Neutral Citation No. [2010] NICA 38 | *Ref:* **GIR7998**

Judgment: approved by the Court for handing down | *Delivered:* **22/11/10**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

THE OFFICIAL RECEIVER FOR NORTHERN IRELAND

Applicant/Respondent to the Appeal:

-and-

PATRICK JOSEPH McANULTY

Appellant/Respondent.

Before: Girvan LJ, Coghlin LJ and Sir Anthony Campbell

Girvan LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal brought by Patrick McAnulty ("the appellant") from an order of Deeny J dated 5 March 2010 whereby the appellant was ordered to forthwith deliver up possession of premises at 25 Balmoral Mews, Belfast ("the premises") to the respondent, the Official Receiver for Northern Ireland, the statutory successor in title of the Official Assignee, the trustee in bankruptcy of the appellant. The respondent was given liberty to sell the premises and deal with the net proceeds of such sale in accordance with an order of Master Redpath dated 5 October 2007. On the hearing of the appeal Mr Coyle represented the appellant and Mr Devlin represented the respondent.

The bankruptcy background to the application

[2] The appellant was adjudicated bankrupt on 24 January 1984. This was at a time before the new insolvency code introduced by the Insolvency (Northern Ireland) Order 1989 and thus his bankruptcy fell to be administered under the earlier bankruptcy regime. In consequence of his adjudication his assets at the commencement of the bankruptcy vested in the Official Assignee.

[3] The appellant was heavily insolvent at the time of his adjudication owing some £264,000 to his ordinary creditors. His only assets were non realisable shares in three private companies.

[4] On 18 December 1984 while still an undischarged bankrupt the appellant purported to borrow some £32,000 from Abbey National Building Society in respect of the premises. It is clear that in borrowing this money the appellant was committing an offence under Article 42 of the Bankruptcy Amendment (Northern Ireland) Order 1980.

[5] The Official Assignee having discovered that the premises had been acquired claimed the premises as after-acquired property and according to the agreed chronology they became vested in him in September 1987. Accordingly as from that date the Official Assignee became the paper title owner of the premises and as such was entitled to enter into possession of the premises.

[6] After the coming into effect of the 1989 Order the title became vested in the Official Receiver as the statutory successor of the Official Assignee.

[7] On 11 June 1991 the appellant was discharged from his bankruptcy. There is no evidence before the court as to the circumstances in which the discharge occurred, whether it was by an order of the court on the application of the Official Assignee or of the bankrupt or by automatic operation of law. The law relating to discharge from bankruptcy under the pre-1989 bankruptcy regime was complex. Where the discharge was effected by order of the court, the court was empowered to impose conditions which might have included conditions in relation to property remaining vested in the Official Assignee or in relation to property subsequently acquired after discharge (see generally John M Hunter's Northern Ireland Bankruptcy Law and Practice Chapter 13). Neither party could explain the background to the discharge in this instance. The respondent did not seek to argue that any special conditions were imposed. In the absence of any evidence of special conditions it must be assumed that the discharge was a complete and unconditional discharge of the bankrupt.

[8] The discharge of a bankrupt from bankruptcy did not revest in the bankrupt any property vested in his assignees for the benefit of his creditors and which remained unrealised. Accordingly as from 11 June 1991 the paper title remained vested in the Official Receiver for the benefit of the creditors. The appellant was, however, discharged from the disabilities and disqualifications flowing from the status of a bankrupt.

[9] On 24 January 1994 the respondent was adjudicated bankrupt for a second time but he was discharged from that bankruptcy in September 2004. The second bankruptcy did not capture the title to the premises which were not part of his estate at the date of his adjudication on 24 January 1994 since the legal paper title was still vested in the Official Receiver.

The evidence relating to the premises

[10] Unusually for a case which turned on a disputed question whether a party had acquired a possessory title the evidence adduced by the parties consisted solely of affidavit evidence which was not the subject of any cross-examination. In consequence the evidential basis of the parties respective claim and defence was exiguous. It may well have been in the interests of the Official Receiver to have probed the appellant's evidence and it would clearly have been in the interests of the creditors if the Official Receiver had taken a more pro-active role in defending the creditors' interest in respect of the premises by ensuring that the appellant's occupation of the premises was at all times expressly permissive only. At the time of the discharge application could have been made for the imposition of special conditions in relation to the bankrupt's occupation of the premises. The case, however, must be determined on the basis of the evidence adduced before the court and the drawing of proper legal inferences from that evidence applying the ordinary principles. One of those principles is that uncontradicted factual averments will be accepted as correct unless the totality of the evidence shows that such a conclusion should not be made.

