Application to set aside order in bankruptcy jurisdiction – whether order made under Bankruptcy Acts – failure of plaintiff to present proper material at first hearing – whether court should permit new material – Bankruptcy Amendment (NI) Order 1980

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Judgment: approved by the Court for handing down | *Delivered:* **07/11/2002**

(subject to editorial corrections)

1989-B148

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

IN THE MATTER OF HERBERT KERR, BANKRUPT

BETWEEN:

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Applicant

and

1. HERBERT KERR
2. JENNIFER KERR

Respondents

GIRVAN J

[1] By notice of motion issued on 5 September 2002 the applicant, the Official Receiver for Northern Ireland ("the Official Receiver"), seeks an order by the court reviewing, rescinding or varying its earlier decision of 7 June 2002 ("the primary order"). The primary order was itself made in proceedings instituted by the Official Receiver by summons issued on 10 August 2002. In those proceedings the Official Receiver sought possession of premises known as 48 Glensharragh Gardens, Belfast being lands comprised in folio 5619L County Antrim ("the premises"), being leasehold premises registered in the Register of Leaseholders. By its order the court dismissed the application for the reasons set out in a judgment which I gave in the matter.

[2] The background to the primary order lay in the bankruptcy of Herbert Kerr the first defendant, who was adjudicated on 18 August 1989. The first

defendant and his wife, the second defendant, were joint tenants of the premises. The first defendant was deemed to have been discharged from his bankruptcy on 1 October 1994, having regard to the effect of the Insolvency (Northern Ireland) Order 1989 and its transitional provisions, the adjudication predating the commencement of the 1989 Order.

[3] In the proceedings it was contended by the Official Receiver that as a consequence of the adjudication the bankrupt's interest in the premises vested in the Official Receiver, that that was a proprietary right which remained vested in him notwithstanding the bankruptcy discharge and that as 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. In opening the proceedings Mr Good on behalf of the Official Receiver in his skeleton argument contended that the vesting of the bankrupt's interest in the premises in the Official Receiver took place on the adjudication in bankruptcy.

[4] It was clear that the interests of the first defendant was an interest in leasehold premises. Section 271 of the Irish Bankrupt and Insolvent Act 1857 ("the 1857 Act") which governed the relevant bankruptcy proceedings provided that if the trustee 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 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 decided that land held under a lease does not vest in the assignees in bankruptcy unless and until the assignees elect to take the land or the benefit of the lease and until such election it remains vested in the bankrupt.

[5] When the point was raised by the court 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 he then had a reasonable time to decide whether to take it. He argued the debtor had not put the trustee in bankruptcy to his election and that it was still open to the Official Receiver to elect to take the property. It appeared from cases such as Re Burkes Estate [1916] 1 IR 371 and Mackley v Pattenden 1 B&S 181 that irrespective of whether a trustee in bankruptcy has been put to his election he must still elect within a reasonable time whether he is going to take the leasehold property. Mr Good did not present any material or argument to the effect that the applicant had elected to take the leasehold property and the case proceeded accordingly on the basis that the property was not vested in the Official Receiver. The fact that Mr Good was contending that it was still open to the Official Receiver to elect to take underlines the fact that it was being requested but that there had not been an election.

[6] Since the bankruptcy was at end no question of exercising an election at this time could arise. After the decision of the court dismissing the application on this basis, the solicitors for the Official Receiver and the Official Receiver's officers carried out a review of the file relating to the bankruptcy. A number of letters were discovered which the Official Receiver contended showed that an election had been made to take the bankrupt's interests in the property. Letters of 4 June 1990 and 12 November 1991 make clear that the Official Receiver was treating the bankrupt's estate as vested in him. Had that material been before the court at the initial hearing of the summons then the court would have been satisfied the Official Receiver had elected to take the bankrupt's estate in the premises.

[7] Mr Good on behalf of the Official Receiver relied on the power vested in the court under article 36 of the Bankruptcy Amendment (Northern Ireland) Order 1980 which provides:

> "(1) Subject to any express provision of the Bankruptcy Acts the court has power to review, rescind or vary any order made by it under those Acts.
>
> (2) The power conferred by paragraph (1) to vary any order includes the power to suspend or revive it."

[8] The wording of article 36 of the 1980 Order follows similar wording in Section 6 of the Bankruptcy (Ireland) Amendment Act 1872. Article 371 of the Insolvency (Northern Ireland) Order 1989 gives the High Court power to review, rescind or vary any order "made by it in exercise of the jurisdiction under this order." A similar power is found in the equivalent English legislation namely section 375 of the Insolvency Act 1986. Mr Good pointed to the width of the jurisdiction under the equivalent English legislation. In Re R S & M Engineering Co Limited [1999] 2 BCLC 485 at 492 Chadwick LJ stated:

> "… It is appropriate that I indicate that I can see no basis why the words used in Rule 7.47(1) (of the English Insolvency Rules) should not be given the very wide effect which, as a matter of language, the meaning which they naturally bear would indicate that the rule making body intended. The rule is in terms which are indistinguishable from the parallel provision applicable in bankruptcy – see Section 375(1) of the 1986 Act and on that context, there is no reason to doubt that Parliament

> intended to preserve the unlimited jurisdiction to conduct a rehearing which as Sir James Bacon observed in Ex parte Keighly [1874] LR 9 Ch App 667 at 668, was `a very considerable antiquity' and which had been enshrined in successive Bankruptcy Acts … The exercise of the power should be confined as a matter of discretion to cases in which there has been some change in circumstances (which may perhaps include the consideration of material of which was not previously before the court) since the original order was made – see the observations of Millett J in Re A Debtor [1993] 2 All ER 991 at 995."

