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*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **21/01/2015**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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ROBERT JAMES SHAW
And
DEIRDRE KATHLEEN SHAW

-v-

LAWRENCE PATTERSON

_____

MR JUSTICE DEENY

[1] The court has before it today an unusual and novel situation and it stems from long running proceedings involving the applicants today Mr Robert James Shaw and his wife Mrs Deirdre Kathleen Shaw and the respondent Mr Lawrence Patterson. There has been a very long running dispute between these parties about a right of way giving access to Mr and Mrs Shaw's property as well as to other properties.

[2] As has been rehearsed at length in previous cases the matter was initially heard in the County Court on an interlocutory basis in 2007. It was subsequently the subject of a full hearing before Her Honour Judge McReynolds in 2008 over four days and she delivered a corrected judgment in January 2009. That judgment was appealed to this court and on the application of Mr Patterson through counsel Mr Sharpe, I believe, I struck that out on 15 March 2010. That was subsequently appealed but that appeal was rejected by the Court of Appeal in Northern Ireland in 2012. There were other related proceedings which were brought before Mr Justice McCloskey on one occasion and other proceedings before me. There were orders for cost understandably made and they were not complied with. A statutory demand was served on Mr and Mrs Shaw and they applied, as they are entitled to do, to the Master in Bankruptcy to set aside that statutory demand. On 4 October 2013 Master Kelly dismissed that application. I refused their appeal from that decision of the learned Master; I do not have the precise date of that I think before me at this moment and time. But in any event they then appealed to the Court of Appeal in Northern Ireland and they did so in error originally but on a corrected basis it went

before that court by a Notice of Appeal on 21 January 2014. By a judgment of 14 October 2014 the Lord Chief Justice sitting with Lord Justice Higgins and Lord Justice Coghlin upheld the decision of this court. They took into account the points made by Mr and Mrs Shaw in the careful judgment of the Lord Chief Justice. Since then an application was made, given a statutory demand not having to be set aside, to make Mr and Mrs Shaw bankrupt and that Order was made by the Master in Bankruptcy on 9 January of this year.

[3] The Shaws applied on 2 January of this year in a somewhat unusual application for various reliefs and that came before the court on 12 January before this court. The application is entitled 'Application for Contempt of Court, Breach of Court Order/Injunction and to reopen the order of His Honour Mr Justice Deeny'. It was supported by a document signed by Mr and Mrs Shaw.

[4] At a hearing on 12 January I heard from Mr Shaw and also from Mr Cole, solicitor to Mr Patterson and I identified in effect four issues in their application. The substantive issues they were raising were that there was an infringement of the decree of Her Honour Judge McReynolds relating to the right of way caused by works that were being carried out by Mr Patterson and it is right to say that he was doing so in co-operation apparently with a Mr Smith and that these two gentlemen now own the property of Mrs McConnell who had a house on the other side of the right of way, so to speak, from Mr and Mrs Shaw. So that was the first request : there was an infringement of the decree. Secondly, that there was contempt of court on the part of Mr Patterson by doing these works. But, thirdly, that they had discovered new material which undermined the previous decisions of the court in this long running case which has been before me from at least 2009 on and off. The fourth point I identified was, of course, had they a right of hearing at all, because they had been made bankrupt on 9 January. As Mr Cole, the solicitor for Mr Patterson submitted, was any cause of action now vested in the trustee in bankruptcy and [if so] I should not hear them.

[5] Now initially I put the matter back for hearing on 2 March to determine that point. Mr and Mrs Shaw then wrote in complaining that more works had been carried out while they were at the court and asking for an earlier hearing and I consented to that and consented to sit today 21 January. Today I have the assistance of a lengthy written argument from Mr and Mrs Shaw, which I have read carefully in preparation yesterday for this case, dated 19 January and of some 49 paragraphs with a considerable bundle of maps and photographs which I have had the opportunity of considering overnight. I have also had the assistance of Dr David Sharpe of counsel on behalf of Mr Patterson and with a skeleton argument which he prepared in response to that of Mr and Mrs Shaw.

