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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **12/10/17**

2015/86820

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

Orla Wallace as Trustee in bankruptcy of Eamon Malone

Applicant:

and

Eamon Malone
Catherine Malone
Eimear Malone
Eadaoin Malone

Respondents:

MASTER KELLY

[1] By application filed on 15th September 2016, the Bankrupt's trustee ("the Trustee") seeks leave to evict the Bankrupt from his home in 22 Riverview Street, Belfast ("the Home") under Article 310 of the Insolvency (Northern Ireland) Order 1989 ("the Order"). Although the Home is registered in the sole name of the Bankrupt, the Trustee joined the Bankrupt's wife and two adult children as respondents to her application. The second respondent, Mrs Malone, is the Bankrupt's wife. She asserts a beneficial interest in the Home, and resists the relief sought by the Trustee.

[2] The substantive hearing of the application took place on 20th December 2016. Mr Coyle appeared for the Trustee, and Mr Atchison appeared for Mrs Malone. That hearing took the form of a short hearing on the papers. Mrs Malone appeared for the hearing of the matter but was not cross–examined on her evidence.

[3] Following that hearing, I gave written judgment in which I set out the decision I was minded to make based on the evidence before me, and the case that I heard. However, I said that I would defer any final decision on the matter to enable the parties to hold a joint consultation to see if resolution was possible. In the course of attempting to do so, Mrs Malone's solicitors set out her position by letter of 28th April 2017 to the Trustee's solicitors. The Trustee's solicitors did likewise by letter of 15th May 2017. I have been provided with a copy of those letters. But it is clear from their contents that the parties are worlds apart.

[4] In view of the impasse, the parties are agreed that I should deliver a final judgment in the matter, and I do so here. However, it must be stressed that this final judgment reflects the actual case that I heard. As I have already said, the case that I heard, notwithstanding that it was listed for a full day, was conducted on the papers in about an hour. Despite the onus being on Mrs Malone to prove her case, she was not cross-examined. Therefore, this judgment must be read and interpreted within that particular context.

[5] In simple terms, Mrs Malone's case is essentially as follows:

> (i) That the Bankrupt & Mrs Malone agreed that the Home the was to be owned by them jointly, and that the reason that this is not reflected on the title is because Mrs Malone was suffering from poor health at the time;
>
> (ii) That Mrs Malone made substantial direct financial contributions to the Home for which she is entitled to additional credit.

Thus the issue for the court to determine is the question of whether Mrs Malone can satisfy the Court that she has an interest in the Home, and if so, the extent of that interest.

[6] The relevant legal principles are as follows:

> (i) The starting point for the determination of the parties' interests in the property is the legal title, per Lady Hale **Stack v Dowden [2007] UKHL 17;** also **Jones v Kernott [2011] UKSC 53** at 10;
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> (ii) The legal title is a presumption, capable of being rebutted if there is evidence of contrary intention **Jones v Kernott [2011] UKSC 53**;
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> (iii) The burden of proof that the parties' interests are held other than the legal title rests with the party so contending. (Lord Hope: **Stack v Dowden [2007] UKHL 17**);

> (iv) In a single owner case: "where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property." (Chadwick LJ : **Oxley v Hiscock [2005] Fam 211);**
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> (v) Broad meaning is to be given to "the whole course of dealing" (Lord Walker and Baroness Hale: **Jones v Kernott** paragraph 51(4)).

Applying the appropriate legal principles, the question I have to consider is what interest Mrs Malone has in the Home. The legal authorities are clear that the burden of proof lies on Mrs Malone. And, as I say, the Trustee elected not to cross-examine her on her evidence. This seems a curious position for the Trustee to adopt given her apparent suspicion that the Bankrupt and Mrs Malone are in fact separated, with the Bankrupt living in the Home, and Mrs Malone living in a rented property in Armagh. But adopt it she did, and it follows then that the application of long established legal principles poses a duty on the court to view Mrs Malone's affidavit evidence objectively, rejecting it only if it is inherently incredible.

[7] Upon careful consideration of the affidavits filed in the matter, the conclusion I have reached is that Mrs Malone's evidence is to be accepted because it is inherently credible, and I have no reason to consider it to be anything other than truthful. The result of that is as follows.

