

2011/013743

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

RE: CIARAN GALLAGHER (BANKRUPT)

BETWEEN:

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Applicant:

and

CATHERINE GALLAGHER

Respondent:

MASTER KELLY

INTRODUCTION.

- (1) This case involves two applications arising out of a bankruptcy in which there were ongoing ancillary relief proceedings prior to the making of the bankruptcy order. The ancillary relief proceedings settled by way of a matrimonial agreement which was then made an order of court. The bankruptcy order was made shortly thereafter. The Official Receiver's application seeks a declaration that property dispositions under the terms of the matrimonial agreement are void under Article 257 of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order"), as Article 257 provides that any property disposition made by the debtor during the period between the presentation of a bankruptcy petition and the making of a bankruptcy order, is void unless it is made with the consent of the High Court or was subsequently ratified by the Court. The Official Receiver further seeks an order setting aside the matrimonial agreement. By cross application the respondent seeks an order under Article 257 ratifying the property dispositions. At the hearing of this application the Official Receiver was represented by Mr Gowdy and the respondent by Mr Girvan.

The factual background.

- (2) The facts in this case are not materially in dispute. On 31st January 2011 a bankruptcy petition was presented against the bankrupt by Her Majesty's Revenue and Customs ("HMRC") in the sum of £154,510.99. The petition was initially endorsed with a hearing date of 9th March 2011. A new hearing date of 4th May 2011 was subsequently appointed by the bankruptcy court in order to facilitate the substituted service of the petition on the bankrupt. On 4th May 2011 the petition was apparently dealt with by the matrimonial court in the course of ancillary relief proceedings where the court remained seised of it until a bankruptcy order was made on 13th January 2012.
- (3) The ancillary relief proceedings settled on agreed terms on or about 15th November 2011. Both parties were represented by Senior and Junior Counsel. Terms of agreement were executed by the parties on that date and the agreement was placed before the court on 18th November 2011 for approval. The bankruptcy petition was also before the court on 18th November 2011. On that date it appears the court was advised that following the submission of tax returns the petitioner's debt would be/had been adjusted from £154,510.99 to £19,600.
- (4) The terms of the matrimonial agreement provided for inter alia:
 - (a) A lump sum payment to the respondent in the sum of €20,000.
 - (b) The payment of £21,500 to HMRC in settlement of the bankruptcy petition.
 - (c) A transfer to the respondent of the bankrupt's interest in property at Culoort, Malin, Co Donegal.

The court approved the terms of the matrimonial agreement which was made an order of court on 18th November 2011.

- (5) The bankruptcy petition was adjourned to 9th December 2011 and again to 13th January 2012. There was no appearance by or on behalf of the debtor on either occasion. As the petition debt remained unpaid on 13th January 2012, a bankruptcy order was made on that date.
- (6) Following the bankruptcy order the bankrupt applied to annul the bankruptcy but withdrew his application when he had to concede that his liability to HMRC now extended significantly beyond the content of the bankruptcy petition. As at the date of bankruptcy the liability was £207,546.72. I will return to this particular issue later.

The parties' case.

- (7) It is common case that property adjustment orders may be made in ancillary relief proceedings before, but not after, the making of a bankruptcy order. It is also common case that the property adjustment orders in this case were made prior to the bankruptcy order. It is further common case that the principles established in **Haines -v-Hill [2007] EWCA Civ 1284**, which restrict the grounds for setting aside property adjustment orders in bankruptcy to fraud, mistake, misrepresentation and collusion, do not apply in this case. Rather, the Official Receiver's case is a discrete one. Put simply, the Official Receiver's application contends that the matrimonial order should be set aside on the basis that the property dispositions at paragraph (4) *supra* are void under the provisions of Article 257 of the 1989 Order which states at paragraph (1):

"Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this Article applies is void except to the extent that it is or was made with the consent of the High Court, or is or was subsequently ratified by the Court."

The relevant period to which Article 257 applies is the date following presentation of a bankruptcy petition (in this case **31st January 2011**) to the date of vesting of the bankrupt's estate in the Official Receiver (in this case **13th January 2012**).

(8) The underlying premise of the Official Receiver's case seems to be firstly, that the bankruptcy petition ought not to have been removed from the bankruptcy court to the matrimonial court; secondly, that the petition was adjourned by the matrimonial court for an excessive period of time; and thirdly, that the bankruptcy court did not consent to the property dispositions under Article 257 of the 1989 Order. Mr Gowdy submitted that the rationale for the Official Receiver's position was:

- (i) The two sets of proceedings, while having the debtor in common, were otherwise unconnected.
- (ii) The court in ancillary relief proceedings is concerned only with the interests of the parties to the marriage and the children of the marriage, whereas the court in bankruptcy proceedings is concerned only with the debtor and the creditors of the debtor.
- (iii) The presentation of a bankruptcy petition is an emergent legal process which requires urgent action to (a) avoid bankruptcy and (b) protect the assets of the debtor for the benefit of creditors.

