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Judgment: approved by the Court for handing down | *Delivered:* **30/01/2017**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN

MICHAEL GERARD McKAY and
GERARD JOSEPH DALRYMPLE

Plaintiffs:

v

BRIAN WALKER and JOSEPH McDONALD
practising as
WALKER McDONALD Solicitors

Defendants:

STEPHENS J

Introduction

[1] This is an application pursuant to Article 277(4) of the Insolvency (Northern Ireland) Order 1989 ("the Insolvency Order") by Michael Gerard McKay and Gerard Joseph Dalrymple ("the plaintiffs") for leave to bring proceedings against Brian Walker ("the first defendant") who was their trustee in bankruptcy.

[2] Article 278(2) of the Insolvency Order provides discretion to the trustee when getting in the bankrupt's estate in the following terms:

> "(the) function of the trustee is to get in, realise and distribute the bankrupt's estate …; and in the carrying out of that function and in the management of the bankrupt's estate the trustee is entitled, …, *to use his own discretion*." (emphasis added)

However there is potential liability for the trustee under Article 277(1) which provides that:

> "Where on an application under this Article the High Court is satisfied—
>
> > (a) that the trustee of a bankrupt's estate has misapplied or retained, or become accountable for, any money or other property comprised in the bankrupt's estate, or
> >
> > (b) that a bankrupt's estate has suffered any loss in consequence of any misfeasance or breach of fiduciary or other duty by a trustee of the estate in the carrying out of his functions,
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> the Court may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property (together with interest at such rate as the Court thinks just) or, as the case may require, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the Court thinks just."

Before a bankrupt can commence proceedings against his trustee he requires the leave of the court under Article 277(4).

[3] In support of their application for leave the plaintiffs have made available a draft of the allegations that will be contained in their statement of claim. The plaintiffs allege that part of their property included causes of action against Carey Consulting, a firm of chartered civil engineers, for breach of contract and negligence and against Northern Ireland Water Limited for negligence. Northern Ireland Water Limited is a Government owned company set up in April 2007 providing water and sewage services in Northern Ireland. It trades as Northern Ireland Water.

[4] The plaintiffs allege that these causes of actions arose out of events which occurred in 2007 and that upon the plaintiffs being declared bankrupt on 1 April 2009 and the appointment of the first defendant as a trustee in bankruptcy on 24 April 2009, those causes of action became vested in the first defendant. As initially articulated in the draft Statement of Claim, the plaintiffs allege that the first defendant failed to "get in" the substantial damages that should have been recovered from Carey Consulting and from Northern Ireland Water by commencing and successfully prosecuting proceedings.

[5] However, during the course of the application for leave, Mr Good QC, who appeared on behalf of the plaintiffs with Mr Keith Gibson, defined the plaintiff's case as being a breach of duty by the first defendant not to consider assigning the causes of action to the plaintiffs prior to the claims becoming statute barred in 2013, in circumstances where either deliberately or by omission, the first defendant had not

commenced proceedings against Carey Consulting and Northern Ireland Water. That if the first defendant did not intend to "get in" the damages that the plaintiffs allege were owed to them, the causes of action should have been re-assigned to them prior to 2013 and that they would then have recovered substantial damages. It is in relation to that loss of a chance that the plaintiffs seek leave to commence proceedings against the first defendant.

Factual background

[6] The plaintiffs are property developers and in June 2006 they purchased land to the rear of 11 Church Road, Rasharkin, Co Antrim ("the site"). Bell Architects applied for planning permission on their behalf for 4 houses to be constructed on the site. The plaintiffs state that in or around 2006, they orally engaged Carey Consulting to act on their behalf to design suitable sewers to service the site and to obtain the necessary statutory consents. It is alleged that on 20 December 2006, Northern Ireland Water stated that it was carrying out a feasibility study into the provision of a new storm sewer to serve a number of developments within Rasharkin and that the plaintiffs' proposed development would be included in this study.

