Neutral Citation No. [2011] NICh 2 | *Ref:* **DEE8070**

Judgment: approved by the Court for handing down | *Delivered:* **10/02/11**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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SWIFT ADVANCES PLC

Plaintiff;

-v-

MICHAEL GERARD McKAY

First Defendant;

-and-

BRIAN F WALKER

Second Defendant

SWIFT ADVANCES PLC

Plaintiff;

-v-

GERARD DALRYMPLE

First Defendant;

-and-

BRIAN F WALKER

Second Defendant.

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DEENY J

[1] This judgment relates to the proceedings issued by the plaintiff against these two defendants. The circumstances of the two defendants are very similar. The chronology is not without its complexity. This judgment will therefore deal principally with the chronology regarding Michael Gerald McKay. In so far as there are any slight differences with the facts relating to Mr Dalrymple they are not material to the decision.

[2] The point at issue is a relatively novel one as to the right of these two former bankrupts to defend possession proceedings brought against them by way of an appeal from the Master to the High Court in circumstances where they no longer have a proprietary interest in the dwellings in question and where their trustee in bankruptcy (and former solicitors) purported to withdraw the appeal.

[3] The matter arises in this way. On 6 November 2008 the plaintiff issued a summons against Mr McKay seeking delivery by him to the plaintiff of the premises which consisted of a dwelling house. Mr McKay lives at that dwelling house with his wife and three teenage children.

[4] By originating summons of 7 July 2009 the plaintiff brought possession proceedings against Mr Dalrymple in respect of premises. Again this was a dwelling house, in which Mr Dalrymple resides with his wife and four children.

[5] In both cases the plaintiff had advanced substantial sums of money to the defendant on repayment terms. In both cases the defendants were in substantial default in regard to the monies owed. The loans were secured by way of charges, the plaintiff contends, on the two dwelling houses in question. A firm of solicitors entered an appearance for Mr McKay on 19 November 2008 but it is clear on the papers that by 15 January 2010 at the latest his solicitors were Messrs Walker McDonald. That firm had entered an appearance on behalf of Mr Dalrymple on 29 July 2009 and acted for him thereafter.

[6] On 22 July 2009 the plaintiff's then solicitors served a notice of appointment on Mr McKay requiring his attendance before the Master on 16 October 2009 and they served with that an affidavit of Mr Michael Bennett supporting their claim for an Order for possession because of default in payments. On that date the Master adjourned the originating summons to 24 November 2009 but made two relevant orders in addition. First of all, he ordered that Brian F Walker, by then the trustee in bankruptcy of the first defendant's estate, be added as defendant. This followed Mr McKay's adjudication in bankruptcy on 1 April 2009. Furthermore the Master ordered the second defendant i.e. Mr Walker, to file and serve an affidavit in answer on or before 30 October 2009. Similarly Mr Dalrymple was declared bankrupt and Mr Walker became his trustee in bankruptcy and similar orders were made by the Master. On 24 November 2009 the matter came back before the Master who again ordered the second defendant i.e. Mr Walker, to file and serve an affidavit, this time before 16 December 2009, because none had been filed, and he adjourned the hearing of the summons to 18 December.

[7] Such an affidavit was filed but not until 15 January 2010. In that affidavit Mr Walker briefly indicated concerns that Mr McKay had both about

the changing identities of the plaintiff and its right to rely on the charge and in addition about whether the plaintiff's loans complied with the provisions of the Consumer Credit Act, 1974. The plaintiff responded to these matters with an affidavit of Mark White filed 16 February 2010 and again, for some reason, on 19 February 2010. One appears to be a draft of the other. The matter came back before the Master on 17 May 2010. A period of some 3 months had elapsed from the plaintiff's affidavit without any response from the defendants. In particular they had not responded to Mr White's complaint that the allegations of breach of the Consumer Credit Act had not been particularised. On 17 May Master Ellison ordered the second defendant i.e. Mr Walker to pay the plaintiff's costs to be taxed if not agreed and paid as soon as possible. He then adjourned the matter to 14 June. On 14 June no further affidavit had been provided. The Master then again ordered the second defendant to file and serve such an affidavit, no later than 21 June and again ordered the second defendant to pay the plaintiff's costs of and incidental to the adjournment to be taxed forthwith if not agreed and paid as soon as possible.