[9] While conceding that the evidence about the election should have been adduced in the earlier proceedings and that the Official Receiver was in error in contending that the vesting took place at the date of adjudication, Mr Good contended that the defendants had not sought to take any point as to the bankrupt's interest not being vested in the Official Receiver and that if the defendants had taken the point in their affidavits the Official Receiver would have been alive to the issue and would have been in a position to put the material before the court.

[10] Mr Coyle in his skeleton argument and oral submissions conceded that the court had jurisdiction to review the case but the court should be slow to do so. The relevant material should have been before the court at the appropriate time. He reminded the court that the court had risen for 30 minutes to enable the Official Receiver to consider the question and counsel had returned to court to contend that it was still open to the Official Receiver to elect to take the property which was inconsistent with an election having been exercised.

[11] An initial question arises as to whether the statutory power to review arises at all in this case or whether the plaintiff must pursue the remedy by appeal. The power of the court to review under the 1980 Order rises in relation to any order "made under the Bankruptcy Acts". The 1980 Order still applies in this bankruptcy situation having regard to Schedule 8 paragraph 8(1) of the 1989 Order. The question arises whether the order dismissing the Official Receiver's claim for possession was an order made "under the Bankruptcy Acts". Mr Coyle appeared to concede the question but it is necessary for the court to satisfy itself that it has jurisdiction to review having regard to the fact that counsel's concession cannot confer upon the court a jurisdiction that it otherwise does not have.

[12] Under section 24 of the 1857 Act the court may hear, determine and make orders in any matter of bankruptcy whatsoever so far as the assignees

are concerned relating to the estate and effects of the bankrupt or any estate or effects taken or claimed by assignees for the benefit of creditors or relating to any acts done or sought to be done by the assignees. This power is extended by section 66 of the 1872 Act which gives the court full power to decide all questions of priorities and all other questions whatsoever whether of law or fact arising in any bankruptcy or arrangement or which the court may deem it necessary or expedient to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. It is pointed out in Hunter on Northern Ireland Bankruptcy Law in Practice at page 243 that:

> "If the bankrupt's spouse or any other person in occupation as a joint owner of the land and the official assignee is unable to reach agreement with such person for vacation of the premises, the assignees will have to apply for an order for sale under the Partition Acts (which could be made by the court under section 66 of the 1872 Act) followed if necessary by an application for an order for possession."

[13] The order dismissing the Official Receiver's application accordingly is to be treated as made under the Acts and accordingly the jurisdiction to review arises.

[14] In Re A Debtor [1993] 1 WLR 314 Millett J held that there was a significant distinction between an application to review and an appeal and on an application to review the court could as a matter of discretion admit fresh evidence notwithstanding that the evidence could have been obtained at the time of the original hearing.

[15] I have come to the conclusion that in the interests of justice (which includes considering the position of the creditors in the bankruptcy) the court should set aside its order and proceed to consider the application on its merits on the basis that it is now clear that the bankrupt's estate was vested in the Official Receiver. A number of factors have led me to this conclusion.

(a) Firstly, there is now clear evidence of an election. The issue as to whether the property of the bankrupt in the premises had vested in the Official Receiver was a matter raised not by the defendants but by the court. The court was bound to take any point which could have an impact on the home rights of either of the defendants having regard to article 8 of the Convention. It is unfortunate that the Official Receiver did not seek further time to research the issue once the court had raised the point and that the relevant evidence was not properly before the court. There is some strength in the proposition put forward by the Official Receiver that because the point was not being pursued by the defendants themselves the Official Receiver's

advisors have proceeded upon the basis that the property was vested in the Official Receiver. To shut the Official Receiver out at this stage would give the defendants an unexpected windfall on an issue which they had not themselves taken and would be to the severe disadvantage of the bankrupt's creditors who remain unpaid.

(b) Secondly permitting the case to proceed leaves it open to the defendants to seek to defend the application on the merits rather than on a technical and now demonstrably unmeritorious point.

(c) The defendants will be protected on the issue of costs. Justice demands that the Official Receiver pays the defendants' costs of the second hearing in relation to the review and I shall hear arguments in relation to costs relating to the first hearing.

(d) The defendants have in the meantime had the benefit of the premises. If they successfully defend the proceedings then they will have lost nothing. If however on the merits they fail to successfully defend the application they will have had the use of the premises for longer than would otherwise have been the case.

[16] In the result in the exercise of my discretion I accede to the application to set aside the primary order and I shall direct the summons to proceed.