Neutral Citation No. [2012] NICh 12

Ref:	**DEE8452**

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

Delivered:	**19/04/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

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1990 B30

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BETWEEN:

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Applicant;

And

MARY SUSAN CECILIA O'BRIEN

Respondent.

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DEENY J

[1] On 20th February 1990 Michael James O'Brien was adjudged bankrupt and his estate was vested in the then Official Assignee for Bankruptcy. The Official Receiver in succession to that office is now the trustee of the estate of Mr O'Brien which vested in him by operation of law and which he did not disclaim. When the respondent came to swear an affidavit in this matter it transpired that her full name was Mary Susan Cecilia O'Brien and I amend the title of the action accordingly.

[2] The respondent is the wife of Mr O'Brien and they were the joint owners as tenants in common of a dwelling house at Ballykelly, County Londonderry ("the property").

[3] On 24th August 1992 the Office of the Official Receiver wrote to the respondent about the property. They had been advised that the equity in the property in the light of a mortgage to the Halifax Building Society, as it then was, of about £25,500 would only be about £2,500 after costs. The Official Receiver offered to sell his half interest in the premises for £750. No reply was received to that letter. The Official Receiver then wrote a further letter (marked `Without Prejudice' but disclosed by the Official Receiver) on 4th January 1993 reiterating the offer to sell for £750 plus about £200 of costs. Unfortunately the respondent was not in a position to raise this sum of money at the time. She and the Official Receiver therefore continued to be the joint owners of the premises. The letter of 4th January 1993 went on to say the following.

> "If you do not wish to acquire my interest at present, I shall take no immediate action in relation to the property. However, when the value of the property rises with inflation, at some date in the future, I shall seek an order for possession and sale in order to realise your husband's interest."

Again apparently no response was made to this letter.

[4] On 15th February 2002 the applicant issued a summons through his solicitors Messrs King & Gowdy against the respondent seeking an order for vacant possession of the premises and that they be "sold in lieu of partition and that the proceeds of the sale thereof be divided between the Applicant and the Respondent in equal shares and such other shares as to the court shall seem appropriate." Certain incidental reliefs were also sought. It seems that this case was one of more than 30 cases where the Official Receiver had issued proceedings to avoid becoming statue barred in respect of any claim for sale of premises which he jointly owned as trustee in bankruptcy of a series of bankrupts. This particular case was repeatedly adjourned on consent by the Master. However, in parallel, cases seem to have been brought before the then Chancery Judge and two cases were selected for hearing to act as test cases for the general group of such proceedings. In each case in the group the Official Receiver had issued proceedings prior to the expiration of 12 years from the date on which his right of action for possession and sale accrued. Pursuant to Article 21 of the Limitation (NI) 1989 the right would have been barred after the expiration of 12 years. It is important to note in this case and in the rest of the group of cases that although the bankruptcy of Mr O'Brien took place in 1990 that was before the provisions of the Insolvency (NI) Order 1989 came into force. It is a commentary on the antiquity of this case that I am not therefore applying Article 309 of that legislation although it was passed some nearly 23 years ago. Under Article

309 there is express power for the High Court to make such order "as it thinks fit" notwithstanding the provisions of the Partition Act 1868 to which I shall come. The court at Article 309(5) is enjoined to assume that the interests of the bankrupt's creditors outweigh all other considerations "unless the circumstances of the case are exceptional". Article 256 A of the Order as now further amended re-vests the property in the bankrupt after three years if it has not been sold in that time; but that does not apply here either. However, as counsel for the Respondent accepted it is a relevant consideration to bear in mind in the exercise of any discretionary judgment.

[5] The two test cases of Official Receiver v Rooney and Paulson [2008] NI Ch. 22 were heard by the Judge on 31st March and 1st April 2004. Unfortunately judgment was not delivered until December 2008. There was some attempt on the part of the Official Receiver to invite the Judge to review his decision which he declined to do. An appeal was considered but not pursued. The matter was only brought to my attention at the end of November 2010. I then listed a number of these cases for case management on 13th January 2011. Test cases were selected at the request of the parties and fixed for May 2010. In the event the structure and presentation of those cases did not allow, it was agreed, a clear view to be taken. The matter was adjourned for consideration of this case only and owing to the commitments of counsel or the court it was ultimately heard on 15th and 16th March 2012. The parties sought the court's determination on a preliminary issue.

> "Whether a delay of almost 12 years from adjudication of Michael James O'Brien as bankrupt to the commencement of these proceedings is and of itself a defence to the applicant's claim?"

