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

Delivered: **22/02/13 & 12/04/13**

2012/46841

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

TERENCE NOEL LIGGETT & DENISE LIGGETT

Applicant:

and

THE OFFICIAL RECEIVER

Respondent:

NORTHERN BANK LTD

Notice Party:

MASTER KELLY

Introduction

[1] The applicants and the Northern Bank ("the bank") are creditors of Melanie Harrison ("the bankrupt") against whom a bankruptcy order was made on 7th October 2011. By virtue of the bankruptcy order the bankrupt's interest in lands comprised in Folio No AR22407 County Armagh ("the lands") vested in the Official Receiver. On 15th March 2012, the Official Receiver disclaimed his interest in the lands on the grounds that they were onerous property in the bankrupt's estate. The applicants seek to have the disclaimed lands vested in them and the bank objects.

[2] At the hearing the applicants appeared in person with Mrs Liggett conducting their application. The bank was represented by Mr Brady instructed by Elliott Duffy Garrett. I am grateful to both parties for their helpful skeleton arguments which were of great assistance to the court.

Background

[3] The applicants who are husband and wife, trade as a building firm known as Period Homes. In or about September 2000 they entered into a contract with the bankrupt for the construction of a residential housing development in Lurgan known as Silverwood Leaves. The bankrupt was then the sole owner of the development lands. These lands are comprised in Folio AR22407. The contractual terms governing the construction of the development are to be found in a Licence Agreement (“the agreement”) which the applicants entered into with the bankrupt in or about 8th September 2000.

[4] In or around 2003, for various reasons, work on this development ceased before all phases of the development had been completed. This gave rise to litigation between the applicants and the bankrupt. For present purposes it is not necessary to recite the full background of that litigation, but it may be found in the judgment of Weatherup J reported as neutral citation [2010]NIQB 83, which I am content to adopt. For the purposes of this application, it is sufficient to say that in or about 2005, the applicants issued proceedings against the bankrupt seeking damages for breach of contract, and further ancillary orders relating to their contractual obligations regarding the development. In or about 23rd February 2009, the applicants registered an inhibition against the lands pending the hearing of the proceedings.

[5] On 29th June 2010 the applicants obtained judgment against the bankrupt from Weatherup J in the sum of £197,310 together with costs and interest. Other additional orders were made in relation to the parties’ remaining contractual obligations for the development. On 12th April 2011, the judge made further specific orders against the bankrupt in respect of the maintenance of the Silverwood Leaves development (“the maintenance order”) and responsibility for the road bond relating to the development (“the road bond order”). The road bond order compelled the bankrupt to take over responsibility for the road bond from the applicants within 28 days of the order, but the bankrupt failed to comply with its terms. There being no further order in respect of the road bond, the bankrupt remained subject to the terms of the road bond order as at the date of her bankruptcy.

[6] As previously stated, the bankruptcy order vested the bankrupt's interests in the lands in the Official Receiver. In the course of his administration of the bankrupt's estate, the Official Receiver concluded that the value of securities held against the lands exceeded the lands' value, and disclaimed the lands as onerous property by notice under Article 288 of the Insolvency (Northern Ireland) Order 1989 ("the Order"). Article 288 provides:

288.—(1) Subject to paragraph (4) and Articles 289 to 291, the trustee may, by the giving of the prescribed notice, disclaim any onerous property and do so notwithstanding that he has taken possession of it, endeavoured to sell it or otherwise exercised rights of ownership in relation to it.

(2) The following is onerous property for the purposes of this Article, that is to say—

(a) any unprofitable contract, and

(b) any other property comprised in the bankrupt's estate which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act.

(3) A disclaimer under this Article—

(a) operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the bankrupt and his estate in or in respect of the property disclaimed, and

(b) discharges the trustee from all personal liability in respect of that property as from the commencement of his trusteeship, but does not, except so far as is necessary for the purpose of releasing the bankrupt, the bankrupt's estate and the trustee from any liability, affect the rights or liabilities of any other person.

