Neutral Citation No. Master 74

Ref:	**Master 74**

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

Delivered:	**03/09/09**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY (BANKRUPTCY)

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RE PATRICK JOSEPH McANULTY (A BANKRUPT)

BETWEEN:

PATRICIA McGRATH

Plaintiff;

-and-

1. **IAN FINNEGAN AS TRUSTEE IN BANKRUPTCY OF PATRICK JOSEPH McANULTY**

2. **PATRICK JOSEPH McANULTY**
3. **OFFICIAL RECEIVER**

Defendants.

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Master Redpath

[1] Although not so expressed in the summons this case commenced as an application under Article 334 of the Insolvency (Northern Ireland) Order 1989 which states:-

> "334-(1) Every bankruptcy is under the general control of the High Court and, subject to the provisions in Parts VIII-X the court has full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy."

[2] The plaintiff in the application is the former partner of the second named defendant Patrick Joseph McAnulty (the bankrupt). It was her case (and this was not seriously denied) that she began a relationship with the bankrupt in or around 1980 and that there was one child of the relationship born on 10 August 1985. The relationship ended in December 2003. Five years after the commencement of the relationship the bankrupt purchased the premises which are the subject of this application in his sole name. This was following his first bankruptcy which occurred as long ago as the 2 August 1984. It was the plaintiff's case that in September 1990 she sold her own house and moved into the subject property with her daughter. The case was made by her that she then proceeded to make various contributions including installing a new kitchen in the property and that she therefore acquired an equitable interest in it. The bankrupt was adjudicated bankrupt for the second occasion on 24 January 1994. The purpose of the plaintiff's application is to establish an interest in the property which can be recovered from the sale of the property.

[3] The matter came before me for hearing on 9 February 2007. It was indicated to me by counsel that the applicant and the first and third named defendants had come to an agreement. The second named defendant (the bankrupt) was unrepresented but present, and he indicated that he did not agree with the order that was being proposed. I indicated to the parties that I therefore did not consider the matter settled and that it would be necessary to list it for hearing. There were a number of appearances in between that date and the date when it was eventually fixed for hearing on 5 October 2007.

[4] When the case came on for hearing the bankrupt was represented by counsel who indicated to the court that he felt the case involved a delay point similar to that in the cases of *Official Receiver v Rooney and Paulson* which had been heard by the Chancery Judge and in which judgment was awaited. On that basis he wished to have the matter adjourned pending the outcome of those cases. I indicated to all the legal representatives present that I considered that the issue before me could be regarded as a discrete issue from those cases. I indicated to them that they should withdraw to consider whether it would be possible to conclude an agreement in relation to the plaintiff's claim, with the house being sold, and the Official Receiver retaining the remaining proceeds of sale pending the outcome of the *Rooney and Paulson* cases. Counsel withdrew, and after some time, came back, when I was advised that agreement had been reached in the case. The agreement was dictated to me and I made it an order of court. The order made was as follows:-

That:-

(1) The applicant was entitled to 15% of the net equity of the subject premises after the costs of the sale and her costs were deducted.

(2) The property at 25 Balmoral Mews, Belfast be sold, that McCartan Turkington and Breen solicitors have carriage of sale, with the estate agents in the absence of agreement being appointed by the court.

(3) The second named defendant give vacant possession of the premises on completion of the sale.

(4) The net remaining proceeds be held on joint deposit receipt pending further order of the court.

(5) The costs of the first and third named respondents be costs in the second named respondent's estate.

(6) The costs of the second named respondent be taxed in accordance with the provisions of Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.

(7) Liberty to apply.

[5] On 29 October 2007 I received a letter dated Friday 26 October 2007 from Mr Gowdy, the solicitor for the Official Receiver, which went as follows:-

> "We refer to the above matter which was before Master Redpath on 5 October 2007.
>
> We should be obliged if you would have this matter re-listed before Master Redpath. A binding settlement was agreed between the applicant, the first respondent and the third respondent on 8 February 2007. The order which was made on 5 October 2007 does not reflect the terms of that settlement. Apparently the Master was not informed of the earlier binding settlement that had been agreed. It is for that reason that we ask for this case to be brought back before the courts.
>
> We would be obliged if you would confirm to us the date and time.
>
> We are furnishing copies of this letter to the other parties."