[6] The position is that if Mr and Mrs Shaw are right in saying that they have a right to continue well then they are anxious to do that very quickly and they should really be going into the County Court where the decree was made seeking some form of relief, because apparently the works are continuing, that is the point they are

making to me or one of the points they are making to me. So it seems to me that it is my duty to deal with this matter expeditiously. In any event as the courts have held matters of insolvency should be dealt with as expeditiously as possible and so I conceive it to be my duty to deliver this judgment now rather than reserving on the point.

[7] The thrust of the case on behalf of the applicants is that there is new material which undermines the earlier decisions of the court. Secondly, that there is interference with the right of way. How do those submissions, taken at their height at this stage, how do they gel with the law? Well as counsel points out there are relevant authorities on this point. First of all there is a decision of a strong Court of Appeal in Heath and Tang and Another (1993) 4 AER 694 where Lord Justice Hoffman delivered the judgment of the court with which Sir Thomas Bingham Master of the Rolls and Lord Justice Steyn, as he then was, agreed. There is, as always, a lucid and interesting judgment from Lord Justice Hoffman but Mr Sharpe submitted the matter was well summarised in the headnote to this effect:

> "The general principle in bankruptcy was that, following the vesting of the bankrupt's estate under Section 306 of the Insolvency Act 1986 in his trustee when appointed, the bankruptcy was divested of, and ceased to have an interest in, either his assets or his liabilities, and by virtue of Section 285(3) of that Act, after the making of a bankruptcy order creditors had no remedy against the property or person of the bankrupt in respect of any debt provable in the bankruptcy. Furthermore, in principle a bankrupt could not appeal in his own name from a judgment against him which was enforceable only against the estate vested in his trustee. However, a bankrupt was entitled to bring an action e.g. for defamation or assault, which was personal to him and to defend an action seeking relief, such as an injunction, against him personally and to appeal from an adverse judgment in such proceedings. In the case of an appeal from the judgment at which a bankruptcy petition was founded the general principle applied that the bankrupt was divested of any interest in proceedings and had no locus standi to appeal from a judgment against him which was enforceable only against the estate vested in his trustee. Accordingly both applications for leave to appeal would be refused."

[8] Now the matter came before me in the case of Swift Advances v McKay and Walker and Swift Advances v Dalrymple and Walker ,which is to be found at [2011]

NICh 2 and was delivered on 2 February 2011 and Mr and Mrs Shaw rely on the decision of this court in that regard. At paragraph [14] and, well in fact beginning at paragraph [12] I deal with the legislation and certain other matters and then at paragraph [14] I turn to the decision from which I have just quoted Heath and Tang. At [15] I go on quote from the submission of Mr David Dunlop, as I believe it was, from Mr Justice Treacy a decision to which I will turn in a moment. Mr William Gowdy of counsel helpfully appeared for those gentlemen on a pro bono basis instructed by the Bar Pro Bono Committee to his credit and that of that committee. He did not seek to dispute the general thrust, namely that propriety claims are vested in the trustee in bankruptcy. The bankrupt can pursue personal claims but if they are hybrid claims they fall outside the personal exception and vested in the trustee. The authority for that is Orde v Upton (2001) AER 193 at 197. He argued that this was personal because the relief being sought by Swift here was for an order for possession of the homes of these men and that the two men in question, who were both bankrupted at that time, though in fact I think discharged shortly afterwards, they were both living in their houses with their wives, and their children, 3 and 4 respectively. As Dr Sharpe reminds me in his submissions my judgment of that case records criticisms of the trustee in bankruptcy there who had occasion to have orders for costs made against him twice and as I hope courteously as always but nevertheless clearly state did seem to behave somewhat oddly and not in the best interests of the two bankrupts there. Taking those facts together I concluded as Mrs Shaw said in her independent submission to the court at paragraph [16]:

> "I accept that the residence in these dwelling houses by these men is a personal matter. It could hardly be more personal. To be dispossessed of their homes must be at least as a personal matter as having their character damaged by defamation. If support for that were necessary Article 8 of the European Convention on Human Rights could be prayed in aid.
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> [17] That is sufficient to establish locus standi on behalf of these men. If, of course, at a full hearing of this matter the plaintiffs established the legal validity of their charges then they will be enabled to contend that it is necessary to protect their rights for an order for possession to be made against the appellants. Article 8 does not prevent possession orders themselves but merely ensures that they must constitute a necessary and justified interference with the privacy rights of occupants and they must be according to law."

