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61

THE HIGH COURT
(BANKRUPTCY)

BETWEEN:

BARCLAYS BANK IRELAND LIMITED

Applicants

and

TIMOTHY CARROLL

Respondent

Judgment of the President of the High Court delivered on the 10th
day of September 1986

The Respondent in the title hereof was adjudicated a bankrupt on the 22nd day of October 1982.

By Deed and Transfer and Indenture of Conveyance made between one John Gleeson of the one part and the Bankrupt of the other part, the lands comprised in Part 1 and Part 2 of the Schedule annexed to the Notice of Motion herein dated the 17th day of June 1986 were transferred and conveyed to the Bankrupt.

The lands referred to in Part 1 of the said Schedule were lands comprised in Folio 25600 of the Registrar for holders of County Tipperary and on the 22nd day of November 1983 the Bankrupt was registered in the Land Registry as a full owner of the said lands.

These lands, inter alia, were the subject matter of an indenture of mortgage and charge made between the Applicants herein of the one part and the Bankrupt of the other part and dated the 11th day of December 1979.

In proceedings instituted by the applicants herein as mortgagees, Mr. Justice Costello on the 29th day of July 1983 made an order that:-

"the claim of the said Barclays Commercial Bank Limited be and the same as hereby declared proved and established, subject to the taking of the accounts hereinafter directed, and accordingly the Court declared that the sum that shall be found due to the said Barclays Commercial Bank Limited upon foot of the said mortgage in the said premises is well charged upon all the estates and interest of the said Bankrupt and of his assignees in and to the said premises being the premises comprised in the said mortgage"

and

"that all the estate and interest of the said Bankrupt and of his assignees and mortgagees shall be sold for the purpose of discharging the said sum and the costs of the said mortgagees when taxed".

A difficulty exists with regard to the title of the Bankrupt to the property and on the 17th day of June 1986 the applicants caused to be issued a Notice of Motion in which they seek inter alia:-

1. An enquiry into the validity of the Deed of Transfer and Indenture Conveyance, made between John Gleeson and the Bankrupt herein on the 11th day of December 1979 of the lands set forth in the Schedule hereto, Parts 1 and 2.
2. A declaration as to the validity of the said transfer and/or Conveyance.

The Notice of Motion is grounded on the affidavit of one Mark McParland sworn herein on the 17th day of June 1986.

The difficulty with regard to the title of the Bankrupt to the property is referred to in Paragraph 9 of the said affidavit in which the said deponent avers that:-

"In the course of having the Contract for Sale settled by the Court Conveyancing Counsel, it came to my attention and the attention of the Applicants, for the first time, that the registered land aforesaid comprised a dwelling which was the ordinary residence of John Gleeson and his wife, Ellen Gleeson at the date the property was sold to Timothy Carroll. No prior consent to the sale of the registered land to Timothy Carroll has ever been obtained from Ellen Gleeson, although I am advised by her present Solicitors - Butler, Cunningham and Moloney - that at all material times, she was aware of the ^{said} sale and did in fact consent to the same, although not in writing. She also was of the opinion that the monies paid by the Bankrupt for the ^{said} lands constituted a reasonable purchase price".

Section 3 of the Family Home (Protection) Act, 1976 provides that:-

"3(1) Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to sub-Sections (2) and (3) and Section 4 the purported conveyance shall be void.

(2) Sub-Section (1) does not apply to conveyance if it is made by a spouse in pursuance of an enforceable agreement made before the marriage of the spouses.

- (3) No conveyance shall be void by reason only of sub-Section (1)
 - (a) if it is made to a purchaser for full value
 - (b) if it is made, by a person other than the spouse making the purported conveyance referred in sub-Section (1) to a purchaser for value, or
 - (c) if its validity depends on the validity of a conveyance in respect of which any of the conditions mentioned in sub-Section (2) or Paragraph (a) or (b) is satisfied.

(4) If any question arises in any proceedings as to whether a conveyance is valid by reason of sub-Section (2) or (3) the burden of proofing that validity shall be on the person alleging it.

(5) In sub-Section (3) "full value means such value as amounts are approximates to the value of that for which it is given".

Section 4(1) where the spouse whose consent is required under Section 3(1) omits or refuses to consent, the Court may, subject to the provisions of this Section, dispense with the consent."

In the course of delivering the judgment of the Supreme Court in Nestor .v. Murphy (1979 I.R. Page 326) Mr. Justice Henchy stated that:-

"the basic purpose of the sub-Section is to protect the family home by giving a right of avoidance to the spouse who was not a party to the transaction. It ensures that protection by requiring, for the validity of the contract to dispose and of the actual disposition, that the non-disposing spouse should have given a prior consent in writing. The point and purpose

of imposing the ^Asaction of voidness is to enforce the right of the non-disposing spouse to veto the disposition by the other spouse of an interest in the family home. "

At Page 329 of the Report he states that:-

"This means that Section 3 sub-Section (1) must be given a construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to the legislative scheme as expressed in the Act of 1976 as a whole. Therefore, the words of Section 3, sub-Section (1), must be given no wider meaning than is necessary to effectuate the right of avoidance given when the non-participating spouse has not consented in advance in writing to the alienation of any interest in the family home."

and later on the same page he states:-

"Because it is evident from the pattern and purpose of the Act of 1976 that the primary aim of Section 3, sub-Section (1) is to enable a spouse who was not a party to a "conveyance" of the family home, and did not give a prior consent in writing to it, to have it declared void, and because an extension of that right of avoidance to spouses who have entered into a joint "conveyance" would not only be unnecessary for the attainment of that aim but would enable contracts to be unfairly or dishonestly repudiated by parties who entered into them freely, willingly and with full knowledge, I would hold that the spouse whose "conveyance" is avoided by the provisions of Section 3, sub-Section (1) is a spouse who has unilaterally (i.e., without the other spouse joining) purported to convey an interest in the family home without having obtained the prior consent in writing of the other spouse. It is only by

thus confining the reach of the sub-Section that its operation can be kept within what must have been the legislative intent."

