

THE HIGH COURT

[2024] IEHC 204

[Bankruptcy Number 3870 & 3871]

IN THE MATTER OF THE BANKRUPTCY ACT, 1988 (AS AMENDED)

BETWEEN

MICHAEL IAN LARKIN (AS OFFICIAL ASSIGNEE IN BANKRUPTCY IN THE
ESTATE OF DAVID HILL, A DISCHARGED BANKRUPT NO. 3870

AND ORLA HILL, A DISCHARGED BANKRUPT NO. 3871)

APPLICANT

AND

DAVID HILL AND ORLA HILL

RESPONDENTS

JUDGMENT of Mr Justice Kennedy delivered on the 15th day of April 2024.

1. The Official Assignee seeks orders for the possession and sale of a family home, 9 Collins Drive, Finglas, Dublin 11 (*“the Property”*) pursuant to section 61(4) of the Bankruptcy Act, 1988 (as amended) (*“the Act”*) by Notice of Motion dated 4 October 2019 (*“the Application”*). On 14 November 2016 David Hill (*“the First Respondent”*) and Orla Hill (*“the Second Respondent”*) were adjudicated bankrupt, on foot of their own petition. Accordingly, their estates, real and personal (*“the Estates”*) vested in the Official Assignee for their creditors’ benefit.

2. The First Respondent attended the hearing of the Application without filing any affidavit or making any oral or written submissions. Conversely, although the Second Respondent did not attend the hearing, an affidavit had previously been filed on her behalf and she had actively engaged with the Official Assignee in respect of the motion. Her Counsel did attend the hearing but was not in a position to make submissions in the absence of instructions. In any event, the Court has had regard to the previous filings on behalf of the Second Respondent.

3. There was no issue as to service – the evidence confirmed that the Application was duly served on both Respondents. In *Lehane v Burke* [2017] IEHC 426 (“*Burke*”), Ms Justice Costello concluded that an application pursuant to section 61(4) is a self-contained application within the bankruptcy proceedings and does not require personal service.

4. The Application was adjourned repeatedly to facilitate the Second Respondent’s efforts to explore the possibility of buying the Official Assignee's equity in the Property but also, for a period, due to COVID. In the event, no meaningful offer was forthcoming, and the Official Assignee applied *inter alia* to re-enter the Application and to substitute Mr Larkin, the new Official Assignee, as applicant. Mr Justice Sanfey directed accordingly on 3 July 2023, with the Second Respondent’s consent, following which further adjournments afforded the Second Respondent the opportunity to file a replying affidavit and obtain her own valuation of the Property (although no such valuation was filed).

5. The key facts are as follows:

- a) The Respondents’ 8 November 2016 Statements of Affairs listed their respective Estates’ indebtedness as follows:

Statement of Affairs	First Respondent	Second Respondent
Secured Creditors	€462,000	€462,000
Unsecured Creditors	€239,007.28	€210,234.39

Total Debts	€701,007.28	€672,234.39
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- b) The Respondents' respective Statements of Affairs listed their joint ownership in the Property, among their assets. The Property has been valued at €325,000 (as of 24 January 2023).
- c) The Property is in the First Respondent's sole name, but the Official Assignee recognises that: (a) the Respondents were previously married to each other; (b) the Second Respondent resides at the Property, which is the family home; and (c) she has a beneficial interest in its ownership. As the First Respondent, as full legal owner, and the Second Respondent, a beneficial owner, have been adjudicated bankrupt, the Official Assignee is the owner of the Property.
- d) There are no other assets available to be realised for the creditors of the Estates.
- e) The circumstances of the Second Respondent and her children were detailed in her affidavit, and it is clear that the sale of the family home would have a significant impact on them. In recognition of this fact, the Official Assignee has indicated that no objection would be made to a stay of two years from the date of re-entering the Application, which would be until June 2025.

The Second Respondent's Objections

6. The Second Respondent's replying affidavit, sworn on 19 December 2023 (*"the Replying Affidavit"*), raises objections to the Application, including that:
- a) the Property is not in the First Respondent's sole name;
 - b) she does not accept the valuation of the Property;

- c) the Property valuation, and therefore the Official Assignee's interest, is fixed as of the date of adjudication or the date of discharge, and the Official Assignee is not permitted to “*speculate*” on the Property value;
- d) the Official Assignee is estopped from pursuing the Application since the Second Respondent was permitted to continue to making mortgage payments by the Official Assignee as part of her Reasonable Living Expenses (“RLEs”);
- e) her creditors are willing to write off her debt.;
- f) she should not have opted to self-petition in bankruptcy;
- g) the Second Respondent is involved in family law proceedings; and
- h) any sale is a breach of her constitutional rights.