[7] Some 4 months later and in April 2007, without planning permission and without resolution of the issue as to a connection to the sewer, the plaintiffs commenced building works on the site. Two months later and on 4 June 2007, the plaintiffs obtained planning permission which contained a number of informatives, for instance, stating that foul-water sewer available subject to Water Service approval to connect. However, in addition to a connection to the public sewer, the plaintiffs required an agreement under Article 161 of the Water and Sewage Services (Northern Ireland) Order 2006, so that when the plaintiffs had constructed sewers and drains on the site, Northern Ireland Water would declare those sewers and drains to be vested. The plaintiffs contend that an Article 161 Agreement was essential to the commercial success of the development of the site and that this was known to both Carey Consulting and Northern Ireland Water.

[8] The plaintiffs state that on 16 October 2007, Ms Lynn Stewart of Northern Ireland Water, sent Carey Consulting an Article 161 agreement for the plaintiffs to sign which the plaintiffs duly did, with the Agreement being returned to Northern Ireland Water. However, it is alleged that on 22 October 2007, Ms Lynn Stewart of Northern Ireland Water rang Carey Consulting indicating that the Article 161 Agreement required four drawings for stamping and that during the course of this conversation, Carey Consulting then attempted to add another one of their clients, Mr Eddie O'Kane, who owned the site adjacent to the plaintiffs' site. It is alleged that this caused Northern Ireland Water to refuse to sign the Article 161 Agreement and that but for this it would have been signed in October/November 2007. That in consequence the process of installing the outfall sewers from this site was delayed from October/November 2007 until January 2010 with the Article 161 Agreement not being signed off until June 2010. In essence, the plaintiffs allege that

Carey Consulting were retained on their behalf but unbeknown to the plaintiffs, they were also acting for other developers and were advancing the interests of those developers rather than the interests of the plaintiffs.

[9] The plaintiffs allege that they sustained loss by virtue of the alleged breach of contract and negligence of Carey Consulting, in that by September 2007 one of the houses on the site had been completed and two others had been built to first-floor level. That in 2007 McAfee Properties and Mortgages had valued each house at £215,000. That in the summer of 2007 the plaintiffs had entered into negotiations with a number of prospective purchasers of the dwellings in the course of which it emerged that the mortgagees/lenders acting in respect of the prospective buyers, were not satisfied with the existence of a temporary sewage system to service the dwellings.

[10] The draft Statement of Claim contains the bald allegation that as a consequence the plaintiffs were unable to sell the dwellings, though, of course, after the dwellings were connected to the public sewer, they were sold. The draft Statement of Claim goes on to allege that there was buyer interest in the dwellings throughout 2008 but that the plaintiffs were unable to sell due to the outstanding issue of the outfall sewers. That subsequent to this, the property market took a significant downturn as a result of which the plaintiffs were unable to sell the properties at the same price as it was intended to sell them in or about 2007. That as a result the plaintiffs sustained loss and damage. At present the draft Statement of Claim does not attempt to give particulars of the amounts of damages that the plaintiffs could recover from Carey Consulting, stating only that the plaintiffs will provide further particulars by way of expert reports to be served hereafter.

[11] The plaintiffs allege that on 14 January 2009, they retained the first and second defendants as their solicitors to provide legal advices in respect of the issue of the outfall sewers, including initiating proceedings against Northern Ireland Water and Carey Consulting. Attendance notes prepared by the defendants establish that they were indeed consulted by the plaintiffs in relation to potential proceedings and they advised obtaining a report from a planning consultant, Mr Michael Burrows. The defendants were put in funds by the plaintiffs to engage Mr Burrows. At this stage one house was complete, two were half complete and it was thought they would sell for around £150,000 each and that it would take approximately £150,000 to finish off the development.

[12] Attendance notes record that it was not proposed to rock any boat with Northern Ireland Water as the plaintiffs still needed them to sign off the sewer and that once that was done, a claim against them and the consultants could be considered.

