

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

2006 No 26866

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

**WILLIAM JAMES YOUNG
&
ROBERTA ANN YOUNG**

Plaintiffs;

and

- 1. ANDREW SYDNEY HAMILTON**
- 2. JAMES SAMUEL HAMILTON**
- 3. MARGARET JOAN HAMILTON**
- 4. DAVID RUSSELL**
- 5. THOMASINA PHYLLIS ALEXANDRA RUSSELL**
- 6. DAVID BOYD**
- 7. LORRAINE THOMPSON (formerly practising as Thompson's Solicitors)**

Defendants.

TREACY J

Introduction

[1] On the ninth day of the trial of this action it emerged, in the course of evidence being given by the plaintiffs' expert witness, Mr Jeremy Harbinson that the first plaintiff had been adjudicated bankrupt, on his own Petition, in London in May 2006, a few weeks before the Writ of Summons in this case was issued. Accordingly, on the date when the action commenced, the first plaintiff was an undischarged bankrupt.

[2] The defendants have sought an Order dismissing the first plaintiff's claim in these proceedings and for judgment against him on the ground that any cause of action which the first plaintiff may have had against the defendants have become vested in his trustee in bankruptcy and that thereupon and at all times thereafter the first plaintiff has had no interest in any such cause of action and therefore no standing to bring these proceedings.

Background to the Substantive Action

[3] In the amended Amended Statement of Claim the first plaintiff's causes of action against the first three defendants (the Hamiltons) are negligence, breach of contract and misrepresentation. As against the fourth and fifth defendants (the Russells) these are wrongful interference with the plaintiffs' right of way, trespass, harassment in breach of Arts3-5 of the Protection from Harassment (NI) Order 1997 and nuisance. As against the sixth defendant (Boyd) they are harassment in breach of Arts3-5 of the Protection from Harassment (NI) Order 1997, nuisance, negligent mis-statement and wrongful interference with the plaintiffs' right of way. As against the seventh defendant (Thompson - plaintiff's former solicitor) they are negligence and breach of Agreement.

[4] The relief claimed against the first, second, third and seventh defendants is for damages only. The relief claimed against the fourth, fifth and sixth defendants is damages and injunctive relief - the injunctive relief relating to the plaintiff's proprietary rights.

[5] The background to the claims are that the plaintiffs purchased from the Hamiltons a building site at 39a Carrowdore Road Greyabbey which purchase included a right of way for access to the said site over a lane. The purchase was completed on 13 October 2000. The Russells lived at 39 Carrowdore Road which is a property on the said lane and further from the Carrowdore Road than the site. The sixth defendant, Boyd, is a nephew of the Russells. The plaintiffs allege that the Hamiltons and Mr Boyd have interfered with the plaintiffs' right of way over the lane on many occasions and interfered with their right of ownership and right to enjoy the site.

[6] The seventh defendant acted as solicitor for the plaintiffs in relation to the said purchase.

[7] The plaintiffs assert the Hamiltons were aware for a number of years that the Russells (and Mr Boyd) claimed that the Hamiltons had no entitlement to ownership or use of the laneway and had frequently interfered with the Hamiltons' ownership and use of it and that they had no reason to believe that the Russells would not continue with the same behaviour in the future.

[8] In a letter dated 22 August from the Hamiltons' solicitors to the plaintiffs' solicitors the plaintiffs claim they were informed, in effect, that the problem between

the Russells and the Hamiltons appeared to have been resolved. The plaintiffs say this was a misrepresentation as were replies to pre-contract enquiries which indicated that the Hamiltons (qua Vendors) were unaware of any person claiming adverse rights over the property and confirming there was no litigation threatened pending or anticipated. The plaintiffs assert that the claimed representations were in respect of a material fact inducing them into entering into a contract which they would otherwise not have entered.

[9] The Russells deny any unlawful interference. The Court was informed the Hamiltons issued County Court proceedings against the Russells seeking injunctions restraining them from interfering and obstructing the Hamiltons in the use of the relevant laneway and access to their adjacent lands. On 7 February 2003 the Court granted the said injunctions. Mr and Mrs Russell appealed the said decision but on 18 November 2004 submitted to a settlement before Mr Justice Higgins in which they accepted, inter alia, the legal and equitable title of the Hamiltons to the lower section of the laneway (over which the plaintiffs now have a right of way).

