Neutral Citation No.: [2008] NICh 20 | ***Ref:*** **DEEH4869.T**

Judgment: approved by the Court for handing down | ***Delivered:*** **11/12/08**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRLAND

CHANCERY DIVISION

BETWEEN:

DAMIEN DUNCAN

Applicant;

and

OFFICIAL RECEIVER FOR NORTHERN IRELAND AND HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND

Respondents.

DEENY J

[1] This is an unusual application, although one grounded on ancient law. It is an application brought by Mr Damien Duncan on foot of Article 293 of the Insolvency (Northern Ireland) Order 1989. He has joined as respondents to the applications the Official Receiver for Northern Ireland and Her Majesty's Attorney General for Northern Ireland. In his application he seeks an order pursuant to Article 293(3)(c) vesting in him the freehold lands comprised in Folios 1725 County Tyrone and 30769 County Tyrone, the lands having been disclaimed by the Official Receiver as the applicant's trustee in bankruptcy and being a dwelling-house and the surrounding grounds which the applicant was, at the time that the bankruptcy petition was presented, entitled to occupy and was occupying pursuant to Article 291 of the Order.

[2] The position is, as averred in Mr Duncan's affidavit with which no issue was taken, that he was adjudicated bankrupt on 8 March 1993. He was in fact the freehold owner of the premises just referred to which are also described as No 52B Brookmount Road, Omagh, County Tyrone. The Official Receiver was appointed as his sole trustee in bankruptcy. On 29 June and 1 July 1993 the Official

Receiver issued notices of disclaimer in respect of these two Folios and they were properly served upon the applicant as he admits. However, what was not appreciated by him or his solicitors subsequently, nor, indeed, by the solicitors for the purchasers of this land at a later date, was the effect of that notice of disclaimer. There was at that time a mortgage in favour of the National & Provincial Building Society, which is now part of the Abbey Group, in a sum of money, which in the opinion of the Official Receiver, exceeded the value of the property. It was, therefore, in his view worthless and he was quite entitled to disclaim it.

[3] However, as Mr Burnton Q.C. sitting as a deputy High Court, (now Lord Justice Burnton), said in SCMLLA Properties Limited v Gesso Properties Limited [1995] BCC 793 : "It is a principle of modern land law that land should not be without an owner". The principle is effected by land escheating to the Crown in the event of there being no other owner of it, as happened here on foot of those two notices in 1993 when the then owner, the Official Receiver as trustee in bankruptcy, disclaimed ownership and the mortgagee at that time took no steps to assert ownership.

[4] The position, therefore, was that Mr Duncan continued to reside in the house until, it would appear, 2004 when he was offered and accepted the sum of £300,000 from Mr John Joseph McElhinney and Mr Neil Stewart to purchase the property. Subsequently their lender for that purchase pointed out that the effect of the bankruptcy and disclaimer was that Mr Duncan did not have title to give to these two gentlemen and the lender understandably required correction of that position.

[5] As I have said the application is brought under Article 293 of our Insolvency Order 1989, the equivalent of Section 320 of the Insolvency Act 1986. I think in the circumstances it is right to read from it briefly.

> "**293.-** (1) This Article and Article 294 apply where the trustee has disclaimed property under Article 288 *[as here]*.
>
> (2) An application may be made to the High Court under this Article by -
>
> (a) any person who claims an interest in the disclaimed property,
>
> (b) any person who is under any liability in respect of the disclaimed property, … or
>
> (c) where the disclaimed property is property in a dwelling house, any person who at the time when the bankruptcy petition was presented was

> in occupation of or entitled to occupy the dwelling house." *[own emphasis]*

It is interesting to note, therefore, that it would appear that if the land in question had been commercial property or agricultural property it may well be that the former bankrupt is not entitled to bring an application of this kind to have the property vested in his name. I say that because it would appear, without making any final ruling on the point, that he does not have "an interest in the disclaimed property" because his interest was lost at the earlier stage. But in any event, fortunately for Mr Duncan, it is a dwelling-house and paragraph 3 of Article 293 goes on to provide as follows:

> " (3) Subject to the following provisions of this Article and to Article 294, the High Court may, on an application under this Article, make an order on such terms as it thinks fit for the vesting of the disclaimed property in, or for its delivery to -
>
> > (a) a person entitled to it or a trustee for such a person,
> >
> > (b) a person subject to such a liability as is mentioned in paragraph (2)(b) or a trustee for such a person, or
> >
> > (c) where the disclaimed property is property in a dwelling house, any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house."

