

Neutral Citation: [2016] NIQB 53

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*Ex tempore Judgment: corrected and approved by the
Judge*

Delivered: 09/06/2016

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Commercial List 2011/11444

COLM HURL

Plaintiff

v

EMMANUEL LUPARI

First Defendant

and

JAMES B KENNEDY

Trustee in Bankruptcy of Emmanuel Lupari

Second Defendant

MR JUSTICE DEENY

[1] This is an application brought by Mr Colm Hurl against Mr Emmanuel Lupari as part of proceedings in the Commercial List Number 2011/11444. The matter has had a long history. It arises out of a co-operation between the plaintiff and the first defendant with a view to developing a housing project in Turkey. Both at one point undoubtedly had shares in a company which is the subject of proceedings in Turkey namely Bodrum Ege Limited.

[2] The matter has an unhappy complication in that it would appear that someone altered an earlier order of my predecessor Mr Justice Weatherup and obtained notarisation of that altered order and that this was drawn to the attention of the Turkish courts. The matter was referred by my predecessor to the Law Society of Northern Ireland but their investigation of it is not yet complete. It is possible that the matter is properly one that should be dealt with by the police and the criminal courts but I can say no more about that at this stage. It is an unprecedented occurrence, in my experience.

[3] Nevertheless, despite that unhappy matter the court has to deal with the case as it stands and with the separate and discrete issue raised by the plaintiff with regard to the first named defendant. That point is that he was made bankrupt in Northern Ireland. The first named defendant was made bankrupt by the Court on 14 March 2011 i.e. he was unable to pay his debts as they fell due. The law in Northern Ireland is quite clear. Pursuant to the Insolvency (NI) Order 1989 the property of the bankrupt then vests in his trustee in bankruptcy. On 24 March 2011 Mr James B Kennedy, a licenced insolvency practitioner in this jurisdiction, was appointed trustee of the bankrupt's estate by the Department of Enterprise, Trade and Investment. This appointment was made in accordance with Article 269 of the 1989 Order. The duty of a trustee in bankruptcy is to get in realise and distribute the bankrupt's estate for the benefit, not only of the creditor who petitioned for bankruptcy, but for any other creditors who come forward and make valid claims against the bankrupt.

[4] The present law in Northern Ireland is to be borne in mind. The bankrupt is entitled to an automatic discharge from bankruptcy after a period of time unless an express order is made by the court to the contrary. Such an order is usually only made if there is clear evidence that the bankrupt is frustrating the efforts of the trustee in bankruptcy to locate the assets. The first defendant here, Mr Lupari, therefore benefitted from that release from bankruptcy on 21 January 2013, after the expiry of 12 months from the original order of bankruptcy. It should be understood that at that point the assets of the bankrupt remain vested in the trustee in bankruptcy. They do not revert to the bankrupt. The trustee is the person who still has the role of recovering the assets and distributing them according to law to the creditors. The functions of the trustee therefore include the ownership, and if he chooses, the pursuit of assets formerly owned by the bankrupt. I have been shown the letter of 16 October 2015 from the Insolvency Service of the Department of Enterprise, Trade and Investment in Northern Ireland explaining these matters for the assistance of those in Turkey concerned with this quite complex case.

[5] On foot of that legal position I had an application on 10 December 2015 seeking various reliefs on behalf of Mr Colm Hurl against Mr Manuel Lupari. One of the applications was for a Declaration. For the avoidance of doubt I should say that Declarations in this jurisdiction are normally made on a final basis; it is the court declaring what a legal position is. Injunctions may be, and very frequently, indeed usually, are granted on an interim or interlocutory basis i.e. pending a full trial (quia timet or otherwise). On that occasion I granted a declaration to the following effect:

"It is declared that all assets (including any shares in any company) held by the first named defendant, Emmanuel Lupari, prior to his bankruptcy on 14 March 2011 are vested in the second named defendant as trustee in bankruptcy namely James B Kennedy."

