Neutral Citation No: [2017] NICh 18

Ref: DEE10337

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

Delivered: *14/06/2017*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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2015 No. 106997

IN THE MATTER OF CIARAN TULLY (A BANKRUPT)

BETWEEN:

BRIAN F WALKER
(AS TRUSTEE IN BANKRUPTCY OF CIARAN TULLY)

Applicant;

-and-

BANK OF SCOTLAND PLC TRADING AS BIRMINGHAM MIDSHIRES

First Respondent;

-and-

AXA INSURANCE UK PLC

Second Respondent;

-and-

CIARAN TULLY (JNR) AND RACHEL TULLY

Third Respondents.

NO 2

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DEENY J

[1] In the previous, No. 1, judgment in this matter I dealt with an appeal by Mr Brian F Walker, as trustee in bankruptcy of Ciaran Tully, from a decision, unreported, of Master Kelly.

[2] She had before her an application by Mr Walker pursuant to Article 276(2) of the Insolvency (Northern Ireland) Order 1989. That provision allows a trustee in bankruptcy to apply to the High Court for "directions in relation to any particular matter arising under the bankruptcy." The three questions for direction before the Master and later this court in fact expressed in different ways one claim that the trustee wished to establish. The bankrupt was the personal representative of his estranged wife who was the owner of a property. He only became bankrupt after her death and after taking out letters of administration. In that capacity he insured the property with the second respondent, AXA Insurance UK Plc. As can be seen in more detail in my previous judgment the property was extensively damaged by fire. AXA are holding the proceeds of a successful claim under this policy. The contention of the trustee is that the bankrupt became entitled to the property and thus the proceeds of this policy as the surviving husband of the deceased. The mortgagee first respondent contended that under a matrimonial agreement between the parties after their separation Mr Tully had expressly waived any such claim to ownership. Furthermore the first respondent contended that on foot of the mortgage deed the property had vested in it as mortgagee. It had, however, never taken possession of the property, nor indeed insured it. I upheld the decision of the Master and like her answered no to the three questions posed by the applicant. Both the first and second respondents, by their counsel, then applied for their costs, above and below in the case of the first respondent, against not only the estate of the bankrupt but Mr Brian Walker personally as the trustee. The Master had followed her normal practice of making an order for costs against the estate but not the trustee personally. There are, in fact, no other assets of the estate so an order against the estate is of no practical value to the respondents.

[3] In the circumstances I allowed counsel to make written submissions on the issue of costs which I subsequently received and which were of considerable assistance to the Court.

[4] The main thrust of the argument of Mr Keith Gibson on behalf of the bank for costs personally against the trustee arises from the decision of the Supreme Court in Gabriel v BPE Solicitors & Anor [2015] UKSC 39. Mr Gabriel had lent £200,000 to a company. The solicitors acting for him, BPE, were found to have been negligent in their handling of the transaction. The trial judge awarded the full amount that Mr Gabriel would have recovered under the facility agreement if the company had been good for the money. The Court of Appeal, however, held that the loss as suffered was not within the scope of the solicitor's duty and they reduced the damages to a nominal award of £2. That Court awarded costs against Mr Gabriel who then was made bankrupt on his own petition but not before leave had been granted by the Supreme Court for an appeal.

[5] The trustee in bankruptcy of Mr Gabriel had some limited assets, which were not adequate to pay the costs of almost £0.5M already awarded in favour of BPE against Mr Gabriel before his bankruptcy. The trustee therefore made a novel

application to the Supreme Court. He sought its determination that if he pursued the appeal before that body he would not, in any event, become liable for the costs incurred in the Courts below.

[6] It can be seen that the facts are quite different from those in the case before me and quite unusual. Lord Sumption, who delivered the judgment of the Court, with which the other four Justices agreed, did, however in his judgment, under the rubric "The question of principle" set out matters of general application.

