Neutral Citation No. [2013] NIMaster 9 | *Ref:* **2013NIMaster9**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **15/04/2013**

2008/132290/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

RE: KIERAN JOSEPH MALLON (BANKRUPT)

BETWEEN:

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Applicant:

and

DEIRDRE MALLON

Respondent:

MASTER KELLY

Introduction.

[1] This is an application by the Official Receiver who seeks a declaration that the transfer of premises comprised in folio 33607 Co Tyrone from the bankrupt to the respondent in or about 28th April 2006 was a transaction at an undervalue. The Official Receiver also seeks an order setting aside the said transfer under Articles 312, 314 & 315 of the Insolvency (Northern Ireland) 1989. The respondent resists the application and contends, among other things, that the beneficial interests in the premises were held otherwise than in accordance with the legal title.

[2] The applicant's case is made out in the affidavit of the Official Receiver dated 9th March 2010. The respondent's case is made out on her affidavits of 5th August 2010 and 2nd November 2011, and her evidence at the hearing of this application. The respondent also relies on the evidence of her father, James Joseph Mallon, who gave his evidence on commission at Dungannon Courthouse on 12th November 2012. An agreed transcript of that evidence was placed before the court at the hearing. The court also had the benefit of the parties' helpful skeleton arguments which are gratefully acknowledged. The applicant was represented by Mr Gowdy and the respondent by Mr Montague QC, who led Mr Foster.

Background

[3] The premises which are the subject of this application comprise a dwelling-house which is contained in folio 33607 County Tyrone. According to the Land Certificate, folio 33607 County Tyrone was originally registered in the sole name of the respondent's father James Joseph Mallon in or about 3rd January 1973. Mr Mallon then built the house known as 50 Rossmore Road, Dungannon, on the land. The house then became the family home in which the respondent, the bankrupt, and their 5 siblings lived and grew up. The respondent, who is now 41 and the second youngest of the family, never left home and is the only one of the siblings remaining in the property where she resides with her father, now in his 70s. The respondent's mother died in 1997.

[4] In or about 15th March 1995, a transfer of the property took place between Mr Mallon and the bankrupt. The consideration for the transfer was £25,000. The transfer was registered in the Land Registry with the bankrupt recorded as the full legal owner of the property. The respondent contends that the sole purpose of this transaction was to enable the bankrupt to use the property to raise capital and start up his own business; and that her father did not intend to dispose of his interest in the property. The respondent further contends that the fact that the family continued to live in the property as if no transaction had taken place together with the fact that the sum of £25,000 is a modest sum, should be taken as evidence that the transaction could only have been for this capital-raising purpose.

[5] Following the transfer of the property to the bankrupt, the bankrupt established himself in a joinery business at or about the property. The respondent says that the bankrupt always seemed to be busy at his work. Some 11 years later, the respondent says there was discussion between herself and the bankrupt regarding the house. It is her case that it was agreed between them that as the bankrupt was getting married the respondent would buy the house and a figure was agreed between them of £56,921.89 being the amount due to redeem the mortgage at this time. Mr Mallon

was not a party to any discussions or the arrangement between the bankrupt and the respondent.

[6]In or around 21st April 2006 the bankrupt got married and on 28th April 2006 transferred his interest in the property to the respondent for the sum of £56,921.89 which the respondent secured by way of mortgage with Alliance & Leicester. The Land Registry transfer records the bankrupt as the sole beneficial owner. As part of that transfer, Mr Mallon signed a Deed of Postponement of any interest he had in the property and according to the Land Registry search the respondent was registered as full owner on or about 7th June 2006.

[7] On 25th February 2009, a bankruptcy order was made against the bankrupt. In the course of his administration of the bankrupt's estate the Official Receiver obtained a valuation of the property as at the date of the transfer from the bankrupt to the respondent in 2006, and also as at the approximate date of bankruptcy in 2009. These valuations are to be found in the report of auctioneer and valuer James Armstrong dated 10th March 2009. This report is exhibited to the Official Receiver's affidavit and is not in dispute. This report values the property at around £110,000 as at 2006 and around £150,000 as at 10th March 2009. Therefore, according to the undisputed report of Mr Armstrong, the property was worth £110,000 at the time it was transferred by the bankrupt to the respondent for the sum of £56,921.89.