[13] On 1 April 2009, the plaintiffs were declared bankrupt and on 24 April 2009, the first defendant was appointed as their trustee in bankruptcy and he continued as trustee until release on 23 January 2014.

History of these proceedings

[14] By Writ of Summons issued on 23 April 2014, the plaintiffs commenced proceedings against the defendants. The Statement of Claim, which was served on 11 September 2014, contained a number of separate heads of claim:

(a) The defendants were instructed as their solicitors to bring proceedings against Carey Consulting and Northern Ireland Water and that if they had done so, the plaintiffs would have been able to discharge loans and avoided bankruptcy. This cause of action related to the defendants' handling of the plaintiffs' affairs prior to their bankruptcy and was not brought against the first defendant as a trustee in bankruptcy.

(b) The defendants were retained to advise the plaintiffs in relation to bankruptcy proceedings and they were negligent in failing to avoid the plaintiffs being declared bankrupt. Again, this was an allegation about a failure of the defendants prior to the plaintiffs being declared bankrupt.

(c) The defendants were negligent in the conduct of proceedings brought against the plaintiffs by Swift Advances Plc in respect of repossession of property.

In relation to the first head of claim it is obvious that it was impossible for the defendants, even if they had been instructed to issue proceedings and even if the plaintiffs were able to finance those proceedings, to have brought them to a successful conclusion between January 2009 and 1 April 2009 when the plaintiffs were declared bankrupt. The last head of claim is not being pursued.

[15] By summons dated 7 July 2015, pursuant to Order 18, rule 19(1) of the Rules of the Court of Judicature (Northern Ireland) 1980, the defendants applied to strike out the Writ of Summons and the Statement of Claim on the grounds that it disclosed no reasonable cause of action or it was scandalous, frivolous or vexatious, or it may prejudice, embarrass or delay the fair trial of the action or it is otherwise an abuse of the process of the court. That application came on for hearing before Master McCorry who, on 11 May 2016, delivered a written judgment striking out the plaintiffs' claims, on the basis that as all of the claims had vested in the trustee in bankruptcy, the plaintiffs did not have locus standi to bring the present proceedings.

[16] On 16 May 2016 the plaintiffs appealed and then by summons dated 8 July 2016 sought leave to amend the Statement of Claim. That summons was amended to also seek leave pursuant to Article 277(4) of the Insolvency Order to bring proceedings against the first defendant in his capacity as trustee in bankruptcy.

[17] The matter came on for hearing before me on Friday 27 January 2017. It was contended, on behalf of the first defendant, that the application for leave should be

heard by the Bankruptcy Master. I ruled that this Court had jurisdiction to hear and determine the application and having done so I now give judgment in relation to that aspect. If in the event I give leave, I will hear and determine the application to amend the Statement of Claim. There is also outstanding the plaintiffs' appeal against the Order of the Master.

Legal principles

[18] Article 277(4) creates a filter in the form of leave of the court before a bankrupt is permitted to bring proceedings against his trustee in bankruptcy. That concept of a filter being imposed by a requirement for leave can be found in many different areas, for instance, the grant of leave to bring judicial review proceedings, the grant of leave to vexatious litigants to bring proceedings, the grant of leave to appeal and the grant of leave under Article 133(1) of The Mental Health (Northern Ireland) Order 1986 to bring proceedings against a Mental Health Review Tribunal, see X (Acting by his Next Friend Y) v The Mental Health Review Tribunal for Northern Ireland [2012] NIQB 1. The principles to be applied when considering an application for leave are not necessarily the same in these different areas and accordingly I seek to apply the principles in the authorities relevant to Article 277(4) or its equivalent in England and Wales, section 342 of The Insolvency Act 1986.