[8] First, I accept Mrs Malone's explanation that the Home was put into the Bankrupt's sole name only because she was suffering from mental health issues at the time of purchase. By itself such an averment might not be persuasive to rebut the presumption of the legal title, but the averment does not stand alone. Mrs Malone has four important points in her favour. These are: (i), that the previous marital home, in which the parties lived for a great many years, was held jointly with the Bankrupt, (ii), the Bankrupt and Mrs Malone have been married for over 30 years, (iii), the mortgage for the subject Home is paid from joint monies, as also appears to be the case with the previous home and (iv), it makes no sense for Mrs Malone to invest substantial monies into the Home if she neither had an interest in it, nor - as the Trustee suspects - lived there.

[9] Secondly, I do not regard the rental of the property in Armagh to be a matter of note. There is clear undisputed evidence that the Home was not habitable at the time of purchase, so it is entirely logical that the family would have to rent somewhere to live until necessary works were completed to make it so. I find nothing untoward

about that. Nor do I find the location of the rental property to be significant given its proximity to Belfast, and the fact that Mrs Malone has family there – which, given her apparent health issues at the time, provides further context to the parties' decision to rent in that particular location. In any event, the reference to a bankrupt's home in the Order refers to the Bankrupt's sole or *principal* home (see: **Gowdy**. **Individual Insolvency at 9.77**). Therefore, even if Mrs Malone stayed in the property intermittently, for whatever reason, she is entitled to do so and it does not affect any claim she might have over the Home.

[10] Thirdly, I do not regard the fact that the Armagh property was subject to a five year lease to be a matter of suspicion either. That suspicion emanates from a belief on the Trustee's part that the Armagh property was rented because the Bankrupt and Mrs Malone are separated – the inference being that the Home is not in truth the marital and family home. But Mrs Malone refutes that claim. For my part, I think it inherently unlikely that Mrs Malone would make direct financial contributions, jointly or individually, to the Home if the parties were living separately. Therefore, there is no reason to disbelieve Mrs Malone either in terms of the status of her marriage or her explanation as to why the Armagh property was rented with a five year lease. That explanation is that it was the only available rental property which the family deemed suitable for them at the time.

[11] Fourthly, I accept Mrs Malone's evidence that the third and fourth respondents' inability to settle in Armagh (they were teenagers at the time) in all likelihood created a need to carry out the renovation works to the Home quickly so that the family could relocate to Belfast without delay.

[12] Finally, there is no dispute that the Home was in serious disrepair when purchased. There is also no dispute that substantial works were carried out to the property. But if there is no evidence that the Bankrupt funded any of that work how was it funded? There is uncontroverted affidavit evidence from both Mrs Malone and her brother, Mr McGeown, that Mrs Malone expended £25,000 on that work. While I note that there is only vouching documentation to support some £19,000 of the £25,000 claimed that is not to say that Mrs Malone did not expend £25,000 on the work. Indeed, the affidavit evidence of her brother supports her claim that she did. Furthermore, those affidavits are persuasive that this direct financial contribution of £25,000 by Mrs Malone was never originally intended by Mr & Mrs Malone and therefore represents a significant change in their original intention with regard to the Home.

[13] Taking all those matters into account, I find on the balance of probabilities that Mr & Mrs Malone purchased the Home on the mutual understanding that they would own it jointly. I further find on the balance of probabilities that Mrs Malone made additional direct financial contribution of £25,000 to the Home for which she is entitled to receive full credit against the Bankrupt's interest for that sum. To be clear, I do not agree with the Trustee's suggestion (made after the case was heard and in the letter of 15th May 2017) that the Bankrupt is entitled to one half of any increase in value to the property by the said works. That proposition flows from authorities

focussed on the issue of home improvements in a more general and cosmetic sense. That is not what we are dealing with here. What we are dealing with here is a more discrete scenario whereby monies were expended by Mrs Malone to make an uninhabitable property fit for habitation by the family. That in my judgment is a different proposition. In any case, the Trustee made no such argument at the hearing of this application.

[14] This brings us to the question of what order should now be made in light of my conclusions. The answer to that question depends on a number of factors. But chief among them is the question of what value is to be attributed to the property. The relevance of this is that depending on the valuation of the property, the outworking of my findings may mean that there is in truth little or no equity in the Home.