7. While points (c) (who benefits from any increase in the value of the Property) and (d) (the alleged estoppel) are dealt with in greater detail below, I can briefly explain why I do not agree with the other points listed:

- a) the Land Registry is clear on its face and, as matters stand, conclusively resolves the legal title to the Property. However, the Official Assignee acknowledges the Second Respondent’s equitable interest in any event;
- b) although the Second Respondent disagrees with the valuation of the Property, she has not produced any alternative valuation despite having been afforded ample opportunity to do so;
- e) the Second Respondent has not adduced any evidence to support her claim that her creditors are willing to write off her debts nor, presumably, would she be in a position to testify in relation to the First Respondent’s creditors;
- f) while the Second Respondent apparently regrets her decision to petition for bankruptcy, the Order of Adjudication was duly made. In the circumstances, there is no basis to revisit that issue;

g) the Second Respondent provides no meaningful details of the family law proceedings to which she refers or as to the basis on which they should affect the exercise of my discretion;

h) the Second Named Respondent does not give details of the basis on which she contends that any sale is a breach of her constitutional rights. Nor does she specify as to what rights she refers. In my view the legislation, including, in particular, the requirement for judicial approval of the sale of the family home, is designed to balance and vindicate the competing rights and interests.

8. The Official Assignee swore a supplemental affidavit on 24 January 2024, addressing the points raised by the Second Respondent. Accordingly, on the basis of the affidavits and the oral and written submissions, the following matters require consideration:

- a) the operation of the Act;
- b) the appropriate valuation date of the Property;
- c) the question of estoppel;
- d) The length of any stay if any order is granted.

THE LAW

Key Provisions of the Act

9. Section 44 governs the vesting of a bankrupt's property in the Official Assignee:

“(1) Where a person is adjudicated bankrupt, then, subject to the provisions of this Act, all property belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt”.

10. Accordingly, the Property vested in the Official Assignee on 14 November 2016, subject to the Act’s safeguards and time limits for the family home.

Section 85(3A)

11. Section 85, which governs the automatic discharge of a bankrupt from bankruptcy, states that any unrealised property remains vested in the Official Assignee, subject to section (3A), which deals with the re-vesting of the family or shared home:

“Subject to subsection (3A), where a bankruptcy is discharged in pursuance of this section the unrealised property of the bankrupt shall remain vested in the Official Assignee for the benefit of the creditors....

(3A) Subject to subsections (3B) to (3F), where on the 3rd anniversary of the date of the making of the adjudication order in respect of a bankruptcy-

(a) the unrealised property of the bankrupt referred to in subsection (3) includes an estate or interest in what was, at the date of the making of the adjudication order, the family home, shared home or principal private residence of the bankrupt, and

(b) in the case of the family home or shared home, the Official Assignee has not applied to the Court for an order for sale of that home,

that estate or interest shall, on that 3rd anniversary, stand re-vested in the bankrupt without the need for any conveyance, assignment or transfer.”

12. Accordingly, an unrealised family home automatically re-vests in a bankrupt on the third anniversary of adjudication, **unless** the Official Assignee has applied to the Court for an order for sale of that home. As Ms Justice Costello made clear in *Burke*, such a motion must be issued and served before that date, but need not be heard, to prevent automatic re-vesting. The re-vesting date would have been 14 November 2019, but the Application was issued and served before that date (on 4 October 2019 and on 7 October 2019 respectively). Therefore, the Property remains vested in the Official Assignee for the benefit of the two sets of creditors.

Section 61(4)

13. Section 61(4) governs the Official Assignee's vesting arrangements and grants the power of sale of the family or shared home. It imposes a requirement to apply to court for the sale of the family / shared home and to consider those with whom the home is shared.

“(4) Notwithstanding any provision to the contrary contained in subsection (3), no disposition of property of a bankrupt, arranging debtor or person dying insolvent, which comprises-

(a) a family home (within the meaning of the Family Home Protection Act 1976 of the bankrupt or the bankrupt's spouse...

shall be made without the prior sanction of the Court and any disposition made without such sanction shall be void.”

