

2011 No 133265/AO1

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

**IN THE MATTER OF JAMES JOSEPH DAVEY, BANKRUPT
AND IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND)
ORDER 1989**

BETWEEN:

**WALTER LISMORE AS TRUSTEE IN BANKRUPTCY OF
JAMES JOSEPH DAVEY**

Applicant;

and

**1. JAMES JOSEPH DAVEY
2. PATRICIA DAVEY**

Respondents.

JUDGMENT

HORNER J

INTRODUCTION

[1] This is an appeal from a decision of Master Kelly given on 1 March 2013. The point for determination on this appeal is whether the Trustee in Bankruptcy (“the Trustee”) can realise the interest of James Joseph Davey, a bankrupt (“the Bankrupt”) in the family home at 52 Suffolk Crescent (“the Home”) which he owns jointly with his wife, Patricia Davey (“the Respondent”) despite the fact that more than 3 years has elapsed since he was made bankrupt. At the outset I would wish to record my thanks to counsel, Mr McEwen BL on behalf of the Trustee and Mr Warnock BL on behalf of the Bankrupt for the assistance provided to the court in their written and oral submissions. Another issue will arise if I find in favour of the

Trustee namely whether the court should exercise its discretion in the circumstances of this case and substitute a longer period so as to permit the Trustee to realise his interest in the Home outside the 3 year period. Only the first issue has been the subject of argument in this appeal.

[2] The Bankruptcy order was made on 13 October 2008. The Trustee did not realise his interest in the matrimonial home in the 3 year period provided by Article 256A of the Insolvency (Northern Ireland) Order 1989 ("the Order"). The Trustee filed an application relying on Article 256A(6) asking the court to substitute a longer period than the 3 years permitted under 256A(2). The application was filed 4 weeks after the expiry of the 3 year statutory period on 10 November 2011.

[3] An explanation has been provided by the Trustee for the delay but this does not concern the court for the purpose of this application. It is sufficient to record that the estate of the Bankrupt is solvent. According to the report of the Official Receiver the Bankrupt had placed a value of £95,000 upon the Home. The Bankrupt's creditors amount to £31,905.

LEGAL FRAMEWORK

[4] The relevant provisions of Article 256A of the Order are paragraphs (1), (2), (3), (4) and (6) which provide:

"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).

(5) If the bankrupt does not inform the trustee or the official receiver of his interest in a property before the end of the period of 3 months beginning with the date of the bankruptcy, the period of 3 years mentioned in paragraph (2) -

- (a) shall not begin with the date of the bankruptcy, but
- (b) shall begin with the date on which the trustee or official receiver becomes aware of the bankrupt's interest.

(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.”

THE RESPECTIVE CASES

[5] The applicant claims:

- (i) Article 256A clearly intends that the period of 3 years can be extended. If Parliament had intended that no application could be made after the 3 year period specified in Article 256A(2) then it would have stated this expressly.
- (ii) Rule 6.229(c) of the Insolvency Rules states:

“The court may substitute for the period of three years mentioned in Article 256A(2) such longer period as the court thinks just and reasonable in all the circumstances of the case.”

Further Article 344 of the Order states:

“Where by any provision in Parts 7A to 10 (other than Chapter 1 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.”

- (iii) If an application could not be made after the 3 year period had expired this would produce absurd results.
- (iv) The applicant should be allowed to rely on the comments made in Parliament when the same provision was introduced into the legislative framework in England under the rule in Pepper v Hart [1992] 1 All ER 42. These comments, it was asserted, support the argument being advanced by the Trustee.
- (v) There are no cases reported on this issue because, it is asserted, it is likely that in England where the equivalent provision is Section 283A of the Insolvency Act (“the Act”) such applications are made routinely after the 3 year period has expired. (There was no factual basis to support this claim.)

[6] The Respondent makes the following points:

- (i) The provision is clear. The interest in the matrimonial home re-vests in the Bankrupt under the Order once the 3 year period has expired save for special circumstances which do not apply here and there is no further provision which would allow it to vest once again in the Trustee.