The question was drafted by the parties. In the event Mr Simpson QC who appeared with Miss Elaine Kelly for the respondent wished to rely on the totality of delay from the date of the bankruptcy of Mr O'Brien to 2012.

[6] For my own part I made it clear that given the period of time that elapsed that I would propose to deal finally with this action over and above the question posed by the parties. However, I shall begin by addressing the question advanced by the parties and then proceed to give as much guidance as I can to allow the speedy resolution of or adjudication upon the remaining cases. Mr Mark Horner QC who appeared with Mr Patrick Good QC for the Official Receiver candidly acknowledged early in his argument that even if his client was entitled to an order for sale on the facts of this particular case he could not resist a decision by the court to stay the proceedings until the demise of the respondent or the sale of the property if that came first. Briefly, the Respondent was still living in the house but had been

abandoned many years ago by the bankrupt from whom she was now divorced. She was left to bring up their five children, at the time aged 2 to 13; all are now over 18 but one is under a disability and needs to remain at home with her mother, as does another child in full time education. She herself is in poor health. With the help of the DHSS and her wider family she has kept up the payments on the mortgage and maintained the house. I agree with Weir J that these are relevant circumstances, which in this case taken together would be exceptional if that were the test to be applied, as the Official Receiver fairly accepts. Counsel acknowledged that such a power to stay the order was vested in the court pursuant to Section 86(3) of the Judicature Act (NI) 1978. He pointed out that since the sixteenth century in Ireland a party could come into court and seek an order for the partition of property jointly owned (33 Henry VIII c10, 1542). By the Partition Act 1868 the court was given a power to direct a sale of the property as an alternative remedy to partition in the circumstances envisaged at Section 3. Section 4 of that Act reads as follows.

> "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct the sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the courts shall, unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary or proper consequential directions." (Authorial underlining)

[7] In Northern Bank Ltd v Beattie & Beattie [1982] 18 NIJB 1 Murray J was dealing with a set of facts not unlike this where the bank was suing as a mortgagee against the husband who was the legal owner and the estranged wife was claiming an equitable half interest. At page 23 His Lordship said.

> "I draw attention to the words `a sale … instead of a division of the property' in section 4 – indeed they also appear in section 3 – and I record that I asked counsel for authority for the proposition that sale can be refused for `good reason' in a case where physical partition is not practicable. No such authority was produced to me and I certainly have not been able to find any myself; indeed the cases point against any such proposition being good law."

His Lordship had adverted to Daniels Chancery Practice (8th Edition), 1914 at page 1176ff. In deference to his views and the distinction of senior and junior counsel for the wife I intend to accept that that was indeed a correct statement of the law at the time.

[8] As a separate point the wording of the section clearly establishes that the onus is on the party opposing the order for sale to establish the good reason to the contrary: Pemberton v Barnes [1871] LR 6 Ch. App 685. I have taken into account the helpful submissions of counsel on both sides even if not expressly referred to herein.

[9] Since that decision the Human Rights Act 1998 has come into force. Section 3 subsection (1) provides as follows:-

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read in and given effect in a way which is compatible with the Convention rights."

[10] The Act of 1868 is primary legislation. The Limitation Order (NI) 1989 is subordinate legislation. With regard to the former there is no application before me to declare it incompatible with the European Convention on Human Rights, nor should there be. The phrase "unless it sees good reason to the contrary" can be read by the court in a new way compatible with Convention rights. There is a helpful discussion of the approach to be adopted in In Re ES [2007] NIQB 58 at paras [50] – [62].

[11] The three rights relied on by Mrs O'Brien here under the European Convention are those under Article 6, Article 8 and Article 1 of the First Protocol. With regard to the Article 6 right to a fair trial within a reasonable time Mr Simpson for Mrs O'Brien submits that the dispute, or "contestation" in the French expression, between the parties was commenced by the Official Receiver's letter to her of 4 January 1993. A reasonable time he submits thus had expired before the summons in this case issued. But the only relevant European authority cited to me was that of Ringeisen v. Austria [1971] 1 EHRR 455 which did not in fact support that submission. The position of the parties is that they are co-owners of this property. The determination of whether the Official Receiver has a right to have the property sold or whether the respondent has the right to remain in it until her death or her election to sell it was commenced by the originating summons herein. That is the "dispute" between these parties. As it deals with the applicant's 'right' to a sale and the respondent's 'obligation' to give up possession to allow the sale it must be an