[8] In a subsequent affidavit of 15 September 2010 Mr McKay paints a most unhappy picture of confusion on the part of his instructing solicitors and/or counsel instructed on his behalf. As this affidavit has not been addressed by the persons concerned I shall not set out these criticisms in detail. Suffice to say that it appears from the court file that the affidavit required by the court was only filed on 29 June and not by 21 June as ordered by the Master. Furthermore although Mr McKay's case related to documentary evidence which he himself had garnered and although it was necessary to respond to the case being made by Mr White on behalf of the plaintiff there were no exhibits attached to the affidavit. Mr McKay has averred that it in any event the draft failed to deal with many of the points which he himself had identified. On the papers before me I accept Mr McKay's averments that even on the day of the hearing the Master kindly adjourned the matter twice to allow Mr McKay to try and put the affidavit before him and locate his counsel who was meant to be appearing on his behalf, but that gentleman was unwilling to appear. It is not surprising that in all the circumstances the Master ultimately granted the order sought by Swift Advances plc.

[7] Without going into the matter in detail a similar picture emerges from the affidavit of Mr Dalrymple and the court file. In the events orders for possession were made in respect of the homes of both Mr McKay and Mr Dalrymple by the Master. I make it clear that they were not critical of the Master in so doing in all the circumstances and in my view no criticism can be made of him.

[8] Without ruling on all the criticisms of Walker MacDonald I conclude for the reasons outlined in the preceding paragraphs that the cases were not properly presented at and before the Master's court.

[9] It may be that the solicitors accepted that, as they agreed to lodge a Notice of Appeal. In fairness to them they say that they agreed with the present appellants to submit the papers to counsel and abide by his advice on whether the appeal was worth pursuing. They did so but I must observe that the counsel they chose, although an experienced junior, was not one I have ever seen appearing in the Chancery Court. His advice against appealing was not accepted by Mr McKay and Mr Dalrymple.

[10] The matter came before me on 16 September 2010. On that occasion an assistant solicitor in the office of Messrs Walker McDonald who had carriage of the matter sought to withdraw the appeal which had been lodged by the trustees. The present appellants were present and strongly objected to that course. Mr David Dunlop, who appeared for the lenders, contended that they had no locus standi. In the circumstances before me an appellant required the leave of the court to withdraw the appeal. If there is an issue of the authority for a solicitor to compromise proceedings, or, as here, by analogy, abandon them, but the dispute is brought to the attention of the court before any order of the court has been made the purported compromise does not bind the client. See Shepherd v Robinson [1919] 1 KB 474. Without at that stage having much information about the case I was uneasy abut the request being made by the assistant solicitor and in the circumstances leave was not given to withdraw the appeal but the matter was listed for argument on 24 September.

[11] In the interval Mr McKay realised that he was entitled to be discharged from the order of bankruptcy as 12 months from the making of the original order had ended with 1 April 2010 and he obtained such a discharge on 20 September 2010. Mr Dalrymple did likewise. Mr McKay put forward a further helpful and detailed statement of 23 September making his case that the loans were bad in law and that he and Mr Dalrymple should be entitled to have that heard by the court. On 24 September Mr Colmer of counsel instructed by Messrs Hewitt and Gilpin indicated that he had provisional instructions only for the two appellants. He sought time to consider the matter. By then the court had become aware that the Master had twice awarded costs against the putative appellant's solicitor/trustee and become aware of several of the other matters dealt with earlier in this judgment. I was concerned that they had not had a fair hearing contrary to common law and Article 6 of the European Convention. I granted a continuing stay on the possession proceedings on condition that the putative appellants either lodge their own Notice of Appeal or an application to be heard within seven days. At the request of the solicitors an extension of time was granted to allow an emergency legal aid application and the matter was listed for review on 8

November and hearing on 20 December. In the event legal aid was ultimately refused. However, at the request of the Pro Bono Committee of the Bar of Northern Ireland Mr William Gowdy very creditably agreed to act on that basis for Messrs McKay and Dalrymple. The hearing took place on 18 January 2011. I am obliged to both Mr Gowdy and Mr Dunlop for their able written and oral submissions and citation of authority.