(4) A notice of disclaimer shall not be given under this Article in respect of any property that has been claimed for the estate under Article 280 (after-acquired property) or 281 (personal property of

bankrupt exceeding reasonable replacement value), except with the leave of the High Court.

(5) Any person sustaining loss or damage in consequence of the operation of a disclaimer under this Article is deemed to be a creditor of the bankrupt to the extent of the loss or damage and accordingly may prove for the loss or damage as a bankruptcy debt.

(My emphasis)

[7] Prior to the bankruptcy the applicants did not enforce their judgment. They say that this was because they believed the inhibition gave them an interest in the lands, and that their judgment was included in this. On 26th April 2012 the applicants lodged an application under Article 293 of the Order seeking the vesting of the disclaimed lands in them. At the hearing of the application on 4th December 2012, the applicants advanced two reasons for their application. First of all, they say that the remaining parts and phases of the site which have been abandoned are of no benefit to anyone and serve no purpose. They say that if the lands are vested in them they could raise finance on them, complete the works on the Silverwood Leaves development, and thereafter sell the properties. The second reason is perhaps more pertinent. The applicants say that their business is in financial difficulties and that the bankrupt's indebtedness to them has contributed to this. They submit that the granting of this application is a possible solution to those difficulties.

[8] The bank, which objects to the application, is a creditor of the bankrupt in the sum of approximately £5.4m. The bank asserts that it is a secured creditor, and that it holds security over the disclaimed lands by way of equitable deposit of title deeds and various solicitors' undertakings. At present the bank is in the process of realising its asserted security over the lands by way of separate proceedings, and the applicants have successfully applied to be joined to those proceedings. The main dispute between the parties in this application is that the bank as a secured creditor contends that the applicants demonstrate no interest in the lands which would give rise to an entitlement for vesting under Article 293, while the applicants do not accept that the bank is a secured creditor. The applicants argue that the bank's security is flawed and that as a consequence, the bank is an unsecured creditor. They argue that the disclaimed lands are unencumbered and it is the vesting of unencumbered lands which they seek. For the sake of completeness it should be stated that the Official Receiver accepts that the bank holds security over the lands,

and considers that the value of that security exceeds the value of the lands. That being the case, the Official Receiver did not participate in this application.

The applicants' case

[9] The applicants contend that they have three grounds on which they can demonstrate an entitlement to vesting for the purposes of Article 293. These are:

(i) That they have a proprietary interest in the lands by virtue of:

(a) Their Licence Agreement with the bankrupt dated 8th September 2000 in respect of the Silverwood Leaves development.

(b) The substructure works on the incomplete sites together with road works and site works constructed on the land for which they have not been paid.

(ii) That their judgment and inhibition entitles them to an interest in the disclaimed lands.

(iii) That their obligations arising from the road bond for the development constitute a liability not discharged by the disclaimer under Article 293(2)(b) of the Order.

Consideration

[10] Article 293 of the Order provides for the vesting of disclaimed property in certain circumstances and states:

293.—(1) This Article and Article 294 apply where the trustee has disclaimed property under Article 288.

(2) An application may be made to the High Court under this Article by—

(a) any person who claims an interest in the disclaimed property,

(b) any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer, or

(c) where the disclaimed property is property in a dwelling house, any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house.

(3) Subject to the following provisions of this Article and to Article 294, **the High Court may, on an application under this Article, make an order on such terms as it thinks fit for the vesting of the disclaimed property in, or for its delivery to –**

(a) a person entitled to it or a trustee for such a person,

(b) a person subject to such a liability as is mentioned in paragraph (2)(b) or a trustee for such a person, or

(c) where the disclaimed property is property in a dwelling house, any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house.

(4) The High Court shall not make an order by virtue of paragraph (3)(b) except where it appears to the Court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.

(5) The effect of any order under this Article shall be taken into account in assessing for the purposes of Article 288(5) the extent of any loss or damage sustained by any person in consequence of the disclaimer.

(6) An order under this Article vesting property in any person need not be completed by any conveyance, assignment or transfer.