Article 6 "determination of his [her] civil rights and obligations". Any other starting point would give rise to uncertainty. As counsel for the Receiver pointed out, she could have commenced proceedings at any time after the letter of 1993 herself to seek a declaration that the Official Receiver was not entitled to an order for sale of the property. She did not do so. I entirely understand that in practice such an application by her would be unlikely. I imagine it never occurred to her but that if it had she would have had to go to a solicitor and ask him to make a legal aid application on her behalf to bring the matter before the court. It is likely that he would have pointed out that she was running a title under the Limitation Order and that it might be better to wait and see whether the Official Receiver did in fact proceed within the 12 year time limit. One does not know if legal aid authorities would have thought such an apparently unnecessary application merited the use of public funds. But in any event neither she nor the Receiver did commence proceedings. I consider that the period for determination of whether or not the property should be sold therefore did not start until proceedings were in fact commenced.

[12] The respondent also relies on Article 8 of the Convention. It reads as follows:-

> "Right to respect for private and family life
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> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[13] This is an important right. It is not unqualified. An order for sale of the property now clearly would be a major interference by a public authority, that is the court, with the respondent's right to a family life and her current home. A correct decision of the court would make it in accordance with the law but would such a decision be necessary? In effect the applicant conceded it could not be judged necessary on the particular facts here. Would it be necessary otherwise to advance the rights of creditors more generally to be paid now (if there were any equity in the property) some 22 years after the bankruptcy of the debtor rather than having to

wait a further period of time until a respondent co-owner dies or wishes to sell the property? These proceedings were commenced after a period of nearly 12 years because the property market in Northern Ireland was then rising. In the effluxion of time since proceedings were commenced the market did indeed rise but has fallen back again sharply. The applicant does not seek to persuade me that very substantial benefits would be obtained by creditors at this time. It is possible that the market will rise again and the equity in the property will increase and the creditors will benefit more if they are left to their relief on the demise of or election to sell by the co-owner. It seems to me that a key aspect of the proper application of this right to the group of cases generally and not just the moving circumstances of Mrs O'Brien is that the right relates to family life and the home. I shall bear that in mind.

[14] The first Article of the first Protocol to the Convention deals with protection of property and reads as follows:-

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Possessions includes property and, inter alia, reversionary rights of landlords: James v UK (1986) 8 EHRR 123, E.Ct.H.R. This property has two legal co-owners. One is indeed enjoying possession of the property but the other by definition is not nor the proceeds of the sale. Applying this Article on its own would be a delicate exercise in proportionality. But it does not, of course, stand alone as indicated above.

[15] In R v. A (No 2) [2001] 2 WLR 1546 at 1582 c-d Lord Hope said:-

> "The rule of construction which Section 3 lays down is quite unlike any previous rule of interpretation. There is no need to identify an ambiguity or absurdity. Compatibility with Convention rights is the sole guiding principle. This is the paramount objective which the rule seeks to achieve. But the rule

> is only a rule of interpretation. It does not entitle the judges to act as legislators – the compatibility is to be achieved only so far as this is possible. Plainly this will not be possible if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible."

I share the uneasiness expressed by Weir J in Rooney and Paulson and by Girvan J in Official Receiver v. Kerr and Kerr [2002] NICH 8 as to an Official Receiver waiting nearly 12 years to bring his proceedings in circumstances of this sort. But neither went on to conclude that that was in itself unlawful and Holtman v Kelmanson [2006] EWHC 2588 is authority against. I do not consider that it is unlawful. I consider that I would be stepping over the line between judicial interpretation and the making of law were I to ignore the 12 year time limit under the Limitation Order which the Official Receiver here relied on. It is not the role of judges either to make the law let alone to break it. That time limit is part of a general code of long standing in our law, albeit with modifications by the legislature from time to time. It seems to me to be inappropriate, in these circumstances, to create uncertainty by saying such an express time limit can simply be set aside by a judge who finds that a party has not acted within a reasonable time, albeit that he is empowered to do by the Human Rights Act.

[16] The answer to the question for determination before me is, therefore, that a delay of almost 12 years from adjudication of Michael James O'Brien as bankrupt to the commencement of these proceedings is and of itself not a complete defence to the applicant's claims. The applicant is entitled to bring these proceedings.

