

Neutral Citation no. [2003] NICH 9

Ref: CAMF4026

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

Delivered: 16/10/03

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

RE ANTHONY QUINN

A BANKRUPT

CAMPBELL LJ

[1] Mrs Gillian Quinn and her five children live at 20 Back Road, Mullaghbawn, Newry. Mrs Quinn is separated from her husband, Anthony Quinn, who was adjudicated bankrupt on 12 June 1998.

[2] Anthony Quinn is the registered owner of the dwelling house and premises at Back Road and Brigid Napier, who is the trustee of his estate, applied for an order for the possession and sale of the property. Mrs Quinn opposed the application and issued a summons seeking an order that she had matrimonial home rights in the house and premises under Articles 4 and 11 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998; an order enforcing her entitlement to remain in occupation; an order restraining the disposal of any estate in the property, and a declaration that she had a fifty percent beneficial interest in the property and requiring the vesting in her of so much of the legal interest as represented her beneficial interest. She sought further or in the alternative a declaration that Article 309 of the Insolvency (Northern Ireland) Order 1989 ("the Insolvency Order") is incompatible with Article 8 and Article 1 of the First Protocol of the Convention.

[3] The court proceeded to consider the issues raised between the parties other than the incompatibility of Article 309 of the Insolvency Order. It was agreed that this would be reserved for further argument should it prove necessary for Miss Margaret Walsh QC (who appeared on behalf of Mrs Quinn with Mr Mark McEwen) to advance it on behalf of her client.

[4] In a judgment delivered earlier this year it was held that the trustee was entitled to an order for possession and sale and that the rights of Mrs Quinn and her family under the Convention had not been infringed.

[5] As a consequence it became necessary for the court to proceed to consider the question of incompatibility. At this further hearing the Department of Enterprise Trade and Investment, having received notice under section 5 of the Human Rights Act 1998, was represented by Mr Declan Morgan QC and Mr David McMillen.

[6] The Insolvency Order is subordinate legislation made under powers conferred by the Northern Ireland Act 1974. Article 309(5) of the Order provides;

“Where such an application is made or such a suit is maintained after the expiration of one year from the first vesting under Chapter IV of the bankrupt’s estate in a trustee, the High Court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt’s creditors outweigh all other considerations.”

[7] Miss Walsh contended that this paragraph by requiring the Court to assume, save in exceptional circumstances, that the creditors interests outweigh all other considerations exceeds what is necessary in a democratic society in the interests of the economic well-being of the country and is therefore incompatible with Article 8 of the Convention.

[8] She submitted further that paragraph (5) is incompatible with Mrs Quinn’s rights under Article 1 of the First Protocol in that an interference with the enjoyment of possessions is only justified if a fair balance has been maintained between the demands of the general interest of the community and the requirement of the protection of the individuals fundamental rights - *Sporrong and Lonnroth v Sweden* (1982) 5 EHRR 35 at paragraph 69. Miss Walsh submitted that such a balance is not kept where after one year in the absence of exceptional circumstances the interests of the creditors outweigh all others

[9] Although it has been decided that Mrs Quinn’s Convention rights have not been infringed Miss Walsh submitted that in seeking a declaration of incompatibility under section 4 of the Human Rights Act her client does not have to establish that she is a “victim” within section 7 of the Act. Mr Morgan took issue with this.

[10] The Northern Ireland Act 1974 which is the empowering Act for the Insolvency Order is in general terms and does not prevent the removal of any incompatibility that is said to exist in the Order. As it is subordinate legislation it does not enjoy any of the immunity given to primary legislation and its incompatibility does not fall to be considered under section 4 of the Human Rights Act. If it is found to be impossible to read or give effect to paragraph (5) of article 309 in a way that is compatible with Convention rights the court can set the provision aside either by striking it down or disapplying it. Such a result is envisaged by section 10 (2) of the Human Rights Act.

[11] Section 6(1) of the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Mrs Quinn who claims that a public authority has acted in a way made unlawful by section 6(1) may rely on the Convention right or rights concerned in any legal proceedings, but only if she is (or would be) a victim of the unlawful act.

[12] Since it has been decided that Mrs Quinn is not a "victim" as defined in section 7 (7) of the Human Rights Act and Article 34 of the Convention this places an insuperable difficulty in her path.

[13] There is an obligation on the court as a public authority not to act incompatibly with a Convention right. It is described by Keene LJ in *Ghaidian-Mendoza* [2003] Ch.380 at p 396, para.37 in these terms;

"Section 6 (1) of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, and by virtue of section 6 (3)(a) this court is a public authority. It follows that this court cannot act incompatibly with a Convention right unless (see section 6(2)) the court is acting to give effect to or enforce provisions of or made under primary legislation which cannot be read or given effect in a way that is compatible with such a right."

[14] So far as the individual rights of Mrs Quinn under the Convention are concerned the court has held that there is no infringement and by making the order sought by the trustee the court would not be acting in a way which is incompatible with any Convention right.

[15] In so far as there may be an obligation on the court to consider the possible incompatibility of Article 309(5) in a wider sense I make these observations.

[16] In *R v DPP Ex p Kebilene* [2000] 2 AC 326 Lord Hope of Craighead at pp380-381 referred to the doctrine of the “margin of appreciation” and said

“But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between the competing interests and issues of proportionality. In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body, or person whose act or decision is said to be incompatible with the Convention....”

Lord Hope went on to say:

“It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection”

[17] In examining the underlying social purpose of legislation it is proper to have regard to a ministerial statement - *see Wilson v Secretary of State for Trade and Industry* (2003) UKHL 40 at para. 64 per Lord Nicholls, Lord Hope at paras. 116-118 and Lord Hobhouse at para. 142. The court has been provided with a statement made by Lord Lucas to the House of Lords in which he said:

“The amendments represent a compromise between two conflicting interests, and in our view achieve a reasonable balance between the rights of the creditor, who can only look to the bankrupt’s assets for payment of his debt, and

those of the family, who will normally be able to remain in the property concerned for a reasonable period so as to give them an opportunity to adjust to their changed circumstances and make arrangements either for alternative accommodation or for the buying out of the bankrupt's interest in the property"

(HL Debates Vol 467, column 1268, 23 October 1985).

[18] As Lord Hope observed in *Wilson* (supra) at para 67 "the court is called upon to evaluate the proportionality of legislation, not the adequacy of minister's exploration of the policy options or of his explanations to Parliament". In this area of social and economic considerations a degree of deference has to be shown to the opinion of the legislature. In the circumstances it would be difficult for a court to say that a proper balance has not been struck by the legislature in Article 309(5) between the need for protection of the interests of the family of the bankrupt and those of his creditors.

[19] Accordingly the trustee is entitled to an order in the terms indicated in the decision of the court given on 31 January 2003.