[11] In paragraph 6 of his affidavit the Official Receiver stated:

> "The property was claimed by the then Official Assignee for bankruptcy for Northern Ireland as after acquired property and so vested in the Official Assignee and the title to the property has resided in the Official Assignee, and, since the coming into effect of the Insolvency (Northern Ireland) Order 1989, in the Official Receiver. The equity in the property at that time available for creditors was very small and the property was therefore not then realised."

The Official Assignee did not allege that the bankrupt was permitted to reside in the premises on a permissive basis.

[12] In paragraph 9 of his affidavit the appellant stated:

> "From the date of purchase of the property in December 1984 I have lived at the property and nowhere else. At no time did I ever seek the permission of my trustees in bankruptcy, the Official Receiver or anyone else to continue living in my home. At all times I have treated the property as my own. I have not acknowledged the title of any other person. I have not been granted a licence by any person who claims to be entitled to give such a grant of permission up to the present time."

[13] The factual situation relating to the premises is somewhat complicated by the fact that although in his affidavit the appellant asserted that he lived in the premises from the date he acquired them, in proceedings brought in respect of the premises by his former partner Patricia McGrath ("Ms McGrath"), who claimed a beneficial interest in the premises the appellant stated that he let the premises for three years from September 1987 to September 1990. This fact was not disputed by Mr Devlin on behalf of the Official Receiver and the judge appears to have accepted that he did so. This being so it appears that factually the appellant was in receipt of the rents and profits from the premises for three years and thereafter was in physical occupation of the premises as a dwelling house which on his undisputed evidence he treated as his home and which he treated as his own property.

[14] The factual situation is further complicated by the fact that his partner in October 2004 asserted that she had acquired an equitable interest in the premises initially in County Court proceedings and subsequently in High Court proceedings issued in October 2005. The appeal book before this court did not contain any of the evidence relating to those proceedings. It appears that Ms McGrath claimed that she had earned an equitable interest by virtue of expenditure on the premises after acquisition. Those proceedings were brought by her against the trustee in bankruptcy in the second bankruptcy (who had no interest), the appellant and the Official Receiver. These proceedings were settled, an agreed order declaring that Ms McGrath was entitled to 15% of the net equity of the subject premises after deduction of costs of sale and her costs. The appellant agreed to give vacant possession and the net remaining proceeds were to be held in joint deposit "pending further order of the court".

[15] The respondent called in aid the order made by Master Redpath in support of an argument that the appellant could not have acquired

possessory title in the premises because if he claimed that he had he would or should have made that point clear in those proceedings. It was argued that the fact that he had not negatived animus possidendi. It was argued that the order gave rise to an issue estoppel precluding him from subsequently asserting that he had acquired a possessory title. It will be necessary to return to that issue later in the judgment.

The judge's analysis

[16] The judge was minded to accept the appellant's submission that the letting of the property between 1987 and 1990 was an act of physical control which was not inconsistent with the running of a possessory title. He was persuaded by the appellant that the settlement of the case with Ms McGrath was not inconsistent with the appellant's claim to adverse possession. The judge was not persuaded that Article 310 of the Insolvency (NI) Order 1989 applied and, accordingly, the appellant was not in occupation on foot of his statutory licence. However, he concluded that the appellant could only succeed if he could prove that he had both factual possession and the requisite intention to possess (animus possidendi). He considered that the appellant had not proved that he had the necessary animus possidendi the evidence of possession being equivocal. The giving up of vacant possession on foot of Master Redpath's order without admission by the other parties that he had run a possessory title would have terminated the possessory title. It was almost inconceivable that if he had animus possidendi he would have not so argued at that time. The judge noted that the appellant had not made any averment in his affidavit that he was intending to dispossess the legal owner and he seems to have drawn an adverse inference against the appellant from that omission.

The relevant legal principles

[17] It appears to have been accepted by the parties and the judge that a bankrupt may run a title against his trustee in bankruptcy. The position is so stated in John M Hunter's Northern Ireland Bankruptcy Law and Practice at 28.04.

