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

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2014/82132

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

RE: KEVIN DOYLE (BANKRUPT)

BETWEEN:

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Applicant;

-and-

PATRICK DOYLE

Respondent.

MASTER KELLY

[1] This is an application by the Official Receiver for, inter alia, a declaration that a transfer of lands comprised in Folio 4823 County Tyrone (“the lands”) made by the bankrupt to the respondent for natural love and affection was void because it was a transaction at an undervalue and/or a preference pursuant to the provisions of articles 312 & 313 of the Insolvency (Northern Ireland) Order 1989 (“the Order”). Mr Gowdy appears for the Official Receiver and Miss Mulholland appears for the respondent.

[2] In or about May 2009, the respondent advanced the bankrupt the sum of £5,000 to purchase a car. On or about 10th July 2009 the respondent advanced the bankrupt a further sum of £45,000 to discharge pressing business debts. For the purposes of these proceedings the respondent argues that the £50,000 he advanced to the bankrupt was a loan. There is no dispute that the bankrupt gave no security for the alleged loan.

[3] The respondent and the bankrupt are respectively father and son. They are therefore associates under article 4 of the Order. The lands which are the subject of this application are family lands which have been in the Doyle family for several generations. They came into the possession of the bankrupt by way of an inheritance from an uncle (the respondent's brother).

[4] On 18th August 2010, the bankrupt agreed to transfer full legal ownership of the lands to the respondent for natural love and affection by the execution of the appropriate Land Registry document. The transfer instrument clearly states that its sole purpose was to transfer full legal ownership. It is agreed that at the time of this transfer the lands were worth £54,000. The transfer was not registered in the Land Registry until 8th August 2011 - almost a year later. On 31st August 2012, the bankrupt presented a debtor's petition for bankruptcy to the court. On 13th September 2012 a bankruptcy order was made against him on foot of that petition. The chronology of events is relevant because of the provisions of article 314 (1) of the Order which provide:

“Subject to the provisions of this article, the time at which an individual enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into or a preference given-

(a) in the case of a transaction at an undervalue, at a time within the 5 years immediately preceding the day of the presentation of the bankruptcy petition on which the individual is adjudged bankrupt,

(b) in the case of a preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee), at a time within the 2 years immediately preceding that day, and

(c) in any other case of a preference which is not a transaction at an undervalue, at a time within the 6 months immediately preceding that day.”

[5]The respondent submits that the Official Receiver's application may be challenged on two grounds. First, he contends that the transfer was not a transaction at an undervalue because the transfer was in repayment of the £50,000 he advanced to the bankrupt. Secondly, he argues that the date on which the transfer document was signed (as opposed to the date on which it was registered in the Land Registry) is the relevant date for the purposes of article 314 (1) (b). That date is more than 2 years

prior to the date on which the bankruptcy petition was presented. Both grounds are contentious.

[6] The respondent chose not to file an affidavit in reply to the Official Receiver's application. Instead, he produced an affidavit filed by him as a Notice Party to the bankrupt's ancillary relief proceedings because a similar application was made in the course of those proceedings to have this transfer set aside. The respondent further relied on the bankrupt's affidavit evidence in those proceedings even though the issue was not in the end tried out in the matrimonial proceedings. The respondent also chose not to appear at the hearing of this application to give oral evidence. The court was provided with a short GP report in which it was stated that the respondent suffered from long-term depression, and that the stress of having to attend court could exacerbate his condition. I do not intend to comment on the medical evidence further because the respondent through Miss Mulholland indicated that he was content for the matter to proceed on the basis of his affidavit evidence. However, I will return to the issue of the respondent's lack of oral evidence in due course.

[7] In view of the "relevant time" provision in article 314(1)(b), it is necessary to first consider whether the transfer of the lands by the bankrupt to the respondent was a transaction at an undervalue. If the transfer was a transaction at an undervalue, the contentious issue over whether the transaction took effect on the date of the execution of the transfer instrument or on the date of registration in the Land Registry becomes irrelevant. Article 312 (3) of the Order provides that an individual enters into a transaction with a person at an undervalue if:

"(a) he makes a gift to that person or he otherwise enters into a transaction with that person on terms that provide for him to receive no consideration.

(b) he enters into a transaction with that person in consideration of marriage, or

(c) he enters into a transaction with that person for a 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"

As appears from the wording of paragraph (3) (a) and (c) the issue of an undervalue transaction is dependent upon the movement of consideration between the parties to the transaction. However, it is also clear from the wording of article 312 that consideration must be present and not past consideration (see also: **Official Receiver -v-Stranaghan [2010]NICH8**). Paragraph 3 (b) has no application here.