[10] As against the seventh defendant the plaintiffs allege negligence and breach of contract in relation to, inter alia, inadequate advice and warnings and insufficient enquiry to discover whether the said dispute was ongoing.

Background to the Bankruptcy

[11] Peter Leslie Matthews Lunn, Official Receiver and Trustee Ex-Officio of the estate and bankruptcy of the first plaintiff has sworn an affidavit in these proceedings explaining the background to the first plaintiff's bankruptcy.

[12] On 10 May 2006 the first plaintiff petitioned under Section 264 of the Insolvency Act 1986 ("the Act") for himself to be made bankrupt at the High Court in London. On the same date his application to be declared bankrupt was granted by the High Court.

[13] Mr Lunn's predecessor, Graham Charles Rogers, was, pursuant to Section 287 of the Act, appointed the Receiver and Manager of the first plaintiff's bankruptcy estate on the making of the bankruptcy order on 10 May 2006.

[14] Mr Rogers, as Official Receiver, arranged for advertisements in the London Gazette and the London Evening Standard to be placed as they duly were on 11 May 2006.

[15] On 9 June 2006 the Writ of Summons in the present action was issued in the name of the plaintiffs by their then solicitors Harrison's (who have, since these proceedings commenced, come off record).

[16] On 3 July 2006 notice of intention not to summon a general meeting of creditors under Section 293 was filed at Court and, from that date, Mr Rogers

became the trustee of the first plaintiff's bankruptcy estate. As trustee in bankruptcy Mr Rogers had no intention or interest in pursuing any of the current litigation arising out of or in relation to 39A Carrowdore Road Greyabbey Co Down. Not least as he was aware that the trustee could be liable for costs and that there were no funds available in the first plaintiff's bankruptcy estate to meet such costs. Under Section 315 of the Act Mr Rogers therefore issued a Notice of Disclaimer dated 28 September 2006 which was filed in the High Court in London on 29 September 2006 and which related to both the land itself and also to this current litigation. At para.9 of his affidavit Mr Lunn has deposed as follows:

"I understand it was Mr Rogers' intention by issuing the aforesaid Notice of Disclaimer to disclaim the Trustees rights in relation to both the property itself and the litigation contained in the said Writ and Statement of Claim. However, Mr Young was not thereby free to pursue that litigation without reference to Mr Rogers or to the Court having conduct of the bankruptcy proceedings. When a trustee in bankruptcy disclaims an asset, whether that it is a tangible asset or an intangible asset (such as a cause of action) there is not provision whereby that asset automatically re-vests in the bankrupt or former bankrupt, or indeed in any other party. Under Section 320 of the Insolvency Act 1986, any of the persons listed in Section 320(2) can apply to the Court having conduct of the bankruptcy proceedings for the disclaimed property to be re-vested in him or her (known as a Vesting Order). Any disclaimed asset which is not subsequently the subject of a Vesting Order becomes bona vacantia and is liable to be dealt with accordingly. Under Rule 6.186 of the Insolvency Rules 1986 any application for a Vesting Order must be made within three months of the applicant becoming aware of the disclaimer. I do not believe that Mr Young made any such application *and therefore he is not entitled to pursue the litigation.*"

[17] On 31 October 2006 the original Statement of Claim in the present proceedings was served by the plaintiffs' then solicitors, Harrisons.

[18] On 4 January 2007 Mr Rogers was released from office as trustee of the first plaintiff's bankruptcy estate upon his transfer to a different position and on the same date by virtue of Section 300 of the Act Mr Lunn became a trustee ex-officio of the first plaintiff's bankruptcy estate.

[19] On 10 May 2007 pursuant to Section 279(1) of the Act the first plaintiff was automatically discharged from bankruptcy.

Effect of Bankruptcy

[20] Section 306¹ of the Act provides that the bankrupt's estate shall vest in his trustee in bankruptcy at the moment of the trustee's appointment without the need of any formality. Accordingly, the first plaintiff's estate became vested in his trustee in bankruptcy immediately upon his appointment on 3 July 2006.