Section 61(5)

14. Section 61(5) states:

“On an application by the Official Assignee under subsection (4) for an order for the disposition of a family home or shared home, the Court, notwithstanding anything contained in this or any other enactment, shall have power to order postponement of the disposition of the family home or shared home, as the case may be, having regard to the interests of the creditors, spouse or civil partner ... and any dependants, of the bankrupt, arranging debtor or person dying insolvent, as the case may be, as well as to all the circumstances of the case.”

15. Accordingly, when considering an application for an order under section 61(4) for the sale of a family home the Court must have regard to: (i) the creditors; (ii) the spouse of the bankrupt; (iii) any dependants of the bankrupt; and (iv) all the circumstances of the case.

16. Ms Nesdale, on the Applicant’s behalf, comprehensively reviewed the jurisprudence and submitted that the authorities show that the primary issue is whether a stay / postponement should be placed on the order for the sale of the family home. Several cases have considered that discretion, including *Rubotham v Young* (Unreported, McCracken J., 23 May 1995) (“*Young*”), and *Rubotham v Duddy* (Unreported, Shanley J., 1 May 1996) (“*Duddy*”). More recently, the Court has dealt with such an application in *Re O’Shea* [2018] IEHC 181 (“*O’Shea*”), *Lehane v A.R. (A Discharged Bankrupt No. 3040)* and *J.L.R* [2019] IEHC 771 (“*A.R.*”), and *Lehane v Clohessy* [2021] IEHC 91 (“*Clohessy*”). Most, if not all, of the cases

deals with the “innocent spouse” scenario (to use the somewhat invidious language of the authorities, which is not intended to convey any moral turpitude on the part of those spouses not qualifying for that epithet). In this case both Respondents were bankrupts, but their dependant children reside in the Property.

Date of Valuation

17. As the Applicant notes, the facts in *Young* were similar to this case. McCracken J. concluded:

“In section 61(5) of the Bankruptcy Act, I am given specific guidelines as to the matters to be taken into account in exercising a discretion to postpone a sale. I must have regard to the interests of the creditors on the one hand and the interests of the spouse and to the dependants of the bankrupt on the other hand, and to all other circumstances of the case. As far as the creditors are concerned, the Bankrupt was adjudicated almost seven years ago, and the creditors have been paid nothing, and will be paid nothing unless and until the family home is sold. Even then, they will not be paid in full, there will be no funds available to meet any claim they might have in relation to interest to compensate them for the long delay. On the other hand, the spouse and dependants have lived in the house, in reality at the expense of the creditors, for almost seven years, and while at the time of the adjudication, some of the children were minors, they are now all of full age, although two of them are unemployed.” (Emphasis added)

18. The Court postponed the sale for four months from the date of the order.

19. In *Duddy*, the Court noted that the bankrupt had suffered ill health and that his spouse (who also suffered from both physical and psychiatric difficulties) had lived in the premises for thirty-eight years. The family had various difficulties which are noted in the judgment. An offer had been made from time to time to acquire the Official Assignee’s interest in the family home. The Court referred to an English decision of in *Re Mott* [1987] CLY 212, where the Court directed a stay until the death of the Bankrupt's mother. Shanley J. concluded that:

“The approach of the Court in that case is one which I propose to adopt. In this case there are exceptional circumstances which justify me in exercising the power to order a postponement of the sale of the family home. I shall not, however, order the postponement to extend beyond ten years.”

20. The Court added that:

“This is a case where exceptional circumstances do exist and it is a case where I have had regard to the interests of the creditors. Whilst the creditors are out of their money at present, they have the prospect of the property appreciating.” (Emphasis added)

21. The jurisprudence recognises that, if a spouse and/or dependants are allowed to remain in the family home following an adjudication, then that concession is at *“the expense of the creditors”*. However, conversely, the creditors may *“have the prospect of the property appreciating.”*

22. The bankrupt’s assets, including the family home, vest in the Official Assignee as of adjudication. They remain vested in the Official Assignee, subject to the Act. In my view, fluctuations in value cannot change that position. The Property remains vested in the Official Assignee. Its valuation affects the creditors. The equity to be derived from the Property for the creditors of the Estates is whatever is achieved on sale of the Property. I see no merit in the objection in respect of the property valuation issue.