[8] The first issue to be determined is the question of what case the respondent makes in his affidavit. The second issue is the question of what probative value the

respondent's affidavit has in terms of the legal principles relevant to these proceedings. The third issue then is what prejudice if any was caused by the respondent's lack of oral evidence.

[9] The answer to the first issue is that in the ancillary relief proceedings the respondent's case is that the purpose of the transfer was to repay him the £50,000 he advanced to the bankrupt. He argues that the £50,000 was a loan and that the transfer of the subject lands was in repayment of that (paragraph 20 of respondent's affidavit). In simple terms, it is his case that repayment of the alleged loan amounts to valuable consideration. The bankrupt, who did appear to give oral evidence, makes the same case.

[10] This leads me to the second issue. Having considered all the evidence I accept that the £50,000 advanced to the bankrupt by the respondent was a loan rather than a gift. I also accept that the transfer of the lands was in repayment of the loan. But I do not accept that repayment of a debt is consideration for the purposes of article 312 because no consideration is moving between the parties. Nor did the transfer instrument provide for the bankrupt to receive consideration. The transfer was simply the means by which the bankrupt repaid and satisfied his debt to the respondent. The loan itself could not have been consideration as it was past consideration which is no consideration. Therefore, as no consideration moved between the bankrupt and the respondent in the transaction, then in the absence of evidence to show that the bankrupt was not insolvent at the time of the transaction, it is prima facie a transaction at an undervalue under article 312 (3)(a).

[11] Neither the bankrupt nor the respondent adduced evidence to show that the bankrupt was solvent at the time of the transaction. On the contrary, the evidence of both the bankrupt and the respondent discloses a background of established and continuing insolvency. First, at the time the loan was made to the bankrupt the bankrupt couldn't pay his debts as they fell due (paragraph 20 of the respondent's affidavit and paragraph 12 of the bankrupt's affidavit). Secondly, the evidence of both the bankrupt and the respondent is that despite the respondent's loan the bankrupt's financial situation did not improve (paragraph 11 of the respondent's affidavit). This quickly led to his bankruptcy. Finally, the bankrupt admitted in the course of cross-examination by Mr Gowdy that he was aware that in transferring the lands to his father when he did, that the lands wouldn't then go either to his creditors or to his wife in the matrimonial proceedings. Accordingly, taking all those matters into account, I find that the transaction was a transaction at an undervalue pursuant to article 312 (3)(a).

[12] Having found that the transaction was a transaction at an undervalue, the relevant time in article 314 (1)(b) which has been a matter of contention between the parties is immaterial because that only applies in the case of a transaction which is a preference but not a transaction at an undervalue. But a transaction can be both a transaction at an undervalue and a preference. Article 313 of the Order defines a preference as follows:

“(3) For the purposes of this Article and Articles 314 and 315, an individual gives a preference to a person if-

- (a) that person is one of the individual’s creditors or a surety or guarantor for any of his debts or other liabilities, and
- (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual’s bankruptcy, will be better than the position he would have been in if that thing had not been done.”

Paragraph (4) provides:

“ The High Court shall not make an order under this Article in respect of a preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned in paragraph (3)(b).”

Paragraph (5) provides:

“An individual who has given a preference to a person who, at the time the preference was given, was an associate of his (otherwise than by reason only of being his employee) is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as mentioned in paragraph (4).”

[13] It is clear from the facts that at the time of the transaction the respondent was both a creditor and associate of the bankrupt. It is also clear that the transfer of the land to the respondent took place at a time when the bankrupt was not solvent. It is further clear that the bankrupt’s act of transferring the lands had the effect of putting the respondent in a better position in the event of bankruptcy than he would have been had the transaction not taken place. Therefore, the above requirements in Article 313 (3) - (5) are met.

[14] I do not accept Miss Mulholland’s argument that as bankruptcy was not allegedly anticipated by either the bankrupt or the respondent at the time of the transaction that the bankrupt could not have been influenced by a desire to better

the position of the respondent in the event of bankruptcy. The provisions of article 313 do not involve the question of whether bankruptcy is anticipated. Article 313(3)(b) merely refers to “in the event of bankruptcy” and goes no further than that. Accordingly, in all the circumstances, I find that the bankrupt’s transfer of the lands in repayment of the respondent’s debt was also a preference for the purposes of article 313 of the Order.

[15] The third and final issue then is the question of what prejudice if any was caused by the respondent’s lack of oral evidence. Having considered that issue, I am of the view that no prejudice was caused to him by that because the case he makes out on affidavit is inconsistent with the legal principles which underpin articles 312, 313 and 315. The same equally applies to the bankrupt’s evidence. Therefore, it is unlikely that cross-examination of the respondent would have benefitted his case.

[16] For the reasons given, I find that the Official Receiver is entitled to the relief sought. I will now turn to the terms of the order.