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

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Application to strike out – administration of deceased insolvent’s estate – alleged invalidity of disposition effected by executrix before adjudication – retrospective effect of article 257 of Insolvency (NI) Order 1991 as amended by Administration of Insolvent Estates of Deceased’s Persons Order (NI) 1991 – potential impact of Article 1 protocol 1 of the ECHR – Article 6 of the ECHR.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

PAUL McATEER and BEECHFINCH LIMITED

Plaintiffs;

And

WALTER LISMORE AS TRUSTEE OF THE ESTATE OF JAMES KEVIN McATEER
DECEASED, INSOLVENT

Defendant.

GIRVAN J

JUDGMENT

INTRODUCTION

This matter comes before the court by way of an appeal from the order of the Master (Chancery) who on 4 July 2000 refused the defendant’s application to dismiss the second plaintiff’s proceedings against the defendant in the action. The application was made under order 18 rule 19 and in the course of the appeal before me the summons was amended to ask the court to exercise its inherent jurisdiction to stay the proceedings. The Master dismissed

the first plaintiff's claim against the defendant under order 18 rule 19 on the grounds that the first plaintiff was seeking to re-litigate issues which have already been determined by an earlier order against the first plaintiff. There is no appeal against that part of the Master's order.

NATURE OF THE PROCEEDINGS

The relevant premises which comprise a dwelling house, outbuildings, stables and some land situate and known 20 Temple Hill Road, Newry, Co Down belonged to James Kevin McAteer, a deceased insolvent ("the deceased") who died on 6 May 1993. The deceased's estate was declared insolvent by order of the court on 9 January 1995 on the petition of the Inland Revenue. The defendant was appointed trustee of the estate in a meeting of creditors held on 4 April 1995.

By an order made on 27 May 1996 the Master (Bankruptcy) declared that Mrs Sheila McAteer the widow of the deceased (who had taken out a grant to the estate of the deceased in July 1993) had no legal or beneficial interest in the premises and it was ordered that her right of occupation in respect of the premises be terminated. That order also ordered her sons Fergus and Paul McAteer and Paul McAteer's wife and any other persons in occupation of the premises to deliver up vacant possession. By a subsequent order made on 19 November 1997 made specifically against the first plaintiff it was ordered that he deliver up possession of the premises.

In the present action as it currently remains following the dismissal of the first plaintiff's claim, it is asserted that the second plaintiff ("the company") took a lease for twenty-five years commencing on 1 December 1993 from Sheila McAteer. The statement of claim alleges that Mrs McAteer executed the lease prior to the insolvency of the estate of the deceased at a time when neither Mrs McAteer nor the company had knowledge of the insolvency.

THE APPLICATION

Mr McEwan on behalf of the defendant argues that the company's proceedings against the defendant should be struck out under order 18 rules 19 and under the inherent jurisdiction of court on the ground that the company's claim is frivolous, an abuse of process and has no prospect of success.

Central to Mr McEwan's argument is the proposition that the lease between Mrs McAteer and the company was void having regard to article 257 of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order") as modified for insolvent estates by the Administration of Insolvent Estates of Deceased Persons Order (Northern Ireland) 1991 ("the 1991 Order").

Article 257(1) of the 1989 Order provides:-

"Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this Article applies is void except to the extent that it is or was made with the consent of the High Court, or is or was subsequently ratified by the court."

Article 257(3) and (4) provide:-

- "(3) This Article applies to the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting, under articles 278 to 308 of the bankrupt's estate in a trustee.
- (4) The preceding provisions of this Article do not give a remedy against any person –
 - (a) in respect of any property or payment which he received before the commencement of the bankruptcy in good faith, for value and without notice that the petition had been presented; or
 - (b) in respect of any interest in property which derives from an interest in respect of which there is by virtue of this paragraph no remedy".

Paragraph 15 of Part 2 of Schedule 1 of the 1991 order modifies section 257 for the purposes of the administration of a deceased insolvent's estate by providing:-

“Article 257 ... shall have effect as if the petition had been presented and the insolvency administration order had been made on the date of death of the deceased debtor”.