Estoppel

23. The Second Respondent asserts that, by allowing her to claim her mortgage payments as part of her RLEs, the Official Assignee is somehow estopped from pursuing the Application. This is to fundamentally misunderstand the purpose of RLEs, which are to assist a bankrupt and are therefore in their interest, rather than to their detriment. If a bankrupt was not given the opportunity to continue their mortgage payments, as part of their RLEs, this would be to deprive them of the opportunity to keep the property in which they and their family reside.

24. Moreover, it is a general principle that the Official Assignee should first invite an offer for the vested equity in a family home from a bankrupt or spouse. The Official Assignee has gone to every length to try and facilitate the Second Respondent in her attempts to so purchase the Property. Such acts for the benefit of the Second Respondent cannot in principle give rise to an estoppel in her favour (and to recognise such an estoppel would have consequences detrimental to the interests of bankrupts in general).

Length of a Stay

25. *O'Shea* concerned an “innocent” non-working spouse with young dependant children. The spouse argued that she was an innocent party to her husband's debts and that the sale of the family home would be disproportionate and render the family homeless. Ms Justice Costello determined that section 61 expressly contemplates the sale of family home. Section 61 applies whether or not a non-bankrupt spouse has an interest in the family home and section 61(5) specifies the considerations for the Court when balancing the competing interests between the creditors and the dependants of a bankrupt. This is addressed by a postponement of sale where appropriate, with the Court also having a discretion as to the length of postponement. Costello J. noted that the purpose of the section was “*to balance the interests of the creditors against the interests of the spouse and dependents of the bankrupt*”.

26. The Court listed the factors relevant to the exercise of the judicial discretion in that particular case as:

“(1) It involves the sale of a family home.

(2) The spouse of the bankrupt is not bankrupt.

(3) It is the home of the spouse and young dependant children of the bankrupt.

(4) The spouse was not a party to any of the loans of the bankrupt.

(5) The spouse instituted proceedings against the bankrupt in 2015 seeking a declaration that she is entitled to a 50% interest in the lands comprised in the family home. Since the institution of the proceedings, they have not been progressed in any fashion.

(6) *Despite being afforded a number of opportunities so to do, the spouse has adduced no evidence at all as to her interest in the family home or the value of that interest. The Official Assignee is the registered full owner of the lands. In the absence of any evidence to the contrary he is the 100% owner of the family home.*

(7) *The spouse (and the bankrupt) has refused to allow a valuer appointed by the Official Assignee access to the family home in order to provide a valuation for the court. The Official Assignee obtained orders on 9th October and 6th November, 2017 directing that his valuer be granted access to the family home for the purpose of carrying out a valuation. Ms O'Shea appealed each of these orders and refused to afford the valuer access to the family home despite the fact that there was no stay on either order.*

(8) *The house has been valued at €275,000.*

(9) *The family home is unencumbered and therefore provides a real prospect of recovery for the benefit of creditors.*

(10) *While the spouse currently does not work outside the home and is the carer of her young children, she is not to be equated to the spouse in Duddy's case. She is a young woman and she confirmed to the court that she previously worked in a bank and, on her own case, had in the past earned sufficient monies to generate savings which allowed her to renovate and restore the house as set out above.*

(11) *No offer has been made to purchase the Official Assignee's interest in the family home.*

(12) *The bankrupt is entitled to earn and is entitled to a living allowance in accordance with the Insolvency Service of Ireland Guidelines which includes cost of living expenses for himself and his family. This would include the cost of renting a family home. There was no evidence before the court regarding his income, though he remains in occupation of and is working a farm.*

(13) *Very substantial monies are due to the creditors [sic]*

(14) *There has been no recovery to date despite the fact that the petitioning creditor obtained a judgment against the bankrupt on the 4th March, 2013. A receiver has been appointed by the judgment creditor over the farmlands of the bankrupt and he has experienced very considerable difficulties in obtaining possession of the lands and securing a sale of the lands. The bankrupt has indicated that he will not cooperate with the sale of any of the assets of the estate. The Official Assignee anticipates that it will be very difficult to realise any assets for the benefit of creditors.*

(15) Postponement of the order for sale involves the family of the bankrupt living in the family home at the creditors' expense while interest on the substantial sums continues to accrue.”