- (ii) It is intended that the provision should be a “use it or lose it” one and that such an effect would not be achieved if an application could be made by the Trustee to substitute a new period after the 3 year period had expired. The construction put forward by the Bankrupt and the Respondent is a purposive one.
- (iii) There is no absurdity produced by the Respondents’ construction of the Article and the examples put forward by the Trustee are unconvincing.
- (iv) There is no entitlement to invoke Pepper v Hart. The statutory provision is clear. The provision produces certainty. The Trustee has 3 years to realise the interest in the Bankrupt’s Home if it is jointly owned. Once the 3 years have expired, the Trustee’s interest in the matrimonial home ends and the interest re-vests in the Bankrupt.
- (v) In any event what was said in Parliament supports the construction being put forward on behalf of the Bankrupt.

DISCUSSION

[7] It is true that there are no authorities on this particular point. There have been other decisions on Section 283A of the Act and Article 256A of the Order but none on this particular issue. However, there is some assistance to be derived from another decision in which section 283A was considered by the Court of Appeal in England.

[8] In Lewis v Metropolitan Property Realisation Ltd [2008] EWHC 276 Mr Lewis had been bankrupted on 12 July 2004. He was the joint legal owner with his wife of a matrimonial home with a net worth of £280,000. In fact, his wife claimed that she was the sole owner in equity. The Trustees did not agree but decided it was preferable to assign their interest to Metropolitan Property Realisation Ltd for £1, the second largest creditor who would then take up the cudgels against Mrs Lewis. If Metropolitan Property Realisation Ltd won then it would disgorge 25% of the net realisation to the trustees. At first instance the Judge held that the sale of the estate’s interest for deferred contingent consideration was a realisation of the interest within the meaning of Section 283A(3)(a). This decision was appealed successfully to the Court of Appeal. But the Judge at first instance commented at paragraph [21]:

“The scheme of Section 283A provides an exhaustive list of the steps available to the trustee during a 3 year period in relation to the bankrupt’s interest in the dwelling house. If the trustee fails to take such steps, or obtain an extension of the 3 year period from the court under

Section 283A(6), the interest will revert to the bankrupt. The trustee must use it or lose it." (emphasis added)

The Court of Appeal did not take issue with this comment when it heard the appeal.

[9] In giving the lead judgment of the Court of Appeal, Laws LJ said at paragraph [18]:

"18. That conclusion gets further support from an analysis of the structure and apparent parliamentary purpose of the provision. The provision was new in 2002, and it formed part of a package of measures affecting bankruptcies on or after 1 April 2004. Some of those measures have no direct bearing on the point at issue in this appeal (for example the reduction of the discharge period from three years to one year) but others seem to form part of a scheme, albeit not necessarily an overall consistent one. The scheme reinforces the views expressed by Lawrence Collins J in In re Byford, decd [2004] 1 P & CR 159. That was a case under the old regime in which the question was as to the allowances that the wife and the trustee in bankruptcy should be allowed in adjusting their respective interests in a jointly owned house. The trustee had waited almost ten years before taking steps to realise the property. Lawrence Collins J reflected on the position and said, at p 163:

“Parliament has now made it clear in the new section 383A [sic section 283A] of the Insolvency Act 1986 ... (not yet in force) that it is undesirable for trustees to wait for many years before resolving their rights in respect of the home of the bankrupt or his spouse. This introduces a general rule that the trustee must take steps to realise his interest in the home of the bankrupt or his spouse within three years of the bankruptcy, subject to specified exceptions. If he fails to do so the property vests in the bankrupt and the creditors lose all rights to it. All parties concerned would know where they stand within a reasonable time. Although the section is not in force and will not apply to this case when it is it can be taken as a strong indication of public policy,

and the court should take into account that policy in deciding what is equitable.”

Laws LJ then set out the scheme of section 283A at paragraph [22]. Against that background he concluded on a purposive construction that:

“Realise in the sub-section involved getting in the full consideration for the deal”.

[10] In Northern Ireland the problem with delay in the trustee realising his interest could also be acute; see the comments of Weir J in Official Receiver v Rooney and Paulson (2008) NICH 22 at [19] and Deeny J in Official Receiver v O’Brien (2012) NICH 12 at [13].

[11] Master Kelly in her judgment noted that “an application under Article 256A(6) to substitute a longer period was often referred to erroneously as an extension of time application”. She went on to conclude that:

“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.”

I agree.