[12] The sole issue at the hearing of 18 January was the question of the standing of Messrs McKay and Dalrymple to appeal where the action is one for possession of the appellant's principal residences which have vested in their trustees in bankruptcy. It will be recalled that under the legislation currently in force (Art. 265A of the Insolvency (N.I.) Order 1989, as amended) the bankrupt's property remains vested in the trustee in bankruptcy for three years from the date of the bankruptcy i.e. from 1 April 2009. Mr Gowdy therefore accepted that they have no proprietary interest in the property.

[13] The plaintiff respondents were also taking the point that the appeal had in fact been withdrawn by the trustee but Mr Dunlop at the hearing before me accepted that in the light of the actual orders made by the court in September 2010 and the authorities cited by Valentine Civil Proceedings: The Supreme Court; para. 20.34 that the original appeal had not been withdrawn and he did not pursue that point. For the avoidance of doubt even if that had not been the case I would have been minded to grant an extension of time to Messrs McKay and Dalrymple to pursue the Notice of Appeal, giving them an extension of time up to the date in which they in fact filed such an notice. As matters stand however that notice would appear to be superfluous.

[14] In seeking to address the remaining ground counsel agreed that a leading authority was that of the Court of Appeal in England in Heath v Tang [1993] 4 All ER 694. The court (Sir Thomas Bingham M.R., Steyn and Hoffmann LJJ) was dealing with a situation where two persons had lost an action and had judgment ordered against them. Following their failure to satisfy the judgments bankruptcy petitions were presented and they were adjudicated bankrupt. In one case the trustee was unwilling to appeal and there was no trustee in the other case. Both bankrupts applied for leave to appeal contending that they, as opposed to their estates, had an interest in the proceedings, because if they could have the judgments set aside they would be in a position to have the bankruptcy orders annulled on the ground that they should never have been made. The Court held that the general principle in bankruptcy was that following the vesting of the bankrupt's estate by statute in his trustee when appointed, the bankrupt was divested of and ceased to have an interest in, either his assets or his liabilities, and by virtue of statute 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. As Hoffmann LJ pointed out there was at common law, going back to Spragg v Binkes (1800) 31 ER 751, a jurisdiction in the court to supervise the actions of trustees in bankruptcy and such is now to be found in statute. It is therefore no great extension of this principle to conclude that a bankrupt could appeal in such personal matters. It follows, a fortiori, that a former bankrupt divested of his estate which is now vested in the trustee could also act in an appeal in connection with personal matters. I observe that that must be particularly so while there is ground for criticism, as here, of the actions of the trustee.

[15] Mr Dunlop relied on the judgment of Treacy J in Young and Another v Hamilton and Others [2010] NI Ch 11. The judge accepted there and ruled that indeed personal claims could be brought by a bankrupt. He went on at paragraph 25 to deal with hybrid claims:

> "Some rights of action are hybrid – that is to say 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 [2000] 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 and Maxwell 2009 at para. 8-013 and Gowdy and Gowdy Individual Solvency – The Law and Practice in Northern Ireland SLS 2009 at paragraph 8.18 and 3(2) Halsburys Laws (4th Edition) (2002 reissued) at para. 436."

[16] Mr Gowdy did not dispute the rightness of that finding. His primary submission was that this was not a hybrid claim. The defeat of these possession proceedings by the creditor or plaintiff here will not re-vest this property in the plaintiff. The properties will remain vested in the trustee in bankruptcy with the range of powers open to him under the Insolvency Order 1989 as amended. I accept that submission. 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 personal a 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.

[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 establish 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 in 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.

[18] Mr Dunlop sought to rely on the authority of Rochfort v Battersby and Others 9 E.R. 1139 (House of Lords) and James v Rutherford-Hedge [2005] EWCA Civ. 1580, [2006] BPIR 973 but in neither of those cases was the bankrupt in question in occupation of the premises concerned. Therefore their personal rights to their homes as here were not involved.

[19] In the circumstances I need not rule finally on Mr Gowdy's alternative submission that even if this were a hybrid claim the defendants would be entitled to appeal as they were defendants rather than parties acting as plaintiffs pursuing a cause of action, although that submission may be well founded.

[20] I therefore confirm my oral order that Mr McKay and Mr Dalrymple have locus standi to pursue the appeals on their behalf initially lodged on 5 July 2010.