27. The Court directed the sale pursuant to section 61(4), postponed for one year. In dismissing the spouse’s appeal, Ms Justice Baker held:

“The sale of a family home in the course of the realisation of the assets of a bankrupt must as a matter of law be sanctioned by the High Court. To that extent the Act recognises that a family home is to be given special consideration and the discretionary nature of the power vested in the court to stay or postpone, or even refuse to sanction, a sale requires that all relevant factors be weighed in the decision. The statutory scheme requires the sanction of the High Court and permits a broad range of solutions including the postponement of the sale and to have regard to "all the circumstances of the case". I accept to that extent the argument of the appellant that special protection is to be afforded to her because she resides in the dwelling house with her young children. The protection is the oversight of the High Court.”

28. Mr Justice Barniville adopted the factors outlined in *O’Shea* in *A.R.*. In that case, the bankrupt’s estranged spouse resided in the family home with three dependant children. The bankrupt was the subject of a barring order preventing him from living in the property. The positive equity of the home vested in the Official Assignee was approximately €65,000. Mr Justice Barniville granted the order with a postponement of the sale for a period of two years, stating that:

“I am satisfied, for the reasons explained below, that it is appropriate to make an order for sale of the property under s. 61(4) of the 1988 Act (as amended). The equity representing the interest in the property (vested in the Official Assignee under s. 44(1) of the 1988 Act (as amended)) of approximately €65,000.00 is an asset available for the benefit of Mr. R's creditors. However, it is necessary to consider not only the interests of Mr. R's creditors but also the interests of his spouse (Ms. L) and his dependants (being his and Ms. L's children, three of whom continue to reside in the property). I am expressly required to have regard to their interests under s. 61(5) of the 1988 Act (as amended). Under that provision, the court has the power to order postponement of the disposition

of the relevant family home having regard to the interests of the creditors, the spouse and the dependants of the bankrupt. The Official Assignee has confirmed that he does not oppose a postponement of the disposition of the property of up to two years. I believe, having regard to the factors which must be taken into account, as appears from the O'Shea case, that it is appropriate having regard to the respective and competing interests of the creditors and of Ms. L and her and Mr. R's dependants, that there should be a postponement or stay on the sale of the property for two years...

In terms of the factors to be taken into account in determining whether sanction should be given for the sale of the property by the Official Assignee, I have derived most assistance from the judgment of the High Court (Costello J.) in O'Shea. In that case Costello J. held that s. 61 of the 1988 Act (as amended) applies whether or not the spouse of the bankrupt has an interest in the family home, provided the family home is part of the property of a bankrupt (per Costello J. at para. 17 of her judgment in O'Shea). I accept that and follow O'Shea on that point."

29. In the recent case of *Clohessy*, Mr Justice Humphreys emphasised that there is a presumption in favour of granting an order for sale, unless special circumstances are shown to the contrary having due regard to all matters, including prejudice to the creditors, the bankrupt and any dependants:

"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."

30. The Official Assignee submitted that, applying the principles from the authorities to the current situation it must be acknowledged that the Second Respondent is herself a discharged bankrupt who has been living in the Property for seven years, at the creditors' expense. The Official Assignee is under a duty to realise the Property for the creditors' benefit. I agree with that assessment.

CONCLUSION

31. The operation of the statutory regime is clear; the assets of a bankrupt, which include the family home, vest in the Official Assignee to be realised for the benefit of creditors. The Property vested, and remains vested, in the Official Assignee. The value of the Property is a matter which affects the creditors of the Estates.

32. The Official Assignee has made clear that it would accept an offer, provided it represents reasonable value for the creditors of the Estates with respect to the Property. At each juncture, the Official Assignee has accommodated the Second Respondent's efforts in trying to find a solution to the situation in which she finds herself. However, this has not been possible.

33. The Respondents were adjudicated bankrupt in November 2016, over seven years ago. It is four years since the Application issued. In the circumstances, it is appropriate for this Honourable Court to grant an order for possession and sale of the Property.

34. In the light of the trilogy of decisions referenced above (*O'Shea, A.R and Clohessy*) the Applicant's proposals with regard to a stay are entirely appropriate. The Court will accordingly direct the sale of the Property in accordance with section 61, with a stay until 3 July 2025, being the second anniversary of the re-entry of the Application with the Applicant's costs of the application to be costs in the bankruptcy.

35. Reliefs will accordingly be granted in the terms sought in paragraphs 1, 2 and 4 of the Notice of Motion and an order granting carriage of the sale of the Property to the Applicant as sought in paragraph 3 of the Notice of Motion.