Neutral Citation No: [2022] NICA 19 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **TRE11816** *ICOS No:* **20/19/85355** *Delivered:* **8/4/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND CHANCERY DIVISION (BANKRUPTCY)

RE GREG FOSTER

BETWEEN:

DEPARTMENT OF FINANCE, LAND AND PROPERTY SERVICES

Petitioning Creditor/ Respondent:

and

GREG FOSTER

Respondent / Appellant:

William T Gowdy QC with Robert C McCausland BL (instructed by the Crown Solicitor) for the Respondent
The Appellant appeared as a Litigant in Person

Before: Keegan LCJ and Treacy LJ

TREACY LJ *(delivering the judgment of the court)*

Introduction

[1] This appeal is about unpaid rate bills which rarely give rise to litigation in the High Court or the Court of Appeal. The paucity of cases of this kind in the higher courts is due to the existence of procedures and mechanisms designed to allow these routine matters to be resolved quickly and at minimal expense in other fora. This court would stress that these alternative mechanisms are the correct mechanisms to use in cases of this kind.

[2] It is both regrettable and wrong in principle that a personal litigant who is not funding professional advocates to advance legal arguments which such advocates have confirmed as being viable, and/or who does not qualify for legal aid to advance his arguments, possibly because he cannot show a viable legal basis for them, should nonetheless access this court by the simple mechanism of presenting arguments of their own and presenting them in the capacity of a 'personal litigant'. That is one of the reasons why there has to be filter mechanisms to eradicate the real and growing risk of expensive, time wasting and wholly unmeritorious cases finding their way to this court. That fundamental safeguard existed in this case in the form of the requirement to obtain leave from the High Court. That Court having dealt with the case is best placed in the first instance to determine whether it should be allowed to progress further. That exercise can readily be determined by the High Court judge speedily and without undue engagement not least because the judge has already completed a detailed evaluation of the merits after having heard oral evidence and submissions. If requested to grant leave, and the High Court judge is clear that the case is devoid of legal merit, s/he should have no hesitation in refusing leave. Failure to apply that filter mechanism can, as in this case, result in tying up the time of the Court of Appeal in hearing, yet again, entirely unmeritorious arguments some of which the judge had rather generously characterised as 'legal nonsense' when, in truth, they were just plain nonsense.

[3] The courts have always sought to facilitate personal litigants who have, or may have, a viable point of law to make, but who are unable or unwilling to fund professional representatives either because they do not qualify financially for legal aid or because the potential complexity of their case makes it too large a financial risk even for a person of theoretically adequate means. People in such circumstances face the risk of being excluded from access to justice with the result that their viable legal arguments might go unheard and unresolved. These courts try hard to facilitate cases of this kind in order to avoid injustices from arising due to inequality of arms among the citizens that come before it.

[4] However, there is a difference between a person who has a viable point which merits evaluation and a person who may simply adopt the persona of 'personal litigant' in order to gain a hearing for arguments with little or no substance. Moreover there is an inescapable risk that such arguments may be generated as a ruse to delay or, they might hope, derail other available resolution mechanisms that might otherwise resolve these routine matters.

[5] Mindful of these broader concerns we now turn our minds to the matter before us.

Background

[6] The Department of Finance, Land and Property Services ("the Department") issued a bankruptcy petition against the appellant based on unpaid rates bills. On 27 November 2019 Master Kelly ordered that he be adjudicated bankrupt. He

appealed to the High Court where McBride J ("the trial judge") in a detailed judgment dismissed all his grounds of appeal and affirmed the order of the Master – see [2021] NICh 4. He now seeks to appeal to the Court of Appeal against that decision.

Requirement of leave to appeal

[7] The order under appeal is a bankruptcy order made under Article 245 of the Insolvency (NI) Order 1989 ("the 1989 Order"). As such, an appeal to the Court of Appeal lies only with leave of the judge below or of the Court of Appeal as per section 35(2)(j) of the Judicature Act (NI) 1978:

> "**35 Appeals to Court of Appeal from High Court.**
>
> …
>
> (2) No appeal to the Court of Appeal shall lie—
>
> …
>
> (j) without the leave of the High Court or of the Court of Appeal, from a decision of the High Court under the Insolvency (Northern Ireland) Order 1989."