> "9 A trustee in bankruptcy, unlike the liquidator of a company, is personally a party to legal proceedings which he has adopted. The reason is that the assets of the bankrupt at the time of the commencement of the bankruptcy vest in him personally, and the bankrupt has no further interest in them. The rule, which dates back to the beginning of bankruptcy jurisdiction in England, is currently embodied in section 306 of the Insolvency Act 1986 . The trustee's position differs in this respect from that of a liquidator, for although a liquidator is a trustee for the proper administration and distribution of the estate, the assets remain vested in the company and proceedings are brought by or against the company. It follows that with the exception of a limited (and for present purposes irrelevant) class of purely personal actions, a bankrupt claimant has no further interest in the cause of action asserted in the proceedings. Likewise, as Hoffmann LJ observed in *Heath v Tang [1993] 1 WLR 1421* , 1424, where the bankrupt is the defendant, he has no further interest in the defence, because the only assets out of which the claim can be satisfied will have vested in the trustee.
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> 10 None of this means that the trustee is bound to adopt the action. If the trustee does not adopt it, the action cannot proceed and will be stayed or dismissed if the bankrupt is the claimant: *Heath v Tang [1993] 1 WLR 1421* . If the bankrupt is the defendant, an action which the trustee does not adopt is liable to be stayed under section 285(1) and (2) of the Insolvency Act 1986 . If, however, the trustee does adopt the action, he becomes the relevant party in place of the bankrupt. In the ordinary course, he will be substituted for the bankrupt under what is now CPR 19.2 . But it is well established that he will be treated as the party if he has in fact adopted the proceedings by conducting the litigation, even if there has been no formal substitution: *Trustee of*

> *the Property of Vickery (a bankrupt) v Modern Security Systems Ltd [1998] 1 BCLC 428* . It follows that an order for costs in favour of the other side is made against the trustee personally in the same way as it would be made against any other unsuccessful litigant. The cost of satisfying the order is treated as an expense of performing his office, for which he assumes personal liability just as he does for any other expenses and liabilities incurred in the administration and distribution of the estate, but subject to a right of indemnity against the assets if the expenses and liabilities were properly incurred."

[7] His Lordship went on to consider the application of these principles to the particular facts before the Court. The trustee in bankruptcy there, without dissent from the Court, accepted that he was at risk of the costs of the hearing before the Supreme Court.

[8] Mr Gibson submits that this is clear authority for the proposition that Mr Walker is liable for the costs of these proceedings, implicitly, on the basis of the normal costs rule that they should follow the event. He also relies on Re Mordant (a Bankrupt) [1995] 2 BCLC 647 and Re a Debtor (No 26 A of 1975) [1984] 3 All ER 995. In that latter case Scott J said the following at page 998 (c and d).

> "So, if a trustee commences or continues an action without the requisite sanction and incurs any costs in so doing, he cannot charge those costs to the bankrupt's estate. But he becomes liable to the solicitor who acts for him in the action in exactly the same way as any other client of the solicitor and he incurs a potential liability in costs to the other party to the litigation in exactly the same matter as any other litigant. The only difference between the position where the trustee does and the position where he does not have a Section 56 sanction is that in the former case he can but in the latter case he cannot charge his costs against the estate."

[9] The reference to the Section 56 sanction is seeking the agreement of the Committee of Inspection in the bankruptcy. That does not apply here.

[10] It can be seen, therefore, that there is clear law that a trustee in bankruptcy is generally liable for the costs of an action which he commences. That is not normally the case where a trustee is made a party to proceedings on the application of another party or, it seems, by the Court's own motion: *Gowdy & Gowdy*, *Individual Insolvency* [12.24], citing the two cases relied on by Mr Gibson.

[11] For completeness I observe that the equivalent of Section 306 of the English Act is Article 279 of the Northern Ireland Order 1989 which vests the property of the bankrupt in the trustee.

