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

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Delivered: 07/06/2002
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No. 2001 - 2227

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

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IN THE MATTER OF HERBERT KERR

**BETWEEN:**

**THE OFFICIAL RECEIVER FOR NORTHERN IRELAND**

**Applicant;**

**-and-**

1. **HERBERT KERR**  
**and**
2. **JENNIFER KERR**

**Respondents.**

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**GIRVAN J**

1. By summons issued on 10 August 2001 the Official Receiver for Northern Ireland ("the applicant") seeks possession of premises known as 48, Glensharragh Gardens, Belfast, premises comprised within Folio 5619L in the Register of Leaseholders in the Land Registry ("the premises"). The summons was referred to the judge by the Master apparently because the

respondents argued that the case raised issues under the European Convention on Human Rights (“the Convention”).

2. Herbert Kerr, the first defendant, was adjudicated bankrupt on 18 August 1989 on a petition of Trevor Lusty Limited dated 16 August 1989. In opening the case on behalf of the applicant Mr Good contended that by virtue of the adjudication the premises vested in the trustee in bankruptcy though as will emerge later in the judgment the property being of a leasehold nature did not as such vest automatically on adjudication.

3. The first defendant and his wife the second defendant were joint tenants of the property. If the applicant’s contention that the bankrupt’s estate vested in him by virtue of the adjudication the application for possession simpliciter was misconceived since the applicant as a tenant in common with the second defendant (the joint tenancy hypothetically having been severed by adjudication) would not as such be entitled to possession as against the second defendant, but rather would have had a right to apply under the Partition Act 1868-1876 for an order for sale in lieu of partition. The premises were a dwelling house and partition of the premises accordingly was not a practical position.

4. The adjudication of the bankrupt in this case predated the commencement of the Insolvency (Northern Ireland) Order 1989 (“the 1989 Order”) and the bankruptcy accordingly is covered by the transitional provisions set out in Part II of Schedule 8 of the 1989 Order. Paragraph 11 of Schedule 8 provides:

“(1) Where a person

(a) was adjudged bankrupt before the commencement date or is adjudged bankrupt on or after that date on a petition presented before that date, and

(b) that person was not an undischarged bankrupt at any time in the period of 15 years ending with the adjudication,

that person is deemed (if not previously discharged) to be discharged from his bankruptcy for the purposes of the Bankruptcy Acts at the end of the discharge period.

(2) Subject to sub-paragraph (3), the discharge period for the purposes of this paragraph is -

(a) in the case of a person adjudged bankrupt before the commencement date, the period of three years beginning with that date ...”

5. Mr Good could not point to any court order under paragraph 11(3) affecting the discharge period. Accordingly the first defendant was deemed to have been discharged from his bankruptcy at the end of the period of three years beginning with the commencement date of 1989 Order. Accordingly the first defendant ceased to be a bankrupt as from 1 October 1994.

6. Mr Good argued that as a consequence of adjudication the first defendant’s interest in the premises vested in the applicant, that was a proprietary right which remained vested in him, notwithstanding the discharge of the bankrupt and the proprietary interest did not revert in the former bankrupt after his discharge and that as a trustee in bankruptcy the applicant was entitled to seek to sell the property to realise the bankrupt’s share in order to pay the remaining debts of the debtor which amount to

some £10,000. Mr Coyle for the defendants founded his argument on the proposition that the bankruptcy proceedings had been carried out in a slow and dilatory way and that the bankrupt's article 6 rights to a fair trial within a reasonable period had been breached. He pointed to decisions in the European Court of Human Rights indicating that court insolvency proceedings involved the determination of a person's civil rights for the purposes of article 6. Article 6 provides that in the determination of his civil rights and obligations everyone is entitled to a hearing within a reasonable time by a tribunal ...." (He cited the case of G J -v- Luxembourg (Application 21156-93) decided at Strasbourg on 26 October 2000 in support of the proposition.

7. Interesting though the arguments presented by counsel on the Convention points are, this case does not in fact raise any Convention point. While it may be tempting to gambol in the apparently sunlit uplands afforded by Convention rights, before we get there we must wind our way through the more mundane minutiae of domestic insolvency law which in fact leads to a decisive answer to the applicant's claim unaffected by Convention rights.

8. As noted the interest of the first defendant in the premises was a leasehold interest. Section 271 of the Irish Bankrupt and Insolvent Act 1857 which governed the relevant bankruptcy proceedings provides that if the trustees in bankruptcy being entitled to any land held under a fee farm grant or lease elects to take such land the bankrupt is not liable to pay any rent

accruing after the filing of the bankruptcy petition or to be sued in respect of any subsequent non-observance or non-performance of any covenants or conditions in the fee farm grant or lease. The courts have construed the section as qualifying the absolute vesting provisions of sections 267 and 268 and have decided that land held in fee farm grant or under lease does not vest in the assignees on the bankruptcy of the grantee or lessee unless and until the assignees elected to take the land or the benefit of the lease and until such election it remains vested in the bankrupt. (See generally Hunter "Northern Ireland Bankruptcy Law and Practice" at paragraph 21.14 which fully discusses the relevant pre-1989 Order bankruptcy law.

9. When faced with the difficulty presented by section 271 Mr Good sought to argue that the section required a party to put the trustee in bankruptcy to his election whether he wished to take the property and then he had a reasonable time to decide whether to take it. He argued that the debtor had not put the trustee in bankruptcy in this case to his election and it was still open to the applicant to elect to take the property. However the authorities such as Re Burke's Estate [1916] 1 IR 371 and Mackley -v- Pattenden 1 B&S 181 indicate that irrespective of whether a trustee in bankruptcy is put to his election he must still elect within a reasonable time whether it is going to take leasehold property. The Convention rights of the debtor under Article 6 give added emphasis to the requirement the decisions affecting his property rights should be taken expeditiously. Were it necessary to decide the matter I would have little hesitation in coming to the conclusion

that in the circumstances of this case the trustee in bankruptcy did not act within a reasonable time in deciding whether to take the property.

10. However the point no longer is relevant because since the applicant did not elect to take the leasehold property of the bankrupt before he was discharged from bankruptcy. The property never vested in the applicant during the bankruptcy and on discharge the applicant no longer had any claim on the property which remained vested in the debtor after his discharge. After discharge the applicant could not elect to take the debtor's interest in the property on the simple ground that the debtor was no longer a bankrupt.

11. In the circumstances accordingly the application fails and I dismiss the application with costs against the applicant.

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**J U D G M E N T**  
**O F**  
**G I R V A N J**

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