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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

19th January 2021

CHANCERY DIVISION (BANKRUPTCY)

Re: Stephen Finlay (A Bankrupt)

2020 No 72492

BETWEEN

David Agnew as Trustee in Bankruptcy of Stephen Finlay

Applicant;

-and-

1. Stephen Finlay
2. Paula Finlay

Respondents.

MASTER KELLY

Introduction

[1] This is an application for an order under article 256A(6) of the Insolvency (Northern Ireland) Order 1989 substituting the period of 3 years specified in paragraph (2) of the said article with the period of 4 years. If granted, this would afford the trustee additional time to realise the bankrupt's interest in property

situate and known as 6 Wynward Park, Belfast ("the property") for the benefit of his creditors. The property is comprised of a dwelling-house and is owned jointly with the second respondent. It is the matrimonial home.

[2] The application was filed on 23rd October 2020. At that time, its stated purpose was to facilitate a sale of the property which was close to completion. Unfortunately, the sale fell through on 2nd December, just prior to the substantive hearing of this application.

[3] The application was heard by the Court on 18th December 2020 on an ex parte basis. However, given the unusual circumstances involved, the trustee rightly put the respondents on notice of the hearing although they did not appear or participate. Mr Gowdy QC appeared for the applicant trustee. I am very grateful to him for his helpful oral and written submissions which were of great assistance to the Court.

The statutory framework

[4] Article 256A provides:

> (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.

The facts

[5] The facts of the matter may be shortly outlined. The bankruptcy order was made on 10th November 2017. Thus the 3 year period specified in article 256A(2) ended on 10th November 2020. For the sake of clarity and convenience, throughout this judgment I will refer to the "end of the period of 3 years beginning with the date of the bankruptcy" referred to in paragraph (2) as "the third anniversary of the date of bankruptcy".

[6] It is clear that the article 256A(6) application was issued before the third anniversary of the date of bankruptcy occurred. However, as it was filed with no indication of urgency, it was given a return date of 20th November 2020. This date is consistent with the normal 28 day timescale for non-urgent applications. Accordingly, the application was filed *before* the third anniversary of the date of bankruptcy but allocated a hearing date *after* it.

The issues for the Court

[7] In determining an application under article 256A(6) there are generally two issues for the Court to consider. The first issue is the question of whether it has jurisdiction to grant the relief sought. If satisfied on that issue then the second issue is whether it should exercise its discretion to do so.

[8] The issue of jurisdiction is normally a straightforward matter but in this particular case what the Court will need to determine is the question of whether it can make an order under article 256A(6) if the third anniversary of the date of bankruptcy occurs between the date of issue of the application and its return date, i.e. the date on which the court is due to hear and decide it.

[9] I will now turn to the trustee's submissions.

The trustee's case

[10] The trustee's solicitor admits that he was aware that the application had issued for a hearing date beyond the third anniversary of the date of bankruptcy. However, he argues that his interpretation of article 256A is that the issuing of the application before the time specified in article 256A(2) would "stop time running" as the article "specifically allows for certain applications to be issued that stop time running". He submits that the Court has jurisdiction to grant the relief sought provided that the application is *made* within the 3 years specified in the article. In support of that argument he relies on the case of Re Davey (bankrupt) [2014] NICh2 in which Horner J said at [14] of his judgment:

> " After three years (and in the absence of the exceptions referred to above), and if no application is made to substitute a longer period during that three year period, then any interest of the Trustee in the Home automatically ceases and vests in the Bankrupt."

The exceptions referred to in the above passage from Davey are those specified in article 256A(3).

Consideration

[11] Neither the Davey case nor any of the other authorities relied on by the trustee (see: Re William Rose [2013] Scot SC 42 [2013] BPIR 955 and Sands v Singh [2015] EWHC 2219 (Ch), [2015] BPIR 1293) assists him in the question of jurisdiction. That is because those authorities are predicated on the issue of the date by which proceedings were, or ought to have been, filed/issued/brought/started under article 256A (and its Scottish and English equivalent). But that is not an issue here because it is clear that the application with which we are concerned was properly filed and issued before the third anniversary of the date of bankruptcy took place.

[12] As the application was filed on time, the only 'time' which then becomes relevant is the specific point in time to which 256A(2) refers. In plain language, that specific point in time is the third anniversary of the date of bankruptcy whereupon the bankrupt's interest in his home re-vests in him automatically by operation of statute. Nothing can prevent that date from occurring. There are only clear and

unambiguous terms which provide for circumstances which prevent the statutory *re-vesting* from taking place on that specific date.

[13] A pending application under article 256A(6) is not one of the exceptions in article 256A(3) to the statutory re-vesting on the third anniversary of the date of bankruptcy. This means that any order to be made under article 256A(6) must be made before article 256A(2) takes effect. Simply put, that means that the Court must make any order substituting the 3 year period with a longer period before the third anniversary of the date of bankruptcy occurs. It is for this reason that article 256A(6) is commonly referred to as the 'use it or lose it' provision.

[14] Under the 'use it or lose it' provision, with the third anniversary of the bankruptcy date approaching, there were two options open to the trustee. He could either issue an Originating Application for possession and sale or he could lodge an Originating Application under Article 256A(6). In this case the trustee chose the latter. He gave various reasons for this choice which are not particularly relevant but what is relevant is the material difference between the two forms of relief under article 256A. That difference is that an application for possession and sale need only be *issued* before the third anniversary of the date of bankruptcy to prevent the statutory re-vesting taking place whereas an application under article 256A(6) must be *issued*, *heard* and an *order made* before that date in order to have the same effect.

Conclusion

[16] Regrettably, there is no merit to the trustee's case. This application could have been heard urgently if required, and even without notice to any other party. There is clear provision for this in Rule 7.08 (6) of the Insolvency Rules (Northern Ireland) 1991. It is accepted that this did not happen because it was believed that the filing of the application was sufficient to protect the bankruptcy estate. But this belief was misconceived for the reasons given.

[17] No order was sought or made under article 256A(6) before the third anniversary of the date of bankruptcy, and the Court does not now have jurisdiction to grant the relief sought because the bankrupt's interest in the subject property re-vested in him and ceased to form part of the bankrupt's estate on 10th November 2020 by operation of statute.