[9] The position therefore is that I did not rule on a point that it seems to me does not apply here - Mr Gowdy's alternative point that the general rule that hybrid

claims fall on the proprietorial side of the issue and are therefore a matter for the trustee is inapplicable if the parties were defendants. It does not arise here because these parties [the Shaws] are clearly applicants as they described themselves or plaintiffs.

[10] So the issue for me today is whether Mr and Mrs Shaw fall on the Dalrymple side of the fence, that this is a personal matter or whether they fall on the proprietorial or hybrid side of the fence. Mr Sharpe relies on a judgment of Mr Justice Treacy in Young and Young v Hamilton and Others [2010] NICh 11 where the learned judge reviews the law at paragraphs [25] and following and concluded that the plaintiff's causes of action there were proprietary in nature. This is the case where it only transpired in the middle of a lengthy hearing that Mr William James Young was a bankrupt on his own petition indeed before he issued the writ of summons. The learned judge dismissed him from the action and he expressly held that hybrid claims were indeed proprietorial in nature and could not be continued by the bankrupt. Now either that was not appealed by Mr William Young or the Court of Appeal in Northern Ireland rejected it because at a later date that court remitted to me as a different judge of the Chancery Division a claim by Mrs Young against David Russell, Thomasina Phyllis Russell and David Boyd and I heard that claim and I apparently dismissed that claim by Mrs Young in an unreported and untranscribed judgment. She then appealed and the Court of Appeal heard this on, I am not quite sure when they heard it, but they delivered judgment on 7 February 2014 and it is reported at [2014] NICA 12. Reading that with the earlier judgment what is clear is that part of the original claims of Mr and Mrs Young was about their right of way, was about interference with their laneway; so there is quite a close proximity of fact between the case that Mr and Mrs Shaw are concerned about and the Youngs' case. It is clear from their judgment that they have remitted the matter back on the part of Mrs Young who was not a bankrupt but not on the part of Mr Young, either because they had refused that appeal or because he had never appealed. So I bear that in mind. I bear in mind the decision of Mr Justice Treacy and I bear in mind his citation of authority including Orde and Upton to which I have referred and the relevant paragraphs, including 8.18, of Gowdy and Gowdy; Individual Insolvency , the Law and Practice in Northern Ireland, to like effect. Bearing those legal submissions in mind I then turn to the facts.

[11] First of all, on 12 January I already dismissed so much of the application, I am not sure how to characterise it because it was not really a summons or a notice of motion but it was some kind of interlocutory application by Mr and Mrs Shaw. I dismissed so much of it as related to contempt because it had not been filed and served in accordance with the Rules of the Court of Judicature including Order 52 Rule 2 and I dismissed that. That left open the interference with the right of way and the allegation that the whole matter should be reopened by them. Let us take those separately. Mr Patterson, and apparently Mr Smith, have done works altering this right of way but with the intention of widening it and putting in a retaining wall and using some of the land formerly owned by Mrs McConnell. Mr Sharpe draws the attention of the court to the nature of that work in law and he points out that in

the useful textbook Power on Intangible Property Rights in Ireland, 2nd Edition, 2008 paragraph 103 the learned author says as follows:

> "An easement is the entitlement by an owner of land either to exercise enjoyment rights over another's land for the benefit of the first owner's land, or to oblige the owner of the other land to submit to some diminution in that owner's enjoyment right so as to augment the facilities enjoyed by the first owner's land. The rights created by an easement are proprietorial, not personal."

He relies on that. It does seem to me that that is a valid observation. Obviously the ownership of land is of its nature proprietorial. Equally obviously you have to own land to have intangible rights such as a right of way because the dominant tenement has the right over some servient tenement. So they are proprietorial in nature. I respectfully agree with the learned authors comments. So that would appear to put the applicants in a difficult position because if it is proprietorial the matter is vested in the trustee in bankruptcy and it is his right or duty, insofar as is proper, for him to consider whether to bring proceedings, injunctive or otherwise, to restrain this.