[19] In Official Receiver v Sinnamon & Another [2013] NICh 11, Deeny J stated that the point about leave, as far as counsel was concerned, was a novel one. That it did seem to him:

> "…firstly, that the party seeking to join a trustee who has had his or in this case her release under Article 72 must at the least satisfy the court that they have an arguable or a prima facie case that the trustee will be liable under Article 277(1) of the Insolvency Order; it would be unjust otherwise to the quondam trustee to be forced to expend time and money in defending a specious action. Secondly, and I will turn to Article 277(1) in a moment, I consider it likely that the court has a discretion in the matter."

I respectfully agree that there is discretion. As will become apparent the authorities in England and Wales express the test in terms of "a reasonably meritorious cause of action" rather than "an arguable or prima facie case." To maintain consistency between the jurisdictions I consider that the test should be expressed as requiring the applicant to show "a reasonably meritorious cause of action."

[20] In Brown v Beat [2002] BPIR 341, Hart J stated that the "factors which the court must bear in mind in deciding whether or not to grant permission, are first, whether or not a reasonably meritorious cause of action has been shown, and secondly whether giving permission for its prosecution is reasonably likely to result

in a benefit to the estate." He went on to state that of "course, in considering whether or not to authorise any litigation, except in the rarest of cases, it is impossible to be certain of what the outcome of litigation will be. Litigation always, to a greater or lesser extent involves a degree of speculation, and regard must therefore be had to the costs and potential benefits of litigation before authorising its institution." He added that a "test has been described by Blackburne J in Re Hellier [1998] BPIR 695 as being whether the application is one which a reasonable litigant would make. That criterion of reasonableness has, of course, to be stretched to include the factors which I have mentioned, that is to say, the likelihood of success, and the risks as to costs of the estate in the event of failure."

[21] The principles to be applied were considered by the Court of Appeal in England and Wales in McGuire v Rose & Ors [2013] EWCA Civ 429. In that case it was contended on behalf of the bankrupt appellant that the judge at first instance had in refusing leave, not applied the proper test which was that set out by Hart J in Brown v Beat. It was contended on the appellant's behalf that the test which should be exclusively applied was that the "factors which the court must bear in mind in deciding whether or not to grant permission are, first, whether or not a reasonably meritorious cause of action has been shown and, secondly, whether giving permission for its prosecution is reasonably likely to result in a benefit to the estate". The Court of Appeal did not agree. The test was wider than those two criterion. Lord Justice Laws stated that "Hart J cannot be taken as having laid down any particular test. It would not be appropriate for the court to lay down exclusive criteria by reference to which an application by the bankrupt under section 304(2) had, in all cases, to be judged. He was doing no more than identifying two central factors which have to be taken into account (and obviously so). That is quite apparent from the context of his judgment. In the immediately preceding paragraph to that in which the words cited appear he referred to the policy behind the leave requirement in section 304(2), namely to apply a filter because of the risk of vexatious applications. The risk of vexation in the proceedings is therefore obviously another matter which can, and in our view should, be taken into account, though a favourable answer to Hart J's two questions may well be sufficient in many cases to demonstrate that the particular course of action proposed by the bankrupt is worthwhile and not driven by vexation."

[22] The factors to be taken into account included, for instance, consideration at the leave stage of a limitation defence. Laws LJ stated:

> "A tribunal hearing an application for leave is entitled to look at the matter in the round, and to take into account anything which would obviously be run as a defence - …. If it appears that limitation is likely to be one of those, then a reasonable litigant would have to bear that in mind, and, in presenting an application to the court, would have to indicate how the apparent defence would be dealt with. The court on that occasion would often not

> rule on the point in a definitive way, but if the applicant bankrupt has no apparent answer to it, then that is plainly something that the court may take into account in considering the leave application. In many cases it will be reasonable to expect the bankrupt actually to anticipate the point. "

[23] The exercise of discretion also includes the manner in which the applicant is likely to conduct the litigation so that even if there is a reasonably meritorious action and even if it is reasonably likely to result in a benefit to the estate, leave could still be refused if it is established that the applicant would conduct the litigation disproportionately or inappropriately. Lord Justice Laws stated:

> "38. … Lewison J took into account the question of whether Mr McGuire would conduct the proceedings properly and proportionately. We consider that this is plainly a relevant consideration for any claim. The main purpose of imposing a leave requirement on bankrupts is to protect trustees from exposure to vexatious or unjustifiable litigation. In many cases the filter will concentrate on the merits of the claim for which leave is sought, but if the bankrupt has provided separate evidence of a tendency to disproportionate and inappropriate conduct in litigation then that seems to us to be potentially highly relevant. Its significance may vary with the strength and value of the claim - we can see that it would be a strong thing to shut out an apparently good and valuable claim because of fears about the manner in which it will be run - but it is still relevant.
>
> 39. The judge was therefore entitled, as a matter of principle, to take it into account. …"

[24] It can be seen that whilst there are no exclusive criteria likely to be among the most important are; (a) whether a reasonably meritorious cause of action has been shown and (b) whether giving permission for its prosecution is reasonably likely to result in a benefit to the estate.

[25] The onus is on the applicant seeking leave to establish factors in favour of granting leave.

[26] At paragraph [29] of X (Acting by his Next Friend Y) v The Mental Health Review Tribunal for Northern Ireland & another, I stated that it would be preferable if an application for leave was accompanied by a draft of the proposed Statement of Claim. In this application the plaintiffs have provided such a draft, however, another factor which may be relevant to the grant of leave, depending on the

circumstances of the particular case, is whether in addition there is on affidavit an averment by the plaintiff that they believe that the facts stated in the draft Statement of Claim are true ("a statement of truth"). In contrast to the position in England and Wales, there is no requirement in our procedural rules for a statement of truth in relation to a pleading but I consider that where, as here, the plaintiffs' are seeking leave to commence proceedings, it would not be fair to permit them to do so if they did not believe that the facts stated in the draft Statement of Claim were true, see also paragraph [15] of Morley v MOD & Ors [2017] NIQB 8.

Discussion

[27] The initial expression of the plaintiff's claims against the first defendant were that he was in breach of duty as their trustee in bankruptcy by failing to get in damages from Carey Consulting and from Northern Ireland Water. Mr Good subsequently preferred to rely on a different ground and expressly did not rely on this ground. However, despite that change in approach, I have given consideration to the question of leave on the basis of the ground as initially expressed.

[28] The first question is whether the plaintiffs have shown a reasonably meritorious cause of action. In addressing that issue, I recognise that litigation always, to a greater or lesser extent, involves a degree of speculation. I also recognise that I am unsighted as to the documents contained in the files of Carey Consulting, the plaintiffs, Northern Ireland Water and Bell Architects. The essence of the plaintiffs' claim against Carey Consulting is that they allowed a conflict of interest to cause a substantial delay to the plaintiffs' development. The draft Statement of Claim did not contain an allegation that the plaintiffs did not know that Carey Consulting had a number of other development clients who had instructed them in relation to the sewage system. The question arises as to whether Carey Consulting did in fact disclose their other and potentially conflicting interests to the plaintiffs and whether the plaintiffs failed to object. This issue was raised during the hearing of the application and the plaintiffs, both of whom were present in court, gave instructions that they were unaware of the fact that Carry Consulting had other clients.

[29] Another issue which was raised was whether regardless as to the steps taken by Carey Consulting, Northern Ireland Water in the public interest would have delayed the Article 161 Agreement pending a proper analysis of the sewage requirements of all the potential developments in the area. My assessment, purely for the purposes of this application, is that this would not have been straightforward litigation and whether a claim against Carry Consulting would have been successful would have become apparent only after a detailed consideration of extensive documentation.

[30] The second question is whether, if the action had been commenced, prosecution was reasonably likely to result in a benefit to the estate. In considering that aspect regard must be had to the costs and the potential benefits of the litigation.