[12] The second respondent, through the skeleton argument of Mr Adrian Colmer, adopts the submissions of the first respondent. It has justified, in my view, its presence by solicitor and counsel at the application to ensure a clear direction at the outcome of the proceedings allowing it to pay the proceeds of the policy to the appropriate party. It is also right to say that Mr Colmer made helpful submissions in the course of the hearing.

[13] Mr Mark McEwen, for the applicant, contends that the judgment in Gabriel op. cit. dealt with a particular set of circumstances entirely different from the present circumstances. He stressed that the applicant here was availing of the Article 276 opportunity to seek directions under our Order. He submitted that trustees, if faced with a personal liability for costs for using this provision, would be less inclined to avail of it to the disadvantage of creditors.

[14] He drew attention to *Doyle & Keay: Insolvency Legislation Annotations and Commentary* 5th Ed p531 in the following terms.

> "There is no hard and fast rule as to where the costs of a s.303 application will fall. In addition to the exercise of its discretion in ordering costs against a particular party, the court may have to consider whether or not any costs should rank as an expense in the bankruptcy."

[15] He also drew attention to the fact that the first respondent had taken no steps to enforce its security against the property or to protect the property either before the fire or thereafter. In fact it fell to the trustee to take those steps at his own expense as there were no other assets, it would seem, of the estate of the bankrupt remaining by the time of the trustee's appointment.

Consideration

[16] The role of the Court in awarding costs, normally at the conclusion of a case, is to be found at Order 62 Rule 3 of the Rules of Judicature. 062 r3(3) reads as follows.

> "If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

[17] It might be thought that this provision leaves a wide discretion to the Court to determine issues of costs. Weatherup J pointed out in Mel Davidson Construction v NIHE [2015] NIQB 26 that there are three steps i.e. whether the Court sees fit to make an order; if so costs will follow the event; except where it appears to the Court that some other order should be made to the whole or any part of the costs. The first and last phrases in the rule together leave a wide discretion although it has been held that a successful defendant is entitled to its costs, unless it brought about the litigation or occasioned unnecessary expense or did some wrongful act in the course of the transaction of which the plaintiff complains; Ritter v Godfrey [1920] KB 47. That authority does not deal with the present situation where a trustee in bankruptcy was seeking the directions of the Court for the discharge of its duties. The legislature has expressly provided, both here and in England and Wales, for such an application to be made.

[18] The Master in Bankruptcy followed what counsel acknowledged to be the standard procedure in making no order for costs against Mr Walker personally even though the questions had been answered contrary to his submissions. Mr Gibson laid stress in his written submissions on the fact that Mr Walker was vigorous in correspondence in asserting that he was entitled to the proceeds of the policy. But it does not seem to me that that alters the fact that he then put the questions before the Master in Bankruptcy for directions.

[19] As is apparent from the reported cases difficult issues of interpretation of the complex legislative provisions in force relating to bankruptcy do arise. They have not been lessened by the frequent amendment of those provisions without the creation of any single consolidating statute. It seems to me contrary to public interest that a trustee in bankruptcy, seeking to recover what assets he can for the benefit of the creditors, who are otherwise going to be at a loss to a greater or lesser extent, should be deterred from bringing such an application, after due and careful consideration and the taking of appropriate advice, by becoming personally liable for costs as a general rule if his submissions are not accepted by the Master. If, of course, there are assets in the estate already he can recover his costs from those assets. But the present situation, where there is no available asset but an arguable claim to some asset out with the control of the trustee is not unknown.

[20] I therefore consider the practice adopted by the Master in Bankruptcy a correct one. In saying so I do not seek to derogate in any way from the general statement of principle in the judgment of Lord Sumption in Gabriel. But it is clear that he was not addressing the English equivalent of our Article 276 procedure. Choosing to sue solicitors or pursue an appeal against solicitors for negligence on behalf of the estate of a bankrupt is a different matter from seeking the ruling of the Court as to the proper ownership of the proceeds of an insurance policy. Of course, the Master still enjoys a discretion. If the application at first instance seems entirely futile, or, perhaps, bears harshly on a contending party, costs might still be awarded against an unsuccessful trustee.