Articles 312, 314 & 315 of the Insolvency (Northern Ireland) Order 1989 (the 1989 Order)

[8] Article 312 of the 1989 Order grants the court power to set aside transactions at an undervalue (provided they occurred at a "relevant time") and make an order restoring the position to what it would have been if the individual had not entered into the transaction. It also defines an undervalue transaction as:

> (a) a gift to a person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration.
>
> (b) a transaction entered into in consideration of marriage, or
>
> (c) a transaction entered into for consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual .

[9] Article 314 deals with the issue of "relevant time" within the context of both preferences and transactions at an undervalue. If the undervalue transaction

occurred five or more years prior to the presentation of the bankruptcy petition, then it cannot be set aside. If the transaction occurred less than two years prior to the presentation of the petition it is prima facie void. If the transaction occurred more than two years but less than five years prior to presentation of the petition, it cannot be set aside unless the individual was insolvent at the time of the transaction or became insolvent as a result of the transaction.

Paragraph (3) of Article 314 provides that an individual is insolvent if:

(a) he is unable to pay his debts as they fall due; or

(b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities.

Where the undervalue transaction is entered into by an individual with an "associate" (other than as an employee of the individual), the insolvency of the individual transferor is presumed to be satisfied unless the contrary is shown. The definition of "associate" for the purposes of the 1989 Order is widely defined in Article 4 but includes relatives of the individual transferor. It is therefore relevant to this case.

[10] Article 315 of the 1989 Order grants the court inter alia power to set aside a transaction at an undervalue and restore the position to what it would have been had the individual not entered into the transaction.

[11] For present purposes, the undisputed facts of this case together with the provisions of Articles 312,314 & 315 establish the following material facts:

(i) The transaction between the bankrupt and the respondent was a transaction entered into for consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the individual .

(ii) The transaction took place at a relevant time.

(iii) The respondent is an associate of the bankrupt.

(iv) The insolvency of the bankrupt is presumed unless the contrary may be shown;

(v) The onus is on the party contending solvency to prove solvency.

[12] According to the respondent's skeleton argument, which I accept was filed prior to Mr Mallon's evidence, the respondent advances three propositions in defence of the application. These are firstly, that the beneficial interest in the subject property is held other than in accordance with the legal interest; secondly, that the respondent is entitled to argue proprietary estoppel in defence of the application; and thirdly, that the bankrupt was not insolvent at the time of the transaction. It follows therefore that these are the three issues to be considered and it is common case that the respondent bears the burden of proof on all three issues.

Discussion.

[13] In order to consider the legal concept of a constructive trust it is necessary to ascertain from the evidence what the common intention of the parties giving rise to that trust. The relevant principles in relation to a constructive trust were set out by Sir Nicolas Browne-Wilkinson VC in **Grant v Edwards & another [1986] Ch. 638** and cited with approval by Stephens J in the case of **McKenna –v-McDonnell [2008] NICh 17** in paragraph [19] of his judgment as follows:

> "In my judgment, there has been a tendency over the years to distort the principles as laid down in the speech of Lord Diplock in *Gissing v. Gissing* [1971]A.C.886 by concentrating on only part of his reasoning. For present purposes, his speech can be treated as falling into three sections: the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right. 1. The nature of the substantive right (p905B-G). If the legal estate in the joint home is vested in only one of the parties ('the legal owner') the other party ('the claimant'), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; (b) that the claimant has acted to his or her detriment on the basis of that common intention. 2. The proof of the common intention. (a) Direct evidence (p. 905H). It is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention: see pp. 907C and 908C. (b) Inferred common intention (pp. 906A-908D). Lord Diplock points out that, even where

> parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to infer such intention viz. contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust. 3. The quantification of the right (pp. 908D-909). Once it has been established that the parties had a common intention that both should have a beneficial interest *and* that the claimant has acted to his detriment, the question may still remain 'what is the extent of the claimant's beneficial interest?' This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important."