[17] However, with a view to resolving the outstanding cases without further delay or costs being incurred it seems to me that I should and can express a clear view of what the effect of the delay is. We are now not merely 12 years from the date of the adjudication of this and various other bankrupts but some 22 years. What is a reasonable time "must always depend on the circumstances" per Lord Herschell L.C., Hick v Raymond & Reid [1893] A.C. 22, 29. It seems to me clear that in any case where the non-bankrupt co-owner can avail of Article 8 i.e. she is enjoying the property as her home and as the centre of her family life, it is not necessary or appropriate or proportionate to interfere with that by an order for sale, whether that is to be stayed or not. Mr Horner ingeniously postulated the possibility of a co-owner who had in fact remarried and gone to live elsewhere and was letting the property in her joint ownership with the Official Receiver but such a person, if indeed that is true of any of these litigants, would not be able to avail of Article 8. It seems to me that Article 1 of the First Protocol taken in isolation may well not be

strong enough to resist an application from the Official Receiver, even after this long period of time, for an order for possession and sale of the premises. But if the co-owner can avail of Article 8 the court will not grant an order for sale, even if her children have left home, unless some other specific and significant circumstances, not existing here, made that a necessary and proportionate measure. The court will put a modern interpretation, pursuant to the Human Rights Act, on the provision in the Partition Act as to "good reason" for refusing an order for sale.

[18] There was debate at the hearing on a pragmatic approach of granting an order for sale but staying it until the demise or agreement of the co-owner. I accept the submission of Mr Simpson that whereas in practice it may not make a lot of difference a mere stay by the court in the exercise of its discretion is a less clear determination of the parties' rights herein. I prefer to take the course of refusing an order for sale. The refusal relates to this respondent, not to her heirs and assigns.

[19] This leaves a burden on the Official Receiver to supervise his interest in the property on behalf of the creditors. He may have to wait many years before the co-owner passes away. As a co-owner he can prevent any sale of the property but equally well he can consent to the same if the co-owner desires it. It may well be that in practice he will adopt a similar approach to that adopted in 1993 i.e. to offer to sell his interest in the property, and no doubt at a discounted rate, again, to allow for the fact that the Official Receiver will not be troubled with further administration of the matter and the creditors will receive a dividend now rather than at some indeterminate point in the future. Any such offer would need to be very carefully looked at by those in the position of Mrs O'Brien as it might be extremely sensible for them to try and raise some money so as to acquire the sole ownership of the family home. But I have concluded that this is a matter I should leave to the parties own good sense.

[20] It can be seen therefore that I take a somewhat different but nevertheless, in my view, not inconsistent approach to that of Weir J in Rooney and Paulson, op.cit. when he heard the matter at an earlier date. It was suggested by counsel that an interpretation had been put on his judgment that the refusal of the order for sale in effect amounted to a transfer to the wife of the bankrupt's interests. I do not see any such finding in his judgment and I view this as a misreading thereof.

[21] Mr Horner submitted that his client was a victim of delay as much as the respondent. That might be true for part of the period of time. But I do not think that, outside that, the Official Receiver has anything of which he can legitimately complain. While he was entitled, I find, to avail of his strict legal right not to issue proceedings until close to the expiry of the 12 year limit it is nevertheless a fact that that is what he chose to do. It is a fact that the respondent has been living in this

house all these years with the shadow hanging over her of a possible successful claim from the Official Receiver. Some at least of the passage of time from the issuance of these proceedings might suggest a lack of haste on his part. There may well be a variety of reasons, some of them good reasons, for the passage of time. But the court has to face the reality that it is now 22 years since the bankruptcy of Mr O'Brien and others like him in the group of cases and that it would clearly be a disproportionate interference with the rights of any co-owner who has been living in and maintaining the property as their family home to now put them out. The combination of Articles 6 and 8 defeats the Applicant's claim.

[22] For completeness I have read the helpful note by Dr Heather Conway (author of Co-ownership of Land, 2000) in Folio, Issue 2/2011. The cases cited by her and relied on by Mr Horner of Foyle v Turner [2007] BPIR 43 and Turner v. Avis [2009] 1 FLR 74 are distinguishable on the facts from my decision. The same is true of O'Brien v. Sheahan [2002] FC1292 where the Federal Court of Australia granted relief against an order for sale on the ground of estoppel. But there Care J refers to statements made on the Official Receiver's behalf. There are no equivalent statements in this case. I do not consider that the conduct of the Official Receiver has been unconscionable. I do not apply the doctrine of estoppel to this case. It seems to me that there is "good reason" to arrive at the simple conclusion that an order for sale pursuant to s.4 of the Partition Act should not be granted for the sale of the family home of a co-owner 22 years after the Official Receiver acquired the right as co-owner to seek such an order.