



**COURT OF APPEAL
CIVIL**

Appeal No.: 2015/620

O'Donnell J.
Finlay Geoghegan J.
Peart J.

Between

The Governor and Company of Bank of Ireland
and Tom Kavanagh

Respondents/Plaintiffs

-and-

Brian O'Donnell and Mary Patricia O'Donnell

Appellants/Defendants

Judgment of O'Donnell J. delivered the 27th of July 2016

1 Does a right of residence in a house on unregistered land become part of a bankrupt's estate so that any claim in relation thereto is to be taken, in the first place at least, by the Official Assignee? When it is sought to restrain a bankrupt from trespassing on property, and the bankrupt seeks to defend the proceedings either by denying trespass or by challenging the title of the plaintiff to the property for example by reference to the Family Home Protection Act 1976, may he or she defend the proceedings in his or her own right, or is this a matter for the estate of the bankrupt and therefore again, at least in the first place, for the Official Assignee? It does not appear that these issues have been addressed specifically in Irish law or in any jurisdiction with a similar bankruptcy code. Until relatively recently bankruptcy was a neglected by-water of Irish law, rarely invoked and only occasionally the subject of serious litigation. The applicable law in this area could readily be traced to decisions of the English courts in the Victorian era and was little changed. However circumstances have changed and bankruptcy today is a more pressing and controversial issue. The right to residence is a uniquely Irish concept and the Family Home Protection Act 1976 is a piece of Irish legislation, which was an innovation when promulgated, has no precise equivalent in the law of comparable common law countries with similar provisions in relation to personal insolvency. This appeal involves an analysis therefore of parts of the Irish law in a context which has not previously been the subject of judicial consideration.

2 In this respect, the Court is required to consider some principles which were originally laid down in an era remote in time, place and circumstances from the world in which the appellants here, a solicitor and a doctor, amassed an international property portfolio, which collapsed in value leading to their adjudication as bankrupts in 2013. This task is complicated by the fact that the bankrupts in this case represented themselves, and the submissions made have covered many topics of complaint against both the petitioning creditor and the Official Assignee. It has not always been easy to isolate the legal points, or see, necessarily, the benefit of raising them.

3 The appellants in this case are Mr. Brian O'Donnell and his wife, Mrs. Mary Patricia O'Donnell. This appeal is only a part of the constellation of the litigation involving them, their principal creditor, the Bank of Ireland, a company Vico limited,

and other entities and individual, much of it related to a substantial house at Gorse Hill, Killiney, County Dublin. On this appeal, only Mr. O'Donnell appeared. He said that his wife was not well and wished him to advance argument on her behalf. Neither of the other parties to this appeal (the Bank of Ireland nor the Official Assignee) raised objection to this course. Given the circumstances of the case, the very substantial overlap between the issues raised in respect of each appellant the fact that this is a single issue of law and only part of the wider litigation between the various parties, and recognising therefore that if Mrs. O'Donnell had appeared her involvement in the case might have been no more than adopting arguments already made by her husband, the Court decided to permit this course. The Court wishes to emphasise however, that if the issues involved were more substantial and distinct, then the Court would expect first, that it be proved by evidence, rather than merely asserted that one party was so ill that he or she could not attend court, and second, that he or she unambiguously authorised the co-defendant (or plaintiff as the case may be) to make submissions on their behalf.

4 The appellants were adjudicated bankrupt on the 2nd September, 2013, and an appeal was dismissed on the 25th February, 2015. From the date of adjudication therefore, their property vested in the Official Assignee. This much is not in dispute. What does arise for decision is what is comprehended by the property or estate of the bankrupt, and what is the consequence of the adjudication and consequent vesting of the estate in the Official Assignee, particularly in relation the capacity of the parties to bring or defend legal proceedings?