[21] In this case Mr Walker not only brought the Article 276 application but, having got an adverse result, from his point of view, from the Master then appealed it. I accept it was reasonably necessary for both the first and second respondents to be represented by solicitor and counsel at that appeal. Lord Sumption has made it clear in his judgment that an appeal is a 'distinct proceeding' for the purposes of costs.

[22] If I may be permitted to recast the arguments of the respondents, it is unfair that they should again be put to the cost and expense of having to re-argue the matter again with no prospect of recovering their costs even if they win, again. Costs, they submit, should "follow the event".

[23] It seems to me that there is force in this submission. A trustee in bankruptcy must reflect carefully, if disappointed by the ruling of the Master under an Article 276 Direction, on whether he should appeal. He should form a view, having taken proper advice, as to the likelihood of him succeeding on that appeal. It seems legitimate to me that he should be potentially at risk of paying the costs of such appeal if the event goes against him. Proper distinction can be made between the initial hearing before the Master and an appeal to the judge, and, even more, any further appeal to the Court of Appeal if such transpired. They are 'distinct proceedings'.

[24] *Doyle & Keay* observe there is no hard and fast rule as to the award of costs if such an application should fall. The Court retains its discretion but a trustee such as Mr Walker is going to be vulnerable to the general principle that costs will follow the event in an Article 276 appeal. By appealing a contrary decision a trustee moves from being a neutral seeker of directions towards the role of a litigation combatant. It is necessary therefore for me to exercise my discretion in this case as to costs in the light of these conclusions. Four principal reasons can be advanced on behalf of the applicant for not making an Order for costs against him.

[25] Firstly, it is submitted that these were interesting issues on which it has been valuable to obtain the view of the Court. With all due modesty I was able to give the judgment I gave in this case ex tempore partly because it seemed to me that I was not reaching a conclusion of wider significance. It was a case that turned on its own facts, very largely.

[26] Secondly, I accept that the Article 276 application was brought not long after the decision of the Supreme Court in Gabriel. Furthermore, the issue as to whether the general principles identified by Lord Sumption applied to an application of this sort had not been tested. This is a more substantial point in favour of the applicant. There appears to be no previous ruling in this jurisdiction or across the water on this aspect of matters.

[27] Thirdly, the applicant will, of course, have to bear his own costs. He is a solicitor but that does not mean that he has no costs and he has instructed counsel.

[28] Fourthly, counsel draws attention to Mr Walker's responsible conduct of the estate so as to preserve the dwelling house in its damaged state when neither the mortgagee owner nor the insurer were doing so. I think this is a substantial point which stands to his credit. It may well assist the mortgagee in disposing of the property. One could measure that and apply a set-off against the costs of either respondent. However that in itself would incur further costs in measuring what the trustee did and proving or agreeing it.

[28] It is clear from what I have said that the only costs that might be ordered against Mr Walker would be in this Court. I consider no case of substance has been made to alter the Costs Order of the Master, as indeed the second respondent was inclined to accept.

[29] I observe further that in certain circumstances a party in the position of the second respondent might well have brought a summons before the Court to seek adjudication on which party should receive the proceeds of the claim under the policy.

[30] Bearing all these points in mind it seems to me that the just outcome on these facts is that I should not make an Order for costs against the trustee in bankruptcy personally on this appeal. The normal Order will therefore issue against the estate on behalf of both respondents.

[31] One matter not addressed in the submissions of learned counsel is costs between the two respondents. I will hear counsel, if the second respondent wishes, on whether the second respondent is entitled for any reason to deduct its costs from the proceeds of the policy of insurance before paying those over to the first respondent as the mortgagee entitled to possession of the property.