The problem which has arisen in this case arises because there was on the lands comprised in Folio 25600 County Tipperary, which were the subject matter of the Deed of Transfer dated the 11th day of December 1979 and made between the registered owner, John Gleeson, thereof of the one part and the Bankrupt of the other part and the subject of an indenture of mortgage and charge dated the 11th day of December 1979 and made between the Bankrupt of the first part and the applicants herein Barclays Bank Ireland Limited of the second part, a dwelling house which was the family home of the registered owner, John Gleeson and his wife, Ellen Gleeson, and the failure of the said Ellen Gleeson to consent in writing to the said transfer of the lands comprised in the said Folio.

The Bankrupt was registered as full owner of the said lands on the 22nd day of November 1982 and the charge on the said lands in favour of the Applicants herein created by the aforesaid indenture of mortgage and charge dated the 11th day of December 1979 was registered as a burden on the said Folio.

It is accepted by the parties to this application namely, Barclays Bank Ireland Limited and the Official Assignee in Bankruptcy that:-

- (1) At least portion of the lands comprised in Folio No. 25600 County Tipperary formed the "family home" of John and Ellen Gleeson, a dwelling house in which they resided, being erected on the said lands;
- (2) Prior to the transfer of the said lands to the Bankrupt, the

registered owner's spouse, Ellen Gleeson, did not give her prior consent to the transfer in writing;

- (3) The Bankrupt did not pay the entire of the agreed purchase price to the said John Gleeson and the outstanding balance was recovered by the said John Gleeson in an action for negligence against his Solicitors.

By reason of this latter fact, it was submitted herein that the Bankrupt was not a purchaser for full value under the terms of the Family Home (Protection) Act, 1976.

It is further submitted on behalf of the Official Assignee that the purported transfer of the lands to the Bankrupt was void by reason of the fact that the transferor's spouse had not prior thereto consented in writing to the said transfer and that consequently the indenture of mortgage and charge created in favour of the Applicants in respect of the said lands is null and void.

In his affidavit sworn on the 17th day of June 1986,
Mr. McParland avers that:-

"9. In the course of having the contract for sale settled by Court conveyancing counsel, it came to my attention and the attention of the applicants, for the first time, that the registered land aforesaid comprised a dwelling which was the ordinary residence of John Gleeson and his wife, Ellen Gleeson, at the date the property was sold to Timothy Carroll. No prior consent to the sale of the registered lands to Timothy Carroll has ever been obtained from Ellen Gleeson, although I am advised by her present solicitors - Butler, Cunningham and Maloney - that at all material times, she was aware of the said sale and did in fact consent to the same although not in writing. She also was of the

opinion that the monies paid by the Bankrupt for the lands constituted a reasonable purchase price".

Information conveyed to the Deponent is hearsay and hearsay evidence is not admissible in any action save in the case of interlocutory applications. This is not an interlocutory application. It is an application for a Declaration with regard to the validity or otherwise of the title to the said property created by the aforesaid indenture of mortgage and charge.

However, in the course of the application in this case, Counsel instructed by Solicitors on behalf of Ellen Gleeson appeared and informed the Court that:-

- (1) At all times, she was aware of the sale and consented thereto, though not in writing, and
- (2) She did not wish to challenge the validity of the transfer of the lands to the Bankrupt or the validity of the Indenture of Mortgage and charge created in favour of the applicants by the Bankrupt.

Having regard to the statements made by Mr. Justice Henchy in Murphy.v. Nestor, already quoted herein, that the basic purpose of sub-Section 3(1) of the Family Home (Protection) Act, 1976 was to protect the family home by giving the right of avoidance to the spouse who was not a party to the transaction and that the sub-Section must be given the construction which does not overstep the limits of the operative range that must be ascribed to it, having regard to the legislative scheme as expressed in the Act of 1976 as a whole. The words of sub-Section 3 sub-Section 1 must be given no wider meaning than is necessary to effectuate the right of avoidance given when the

non-participating spouse has not consented in writing to the alienation of any interest in the family home.

The right of avoidance is given to the spouse and to nobody else.

As already stated, the Court has been informed by Counsel appearing on her behalf, that she does not wish to avail of that right, having regard to the fact that she was at all times aware of the sale of the lands and consented thereto.

It is not open to the purchaser, the Bankrupt herein, or by extension, the Official Assignee, to challenge the validity of the Deed of Transfer of the registered lands to the Bankrupt and to have the said transfer declared void.

In the circumstances, I am satisfied that the said Deed of Transfer and Conveyance constituted a valid transfer of the interest of John Gleeson, the owner of the said lands to the Bankrupt and that the said Bankrupt by the indenture of mortgage and charge mortgaged his interest therein to the applicants.

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