[18] The authority cited for that proposition is a decision of Kenny J in McCafferty [1974] IR 471. In that case a farmer had been formerly a yearly tenant of agricultural land and continued in possession after the Land Act 1923. He was adjudicated bankrupt in 1927 but the Official Assignee did not make a claim to the land at that time. The land was vested in the Land Commission under the Land Act 1931 and in 1953 was vested in the farmer by the Commission. The farmer was registered subject to equities affecting his former interest. The bankrupt remained in possession but in 1966 conveyed the land to his nephew. He never obtained his discharge from bankruptcy. An application was made in 1971 to have the note as to equities

discharged but the Official Assignee claimed an interest. Kenny J held that the possession of the bankrupt had been adverse to the Official Assignee although the bankrupt's equitable estate in fee simple created by the vesting in 1931 under the Land Act had vested in the Official Assignee under section 268 of the Irish Bankrupt and Insolvent Act 1857. The Official Assignee's claim was thus barred by the statute of limitation.

[19] Kenny J's conclusion that the equitable fee simple arising by virtue of the vesting under the Land Act vested automatically in the Official Assignee may be open to question. In Re Keaney [1977] NI 67 at 72 Murray J following Re Ball [1899] 2 IR 317 pointed out that:

> "after acquired property did not vest automatically in the Official Assignee but once he became aware of the existence he was in my view entitled to claim it on behalf of the creditors."

[20] That point is not of significance in the present case because the Official Assignee did elect to take the after-acquired property. If Kenny J's conclusion that the undischarged bankrupt can run a title as against the trustee in bankruptcy is correct then, if the appellant had otherwise acquired a possessory title, there was no reason in law why effect could not be given to it.

[21] One argument not addressed in Re McCafferty was whether a bankrupt could properly assert a right to possess property held for the benefit of creditors at a time when he was under a duty to co-operate fully with the Official Assignee in the administration of the bankrupt's estate for the benefit of the creditors. It is unnecessary to decide that point in this case because whatever duty was owed by the bankrupt qua bankrupt during the bankruptcy, once he was discharged he was free from the duties and disabilities of a bankrupt. In the present case even if time did not begin to run until June 1991, if he possessed the premises with the requisite intent for 12 years thereafter he would have acquired a posssessory title.

[22] The relevant principles to be applied in relation to the question whether a party has acquired a possessory title with the requisite intent had been usefully brought together in the judgment of Jonathan Parker LJ in Topplen Estates Limited v David Townley [2004] EWCA 1363 which carefully analyses the authorities and cites copiously from the speeches in J A Pye (Oxford) Limited v Graham and Another [2003] 1 AC 419 ("Pye"). As Mummery LJ pointed out in Ashe v National Westminster Bank Plc[2008] 1 WLR 710 the law is now plainly established in Pye and earlier authorities do not make the legal position any clearer. Jonathan Parker LJ sets out the relevant propositions at paragraphs [71] to [76] of his judgment.

[23] For present purposes the relevant propositions can be summarised thus.

(a) Adverse possession refers not to the quality of possession but to the capacity of the party claiming possession as being a person "in whose favour the period of limitation can run". It does not connote an element of aggression, hostility or subterfuge.

(b) Possession means no more than ordinary possession of the land. To establish possession there must be sufficient objective acts to constitute factual possession and an intention to possess. Only one party or one set of co-parties can be in possession of the relevant premises at any one time.

(c) An intention to possess is to be distinguished from an intention to own. An intention to possess may be and frequently is deduced from the objective acts of physical possession. Where acts relied on as objective acts of physical possession are equivocal further evidence of intention may be required. Intention to possess means an intention to occupy and use the land as one's own. It is not necessary to establish that the squatter deliberately intended to exclude the owner. He must have the intention to exclude the world at large including the owner with the paper title if he is not in possession, so far as is reasonably practical. Where the objective acts of physical possession are clear and unequivocal those acts will generally constitute sufficient manifestation of the intention to possess.

(d) What acts constitute a sufficient degree of exclusive physical control must depend on the circumstances on the nature of the land and the manner in which land of that kind is commonly used.

(e) In general a squatter will establish factual possession if he can show that he used the land in the way one would expect him to use it if he were the true owner in such a way as to exclude the owner.

(f) Whether the existence of factual possession is itself sufficient to establish the existence of the requisite intention to possess depends on the facts of the case.