(My emphasis)

Article 294 applies only to leasehold property and is not applicable in this case.

The applicants' proprietary interest claim.

[11] The applicants' Licence Agreement with the bankrupt is a substantial agreement. It contains the contractual terms agreed between the applicants and the bankrupt in respect of all aspects of the construction of the Silverwood Leaves

development. It contains relevant provisions in respect of site works, road works, insurances, road bonds, site access, payment, and dispute resolution. It also contains a clause setting out how the agreement is to be interpreted. Under the heading "INTERPRETATION" the agreement states at page 2 section 3 (a) that:

" (it) shall operate as a licence only and not as a demise, and shall not confer on the Licensee any legal estate or interest in the Licensed lands."

Therefore the agreement itself expressly states that it does not confer any interest in the lands on the applicants, proprietary or otherwise. As the issue of the sub-structure works, road works and site works are contained within the provisions of the agreement, I am satisfied that they do not give rise to a proprietary interest in the lands.

The applicants' judgment and inhibition.

[12] The second ground of the applicants' claim to entitlement to vesting is that their judgment and inhibition give them an interest in the disclaimed lands. For ease of reference there are two judgments of 29th June 2010. The first is a court order awarding the applicants damages for breach of contract in the sum of £197,310 and the second is the written judgment of the same date setting out the judge's findings in relation to the applicants' breach of contract claim and the bankrupt's counterclaim. The order contains additional terms providing for an orderly winding up of both the contract and the relationship between the parties. Also included in the order, is provision for payment to the applicants of £32,060 in respect of the sub-structure works on 6 of 12 remaining sites, after which they would relinquish their interest in the remaining 12 sites. The applicants interpret this as the recognition, or conferring, of an interest in the lands. While the order uses the term "interest", the judgment itself makes no reference to this. At paragraph [46] of his judgment Weatherup J states in relation to the sub-structures:

" No expenditure has been incurred in respect of the 12 houses except for the cost of the installing the foundations on six of the houses. I do not propose to allow any further sum, except in respect of the six sub-structures. The defendant contends that the sub-structures may be out of date and will not be sufficient for whatever houses are now to be built on the sites. However, the completion of the sub-structures resulted in costs that have actually been incurred by the plaintiffs. I propose to allow the

plaintiffs the costs they have incurred in completing the sub-structures. Mr Carville has valued those costs in respect of the six houses at £32,060.”

[13] This leads me to the conclusion that, within the context of the Licence Agreement, and the breach of contract litigation, any reference to “interest” in the order can only be a contractual interest in the remaining sites. Neither the order nor the judgment seeks to confer any interest in the lands on the applicants.

The inhibition notice is dated 23rd February 2009 and states:

“2. Our interest in the land is that it is the subject matter of proceedings in the High Court of Justice in Northern Ireland Chancery Division Writ number 2005 Number 787 between ourselves as Plaintiffs and the Registered Owner as Defendant, which said proceedings are presently before the Court awaiting hearing. We attach a copy of the Writ herewith.

3. We apply that an inhibition be entered on the above mentioned folio in the following terms:

All dealings with the land herein (save and except dealings overriding the registered ownership) are inhibited until notice has been given to RM Cullen and Son Solicitors”.

As at 23rd February 2009 no liability had been established against the bankrupt. As appears, the purpose of the inhibition was to prevent any dealings on the land pending the hearing of the applicants’ case against the bankrupt. The inhibition does not therefore relate to the applicants’ judgment against the bankrupt. I also conclude from the wording of the notice that it is limited in effect to notice being given to R M Cullen and Son Solicitors. For the reasons outlined above, I am satisfied that neither the judgment nor inhibition gives rise to an interest in the lands on the applicants.

The applicants’ claim that the disclaimer does not discharge the road bond liability.

[14] The applicants’ final ground for entitlement to vesting is that their obligations in respect of the road bond, constitute a liability not discharged by the disclaimer under Article 293(2)(b) of the Order and that they are entitled to the vesting by way of compensation for that.