[8] We accept that the appellant had been told by the judge that he had a right of appeal and advised that he did not require leave of the court to pursue an appeal. It is indeed unfortunate in view of our previous observations that the experienced lawyers for the respondent did not intervene to point out that leave was required and argue, as they did before us, that leave should be refused. Given what transpired we are satisfied that this explains the appellant's failure to seek leave to appeal. In light of this we considered that the appropriate course was to extend time and this was effectively conceded.

[9] Leave to appeal will be granted if there is a prima facie case of error; or a question of general principle not already decided; or a question of importance upon which further argument and a decision of the Court of Appeal would be to the public advantage: Supreme Court Practice (1999) at 59/14/18. In cases not involving a point of general principle or public advantage, the Appellant must show "an arguable case with a reasonable prospect of success that the trial judge had gone plainly wrong." See *Flynn v Chief Constable of the PSNI* [2018] NICA 3, [2020] NI 293 at [19]. This is the test that must be applied whether leave is being sought from the High Court or on renewal of an application for leave to the Court of Appeal.

[10] The respondent correctly submitted that this case involves no question of general principle nor any point of public importance. The onus lies on the appellant to demonstrate an arguable case that the judge was plainly wrong before leave can be granted. Personal litigants carry this burden in the same way as other litigants and this court will apply the same legal standards to them as to others. In the event

that they fail to discharge this burden they will be advised accordingly by the court. This will not generally require lengthy engagement with arguments that are irrelevant to the central legal question in play.

[11] The grounds of appeal are diffuse and overlapping and we propose to deal with the principal points which are raised. Before doing so it is necessary to set the scene by reference to the judgment of the High Court that is being appealed

Proceedings before the High Court

[12] The evidence before the trial judge consisted of two affidavits sworn by Richard Gregg, a senior enforcement officer employed by the Department on 11 February 2020 and 19 January 2021 and two affidavits sworn by the appellant on 18 December 2019 and 10 March 2020. In addition to his affidavit evidence Mr Gregg gave oral evidence in which he adopted his affidavit evidence and was then subject to cross-examination by the appellant.

[13] The appellant was advised by the court that he could give oral evidence but he declined to do so.

The trial Judge's findings of fact

[14] In summary the trial judge found as follows:

Rates bills

(i) There was no dispute that the appellant resides at 1 Boulevard, Belfast BT7 3LW ("the premises") which is a domestic dwelling and that he has a legal interest in these premises as appears from the Land Certificate;

(ii) Between 2014 and 2018 the respondent sent a number of rates bills and final demands addressed to the appellant at the premises.

(iii) It is undisputed that the rates bills remained unpaid.

Court decrees

(i) After the failure of the appellant to pay the rates bills and after final demands were issued, the respondent applied for and obtained four decrees in the Magistrates' Court in respect of the unpaid rates bills as follows:

    (a) Decree dated 6 October 2014 in the sum of £1416.00 and £50 costs.

    (b) Decree dated 8 March 2016 in the sum of £1427.20 and £50 costs.

    (c) Decree dated 29 July 2016 in the sum of £1450.20 and £50 costs.

(d) Decree dated 19 October 2018 in the sum of £3000.80 and £59 costs.

The trial judge was satisfied that the Department obtained all four decrees set out above.

The appellant never appealed or otherwise sought to set aside any decrees obtained in the Magistrates' Court.

Statutory demand

(i) On 23 January 2019 the Department served a statutory demand on the appellant by first class post claiming the sum of £7,503.20 based on the decrees set out above.

(ii) In his affidavit sworn on 18 December 2019 the appellant averred that "the statutory demand … has never come to my attention." When asked to give oral evidence that he had not received the statutory demand he declined to do so and consequently his evidence to this effect was never tested under cross-examination.