[6] For the assistance of my Turkish colleagues I make it clear that that was a final declaration; it is an indisputable statement of the legal position. It was not appealed from me to the Court of Appeal in Northern Ireland. It had been hoped that that would be sufficient to deter Mr Lupari from making any contrary representation in the courts of Turkey. The applicant before me today in this hearing, Mr Hurl, has sworn two affidavits, the second of which was in response to an affidavit from Mr Lupari and exhibited a number of documents which shows that Mr Lupari appears to be continuing to hold himself out as entitled as of now to a shareholding in Bodrum Ege Limited. That is not correct. If this company resumed its activities and proved to be valuable it is conceivable that if, as he claims, he has a shareholding in the company that a valuable asset would be returned but that would be to the bankrupt's estate, i.e. to Mr Kennedy as his trustee. If the value of any shareholding which Mr Lupari may have in the company exceeded the debts, with interest, which he had at the time of his bankruptcy then conceivably there might be a return to him. But that would be only after the trustee in bankruptcy had discharged his duty to reimburse the creditors according to law. It is quite wrong for Mr Lupari to give any impression to the contrary as he seems to have done through his lawyer insofar as one can judge the matter from the various documents which have been translated and put before the court. (If there is a dispute about the extent of his share-holding that can be determined in the appropriate jurisdiction).

[7] The applicant through his counsel, Mr Keith Gibson, therefore says that the court must go beyond the declaration that was made in December to restrain Mr Lupari from putting forward a case which is in effect wrong, one might even say a dishonest case. This injunction as sought against him is of a personal nature. He is resident in Northern Ireland. He is within this jurisdiction and if the court makes an order he must obey it. If he disobeys the order, as the penal notice of the injunction will say, he is liable to penal sanctions including fines or imprisonment for contempt of court. Mr Gibson makes it clear and I make it clear that I am not purporting to give any direction to the courts of Turkey. The conduct of their affairs is a matter for them. But Mr Gibson has persuaded me, despite the cogent written and oral submissions of counsel for Mr Lupari, that it is proper to now grant such an injunction. I observe that this is an unusual situation. I have given a final declaration on 10 December. I can now only give an interlocutory injunction against Mr Lupari today because I still have not had a full trial of this case between him and Mr Hurl.

[8] As Mr Kennedy of counsel wisely pointed out there are several difficulties to having that trial. One is that he and his solicitor have still not been furnished with documents that they are seeking from the plaintiff but the other, and in my view, insuperable difficulty is that the earlier apparently altered order is still the subject of an investigation and the court will really have to hear evidence about that. The practice in this jurisdiction is that the determination of civil rights awaits and takes second place to the determination of a criminal prosecution. I presume this matter has been reported to the police by Mr Lupari or the Law Society but obviously if a document has been forged, a court order, that is a criminal offence and somebody

may be prosecuted for it. If those steps have not been taken then in my opinion both the defendant and the Law Society should immediately report these matters to the police so that if a criminal offence has been committed the guilty party or parties are indeed prosecuted. In that situation the only injunction I can properly give today is an interlocutory injunction i.e. one awaiting the trial. It is effective on Mr Lupari and he will be subject to penal sanctions if he breaches it. I will turn to the wording of it in a moment.

[9] There is a process in our insolvency law allowing a bankrupt to apply to the court to annul his bankruptcy but I am not aware of such an application having been brought by Emmanuel Lupari. In any event, certainly, no such order has been made by the relevant or any court in Northern Ireland.

[10] For the avoidance of doubt I say that the proper course with regard to the Turkish proceedings so far as is evident in this court is that Mr Lupari's trustee in bankruptcy should pursue that claim if he chooses to do so. That is sometimes obviously done by a trustee in bankruptcy. He would have to be satisfied that it was a claim worth pursuing. He would have to have the necessary funds from the bankrupt's assets or otherwise to fund the continuance of such proceedings. In the alternative, and as I mentioned to counsel, there was an illustration of this in my court this very morning, a former bankrupt such as Mr Lupari can in effect acquire or purchase from the trustee in bankruptcy an assignment of a chose or cause of action; that can and very occasionally is done. But again that is not what Emmanuel Lupari has done. It is still open to do that between now and the next hearing of the matter in Turkey.

[11] I now turn in conclusion therefore to the order sought. Mr Gibson sought to amend paragraph 3 of his summons of 2 December 2015. I accede to that application and I will make an order in the following terms, namely, an injunction pending the trial of this action in Northern Ireland restraining the first named defendant Emmanuel Lupari from representing, whether by himself or by his servants, agents, attorneys or otherwise, that he is entitled as of now to the beneficial ownership of shares held in Bodrum Ege Gayrimenkul Pazarlama Insaat Ticaret ve Sanayi Ltd. Sirketi Reg. No. 178 055 4306, as the beneficial ownership of any shares found to be in the name of Emmanuel Lupari continues to be vested in his trustee in bankruptcy, James B Kennedy.

[12] I will hear counsel as to any ancillary matters. In accordance with our normal practice, as this is an interlocutory Order, I will reserve the costs of the parties to the trial judge.