[15] In my earlier judgment I referred to each party having obtained formal professional valuations on the Home. The Trustee's valuation was carried out on or about 30th January 2016 and placed a valuation on the property of £155,000. Mrs Malone's valuation was carried out on 18th February 2016 and placed a valuation on the Home of £145,000. Both valuations expressly assumed an open market sale with a willing seller. It follows therefore that these were not forced sale valuations – which is the reality of the present situation should any re-possession order be made.

[16] I also rejected the Trustee's valuation evidence based on "comparables". This evidence was uninvited, unreliable, and unnecessary. I also observed that the "comparables" involved valuations (rather than actual sales) ranging from c.£110,000 to c.£170,000, thereby producing a median value of £140,000.

[17] I further rejected the Trustee's "drive–by" valuation carried out on 6th December 2016 which valued the Home at £170,000. Given the earlier formal valuation of the Home, this drive-by valuation served no purpose. It is, however, observable that this "drive–by" valuation is consistent with the only "comparable" with a value greater than the two professional valuations. In any event, that valuation is not agreed. In the circumstances, I am only prepared to accept the parties' formal professional valuations of £145,000 and £155,000. In doing so, I find they produce a median value of £150,000. However, I re-iterate that this figure is likewise derived from valuations assuming a willing seller. The professional valuations themselves contain a caveat to that effect. Therefore, appropriate adjustment should be made to that figure to reflect the reality that if the Home is to be sold, it would be on foot of a court order and by way of a forced sale.

[18] Mrs Malone argues that the adjustment should be 10%, and the Trustee argues that there should be no adjustment at all as she understands from her valuer that properties in the area generally sell well and that a forced sale would not affect its value. I disagree. The caveats in the Trustee's own professional valuations would seem to do likewise. Therefore, I am satisfied that adjustment should be made. I am also satisfied that Mrs Malone's suggested reduction of 10% is not only appropriate, but that it is an informed one as it accords (in the Court's experience) with the practice generally adopted by other Insolvency Practitioners. On applying Mrs

Malone's 10% reduction to the Court's valuation, the valuation is reduced to £135,000.

[19] Applying my findings to that figure lead me to conclude that this is a low value home and therefore it falls under Article 286A of the Order. That is because deductions in the form of mortgage redemption and costs of sale must be made before arriving at any net equity. Mrs Malone estimates that the amount due to redeem the mortgage is £80,000 and that costs of sale are approximately £5,000. If those figures are correct, then applying my findings, there is no equity in the Home.

[20] The Trustee disputes the £80,000 mortgage redemption figure. There is no reason for her to do so. She is well aware that this court is also seised of Order 88 proceedings in relation to the Home. According to the papers filed in that matter, the amount due on foot of the mortgage was approximately £71,000 plus interest as at 26th April 2016. Clearly, that figure is now historic. It must be adjusted to take into account additional interest due and any further arrears accrued. The figure must also be adjusted to take into account the lender's legal costs as these are normally added to the redemption figure. Even if the true redemption figure is not already in or around £80,000, it is likely to reach if not exceed that sum in due course.

[21] On the question of Mrs Malone's estimated figure of £5,000 in respect of sale costs, I believe that to be an underestimation because in the event of a forced sale there will be multiple professional fees involved. Some of those will be in the form of legal costs and at least one will be estate agents fees. Each of those professionals will in all likelihood charge a percentage based professional fee plus VAT and outlays. Therefore, a more accurate figure would be a minimum of £7,500. Consequently, I am led to the conclusion that when the figures are properly analysed, Mrs Malone's equity calculation is a true and realistic projection of the outcome for the Trustee in the event of a forced sale of the Home. Even then, they do not take into account enforcement fees.

Conclusion

[22] In all those circumstances, I am led to conclude that the Bankrupt's home is a low value home pursuant to Article 286A of the Order. In the circumstances, I must dismiss the Trustee's application. In doing so, I again remind the Trustee that she elected to conduct the substantive hearing of her application without cross-examining Mrs Malone thus leaving the matter to the Court to make whatever decision it saw fit in the exercise of its considerable discretion.