b) vest in the bankrupt (without conveyance, assignment or transfer).**

**(6) The High Court may substitute for the period of 3 years mentioned in paragraph (2) a longer period—**

**(a) in prescribed circumstances, and**

**(b) in such other circumstances as the Court thinks appropriate. "**

**(**Article 286 refers to low equity homes and does not apply in this case**).**

**[8]** It follows therefore that if, during the period of 3 years, any of the circumstances in paragraph (3) apply, the dwelling-house does not cease to form part of the bankrupt's estate and no re-vesting occurs. In this case it is accepted that none of those grounds apply. The application in this case is for an order under paragraph (6); but after the expiration of the 3 year statutory period referred to in that paragraph. Mr McEwen concedes that he can find no

case law on this particular issue and attributes this, rightly I think, to the fact that it is a relatively new area of law. The authority he advances for this application, is founded on the contention that the 3 year period referred to in paragraph (6) is a time limit, and as such may be extended retrospectively under Article 344 of the Order. Article 344 states:

> **"344. Where by any provision in Parts VIII to X (other than Chapter I of Part VIII) or by the rules the time for doing anything is limited, the High Court may extend the time, either before or after it has expired, on such terms, if any, as it thinks fit".**

**[9]** Parts VIIII to X of the Order and the accompanying rules, comprise a substantial portion of the Order, and apply to a wide range of insolvency issues. While it is recognised that statutory provisions relating to the bankrupt's home do fall within Parts VIII to X of the Order, prior to the introduction of Article 256A there was no specified period in which a trustee had to realise his interest in the bankrupt's home. Article 344 therefore could not have applied previously. The question is: as the Order has been amended by the introduction of a specified period, can Article 344 apply now?

<u>Consideration</u>

**[10]** An application under Article 256A (6) to substitute a longer period for the statutory period, is often itself erroneously referred to as an "extension of time" application. This is because the effect of an order under paragraph (6) is that a new period, at the end of which re-vesting will occur, is substituted for the statutory one. This affords the trustee additional time (if the court is satisfied it is justified) in which to bring an application for possession. However, paragraph (6) must be read in conjunction with paragraph (2). The period mentioned in paragraph (2) is a date on which a statutory re-vesting occurs, whereby the bankrupt's dwelling-house automatically ceases to form part of the bankrupt's estate. This together with the general provisions of Article 256A mean that the statutory re-vesting date can only be prevented; either by:

(i) Court order substituting a new period at the end of which re-vesting occurs, or

(ii) Proceedings (or binding agreement between the trustee and bankrupt), whereby the issue of re-vesting ceases to apply.

Therefore the re-vesting date, whether determined by statute or court order, can only be prevented, not extended. This leads me to the conclusion that Article 344 cannot apply. Therefore an application to substitute one re-vesting date for another can only be brought <u>during</u> the relevant period.

However, where an application is brought under paragraph (6) during the relevant period, howsoever that period is determined, even if the application is incorrectly expressed to be an

"extension of time" application, no prejudice is caused by that wording, as the re-vesting has not occurred.

Conclusion

**[11]** Due to an unfortunate error, the statutory re-vesting date in this case was incorrectly noted, and as a consequence, the third anniversary of the bankruptcy had occurred prior to the filing of this application. However, for the reasons set out above and elsewhere in this judgment, I am led to conclude that the trustee's application is, in reality, a retrospective application under Article 256A (6). For such an application I can find no authority. It follows therefore, that I conclude that the bankrupt's dwelling-house ceased to form part of his estate by operation of the statute on 13th October 2011, and re-vested in the bankrupt on that date. In the circumstances, I conclude that the trustee's application must be refused.