- (iv) Following the presentation of a bankruptcy petition, the debtor is restricted from making a disposition of his assets without the consent of the High Court under Article 257 (1) of the Order.

In other words, the Official Receiver contends that the removal of the petition from the bankruptcy court to the matrimonial court was inappropriate, and that the bankruptcy petition ought not to have been adjourned over such a lengthy period, particularly in light of the extent of the insolvency of the bankrupt. It is argued that had the bankruptcy petition been dealt with more expeditiously, the bankruptcy order would have been made more promptly, and in all likelihood, before the property adjustment orders were made. It is the Official Receiver's contention that the assets comprised in the property adjustment orders would then have been available for the creditors in the bankruptcy.

(9) The respondent's case is straightforward; namely, that if the Official Receiver accepts that the agreement cannot be set aside under **Haines -v- Hill**, the Official Receiver's case is at best, that the court should, as a formality, ratify the disposition retrospectively under Article 257. In this regard, the respondent brings her own application under Article 257. In order to consider the parties' respective applications, it is firstly necessary to consider the matrimonial agreement within the context of the relevant matrimonial authorities and secondly, it is necessary to examine the basis on which such agreements may be set aside following bankruptcy.

The legal framework.

(10) The fundamental principle of the relevant matrimonial law is that it is founded on the principle of equality. However, in ancillary relief proceedings, the court has the discretion to depart from the principle of equality if satisfied that it is in the interests of fairness to do so. Mr Girvan argued that the starting point for the consideration of matrimonial entitlement is Article 27 of the Matrimonial Causes (Northern Ireland) Order 1978. This sets out the factors that the court may take into account when making property adjustment orders, or approving a matrimonial agreement. These are:

1. The financial needs of any child under 18.
2. Income and earning capacity of the parties.
3. The financial needs and obligations of the parties.
4. The standard of living enjoyed by the family prior to the breakdown of the marriage.

5. The age of each party to the marriage and the duration of the marriage.
6. Any physical or mental disability of the parties of the marriage.
7. The contribution made by each of the parties to the marriage to the welfare of the family, including any contribution by looking after the home or caring for the family.

8. The conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.

For present purposes, the salient facts are:

- (a) This was a 13 year marriage.
- (b) There were three children of the marriage. All three children were under 18 at the commencement of the ancillary relief proceedings although the eldest attained the age of 18 before the conclusion of the proceedings.
- (c) All three children were in full time education and resided with the respondent in rented accommodation, the family home having been re-possessed.
- (d) Neither party to the ancillary relief proceedings was employed. Both were in receipt of State benefits.
- (e) The joint assets of the parties were comprised of properties which were either re-possessed or of little value.

In **Miller -v-Miller [2006] 1FLR 1186**, Lord Nicholls expanded upon the issue of “fairness” in the following key paragraphs of his judgment:-

(4) “Fairness is an illusive concept, it is an instinctive response to a given set of facts. Ultimately it is grounded in social and moral values. These values, or attitudes can be stated. But they cannot be justified, or refuted, by any objective process of logical reasoning. Moreover, they can change from one generation to the next. It is not surprising therefore that in the present context there can be different views on the requirements of fairness in any particular case.”

(8)“ For many years one principle applied by the Court was to have regard to reasonable requirements of the claimant, usually the wife, and treat this as determinative of the extent of the claimant’s award. Fairness lay in enabling the wife to continue to live in the fashion to which she had become accustomed. The glass ceiling which was put in place was shattered by the decision of Your Lordships House in the White case. This has accentuated the need for some further judicial enunciation of general principles.

The starting point is surely not controversial. In the search for a fair outcome it is pertinent to have in mind that fairness generates obligations as well as rights. The financial provision made on divorce by one party to the other, still typically the wife, is not in the nature of largesse. It is not a case of taking away 'from one party' and giving 'to the other party' property which 'belongs to the former'. The claimant is not a suppliant. Each party to the marriage is entitled to a *fair* share of the available property. The search is always for what are the *requirements* of fairness in the particular case."

(11) "This element of fairness reflects the fact that to a greater or lesser extent every relationship of marriage gives rise to a relationship of interdependence. The parties share the roles of money earner, homemaker and childcarer. Mutual dependence begets mutual obligations of support. When the marriage ends, fairness requires that the assets of the parties should be divided primarily so as to make provision for the parties' housing and financial needs, taking into account a wide range of matters such as the parties' ages, their future earning capacity, the family standard of living, and any disability of either party. Most of these needs will have been generated by the marriage, but not all of them. Needs arising from age or disability are instances of the latter."

