THE HIGH COURT

BANKRUPTCY

[2021] IEHC 91

[Bankruptcy No. 3984]

IN THE MATTER OF THE BANKRUPTCY ACT 1988 (AS AMENDED) AND IN THE MATTER OF PETER CLOHESSY (A FORMER BANKRUPT)

BETWEEN

CHRISTOPHER LEHANE AS THE OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE ESTATE OF PETER CLOHESSY (A FORMER BANKRUPT)

APPLICANT

AND

PETER CLOHESSY (A FORMER BANKRUPT)

AND ANNA GIBSON STEEL

RESPONDENTS

Judgment of Mr. Justice Richard Humphreys delivered on Thursday the 25th day of February, 2021

1. Planning permission for the family home of the respondents was applied for in July 2003 and granted on 27th November, 2003. At the time the house was constructed, the first respondent (the former bankrupt) owned the adjoining 48-acre farm. That farm has since been repossessed by AIB and has been sold to Link Assets who are seeking to put it on the market.

2. In 2004 a further planning permission was granted, and on 15th July, 2006 planning permission for a swimming pool was sought, but the application appears to have been incomplete.

3. The former bankrupt ran into financial difficulties and prepared a statement of affairs on 8th December, 2016 showing that he was indebted in the sum of €13,684,311.38. The family home would seem to be the only real asset. That is jointly held with the second respondent, his wife. He was adjudicated bankrupt on his own petition on 23rd January, 2017.

4. As of 11th June, 2019 the mortgage on the property due to AIB was €236,392.69. On 22nd November, 2019, the Official Assignee wrote to the respondents offering to sell them the interest in the half of the property that had been vested in him by virtue of the bankruptcy. Those letters were returned as "not called for".

5. The Official Assignee then filed a motion on 20th December, 2019 seeking an order under s. 61(4) of the Bankruptcy Act 1988 sanctioning the sale of the property and an order directing the respondents to yield up vacant possession. The Official Assignee values the property at €500,000 to €550,000 whereas the respondents value it at significantly less.

6. The motion was adjourned on 20th January, 2020 for a further valuation and then was adjourned on consent on 10th February, 2020 and again on 2nd March, 2020. It was listed again on 20th April, 2020 but court sittings were cancelled due to the Covid-19 emergency. The matter was re-listed on 8th June, 2020 when the motion was adjourned due to negotiations. The adjourned date was 9th November, 2020, when due to the Covid-19 emergency, sittings were adjourned again to 14th December, 2020. On the

latter date, O'Connor J. directed the filing of affidavits and listed the matter for hearing on 8th February, 2021. The matter was heard and judgment reserved on the latter date. I wish to record my gratitude to Ms. Una Nesdale B.L. for the Official Assignee and Mr. H. Pat Barriscale B.L. for the respondents, for their assistance.

Whether an order for possession and sale should be made under s. 61(4) of the 1988 Act

7. The critical context here is that, in general, the property of a bankrupt vests in the Official Assignee on bankruptcy. Section 61(3)(a) of the 1988 Act allows the Official Assignee to sell the property of a bankrupt. In the case of the family home, that requires consent of the court under s. 61(4); and while the court has a discretion in that regard, it is not altogether at large. A major consideration must be that housing for a bankrupt and his or her dependants should not normally be provided at the expense of creditors. The court must of course consider all the circumstances, which include prejudice to the bankrupt and family members, but also prejudice to the creditors. Viewed from the standpoint of international human rights law, an individual has a right to be housed (art. 11(1) of the International Covenant on Economic, Social and Cultural Rights, done at New York on 16th December, 1966). But even assuming *arguendo* that such a right can legitimately be translated into legally cognisable domestic terms in the context of the court's statutory discretion here (perhaps in the rephrased form of an interest which amounts to a relevant consideration - one can safely leave to another case the thorny question of implied constitutional rights), neither that consideration nor the express constitutional right to one's dwelling amount to a right to be remain living in a particular house at the expense of one's creditors. That would make as little sense as the notion that the right to a dwelling involves the right to remain living in an unauthorised development, which would be an absurd proposition. That latter point was emphasised in *Wicklow County Council v. Kinsella* [2015] IEHC 229 (Unreported, High Court, 17th April, 2015), where Kearns P. (in declining to follow *Wicklow County Council v. Fortune (No. 1)* [2012] IEHC 406 (Unreported, High Court, Hogan J., 4th October, 2012) and *Fortune v. Wicklow County Council (No. 2)* [2013] IEHC 255 (Unreported, High Court, Hogan J., 6th June, 2013)) described such a contention as amounting to "anarchy" and "absurdity" (para. 130), inferentially reflecting an "extreme preference for personal rights over those of the community" (para. 147), as a "novel legal matrix" (para. 150), as "providing immunities to wrongdoers" (para. 176) and as creating "a whole new level of uncertainty" which would be "incredibly destructive of planning law" (para. 188). While there is not an exact analogy of course, there is the common theme that the right to a dwelling only takes you so far.