(iii) Having reviewed all the evidence on whether the appellant had received the statutory demand the trial judge concluded that the appellant's averment in December 2019 that the statutory demand had never come to his attention was "factually incorrect".

(iv) The trial judge also found that the appellant "made a considered decision not to give evidence as he wished to avoid answering searching questions under cross-examination. In light of his failure to give oral evidence and the factual inaccuracy of his affidavit and the steps taken to effect personal service upon him, I reject his evidence that he did not receive the statutory demand and I find that it was served upon him in May 2019".

Bankruptcy Petition and Order

(i) On 10 September 2020 the respondent issued a bankruptcy petition against the appellant based on the statutory demand dated 23 January 2019. Para 5 of the bankruptcy petition stated as follows:

> "On 20 May 2019 the statutory demand in respect of the above-mentioned debt was posted via first class post in a sealed envelope addressed to the above-named debtor at 1 The Boulevard, Belfast, County Antrim BT7 3LW and to the best of its knowledge, information and belief the demand will have come to the attention of the debtor by 23 May 2019. To the best of its knowledge and belief the

demand has neither been complied with nor set aside in accordance with the rules and no application to set it aside is outstanding."

(ii) On 14 November 2019 the appellant issued a "Notice of Opposition of Bankruptcy Petition" in which he set out a number of grounds opposing the making of a bankruptcy order.

(iii) On 26 November 2019 the appellant issued a counterclaim against the respondent and others seeking compensation for the theft and demolition of private property owned by him and compensation for various losses arising from his defence of what he termed false claims brought by the respondent against him.

(iv) The appellant attended in person before Master Kelly on 27 November 2019 when the bankruptcy order was made.

(v) The appellant issued a notice of appeal dated 19 December 2019 supported by an affidavit sworn on 18 December 2019.

Consideration

Whether the appellant was denied a fair hearing before the Master

[15] The appellant repeatedly came back to his assertion that he did not receive a fair hearing before the Master. We are in full agreement with the Trial Judge that an appeal from the Master is a de novo rehearing and accordingly such a hearing cures any alleged defects in respect of the hearing at the lower court. Accordingly, the Trial Judge was correct that she did not have to determine the complaints made by the appellant regarding the hearing before the Master. As the trial judge pointed out this did not mean she accepted his complaints but was simply confirming that it was unnecessary for her to adjudicate upon those matters as the case was heard de novo.

The appellant's challenge to the debt

[16] For the reasons set out in *Barnes v Whitehead* [2004] BPIR 693 and because the court must be satisfied the creditor is owed a debt by the debtor the trial judge held she was not precluded from hearing a dispute as to the debt at petition stage when the debtor has not applied to set aside the statutory demand. In any event she held that the court can additionally entertain the dispute on the basis it retains a discretion to refuse to grant a petition [see paras [30]-[33] of her judgment].

[17] The grounds for setting aside a statutory demand are set out in Rule 6.005(4) of the Insolvency Rules (Northern Ireland) 1991 (SR NI 1991/364) namely:

"(a) the debtor appears to have a counterclaim, set off or cross demand which equals or exceeds the debts specified in the statutory demand.

(b) The debt is disputed on substantial grounds.

(c) The creditor holds security for the debt."

The court also has a discretion to set aside on other grounds if it is satisfied that the demand should be set aside.

Counterclaim/ Set off/ Cross claim

[18] A counterclaim was issued on 26 November 2019 by the appellant and his daughter, who may be a minor. The counterclaim was issued against the respondent, and named officials of the Department. The appellant and his daughter seek compensation for theft and demolition of private property owned by the plaintiff. They then claim fees for defending 'false claims' by the Department. In relation to the named officials damages are claimed for inter alia fraud by misrepresentation, fraud by abuse of position and misconduct in public office and harassment.