[12] The Court of Appeal in Lewis made the following comments at paragraph [33]:

“33 In his skeleton argument Mr Davies sought to rely on the legislative history of the provision, starting with background consultation papers, moving through a White Paper (2001) (Cm 5234) entitled *Productivity and Enterprise: Insolvency – A Second Chance*, a private member's original proposal and the ultimate ministerially-introduced final form of the provision. In his skeleton argument Mr Briggs disputed Mr Davies's right to rely on this material, since he said it did not come within the principles established by Pepper v Hart [1993] AC 593, but said that in any event the material did not support Mr Davies's case. This dispute was not developed in the oral submissions before us. Nor was any of the material deployed before Proudman J. It seems to us that the dispute as to the meaning of the word “realise” in this case justifies resort to proper parliamentary material to try to see the mischief aimed at

in, or the legislative intent behind, the provision, but the assistance given by that material is very limited. The White Paper deals with a different broad target of reducing bankruptcy stigma and disabilities, and the issues raised by what is now section 283A were not addressed by it. When the section was introduced by the minister on 17 June 2002 she did so on such general terms that they do not assist in the analysis which we have to conduct. We therefore place no reliance on this material and prefer the schematic analysis that we have sought to carry out above.”

These comments seem equally applicable here in respect of the contention that the court should resort to parliamentary material in its attempt to construe Article 256A. The claim that the bankrupt’s construction would lead to absurdity or ambiguity was, when tested in court, found to have no substance.

[13] I find that the correct construction of the relevant provisions in respect of this application is as follows:

- (i) Article 256A applies because the property which is in issue relates to an interest which the Bankrupt had in the Home which he jointly owned with the Respondent and in which he and the Respondent resided.
- (ii) Consequently the Bankrupt’s interest in the Home vested in the Trustee when he was appointed following the making of the Bankruptcy order on 12 October 2008.
- (iii) The 3 year period continued to apply to the Trustee because he had not realised the interest in the Home, or applied for an Order for Sale in respect of the Home; or applied for possession of the Home; or applied for a charge under Article 286 in respect of that interest in the Home; or reached an agreement with the Bankrupt that the Bankrupt should incur a specified liability to his estate in consideration of which the Bankrupt’s interest in the home should cease to form part of the estate; see exceptions to 3 year rule at Article 256A(3).
- (iv) Accordingly, 3 years after the order was made on 13 October 2008 the interest which the Trustee had in the Home **ceased** and **vested** in the Bankrupt automatically.

[14] As the Trustee’s interest in the home had ceased, the court cannot substitute a longer period under paragraph 4 because there is no mechanism available to re-vest the Bankrupt’s interest in the Home in the Trustee. This accords with the purpose of this provision which was introduced to achieve certainty. After 3 years (and in the

absence of the exceptions referred to above), and if no application is made to substitute a longer period during that 3 year period, then any interest of the Trustee in the Home automatically ceases and vests in the Bankrupt. Here the Trustee failed to realise the interest in the Home within 3 years and accordingly the interest ceased to be comprised in the Bankrupt's estate. It was, of course, open to the Trustee to apply to the court to substitute a longer period than 3 years so as to postpone the vesting of the interest in the Home in the Bankrupt, but this had to be done before the 3 year period expired. If it was not, then the Trustee lost the interest in the Home forever. Once the 3 year period has passed, the court is powerless in the present circumstances to act so as to re-vest the Bankrupt's interest in the Home in the Trustee.

[15] The meaning of the words used in Article 256A is plain and obvious - the Trustee's interest ceases and automatically vests in the Bankrupt. There is no mechanism once the interest is vested in the Bankrupt to permit the Trustee to recapture it no matter how compelling the reason offered by the Trustee for not making the application within 3 years. The words of the Statute should be given their natural and ordinary meaning which also accords with the purpose of Article 256A.

CONCLUSION

[16] Article 256A permits the 3 year period to be substituted with a longer period in certain circumstances. However, the application to substitute a longer period must be made before the 3 year time limit has expired. Once the 3 year period has expired then subject to Article 256A(3) the interest in the Home vests in the Bankrupt automatically and any interest that the Trustee had in it ceases. This accords with the underlying purpose of the Order which is to achieve certainty within a short period of time, namely 3 years. The Trustee in this case had the option of using the Bankrupt's interest in the Home. He failed to do so within the 3 year period and he has lost it. The Master was correct and I affirm her decision.