(13) "Another strand, recognised more explicitly now than formally, is compensation. This is aimed at redressing any significant prospective economic disparity between the parties arising from the way they conducted their marriage. For instance the parties may have arranged their affairs in a way which has greatly advantaged the husband in terms of his earning capacity but left the wife severely handicapped so far as her own earning capacity is concerned. Then the wife suffers a double loss; a loss in her earning capacity and the loss in a share of her husband's enhanced income. This is often the case. Although less marked than in the past, women may still suffer a disproportionate financial loss on the breakdown of a marriage because of their traditional role as a homemaker and childcarer".

(14)" A third strand is sharing. This equal sharing principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals...this is now recognised widely, if not universally. Parties commit themselves to sharing their lives, they live and work together. When that partnership ends each is entitled to an equal share of the assets of the partnership, unless there is good reason to the contrary. Fairness requires no less. But I emphasise the qualifying phrase, unless there is good reason to the contrary. The yardstick of equality is to be applied as an aid not a rule."

Mr Girvan argued that if there was a departure from the principle of equality in the matrimonial proceedings, it was because on the facts of the case the respondent was by virtue of Article 27 entitled to a fair share in the bankrupt's assets.

(11) On the issue of Article 257 the respondent defends the Official Receiver's application on two grounds. The first ground is that the property disposition was made with the consent of the High Court and is not void. The second ground is that the matrimonial agreement was a negotiated settlement of the matrimonial assets pursuant to the Matrimonial Causes (NI) Order 1989 and, as it was approved by the matrimonial court, it should be ratified by the bankruptcy court under Article 257. The respondent further relies on the fact that the petitioning creditor, the main creditor in the bankruptcy, was represented in court on 18th November 2011 when the agreement was made an order of court. In doing so, the respondent seems to suggest that the petitioning creditor in some way acquiesced or consented to the terms of the matrimonial order, as it provided for the discharge of the petition debt. I do not accept that proposition. The petitioning creditor had no locus standi in the matrimonial proceedings. Similarly, the respondent had no locus standi in the bankruptcy proceedings. However, as the two sets of proceedings had effectively been joined together, the petitioning creditor was obligated to attend all hearings or risk the petition being struck out for non-appearance. If a bankruptcy petition is struck out for non-appearance, Rule 6.023 of the Insolvency Rules (Northern Ireland) 1991 ("the 1991 Rules") states:

" If the petitioning creditor fails to appear on the hearing of the petition, no subsequent petition against the same debtor, either alone or jointly with any other person, shall be presented by the same creditor in respect of the same debt, without the leave of the court."

In order to avoid the consequences of Rule 6.023, a petitioning creditor must always appear at the hearing of a bankruptcy petition.

(12) I now turn to the wider issue of setting aside a matrimonial agreement following bankruptcy. Although it is conceded by the Official Receiver that **Haines -v-Hill** is not directly relevant to the present case, the respondent nevertheless relied on it in her defence of the Official Receiver's application and in support of her own Article 257 application. In **Haines -v-Hill** the Court of Appeal held that the claim of one spouse to their matrimonial entitlement in accordance with the relevant matrimonial provisions provided consideration for the transfer of property. The court further considered that a property adjustment order could only be set aside on the grounds of fraud, collusion, mistake or misrepresentation. At paragraph 35 of the judgment Morritt C states:

"If one considers the economic realities, the order of the court quantifies the value of the applicant spouse's statutory right by reference to the value of the money or property thereby ordered to be paid or transferred by the respondent spouse to

the applicant. In the case of such an order, whether following contested proceedings or by way of compromise, in the absence of the usual vitiating factors of fraud, mistake or misrepresentation the one balances the other. But if any such factor is established by a trustee in bankruptcy on an application under section 339 of the 1986 Act {equivalent to Article 312 of the Order} then it will be apparent that the prima facie balance was not the true one and the transaction may be liable to be set aside”.

On the issue of collusion, Rix LJ states at paragraph 82:

“Finally, as to policy, it would be unfortunate in the extreme if a court-approved, or even (an a fortiori case) a court-determined property adjustment order would be liable, in practice, to be undone for up to five years because the husband goes bankrupt within that period. That could even encourage such bankruptcy on the part of a disaffected husband. Although a collusive agreement by a divorcing husband and wife to prefer the wife and children over creditors and thus dishonestly to transfer to her more than his estate can truly bear, if his debts were properly taken into account, and thus more than her ancillary relief claim could really and knowingly be worth, is no doubt susceptible to section 339 {**Article 312**}A relief despite the existence of a court order in her favour (see the decision in *Kumar’s* case) [1993] 1 WLR 224): nevertheless, in the ordinary case, where there is no dishonest collusion, and where a court approves or determines the sum of property to be transferred, it would be entirely foreign to the concept of a “clean break” if the husband’s creditors could therefore seek to recover, in bankruptcy, the property transferred or its value. However, in my judgment it would require the overthrow of long established jurisprudence, the reinterpretation of section 39, the misunderstanding of the doctrine of consideration, and an assault on current views of the statutory entitlement to ancillary relief, to arrive at that unhappy and unnecessary situation”.