Application of the principles to the facts of the case

[24] The judge drew an adverse inference against the appellant from his omission of any statement that he was intending to dispossess the legal owner. However as Pye and Topplen make clear it is not necessary for the squatter to establish that he had a deliberate intention to exclude the true

owner. It is enough if he intended to exclude the world at large, including the paper owner if he is not in possession, so far as is reasonably practicable.

[25] Where the objective acts of physical possession are clear and unequivocal those acts themselves will generally constitute a sufficient manifestation of the intention to possession. In this case the evidence established that the appellant for three years let the premises and kept the rents, an unequivocal act of possession which deprived and must have been intended to deprive the Official Receiver of the profits in the land. Thereafter he and his family occupied the premises exclusively as a dwelling house. The nature of the dwelling house was such that the normal manner of use of such premises is by their physical occupation for dwelling purposes. Where the premises were occupied fully as a dwelling house the logical inference is that the things that would normally be expected of a householder were done, such as securing and maintaining the premises and carrying out necessary repairs and improvements. All of these would be inconsistent with the Official Receiver's enjoyment of the benefit of the premises or with possession of them by him. Such acts could not be described as equivocal acts consistent with an intention not to possess. As Lord Hutton stated in Pye, where the evidence establishes that the squatter has occupied and made full use of it in the way in which an owner would in the normal circumstances have done he would not have to adduce additional evidence to establish that he had an intention to possess. It is only when the evidence is equivocal and is open to more than one interpretation that acts will be insufficient of themselves to prove the intention to possess. In this case the land was occupied and fully used in the way in which an owner would have used it. The undisputed evidence of the appellant asserted possession of the premises as a dwelling.

[26] The judge having reached the erroneous conclusion that the appellant's occupation of the premises did not amount to adverse possession considered it unnecessary to decide the question whether the appellant was guilty of abuse of process or whether his claim was barred by res judicata, though he did not dismiss those arguments and accepted the respondent might be right in law on the point. Nevertheless, he considered that the settlement of the case with Ms McGrath was not inconsistent with his claim to adverse possession. Where alternative legal arguments of substance are raised at first instance it is the better course for the trial judge to reach a conclusion on them for the simple reason that if he is wrong in his conclusion further conclusions may be necessary for a final determination of the case. If the matter goes on appeal the appellate court will have the benefit of the judge's reasoning and conclusion on the disputed issues. Since that course was not followed in the present instance this court has the option of either deciding the case without the benefit of the views of the first instance judge or it may remit the matter for determination on the outstanding issue. When a matter can be decided by this court without the need for fresh evidence this court may resolve the point bearing in mind the overriding objectives in

Order 1 Rule 1A which include the need to avoid expense, the duty to deal with the case proportionately having regard to complexity and importance of the issue and ensuring that the matter is dealt with expeditiously and fairly.

[27] The proceedings brought by Ms McGrath related to her claim to have acquired a beneficial interest in the premises. It is difficult to understand the underlying basis of her claim unless she was in effect proceeding on the basis that as between herself and the appellant she had acquired a beneficial interest. Expenditure by her on the property if it had remained the property of the Official Receiver could only give rise to an equitable interest as against him if the circumstances justified founding a proprietary estoppel. This could only be the case if the Official Receiver was by his conduct leading her to believe that her expenditure was justified because she had a sufficient interest in the premises justifying the expenditure. It is unclear from the material before the court what the basis was for the compromise settlement. As the judge pointed out the settlement was not inconsistent with the appellant claiming to have a beneficial interest in the premises. The settlement left open what was to happen to the proceeds of sale after payment of Ms McGrath's share. It, therefore, did not determine that the appellant had no interest or title. The appellant's agreement to vacate the premises was entirely consistent with an acceptance by him that his sale of the premises was necessary to enable a division of the proceeds to occur so that Ms McGrath could recover her agreed share of the property. Thus the agreement to give up possession of the premises did not of itself, as the judge considered, undermine his argument that he had a possessory title. The settlement did not give rise to any determination or concession on the part of the appellant that he had no interest in the premises. It could thus not have been an abuse of process for him to assert such a claim in the present proceedings and the settlement clearly did not give rise to a res judicata. The settlement did not negative evidence of animus possidendi.

Disposal of appeal

[28] Applying the relevant principles and for the reasons given we conclude that the appellant's appeal must be allowed and the respondent's claim of possession must be dismissed.