[21] By Section 283(1) the estate is defined as comprising "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy".

[22] By Section 436² "property" is defined as including "things in action". A right to bring or pursue legal proceedings is a "thing in action".

[23] The law distinguishes between rights of action which are personal to the bankrupt and do not vest in his trustee and other forms of proceeding which do vest in his trustee.

[24] In *Heath v Tang* [1993] 4 All ER 694 at 696 Letter J et seq the English Court of Appeal said (per Hoffman LJ):

"By Section 306 of the Insolvency Act 1986 the bankrupt's estate vests in his trustee when appointed and by Section 285(3) no creditor has, after the making of a bankruptcy order, any remedy against the property or person of the bankrupt in respect of any debt provable in the bankruptcy. The effect is that the bankrupt ceases to have an interest in either his assets or his liabilities except insofar as there may be a surplus to be returned to him upon his discharge. What affect does this have upon legal proceedings to which he is a party? We shall

¹ "306 Vesting of bankrupt's estate in trustee.

(1)The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee.

(2)Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."

² "Money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest whether present or future or vested or contingent arising out of, or incidental to, property."

consider the position first when the bankrupt is plaintiff and secondly when he is defendant. The property which vests in the trustee includes 'things in action: see Section 436 of the 1986 Act. Despite the breadth of this definition, there are certain causes of action personal to the bankrupt which do not vest in his trustee. These include cases in which-

'that damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property' (see *Beckham v Drake* [1849] 2 HL Cas 579 at 604, 9 ER 1213 at 1222 per Earle J. See also *Wilson v United Counties Bank Ltd* [1920] AC 102, [1918-19] All ER Rep 1035)'.

Actions for defamation and assault are obvious examples. The bankruptcy does not affect his ability to litigate such claims. But for all other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages, vest in his trustee. *The bankrupt cannot commence any proceedings based upon such a cause of action and, if the proceedings have already been commenced, he ceases to have sufficient interest to continue them ..."*

[Italicisation added]

In other words the bankrupt has no locus standi to bring or continue an action which is vested in the trustee.

Hybrid Claims

[25] Some rights of action are hybrid - that is to say if the cause of action gives rise to claims which are both "personal" in nature and "proprietary". If, within a claim, both kinds of remedy are sought and the claim is therefore hybrid it falls outside the "personal" exception and vests in the trustee - see *Ord v Upton* [200] 1 All ER 193 at 197. Only those claims which are solely personal in nature will fall outside the bankrupt's estate - see also *Fletcher "Law of Solvency" Sweet & Maxwell 2009* at para 8-013 and *"Individual Solvency - The Law and Practice in Northern Ireland" Gowdy & Gowdy SLS 2009* at para 8.18 and 3(2) Halsbury's Laws (4th edn) (2002 reissue) at para 436.

The Parties Submissions

[26] The first plaintiff argued that the proceedings were of a hybrid nature including actions both of a financial aspect and of a personal aspect. He submitted that he was entitled to take action to prevent interference with his rights and entitlements and to seek injunctive relief to prevent such interference. He submitted that this right always vested in the plaintiff and at no time vested in the trustee in bankruptcy. Similarly, he submitted that he was entitled to take action to protect himself and his family from harassment. Inter alia he relied on the judgment in *Mulkerrins v PWC* [2003] 4 All ER 1. The plaintiff also relied on Arts 6 and 8 of the ECHR and Art1 of the First Protocol submitting that any restriction on his right to pursue his claims was incompatible with those provisions. In particular he asserted that he was entitled to defend his right to the peaceful enjoyment of his possessions (Art1 of the First Protocol) and that bankruptcy did not prohibit this right.

[27] The defendants submitted that any cause of action that the first plaintiff may have had vested in the trustee in bankruptcy. His claims it was submitted related to his proprietary rather than his personal rights but in any event even if they were hybrid in nature on the principle enunciated in *Ord v Upton* it was submitted these claims vested in the trustee. Thus in accordance with decisions such as *Heath v Tang* (referred to above) the bankrupt i.e. the first plaintiff could not lawfully have commenced these proceedings, ceased to have sufficient interest to continue them and had no locus standi. The defendants submitted that the restrictions imposed on a bankrupt in relation to the bringing of proceedings were not incompatible with the Convention and referred the Court to *M v UK* [1987] 52 DR 269 ECommHR and *Clayton & Tomlinson* paras. 11.384 and 11.545.