[6] The position is, therefore, that the court clearly has a power in this case to vest the property in Mr Duncan. Should it exercise that power? The first issue is the time at which this application is brought. It ought to have been brought within three months of the applicants knowledge of the disclaimer and that is on foot of the Insolvency Rules (Northern Ireland) 1991, Rule 6.183. However, it is interesting to note that 6.183(2) provides:

> "(2) The application must be brought within three months of the applicant becoming aware of the disclaimer or of his receiving a copy of the trustee's notice of disclaimer sent under Rule 6.176, whichever is the earlier."

Of course, he is still an undischarged bankrupt at that stage and his discharge in this case did not occur until 1996. It is perhaps understandable that a bankrupt at that

time, and possibly even a solicitor advising him, might not be alert to the point that the disclaimer allows him to reclaim the property. Of course, the alternative view might be that he would not wish to reclaim the property as it was charged to an extent greater than its value at that time. I note that he managed to continue to service the debt on the property despite his bankruptcy

[7] In this case I have extended time to the applicant to bring this application and I do so because there is no prejudice to the Attorney General, who is represented here by Mr Sands. The Official Receiver takes no part. Furthermore, there is evidence properly before the court, exhibited to an affidavit, of correspondence showing that the applicant's solicitors duly discharged the debt owing to the mortgagee stemming back to the early 1990s and that was done in September 2004 and clearly was discharged with the interest owing up to that time. So, as there is no prejudice to anyone it was right to extend the time in favour of the applicant here in all the circumstances and I did so.

[8] The larger issue is whether the land should now be vested in the applicant. The concept of escheat is not one frequently found in the courts, but it is a very ancient one, but so also is the reversal of such a process. I might be forgiven for pointing out that King Edward III in 1330 executed his uncle, the Earl of Kent, for seeking to release Edward III's father who was still alive and a prisoner at that time, but later in the same year, having escaped from the influence of Roger Mortimer, the young King Edward III repented of his earlier act. He could not give the Earl of Kent back his head, but he did reverse the escheat and gave his lands back to the dead earl's son. So, the reversal of the escheat is an extremely ancient jurisdiction which I am now empowered, as one of Her Majesty's Judges, to exercise.

[9] The matter has been very fairly put forward on behalf of the Crown by Mr Sands. First of all, there was no user by the Crown of these lands. In particular there was no expenditure by the Crown on the lands. If the Crown had exercised its rights of ownership and had expended money on the lands between the date of the disclaimer and the application to the court that might well lead to a different result in this situation, but that is not the case. On the contrary, Mr Sands informs the court that the Crown Estates have a deliberate and longstanding practice not to take action in regard to lands which fall to the Crown on foot of such disclaimers. In the circumstances, therefore, there was no adverse reason against making the order sought. In favour of it is the fact that Mr McElhinney and Mr Sweeney have actually purchased the property in question and paid for it and might reasonably hope to have their title perfected.

[10] In the light of all those circumstances, therefore, I make an order vesting the Folios previously described at 52B Brookmount Road, Omagh, in Mr Damien Duncan on foot of the court's power at Article 293(3) of the 1989 Order and I do so on the following terms:

(i) he will execute a conveyance forthwith in favour of the said John Joseph McElhinney and Neil Sweeney in consideration of the previously paid price, and that conveyance shall be of the freehold estate in the property to them;
(ii) that as this application has arisen out of the earlier bankruptcy of Mr Duncan and his earlier inaction that Mr Duncan should bear the costs of the Attorney General out of the purchase price also.

On those terms I make the order sought.