The plaintiffs have not attempted to analyse the damages that the first defendant could have recovered from Carey Consulting. The suggestion that those damages would have been paid in sufficient time to avoid the plaintiffs' bankruptcy is plainly not sustainable. The plaintiffs state that the value of the completed dwellings in 2007 was £215,000. It is clear that these were valuations rather than being based on an actual sale. The plaintiffs do not state the amounts which they achieved in negotiations in 2007/2008, they also do not state the amounts for which the dwellings were in fact sold. The height of the claim would be the difference between the late 2007/early 2008 valuation and the amount for which the dwellings were actually sold.

[31] However, the position is further complicated because the plaintiffs acknowledge that they were not financially able to complete 3 of the 4 dwellings until the sale of the first dwelling was completed. So there would have been a delay in finalising and completing the other dwellings even if the sale of the first dwelling completed in, say, November 2007. Construction of the first house commenced in April 2007 and had been completed by, at the latest, November 2007. The question then arises as to whether the plaintiffs' claim should be restricted to the loss in value of, say 2, or at the most 3, dwellings. The downturn in house prices occurred during 2008 and it could have taken another, say, 8 months to complete 2 further houses. Again, I make it clear that these are issues which could, rather than would, arise in any proceedings against Carey Consulting and I refer to them to illustrate that even if successful, the claim for damages might be subject to substantial reduction.

[32] In order to decide whether to proceed against Carey Consulting, the first defendant would have to give consideration to the cost of the proceedings and the funds available to him. There has been no attempt by the plaintiffs to assess the likely costs of the proceedings or to demonstrate that the first defendant had sufficient funds to invest in litigation.

[33] In relation to Northern Ireland Water, the plaintiffs assert that at a meeting on 18 May 2009, Roy Mooney of Northern Ireland Water, when asked for reasons for delay stated "I have to admit we were a bit late". That admission is qualified and it is not an admission of any breach of duty owed by Northern Ireland Water to the plaintiffs.

[34] I do not consider that the plaintiffs have established sufficient grounds to grant them leave to commence proceedings against the first defendant on the basis that during the trusteeship he was in breach of duty in not "getting in" damages from Carey Consulting or from Northern Ireland Water.

[35] The alternative expression of the plaintiff's claim against the first defendants is that he acted in breach of his duty in failing to assign the causes of actions back to the plaintiffs. Mr McEwan, who appeared on behalf of the first defendant, stated that he was unaware of any authority supporting the proposition that there was any such duty on a trustee in bankruptcy. In any event if, as the plaintiffs contend, these

were valuable claims then the first defendant would have required either payment or a share in the proceeds of litigation. Furthermore, there was no evidence that the plaintiffs would have been in a position in 2012 or 2013 to have funded any litigation against Carey Consulting or Northern Ireland Water. Finally, that there was never any request by the plaintiffs that the causes of actions should be assigned to them.

[36] The first question is whether the plaintiffs have shown a reasonably meritorious cause of action that the first defendant was in breach of duty in not assigning the causes of action to them. In circumstances where, as here, there was no request from the plaintiffs for such an assignment I consider that such a claim would at the most be speculative.

[37] The second question is whether if permission is granted is it reasonably likely to result in an award of damages to the plaintiffs? These claims would be for the loss of a chance of recovering damages from Carey Consulting and I have already set out the difficulties which they face in establishing that they had a good cause of action against that firm and also as to what the damages would be. In addition, they would have to be able to establish that they could have afforded litigation in 2012/2013. There is simply no evidence that they could have done so. I also consider that the case against Northern Ireland Water would face the same difficulties.

[38] I do not consider that the plaintiffs have established sufficient grounds to grant them leave to commence proceedings against the first defendant on the basis that during the trusteeship he was in breach of duty in not assigning to the plaintiffs the causes of action against Carey Consulting and/or Northern Ireland Water.

Conclusion

[39] I refuse the plaintiff's application for leave to commence proceedings against the first defendant as their trustee in bankruptcy.