[6] I asked a member of staff in my office to respond and the response dated 13 November 2007 reads:

> "Dear Sir
>
> Master Redpath has asked me to respond to your letter of 26 October 2007. This matter was listed for hearing before the Master on 5 October 2007 for hearing. The Master's note for 9 February 2007 reflects that agreement had been reached at that stage as between the applicant and the first and third named respondents. The second named respondent, who at that hearing was unrepresented, did not indicate that he was in agreement. The matter was before the court on five subsequent occasions and at no stage does the Master's note reflect that Mr McAnulty concurred with the agreement reached on 9 February 2007 or that the case was settled. Indeed at the hearing of the matter his counsel raised a delay point on his behalf.
>
> On 5 October 2007, after the opening of the case, counsel withdrew to discuss it, and the agreement as reflected in the order made was arrived at. If the parties agree that the order made on 5 October 2007 does not reflect the terms which were dictated to the court the Master will consider amending them under the 'slip' rule.
>
> Otherwise the Master considers that he has no further role to play in this matter unless a formal application is made to rescind the order dated 5 October 2007 pursuant to Article 371 of the Insolvency (Northern Ireland) Order 1989."

[7] Such an application was then subsequently filed on 8 February 2008. The relevant portion of the affidavit of Mr Gowdy reads:-

> "2.1 The order of 5 October 2007 fails to reflect a binding agreement which had been made between the plaintiff, the first defendant and the third defendant whereby it was agreed between the plaintiff, the first defendant and the third defendant that the plaintiff was entitled to 10% of the net equity of the premises known as 25 Balmoral Mews, Belfast and it further fails to reflect an agreement reached between the plaintiff, the first defendant and the second defendant as to the modalities of the sale of

> the property. The agreement between the plaintiff, the first defendant and the third defendant was negotiated by Keith Gibson, counsel for the plaintiff, Patrick Good, counsel for the third defendant and Brigid Napier as solicitor for the first defendant and the parties had agreed to the terms of an order which would give effect to the agreement which had been reached. I refer to a draft of the said order marked 'STG1' by me."

[8] In paragraph 2.2 of the affidavit Mr Gowdy complains that no directions had been given in the order (which I have already said was dictated to me) as to how the property should be sold and who should have responsibility for that sale. This is a matter that could have been quite easily dealt with on liberty to apply and is not particularly relevant to this case.

[9] In paragraph 2.3 of his affidavit Mr Gowdy makes a point that there was a material fact not disclosed to the court by the second named defendant, namely that he had not been occupying the property at the date of hearing. Again that is frankly neither here nor there as far as this particular case is concerned.

[10] Between the date of the issue of this summons and the hearing of the application on a number of occasions I raised my concerns about whether these proceedings were at all necessary. I had not been aware of the detail of the agreement apparently reached in February 2007, but in any event I had taken the view that without the agreement of all of the parties it was not an agreement that I could endorse by way of an order of the court. Furthermore I was not asked to endorse any side agreement between the other parties.

[11] My concerns essentially were that this property was worth approximately £250,000. There was a mortgage originally due to Abbey National of £34,621.76 and costs estimated at £6,750. This on the figures available gave the applicant's 15% share a value of £31,294.09 with the balance to be held on deposit of £177,333.15. On the basis of a 10% share to the applicant she would receive instead of £31,294.09, £20,862 leaving a balance to be held in deposit of £187,765.24 and that therefore all the effort and concomitant costs being put into this (not to mention the fact that the bankrupt was legally aided) was going to lead to an increase in the bankrupt's estate of approximately £10,000. Furthermore I was concerned that the October 2007 agreement provided that the bankrupt should vacate the premises, something that he had steadfastly refused to do over the course of many years, and that if he refused to vacate the premises on the basis that the agreement he had entered into was not enforceable, then further costs would undoubtedly arise by way of the EJO for an eviction, all of which would further reduce the net amount available to the creditors.

[12] To confuse the situation further, in October 2004 the premises had been remortgaged by the bankrupt, despite the fact that he had no title to them, with this remortgage now the subject of separate commercial proceedings against the solicitor involved. I understand these proceedings have been stayed, pending my judgment in regards to this aspect of the case. The remortgage was for the sum of £160,000. The Official Receiver has taken the initial view that the only amount that will be repaid out of the bankrupt's estate will be that sum that was used to clear the original mortgage due to the Abbey National with any outstanding sum due on the remortgage to be recovered from the solicitor's insurers.

[13] The application to rescind was listed for hearing on 6 June 2008. Mr Devlin, now the third counsel in this case for the Official Receiver, made the point that the terms of the alleged agreement reached in February 2007 were clear and should stand. He said that they were not putative negotiations and that the applicant was in effect estopped by her agreement to take 10% of the proceedings on that date from claiming any greater interest.

[14] Neither counsel was able to provide me with any authorities that were directly relevant to this particular situation.