(See also **Re Kumar** [1993]2 ALL ER 700).

Without doubt, the principles established in **Haines -v- Hill** now afford greater protection for spouses in terms of property adjustment orders in the event of bankruptcy. Given my earlier observations on what I consider to be the underlying premise of the Official Receiver’s

application, I am led to conclude from the Official Receiver's various arguments that the real question he seems to be asking the court to decide, is whether the matrimonial agreement may be set aside as void under Article 257 if it cannot be set aside under **Haines-v-Hill**.

Consideration

(13) Both applications in this case turn on the interpretation and application of Article 257 of the 1989 Order. The starting point for consideration of this is the bankruptcy order itself. The reason for this is that the bankruptcy order has the effect of vesting a bankrupt's assets in a trustee in bankruptcy, to be realised by the trustee, with the proceeds of realisation distributed to the creditors *pari passu*. Therefore, in my view, the true purpose of Article 257 is to protect creditors from any unlawful dispositions of assets between the date of presentation of the bankruptcy petition and the making of a bankruptcy order; as this could potentially offend the *pari passu* rule, or prejudice the interests of the creditors generally. However, the corollary of that is that there may be lawful dispositions of assets within that period. A bankruptcy petition does not necessarily result in a bankruptcy order. Therefore, the existence of a bankruptcy petition should not be allowed to impede the administration of justice in other statutory jurisdictions. It is against that background that I am satisfied that the wording of Article 257, which simply refers to the "High Court", acknowledges that property dispositions may be made during the relevant period to which Article 257 relates, in High Court proceedings generally.

This leads me to conclude that the provisions of Article 257 establish criteria for lawful dispositions of property between the date of presentation of a bankruptcy petition and the making of a bankruptcy order. Those criteria are that the property disposition must be (a), on foot of some form of High Court proceedings and (b), with the consent or ratification of the High Court (which includes the bankruptcy court). However, for any disposition which does not meet these criteria, this may still be addressed if it is deemed necessary to do so by a subsequent application to the High Court to ratify the disposition for the purposes of Article 257.

For present purposes, as the ancillary relief proceedings were High Court proceedings, I am satisfied that the matrimonial court's approval of the matrimonial agreement and the subsequent order fulfilled the

Article 257 criteria. In the circumstances, I am satisfied that the matrimonial agreement is not void save as to the term providing for the payment of £21,500 to the petitioning creditor. Both parties seem to agree that this particular term in the agreement could not have been discharged given that the bankrupt's overall liability to the petitioning creditor exceeded that which was the subject of the petition. However, I do not agree that is the case. Rule 6.008 of the 1991 Rules limits the amount claimed on a bankruptcy petition to that which is claimed on the Statutory Demand, and the period to which the Statutory Demand applies. It follows therefore that the debt contained within a bankruptcy petition is always historic, and that it cannot increase. It can only decrease. If the petition debt is discharged, the debtor is entitled to seek the dismissal of the petition. Thereafter, the creditor may issue a fresh statutory demand for any further liability which has accrued. However, if the petition is not dismissed and a bankruptcy order is made, the creditor is entitled to prove in the bankruptcy for the full amount due as at the date of bankruptcy. There is therefore a distinct difference between a petition debt and a bankruptcy debt – the latter being a creation of the bankruptcy order. With Crown debts for example, or petitions in respect of rent arrears, the petition debt and the bankruptcy debt can differ significantly given the somewhat continuous nature of those liabilities.

Returning to the present case, as at the date of the court approval of the matrimonial agreement, there was only the petition liability to be addressed. It is noted that the sum of £21,500 was required to dismiss the petition and that this sum was provided for in the matrimonial agreement. However, this sum was not paid to the petitioning creditor and, as there was no further appearance at the hearing of the petition by either party to the ancillary relief proceedings, the petitioning creditor sought and obtained a bankruptcy order on 13th January 2012. I am satisfied that the bankruptcy order has rendered the provision in the matrimonial agreement for the payment of £21,500 to the petitioning creditor void, and that the £21,500 now forms part of the bankruptcy estate.

Conclusion.

(14) For the reasons set out above and throughout this judgment, I am satisfied that the property dispositions in the matrimonial agreement in this case are not void under the provisions of Article 257, save as to the

limited extent that the sum of £21,500 which was originally to be paid to the petitioning creditor to dismiss the petition should now be paid to the Official Receiver. In the circumstances, I dismiss both applications. As there is a Mareva Injunction currently in place, I am unable to make any directions as to the payment of the £21,500 to the Official Receiver. That will now be a matter for the learned judge.