(See also **Jones –v-Kernott [2011]UKSC53 paras [51]-[52]; & Oxley –v-Hiscock [2005]Fam211**)

At paragraph [20] Stephens J also addresses the issue of proprietary estoppel:

> " A claimant under a constructive trust is entitled to the agreed beneficial interest (see *Snell's Equity* 31st Edition at paragraph 22-39) whereas the remedy in respect of a proprietary estoppel is discretionary. Accordingly if the plaintiff relied on a proprietary estoppel then in assessing the extent of the plaintiff's beneficial interest I would look at the circumstances to decide in what way the equity can be satisfied but to approach the task with caution in order to achieve the minimum equity to do justice to the plaintiff. In approaching that task in this case I would take a range of factors into account including the other claims legal and moral on the estate of the deceased. I would bear in mind that satisfying the equity is different from satisfying the expectation. However if as here I find that there was an agreement giving rise to a constructive trust then I am obliged to give effect to that agreement."

It follows that in order to consider and give effect to the common intention of the parties to an alleged trust, it is necessary to first establish the identity of the parties. It is then necessary to identify the transaction giving rise to the claim. There are two separate transactions in this case. It is unclear from the respondent's evidence whom she claims to be the beneficiary or beneficiaries of any constructive trust. On the one hand, the respondent (herself now the sole registered owner of the property) refers to the property as the "family" home. On the other hand, she asserts that the house is referred to generally by the family as "Daddy's house". However, for the purposes of this application there is no evidence from any other family member. The only evidence is that of the respondent and her father. The respondent's own evidence, to which I will return later, is that she had no knowledge of the transfer of the property from her father to the bankrupt, and that she only discovered it by chance after it had occurred in what she described as a "fleeting moment of conversation" with her late mother. In the circumstances, I consider that the starting point for the consideration of the issues of constructive trust/proprietary estoppel is the evidence of Mr Mallon.

[14] Mr Mallon's evidence was not fulsome and there was without doubt a degree of confusion in it. However, according to the transcript of his evidence, he states that the bankrupt approached him in or about 1995 and asked him if he would sell the house to him. He attributes this to the fact that the bankrupt wanted to start up a business and needed the finance to do so. When asked by Mr Foster about the nature of the discussion between himself and the bankrupt regarding the bankrupt's proposition, Mr Mallon said: "So he asked me would I sell the house to him. Not at the moment I didn't but I consulted with my wife and the both of us agreed." His evidence continued that the sale of the property to the bankrupt made "no difference whatsoever" to the property as a family home, and that he and his wife continued to discharge the domestic utilities and carry out maintenance and running repairs to the property. When asked by Mr Foster what Mr Mallon meant by the property always being a family home, Mr Mallon replied: " What I meant was that Kieran wouldn't be selling the house to anybody else only somebody in the family." When asked if he was aware of the bankrupt subsequently selling the house, Mr Mallon confirmed he knew that it had been sold to the respondent. When asked of the reason for the sale he replied "Well he was in financial difficulties as far as I can make out." However, Mr Mallon did admit that he was not aware of these financial difficulties at the time but later, in response to Mr Foster's further questions, contradicted his earlier evidence by saying "Well the one thing I completely refute is financial difficulties." When asked by Mr Foster how he would feel about the bankrupt selling the property to someone outside the family his evidence was that

he wouldn't have been too happy about it, but that "if the house was gone there would have been nothing I could have done about it."

[15] On the question of the £25,000 agreed as consideration for the transfer, Mr Mallon's evidence did not expand upon the reason why that sum was agreed but nor did he express any dissatisfaction about it. Mr Mallon accepted that no market valuation was obtained at the time for the house, but was unable to say what he considered the value of the property to be at the relevant time, or why a valuation was not obtained. He only stated that he didn't think this was the full value of the house at this time.

[16] During cross –examination by Mr Gowdy, Mr Mallon accepted that he was represented by a solicitor in the transaction between himself and the bankrupt and that no trust deed was drawn up. Mr Mallon also accepted that his solicitor was not given instructions other than the property was being sold by Mr Mallon to the bankrupt. He also acknowledged in his evidence that the property was initially mortgaged with the Woolwich Building Society and re-mortgaged twice thereafter by the bankrupt. His evidence is that he was unaware of these transactions and that the bankrupt had never approached him to obtain any consent to re-mortgage the property. He confirmed his understanding that if a debt to the building society was not paid back that the building society could sell the house.