As pointed out in *Muir Hunter on Personal Insolvency* at paragraph 5.035 the substituted revision effectively means that where an insolvency administration order is made against a person any disposition of property made by him or his personal representative in the period between the date of death (which is the deemed commencement of the insolvency administration) and the vesting of the deceased's estate in the trustee is void.

This is an expropriatory provision which takes away a property right acquired by a third party prior to the adjudication event. As such a provision it falls to be narrowly and strictly construed in favour of the party whose interest in the property is in question. This strict approach is called for by an application of the ordinary principles of common law (see the discussion in *Cowan v Department of Economic Development* [2000] NI 122 at 130) and the cases there cited).

Protocol 1, article 1 of the European Convention on Human Rights is also relevant. It provides:-

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not however in any way impair the right of state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to procure the payment of taxes or other contributions or penalties.”

Under the terms of the Convention and the second sentence of the first indent in article 1 of the protocol three conditions must be satisfied before a person may be deprived of

his possessions. Firstly, the taking must be in the public interest. Secondly, it must be subject to the conditions provided by law. Thirdly, it must be subject to the conditions provided by international law.

In determining the level of permissible interference with peaceful enjoyment of possessions, the European Court of Human Rights applies the fair balance test. Any interference must achieve a fair balance between the demands of the general interests of the community and the protection of fundamental rights of individuals. There must be a reasonable relationship of proportionality between the means employed and the aim pursued. A compulsory power interfering with private rights of property may infringe article 1 if it is not attended with basic procedural safeguards (see Hentrich v France [1994] 18 EHRR 440).

What is in issue in the present case relates to the question whether the company's claimed leasehold interest in the premises is void and should be set aside as not binding on the trustee. A transaction entered into in good faith and for value by a plaintiff and without notice of the relevant petition will not be set aside. In the case of a deceased insolvent's estate the deemed but fictional presentation of the petition as at the date of death could never be said to be within the notice of the party whose interest is under challenge. The question arises as to whether the onus of proof lies on the party seeking to uphold the transaction or the party challenging the transaction. That is an issue which must be determined at the trial and may raise issues under Article 1 of protocol 1. The strict interpretation called for both at common law and applying convention principles may point to the onus lying on the defendant to prove bad faith and/or lack of value. Even if the onus of proof lies on the plaintiff to prove good faith and value the statement of claim asserts that both grantor and grantee under the lease did not know of any insolvency at the relevant time and it pleads good consideration. At this stage accordingly there must be a triable issue on that matter as between the parties.

In his further attack on the validity of the lease document Mr McEwan argues that the lease document was never validly executed since the persons purporting to sign as directors were not directors of the company at the date of the execution (although they were at the date of stamping), that the company never took possession of the whole of the premises and never intended to, that the company had failed to pay the full rent due on foot of the lease and was considerably in arrears of rent.

An application to strike out proceedings at this stage of the proceedings if acceded to would bring the proceedings to an end and there would be no further trial of the dispute. An application to strike out raises issues under article 6 of the Convention for such an application could result in depriving a plaintiff of his right under article 6 to a fair and public hearing in respect of the determination of the party's civil rights (which includes a right in property).

In a clear cut case where a defendant has clearly no cause of action under domestic law or where it is clear on the undisputable facts that claims are wholly misconceived the court can and should strike the action out for that is all that the court need or should do to ensure a fair trial of the issues between the parties. A right to a fair and public hearing under article 6 does not of itself require a plenary trial when it is clear and obvious that the plaintiff does not have a cause of action or that the plaintiff's claim has no prospect of success. Indeed the defendant has a right to be protected against misconceived proceedings. The existing rules in order 18 rule 19 and under the inherent jurisdiction of the court appear to be entirely compatible with Convention rights under article 6.

Applying the well established principles applicable to a dismissal application of this nature I am satisfied that there are triable issues between the parties and accordingly I dismiss the appeal.

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