The issue of the road bond originates from the provisions of the Licence Agreement. According to the terms of the agreement, the applicants agreed with the bankrupt that they would take out a road bond for the development. It follows therefore that

the road bond was a contractual liability between the bankrupt as Licensor and the applicants as Licensees. Were that not the case, it is difficult to see how the issue of the road bond could otherwise have formed part of the applicants' breach of contract claim against the bankrupt, and the resulting judgment.

[15] The road bond order of Weatherup J of 12th April 2011 compelled the bankrupt to take over responsibility for the road bond from the applicants within 28 days of the order. According to a letter from Roads Service in the applicants' exhibits, this would appear to mean that the bankrupt was to take out a new road bond in place of the applicants' road bond and until such time as she did so, the applicants' road bond would subsist for Road Service purposes. In its letter of 17th November 2010 to the applicants, the Roads Service states:

“ Roads Service is aware of the court order on the landowner to take over the road bond for stage 10. However Roads Service cannot cancel the Period Homes road bond until the new road bond is in place. Roads Service will not pursue the landowner to takeover (sic) this road bond.”

As the bankrupt did not comply with the road bond order the applicants remained liable to Roads Service under their original road bond, and the bankrupt was effectively rendered incapable of compliance with the order by virtue of her bankruptcy. At a hearing following the making of the bankruptcy order Weatherup J by judgment of 13th December 2011 concludes;

“ In relation to the road bond order, the Department {of Rural Development, Roads Service} is considering the appointment of a contractor to complete the highway works. There is no further order that may be made by the court.”

Therefore, as at the date of bankruptcy, the road bond order of 12th April 2011 prevailed and the road bond was the liability of the bankrupt, albeit that she was in default of the order. This leads me to conclude that as the liability rested with the bankrupt, it was discharged if not by the bankruptcy order itself, by operation of the disclaimer. However, in so finding, it is acknowledged that the applicants may have suffered a financial loss in relation to the road bond for which they may be entitled to prove in the bankruptcy, if they haven't already done so.

[16] If, contrary to my finding, the road bond liability is not discharged by the disclaimer, the provisions of Article 293 (2)(b) are nevertheless subject to the

provisions of Article 293(4). This says that the court cannot make a vesting order by way of compensation unless it is just to do so. The remedy of vesting is an equitable remedy and the court must have regard to the interests of all creditors of the bankrupt. This issue is a particularly important one in light of the fact that the applicants seek the vesting of what they consider to be unencumbered lands in them, as they do not accept the validity of the bank's security. However if they are found to be correct about the bank's security, and the lands are indeed unencumbered, I am satisfied that all creditors in the bankruptcy should be entitled to an equal share in them.

[17] As previously noted, the issue of the bank's security is currently the subject of separate proceedings before the Chancery Master. Those proceedings include an application by the bank for a declaration that the bankrupt's liability to the bank is well charged. In the circumstances I consider those proceedings to be the appropriate forum for the determination of that issue. I do not propose to comment further on that issue save as to say that if the security is held to be valid, the bank has the right as a secured creditor to object to this application for vesting and if not, then the lands, if unencumbered, ought to be available for all the bankrupt's creditors equally. If the court were to accede to this application, the rights of creditors in the bankruptcy would be prejudiced one way or another, whether they are secured or unsecured creditors. I am also satisfied that if the bank's charge was held to be invalid, any and all creditors of the bankrupt would have the right to object to the applicants' application for vesting. That would still include the bank. This means that the Official Receiver, as a party to this application, could conceivably request the court to vest the lands back in him under Article 293(3)(a) for the benefit of the creditors as a whole, despite having previously disclaimed them.

[18] In conclusion, for the reasons set out above and elsewhere, I must refuse the applicants' application. However, I do not propose making a final order and disposing of the application pending the determination of the issue of the Bank's security, as this may impact on the position of the Official Receiver. Therefore, I will adjourn this application generally with liberty to apply and reserve the issue of costs.