[17] I am satisfied that Mr Mallon is an entirely honest witness. There has been ample opportunity due to the passage of time to embellish what agreement had taken place between himself and the bankrupt. However, he gave his evidence without embellishment or rancour. He expressed no regret about the transaction. He made no accusations of improper or unconscionable conduct against the bankrupt. I am led to conclude from that evidence that it is consistent with a belief and intention that the bankrupt was to become the sole legal and beneficial owner of the property by virtue of the following facts which may be distilled from that evidence, namely:

> (i) The bankrupt approached Mr Mallon and asked him if he would sell 50 Rossmore Road to him.
>
> (ii) Initially Mr Mallon refused to sell but after discussion with his wife agreed.
>
> (iii) A solicitor was instructed to deal with a sale of the property from Mr Mallon to the bankrupt for an agreed consideration of £25,000. The solicitor was not instructed about any trust agreement.

(iv)Mr Mallon understood that the bankrupt was legally entitled to sell the property and there was nothing he could have done about that.

(v)The bankrupt was entitled to raise finance on it without the consent of any other party; and that he understood the concept of re-possession.

While I accept that it may have been understood between the bankrupt and Mr Mallon that the family would remain in occupation of the property after it had been sold, I consider this to be more suggestive of a private family agreement among close family members, who have a keen sense of family and a strong bond of trust rather than a trust within the legal definition. This is further evidenced by the fact that when selling the property to the respondent (his sister) some 11 years later, the bankrupt did so in accordance with the agreement with his father. It is against this background that I accept that 50 Rossmore Road is/was considered to be the family home.

[18]As to the issue of the consideration of £25,000, while this does appear to be a comparatively modest sum by today's standards, it cannot be assumed, in the absence of evidence to the contrary, that there was not valuable consideration for the transaction. The issue is in any case immaterial as Mr Mallon gave no evidence that he was unhappy with that sum or the circumstances of transfer of the property to the bankrupt. No evidence has been produced to suggest that circa 1995 (almost 20 years ago) this was an unreasonable sum for a property of this type, in this area. In his report, Mr Armstrong describes the property as a modest bungalow in a rural area and in the absence of evidence to the contrary, I do not accept the respondent's claim that this was an undervalue sum. Moreover, I consider that Mr Mallon and his family did gain significant benefit from the transaction in that they continued to live in the property for many years as if nothing had changed, but without the burden of a mortgage. The financial contributions referred to in the respondent's evidence in respect of utilities and maintenance of the property do not, in my view, amount to anything more than the normal domestic expenditure for a family in occupation of a home. As stated by Lord Hope in **Stack v Dowden [2007] UKHL 17:**

> "Parties are, of course, free to enter into whatever bargain they wish and, so long as it is clearly expressed and can be proved, the court will give effect to it. But for the rest the state of the legal title will determine the right starting point. The onus is then on the party who contends that the beneficial interests are divided between them otherwise than as the title shows to demonstrate this on the facts."

[19] In the context of the particular circumstances of the case and Mr Mallon's evidence, I am satisfied that he sold the property at 50 Rossmore Road Dungannon to the bankrupt in 1995 for reasons which apparently suited them both. In the circumstances, I find that the bankrupt was the sole legal and beneficial owner of the property as at the date of the transfer to the respondent. It follows therefore that I am unable to accept the respondent's claim of a constructive trust.

[20] I now turn to the issue of proprietary estoppel. In the case of **Gillett –v-Holt [2001]1CH 210,** Walker LJ stated:

> " the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round."

The respondent's evidence, which I accept, is that the basis for the transfer of the property from the bankrupt to herself was the fact that the bankrupt was getting married; and the respondent was by now the only sibling still living at home and caring for their father who was not in the best of health. When asked by Mr Montague what precipitated the transfer of the property to her name, the respondent's evidence was that "(her) mind-set was that Kieran was getting married and moving to Derry." The respondent gave no evidence of Mr Mallon being involved in any discussions between herself and the bankrupt about her purchasing the property from him. I consider this to be a significant issue if, as alleged by the respondent, the beneficial interest in the property was otherwise than the legal title. As there were no other parties to the discussion between the bankrupt and respondent, and the respondent already knew that the bankrupt was the full legal owner of the property, I am satisfied that the respondent understood the bankrupt to be the sole legal and beneficial owner of the property. When asked about her siblings views on the transaction, the respondent's evidence was that her siblings were not concerned at the amount she paid and that "no one has said 'lucky you'." This evidence suggests that the respondent was aware that she purchased the property at less than full value, and so did the family generally. This leads me to conclude that the whole family consider the respondent to be the full legal owner of the property now, even if it is still viewed by them as the family home. It would also suggest that there is no discord among the family over the respondent's purchase of the property.