[19] In *Hofer v Strawson* [1999] 2 BCLC 336 Neuberger J held that a debtor should only be able to set aside a statutory demand where his counterclaim has a real prospect of success. As the trial judge held the appellant presented no evidence in support of his counterclaim. The only material before the High Court in respect of the counterclaim consisted of the pleadings. The particulars of the counterclaim all relate to the steps taken by the respondent to recover rates. Having considered the allegations set out in the counterclaim the trial judge was satisfied that it has no reasonable prospect of success as the particulars relate to appropriate and reasonable attempts made by the respondent to serve proceedings relating to unpaid rates bills. In her judgement McBride J correctly held the pleadings would be struck out under Order 18 rule 19 of the Rules of the Court of Judicature as they do not establish the necessary legal ingredients to establish fraud, harassment or abuse of position. In addition, there was significant delay in the issue of the counterclaim and it was only issued after the bankruptcy petition was served. The trial judge considered that it was issued as a pretext to stave off bankruptcy. Taking all these matters into account she was satisfied that the appellant had failed to demonstrate that his counterclaim has a real prospect of success. In light of the material before her these conclusions cannot sustainably be regarded as plainly wrong. Indeed, although it is unnecessary to say so, her decision was plainly right.

[20] In addition the appellant submitted that he had a cross demand of a greater amount than the debt on the basis of a failure by the respondent to pay compensation ordered by the Lands Tribunal in "In the matter of a Reference R/6/2015, Between Northern Ireland Housing Executive (Applicant) and Stuart

William George Foster, Gregg James Foster and Gareth Cummings Scott (Respondents) Re 99 Soudan Street, Belfast."

[21] In respect of the appellant's claim that he has a cross demand arising out of the Order of the Lands Tribunal, the trial judge held that he must satisfy the court that the cross demand is between the parties in the same capacities. She referenced *Hurst v Bennett* [2001] 1 EWCA Civ 182 in which the court held that lack of mutuality between the parties is fatal to the application on this ground. The Lands Tribunal provided that the Northern Ireland Housing Executive pay compensation to Alliance and Leicester Building Society ("the building society") in respect of the premises which were vested. The appellant had a legal interest in these premises but as the premises were in negative equity the Lands Tribunal ruled that the compensation should be paid directly to the building society and not to the appellant. Although the compensation has not been paid to the building society, the trial judge was satisfied the respondent owes no compensation on foot of this judgment to the appellant. In addition the Lands Tribunal made the order against another party namely the Northern Ireland Housing Executive. Accordingly, the trial judge considered that the cross demand had no merit as no monies were to be paid to the appellant and even if the Lands Tribunal's order could be construed as an order in favour of the appellant the party liable to pay the debt is Northern Ireland Housing Executive which is a legally distinct body from the Department. Accordingly, the trial judge was satisfied that the cross demand was not a serious and genuine claim. We consider that conclusion is unassailable.

Debt disputed on substantial grounds

[22] If a debtor wishes to set aside a statutory demand on 'substantial grounds' he must show that he has a "potentially viable defence" to the claim. The appellant before McBride J sought to dispute the debt a number of grounds.

No contractual liability to pay rates

[23] The appellant submitted that there is no contractual liability to pay rates. He is the owner and occupier of the premises and he accepted that he had previously paid rates in respect of the same premises. We agree with the trial judge that as the owner and occupier of the premises he is liable for payment of rates in respect thereof and therefore this is not an arguable defence to the claim.

Ground 1

[24] The debt on which the respondent claims to be a creditor arises from the statutory liability of the appellant as the owner of a rateable hereditament to pay the rates attributable to that property. There was no dispute before the trial judge as to the fact that he was the owner of such a property, and that he had not paid the rates levied against that property.

[25] The trial judge was satisfied from the oral evidence of Richard Gregg, a senior enforcement officer, the internal records of the respondent, and the copy decrees produced in three cases, that the respondent had obtained four Magistrates' Court decrees against the appellant, requiring him to pay the unpaid rates to the respondent.