Discussion

[28] The combined effect of Sections 306, 283 and 436 (see paras.20, 21, and 22 above) is that by that process all things in action belonging to the bankrupt at the time of the bankruptcy vested in his trustee - see *Grady v Prison Service* [2003] 3 All ER 745 at paras.19-21.

[29] As to rights of action which vest in the trustee and those which do not vest in the trustee see the discussion in *Fletcher* at paras.8-011 - 8-015 and *Gowdy* paras.8.12 - 8.18. It is clear that claims of a proprietary nature vest in the trustee as do hybrid claims as explained above and it is only claims of a personal nature which have been construed as not constituting a thing in action within the meaning of Section 436.

[30] Thus all rights of action which relate directly to property comprised in the bankrupt's estate pass to the trustee in bankruptcy. Examples of rights of action which vest in the trustee include: actions for trespass or negligence causing injury to the bankrupt's property; actions for breach of contract; actions for

misrepresentations; actions for fraud; and actions involving the bankrupt and pecuniary liability [see Halsbury's Laws of England Vol.3(2)] whereas causes of action arising in respect of the bankrupt's personal injury, personal inconvenience or damage to reputation the right of action remains with the bankrupt e.g. personal injury actions; actions for slander - see *Rose v Buckett* [1901] 2 KB 449.

[31] In my view, the plaintiff's causes of action are proprietary in nature and even if, as I am prepared to accept, the causes of action give rise to heads of damages under both the "personal" and "proprietary" categories the action is, to that extent, hybrid and comes within the principle enunciated in *Ord v Upton* and is therefore to be treated as a "thing in action". That being so, all of the first plaintiff's claims vest in the trustee.

[32] The first plaintiff's reliance on *Mulkerrins* is misconceived since the issue in question before the House of Lords was the effect of an earlier determination in the bankruptcy court and whether it was open to the defendant firm PWC to challenge the practical effect of the earlier order [see the discussion in this case in *Gowdy* at para.8.17]. Accordingly the decision of the House in *Mulkerrins* is of no assistance to the first plaintiff.

[33] Where a trustee in bankruptcy disclaims an asset (including a cause of action) there is no provision whereby that asset automatically re-vests in the bankrupt. As explained by Mr Lunn under Section 320 the first plaintiff could have applied to the Court having conduct of the bankruptcy for the disclaimed property to be re-vested in him. Under Rule 6.186 of the Insolvency Rules any application for a vesting order must be made within three months of the applicant becoming aware of the disclaimer. Mr Young did not make any such application. Any disclaimed asset which is not subsequently the subject of a vesting order becomes bona vacantia and is liable to be dealt with accordingly. Mr Lunn was correct to observe that in the absence of such application the first plaintiff was not entitled to pursue this litigation.

[34] The first plaintiff also claimed that any restrictions imposed upon him in relation to his ability to continue these proceedings was incompatible with Arts 6 and 8 and Art1 of the First Protocol. This claim must also be rejected. Restrictions on the right of access to a Court have been upheld in relation to various categories of litigants including, specifically, bankrupts - see *M v UK*; see also *Luordo v Italy* [2005] 41 EHRR 547 at paras.83-88; *Lester & Pannick "Human Rights Law & Practice"* (3rd edn) at para.4.6.19, *Clayton & Tomlinson* paras.11.384 and 11.545.

[35] Had the first plaintiff wanted to be released from the restrictions arising from his bankruptcy he could and should have made application to the bankruptcy court - see para.33 above and the averments of Mr Lunn.

Conclusion

[36] In my view it is clear that the first plaintiff's claim against the defendants in this action is a "thing in action" and that accordingly his right to bring and continue this litigation passed to his trustee in bankruptcy on 3 July 2006 as did his entire interest in the property the subject matter of the action namely 39a Carrowdore Road Greyabbey. Accordingly I conclude for the reasons given above that the first plaintiff has no locus standi to have commenced or to now continue these proceedings. I will hear the parties as to whether the relief ought to be a stay or dismissal of the first plaintiff's action.