[12] As I have said the law is clear that hybrid claims fall on the proprietorial side and that really ends the matter in the submission of counsel for Mr Patterson and again there is very considerable force in that and that is based on persuasive authority.

[13] Out of an abundance of caution I have considered what is the personal element here? I cannot see anything that would amount to taking it out of a proprietorial let alone out of a hybrid category except the allegation in Mr Shaw's skeleton argument that they could not get a lorry in. But although he has furnished many photographs to the court he has furnished no photograph showing that you cannot get a lorry into his house. His own submissions about that seem to me to waiver somewhat. It may be that while Mr Patterson actually had a piece of plant on the roadway a lorry could not get in for a short space of time, but it seems to me there is nothing more than that. If they literally could not get into the house then conceivably I would have to consider whether hybridity would perhaps be subject to an exception of that kind. It can be seen that I am really striving here to see whether there is a point on behalf of Mr and Mrs Shaw, but the conclusion I reach is that they have not got an arguable case, even taking their case at the height, [if that were the test] that this is a personal interference and it is at most hybrid and I am not minded to depart from the existing authorities to the effect that hybrid claims are a matter for the trustee.

[14] Now Mr and Mrs Shaw's alternative thrust was the bold one of wanting to reopen all these cases. I read their document carefully and listened to his submissions, they were wide-ranging, they touched on a number of aspects of this

case, they touched on the familiar topic of the map that was produced at the interlocutory injunction and indeed Mr Cole was able to produce the map which was exhibited to the 1988 decree as Mr Shaw agreed in this court on 9 December 2009 when he and Mr Cole both initialled it. I have considered carefully what they have to say. I have considered their point that there were planning permissions and they say that there was a conspiracy between Mr Patterson and Mr Smith. I do not see any conspiracy. Any planning documents, of course, submitted to the Planning Service are available for public inspection. I cannot conceivably see and ought to make it clear, I am not making any criticism of Mr Patterson or Mr Smith, I do not see the conspiracy, but even if there was something the evidence would appear to have been available in the past to the applicants. Their submissions, as I say, were wide-ranging, touching on 'Judge' Briscoe's recent conviction and [matters personal to the Shaws]. I have considered all these, but I do not see a case that would allow this court to open up again the findings of the court previously established; particularly, that is to open them up again on the part of two bankrupts who are presumably not a mark for costs.

[15] Furthermore they have chosen to bring the proceedings in the County Court and in this court and I was informed administratively, and I think confirmed in one of the earlier hearings, before the Court of Appeal as well. This is a most novel application. The complaints that they are making are all to the effect that the court was misled or various courts were misled about the right of way in the past. So they all return to an issue that is proprietorial or at best hybrid and as I have already said I am not minded to depart from the established law on hybrid claims. It seems to me therefore that the submissions of Mr Sharpe on instructions on behalf of the respondent are correct and that Mr and Mrs Shaw do not have locus standi to pursue their application of 2 January 2015.

[16] Now Mr and Mrs Shaw or Mr Shaw told me earlier they were appealing the order of the Master in bankruptcy. That obviously is going to be terribly difficult because there have been hearings before three courts on whether or not the statutory demand could be set aside and they failed that. But given that they have told me they are appealing, rather than dismissing these proceedings I will stay the proceedings, certainly in my court, it is not for me to rule with regard to the other two courts. I have stayed the proceedings in this court until further order of the court. Mr and Mrs Shaw should draw their concerns to the attention of the Insolvency Service. Their claims are vested in the Official Receiver and I am minded to stay it until further order but put it in for mention. I usually give the Official Receiver some time in which to decide whether he is pursuing a claim, I think six weeks is pretty customary. So we will put it in for mention in six weeks in case the trustee in bankruptcy wishes to pursue any of these matters. 4th March. So the proceedings are stayed. You can complain to the trustee and ask him to take it up which he may do if he thinks it has reduced the value of your house. But it is a matter for him unless you succeed in setting aside the bankruptcy.