8. Ms. Nesdale says that while the jurisprudence is very consistent in granting orders for the sale of family homes, with the focus being on the length of any possible stays, it does not thus far expressly articulate a presumption that such an order would be granted: see *Rubotham v. Duddy* [1996] 5 JIC 0102 (Unreported, High Court, Shanley J., 1st May, 1996), *Rubotham v. Young* [1995] 5 JIC 2302 (Unreported, High Court, McCracken J., 23rd May, 1995), *In Re O'Shea* [2018] IEHC 181 (Unreported, High Court, Costello J., 21st February, 2018), *In Re O.S*. [2020] IECA 71 (Unreported, Court of Appeal, Baker J.

(Noonan and Power JJ. concurring), 5th March, 2020), *Lehane v. A.R.* [2019] IEHC 771 (Unreported, High Court, Barniville J., 12th November, 2019).

9. Although a presumption that the Official Assignee should be permitted by order to deal with a bankrupt's interest in a family home in the absence of demonstration of special circumstances to the contrary has not been expressly articulated in those terms to date, I propose to do that now because that is what the jurisprudence amounts to and that is what makes most sense in principled terms. The important point here is that the interest of the former bankrupt has already vested in the Official Assignee. That means that while the court has discretion, the starting point is that the Official Assignee would, but for the need for an order, be entitled to deal with the property legally vested in him. It seems to me that such a starting point means that there is a presumption in favour of granting an order under s. 61 of the 1988 Act unless special circumstances have been shown to the contrary having due regard to all matters, including prejudice to the creditors, the bankrupt and any dependants.

10. Irrespective of whether there are special circumstances, the presumption should also be that the co-owner (and/or a discharged bankrupt himself or herself if appropriate), should (unless there is reason to the contrary) be permitted to buy out the Official Assignee's interest if a reasonable purchase price, having regard to market value, can be agreed or determined by the court. So far that has been expressed as a practice rather than a principle; but there *is* a principle here because such an approach normally minimises the level of prejudice to the bankrupt and family members without undue prejudice to the creditors. However, if that is not possible, notwithstanding any sympathy the court may have for innocent dependents, the court should not refuse to allow the Official Assignee to realise the family home absent special circumstances.

11. The court does admittedly have an entitlement to dismiss the application under s. 61. That is reflected in s. 85(3B)(b) of the 1988 Act. But just because the court *can* do something doesn't mean in any particular case that it *should* do that something. There would have to be a sufficiently compelling basis to do so, grounded in special circumstances. The respondents argue that the matter should be dismissed for various reasons primarily relating to access to the site, planning permission issues and the boundaries of the site. The property is land-locked, a holistic centre on the property is built partly outside the boundary and some services are also somewhat outside the boundary. However, the Official Assignee says that he is in negotiations with the receiver of the farm with a view to agreeing questions of access and boundaries. And as regards the planning permission issues, he sees those as relating to the use of the property rather than the structures themselves, so they are not matters that need to be dealt with before the sale. Consequently, these issues do not provide a reason not to make the order. It is also suggested by the respondents that if the property is sold now it would be sold at an undervalue, but that has not been established.

12. As regards the prejudice to the former bankrupt's spouse and three children who would lose this particular home, and the additional prejudice to the spouse who would also lose

the ability to conduct her business on the premises, that is all unfortunate; but is a consequence of the former bankrupt's indebtedness and is not a compelling, special or exceptional matter warranting refusal of the order. That is particularly so in circumstances where the family home offers the only prospect for creditors, where there has already been quite some postponement of a reckoning, and where the family have been living in the property at the expense of the creditors in the four years since the adjudication.

13. In all of the circumstances, in particular those specifically identified above, the balance of justice favours the making of the order sought, subject to a condition that the property be first offered for sale to the respondents at a reasonable price having regard to market value, following resolution of the boundary and access issues.

What valuation should be applied to the property?

14. The parties are in dispute as to the value of the property and also the value and possibly the source of mortgage contributions made by the second respondent. However, it seems to me those matters do not really arise at this point. The principle on the motion is whether the sale should be allowed. The Official Assignee has said at para. 8 of his replying affidavit that the second respondent will be given credit for any mortgage payments once payments are vouched and a decision made that such credit should be allowed, so all of that can be left to agreement between the parties or application to the court if default of such agreement. The value of the property will be clearer anyway once the title-related issues are resolved, if they are.

Whether postponement should be ordered, and if so to what extent

15. Section 61(5) of the 1988 Act allows the court to order postponement of the disposition of the family home having regard to the interests of the creditors, the spouse or civil partner and dependents and to all the circumstances of the case. Having regard to all of those matters I consider that the period of six months offered by the Official Assignee is reasonable. The 2 years suggested by the respondents would impose an unwarranted delay on the creditors, who have waited long enough already. Six months also provides a realistic opportunity for the title-related questions to be resolved.

Order

16. Accordingly, the order will be as follows:

    (i). an order under s. 61(4) of the 1988 Act permitting the Official Assignee to sell the dwelling house the subject matter of the application in order to realise the interest of the first respondent, subject to a condition that he first offer it for sale to the respondents at a reasonable price having regard to market value once the boundary and access issues are resolved;

    (ii). an order directing the respondents to yield up vacant possession of the property;

    (iii). a stay on both orders for six months from the date of the order; and

(iv). liberty to apply (including in the event of being unable to agree on a market price for the property following resolution of the boundary and access issues).