[26] The appellant's evidence did not provide any evidential contradiction of those essential facts. He did not depose to not being the owner of the properties in question; nor did he make the case that the rates somehow were not due. He did claim in an affidavit that he won in the Magistrates' Court, but that evidence is contradicted by the three decrees which have been produced, and is undermined by the fact that he has not produced any formal dismiss from the Magistrates' Court under rule 74 of the Magistrates Court Rules (NI) 1984.

[27] We agree with the respondent that that there was more than ample evidence to establish that the respondent was a creditor of the appellant.

No proof of judgment decrees

[28] The appellant submitted that the respondent had not provided proof that it obtained decrees in respect of the debt. We agree with the trial judge that the court made all the decrees as set out above against the appellant and reject this argument.

[29] Given that decrees were made by the Magistrates' Court it is not the function of this court at the bankruptcy petition stage to look behind those decrees save in exceptional circumstances. As noted by Gowdy & Gowdy in Individual Insolvency Law and Practice in Northern Ireland at 3.18:

> "Thus absent some ground such as fraud or collusion which would vitiate the judgment, a debtor cannot apply to have a statutory demand set aside on the grounds that the debt is disputed on substantial grounds when that debt is a judgment debt."

[30] The trial judge was satisfied there are no circumstances present which would persuade the court to exercise its discretion in this way especially as some of the decrees were obtained after contest at which Mr Foster was present. Again this decision cannot be castigated as plainly wrong. To the contrary, it was plainly correct.

Affidavits not rebutted

[31] The appellant had submitted that his affidavit evidence was unrebutted and therefore the debt is not proved. We agree with the trial judge in rejecting this submission as the affidavits of Mr Gregg rebut the submissions made in the appellant's affidavits.

Fraudulent/ Illegal acts by the Department

[32] The appellant disputed the debt on the basis the respondent acted illegally, fraudulently and coercively and harassed and intimidated him. This claim is similar to the claim made in the counterclaim and we agree with the trial judge's finding that this is not a viable defence to the debt. We agree with her assessment that there is no evidence to show that the respondent acted illegally, fraudulently, or coercively or that it harassed or intimidated the appellant.

The Department owes money to the appellant

[33] The appellant alleged that the respondent owed him monies on foot of the judgment of the Lands Tribunal. Again we agree with the trial judge in rejecting this submission. The Lands Tribunal judgment did not create any liability on the part of the Department to pay any money to the appellant.

A Government agency cannot make Mr Foster bankrupt

[34] Ridiculously, the appellant submitted that he cannot be made bankrupt by any government agency as they do not have a jurisdictional benefit to his life and property. The trial judge described this argument as 'legal nonsense'. This was generous – it is simply nonsense. We are satisfied that the appellant has not established that there is a potentially viable defence to the claim.

Debt settled

[35] The appellant, in further nonsense, insisted that he had settled the debt. This was based on a 'Private Record of the parties." The private record refers to a letter in which the appellant unilaterally appointed certain persons as his trustees and directed them to "close the account." The trial Judge was satisfied that a unilateral declaration of trust is not valid or capable of discharging a debt. Mr Gregg in his evidence confirmed that the debt remained outstanding and the trial judge was satisfied that the debt remains due and owing.

Conclusion

[36] We agree that the appellant's arguments largely go to formal and technical issues. They do not go to the substance of the matter – namely that he was in rateable occupation of a property and failed to pay the rates, that proceedings were issued in the Magistrates' Court and orders made, and that he still did not satisfy his liability to the respondent. He does not put forward any defence of substance to the respondent's claim. Nor does he put forward any genuine and substantial counterclaim. His claim for vesting compensation is a claim against the Housing Executive, not the respondent. His claim against officers of the respondent has no reasonable prospect of success.

[37] We are in full agreement with all of the substantive findings of the trial judge upon which she affirmed the order of the Master making the bankruptcy order and dismissing this appeal. We refuse leave to appeal the judgment of the trial judge as the test for leave, earlier set out, has not been established. This was a hopeless and utterly groundless appeal.