[15] On that date I adjourned the matter for judgment and to await the outcome of *Rooney and Paulson* which again had become relevant to this application, given that the Official Receiver was attempting to overturn the agreement that had been reached with the bankrupt. However on that date in an attempt to move things forward, I also adjourned the case for one week to see if the Official Receiver had any objection to the property being immediately sold. The next week I made the following order:-

> "(1) The property of 25 Balmoral Mews, Belfast will be sold for £250,000 subject to a certificate of value being filed in court by Templeton Robinson estate agents.
>
> (2) The second respondent shall vacate the premises at least seven days before the completion date.
>
> (3) The Official Receiver shall have carriage of the sale.
>
> (4) The net proceeds of sale shall be held by the Official Receiver pending further consideration."

[16] This Order as had the Order of October 2007 effectively protected the bankrupt's position pending further argument.

[17] I then adjourned the matter until 12 September 2008 to see if the bankrupt had moved out of the house. On that occasion it appeared that he had not done so and that the purchaser who was available when I made the order in June was no longer available.

[18] Finally, the Official Receiver has now issued another summons, this time for possession and sale under Article 312(2)(a)(i) of the 1989 Order seeking possession of the premises and eviction of the bankrupt. It should be noted in passing that the issue of this originating summons will inevitably lead to further costs by way of stamp, legal representation etc all of which it will no doubt in due course be proposed come out of the estate of the bankrupt.

[19] During the running of the case it was not made clear to me which of the various types of estoppel were being relied upon by the applicant. It seems to me that the most likely candidate would be proprietary estoppel which is defined in Spencer Barr's Estoppel by Representation 4th Edition at paragraph 1.2.6:-

> "The doctrine of proprietary estoppel has been stated as follows:
>
> > 'Where one person, A, has acted to his detriment on the faith of a belief, which was known to and encouraged by another person, B, that he either has or is going to be given a right over B's property, B cannot insist on his strict legal rights if to do so would be inconsistent with A's belief'."

Re Basham Deceased [1986] 1 WLR 1498 at 1503 it was stated:-

> "In substance, the doctrine has the same requirements as for an estoppel by representation of fact that the party to be estopped has made a representation to the estoppel raiser, whether by language, conduct or silence and that the estoppel raiser has been induced thereby so to act that it would be unfair for the former to reside from the representation."

[20] I think it is important to note that in this application, estoppel can only arise in this case if it can be shown that counsel who appeared before me at

the hearing on October 2007 acted without instructions, and in my view, whilst it may be implicit in Mr Gowdy's affidavit, that he so acted, that case was never explicitly made before me and it is of course the task of the applicant to establish the factual and legal basis for their application before they can be successful.

[21] The matter of counsel acting without instructions, or in breach of instructions, was considered in the case of *Warner v Sampson and Another* [1958] 1 QB 404. At page 410 it is noted:-

> "Lord Esher M.R. in *Matthews v Munster* 20 Q.B.B. 141 that the power of counsel can be controlled by the court, and if, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice, the court has authority to overrule the action of the applicant."

Reference is also made to the case of *Harvey v Croydon Union Rural Sanitary Authority* (1884) 26 Ch. B. 249:-

> "Wherein it was held that the court has a general jurisdiction to do justice between the parties and a discretion to grant relief from the consequences of an action by counsel done either contrary to his instructions or by mistake …"

[22] As I have already said I have been given no factual basis on which to hold that counsel was without instructions in this case. In any event even if he did act by mistake I take the view that the significant difference between the agreement arrived at in October 2007 and that arrived at in February 2007 was that a recalcitrant defendant had for the first time given an undertaking to the court that he would vacate the premises, an order that can of course be enforced through the courts in the usual way.

[23] The second point I wish to make is that it is not entirely clear to me that the third defendant did rely to his detriment on the agreement allegedly entered into in February 2007. I have already said that at no stage was I asked to note any side agreement and furthermore the matter was further before me on 23 February 2007 when it was listed for hearing on 27 April 2007. The matter was taken out prior to that date on 25 April 2007 when counsel came on board for the bankrupt and was put into 6 June 2007 by which date the bankrupt had been granted legal aid and the matter was therefore adjourned to 12 September 2007 for mention and then for hearing on 5 October 2007. Accordingly between this side agreement being entered

into and the matter eventually coming before me for hearing there were no fewer than five opportunities to raise the issue that the applicant was estopped from running the case.

[24] Finally, the Official Receiver as a public servant, has a duty not only to the court, but to the public, as to how he conducts his office. In my view it was quite open to the Official Receiver to concede a further 5% to the applicant in the original application in order to save costs and effect the voluntary vacation of the house by the bankrupt. The further costs of this application, and the outstanding application for possession and sale, are in my view likely to lead to a situation that even were this application to succeed there would be little net benefit to the creditors of the bankrupt. In that regard I draw the parties attention to the well established principles set out in *Ex Parte James* (1874) 9 L.R. Ch app 600, regarding the duty of a trustee to act equitably to all parties.

[25] Accordingly I propose to dismiss this application to rescind the Order dated the 5th October 2007 and I will hear argument as to costs in due course.