[21] In the course of cross-examination by Mr Gowdy, the respondent confirmed that she understood herself to be the full owner of the property after it had been transferred to her by the bankrupt. When Mr Gowdy asked the respondent what would happen if she lived alone in the house and wanted to sell it and move, the respondent's evidence was that she felt she would be entitled to do so and use the

balance net proceeds of sale and buy another property for herself. She also accepted that she agreed the purchase price for the property with the bankrupt and that her father was thereafter informed as to what was happening. Having considered the respondent's evidence, I am satisfied that there is no evidence of unconscionable conduct on the part of the bankrupt. Indeed it is not even alleged by either the respondent or Mr Mallon. Nor do either make any case that they acted to their detriment on any representation made by the bankrupt. It is also noteworthy that in selling the property to his sister only for the amount secured on it when it is likely that both were aware it was worth more, the bankrupt did not seek to profit from the transaction or in any way take advantage of his sister. In the circumstances, I therefore reject the respondent's proprietary estoppel claim.

[22] Finally I turn to the issue of the bankrupt's solvency. There are only two pieces of evidence given as to the bankrupt's solvency. The first is the Respondent's evidence that the bankrupt "always seemed to be busy" (at his joinery business) and the second is an affidavit from the bankrupt's wife exhibiting a payment of £30,000 into their joint account on or about 11th January 2008. However, this post-dates the date of the transaction in question and that is the relevant date. There being no other evidence to rebut the presumption of insolvency, I am satisfied that the bankrupt was insolvent at the time of the transaction.

Conclusion

[23] This is an unfortunate case. I am satisfied that both the respondent and her father are honest witnesses. They gave evidence without embellishment or recrimination when there was opportunity to do so. There were no accusations made against the bankrupt and no ill-will was displayed by either towards him. However, for reasons set out above and elsewhere, I am satisfied that both the respondent and Mr Mallon considered the bankrupt to be the full legal and beneficial owner of the property in and about their respective transfers. I consider that in her defence of this application, the respondent was utilising any and every argument at her disposal in an effort to protect the home in which she and her elderly father reside. She was particularly solicitous of her father's welfare. She described her shock at receiving the Official Receiver's application and I have no doubt that was the case. She also described her financial struggle at making the mortgage payments on the house following her redundancy from her job as a legal secretary in 2010, but that she usually managed somehow. She described how until 2010 she had worked since she left school at 16 and is still hopeful of gaining employment but acknowledged that this was difficult in the current financial climate. Financial hardship is regularly a feature of cases where the application is resisted on the basis of exceptional circumstances. While this was not strictly part of the respondent's case, it was held

in **Re Citro [1991]Ch142** that financial hardship is not an exceptional circumstance. Nourse LJ stated:

> "Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar."

[24] As stated in **Stack-v-Dowden** *supra,* parties are free to enter into whatever bargain they wish in relation to their assets and no issue would have arisen with regard to the transaction between the bankrupt and the respondent in this case had the bankruptcy not intervened to disturb it. However, the bankruptcy did intervene and with that the operation of the insolvency legislation imposes certain statutory obligations on the Official Receiver on behalf of the creditors of a bankrupt. This includes the setting aside of any transaction at an undervalue entered into by a bankrupt at a relevant time. In this case, in order to resist the setting aside of the transaction, the burden proof was at all times on the respondent. On the basis of the evidence presently before me and for the reasons set out above and elsewhere in this judgment, I conclude that the respondent has not discharged that burden of proof. It follows therefore that I find that the transfer by the bankrupt to the respondent on or about the 28th April 2006 of the bankrupt's interests in 50 Rossmore Road, Dungannon, Co Tyrone being the lands comprised in Folio No 33607 Co Tyrone was a transaction at an undervalue pursuant to the provisions of Article 312 of the Insolvency Northern Ireland Order 1989. I will now hear counsel on the terms of the order and the issue of costs.