5 As the title to the proceedings indicates, these proceedings were commenced in 2015 (and at a time therefore when the appellants had been adjudicated bankrupt). The proceedings related to the premises at Gorse Hill. The statement of claim delivered on the 8th May, 2015, pleaded that Vico Limited, a company registered in the Isle of Man, had mortgaged and charged to the Bank of Ireland its interest in the property at Gorse Hill, Vico Road, Killiney, County Dublin, as security in relation to guarantees which Vico had provided to the bank in respect to indebtedness of *inter alios* both appellants. In December, 2010 the bank initiated summary proceedings seeking summary judgment relating to the indebtedness of the appellants to the bank. On the 4th March, 2011, a settlement agreement was entered into, under which among

other things, the defendants agreed that they would provide full vacant possession of the premises. Judgment was obtained on the 12th December, 2011, in the summary proceedings for the sum of excess of €71 million. On the 18th May, 2012, the bank called in the indebtedness of Vico to the bank, and as the debt was not discharged, the bank sought to rely on its security, and on the 7th June, 2012, appointed the second named plaintiff Mr. Kavanagh, a receiver and manager of the assets of Vico. The receiver thereafter sought to take possession of the property.

The Children's Proceedings

6 On the 3rd July, 2012, the occupants of the property, being the children of the defendants, initiated High Court proceedings attempting to challenge the bank's security and seeking to restrain the receiver from taking possession of the property. These proceedings failed and ultimately, the children were directed to vacate the property by noon on the 2nd March, 2015. On the 27th February, 2015 (and therefore shortly before the children were to vacate the property), a letter was received from Mr. O'Donnell stating that he and his wife had a right of residence in the property. The plaintiffs commenced proceedings and sought and obtained an interlocutory injunction restraining the defendants from interfering with the receiver and directing the defendants to vacate the premises. On the 12th March, 2015, the High Court granted an injunction in those terms which was affirmed on appeal by the Court of Appeal on the 15th April, 2015. Leave to appeal that decision was refused by the Supreme Court. Mr and Mrs O'Donnell have vacated the property. What remains in these proceedings therefore is the plaintiffs' claim for a permanent injunction restraining the defendants from "trespassing, interfering with entering upon or otherwise attending at the property more particularly described in the schedule to the Plenary Summons herein" which are of course, the house and lands at Gorse Hill.

The Defendants Defence and Counter-Claim

7 The defendants delivered a single Defence and Counter-Claim on the 22nd June, 2015. At paragraph 5 of the Defence it was asserted that "on 20 October 2000 the Defendants wrote to the trustee of the Avoca Trust indicating that they wished for Vico Limited to agree to a right of residence terminable with a minimum of two years' notice. Vico Limited agreed to this right of residence". At paragraph 7 of the Defence, it was denied that Vico had validly mortgaged and charged the property. It

was stated that the mortgage was the subject of litigation between the children and the bank and other parties. Paragraph 7 continued “the security is not in compliance with the Family Home Protection Act 1976. The Second Named Defendant was not separately legally advised as to the consequences to her family home by entering into the legal documentation and the First Named Plaintiff was on notice of this”. This plea was repeated word for word in paragraph 8. It was also denied that the defendants were indebted to the bank and/or that the settlement agreement was properly executed. The Counter-Claim was in two parts. The first named defendant claimed as follows:

- “1 An order dismissing the reliefs sought by the Plaintiffs.
- 2 A declaration that the settlement agreement of the 4th of March 2011 is void and of no known legal effect;
- 3 A declaration that the judgment of 12th of December 2011 is a nullity and of no legal effect;
- 4 And/or in the alternative a declaration that the judgment of 12th December 2011 be rescinded;
- 5 An order for damages for fraud;
- 6 An order for damages for deceit;
- 7 And/or an order for negligent misrepresentation;
- 8 And/or damages for breach of the Constitution, Article 6 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 1 of the Protocol 1 thereto.
- 9 Interest pursuant to the Courts Act 1981.
- 10 All necessary accounts and inquiries.
- 11 Such further and other Order as this Honourable Court deems fit.
- 12 The Costs of the proceedings.”

8 The Counter-Claim also sought reliefs on behalf of the second named defendant. The first seven paragraphs repeated the first seven paragraphs of the first named defendant’s claim on behalf of the second named defendant. Paragraph 8 introduced a separate contention:

“An order that the following documents be declared void under Section 3 of the Family Home Protection Act 1976:

- (i) The Deeds of Mortgage and Charge dated the 1st of June 2006 between Vico Limited and the First Named Plaintiff in respect of Gorse Hill, Vico Road, Killiney, County Dublin and Folio 211;
- (ii) Guarantee and indemnity dated 1st of June 2006 executed by the Vico Limited in favour of the First Named Plaintiff in respect of the liabilities of Brian O'Donnell and Mary Patricia O'Donnell;
- (iii) Guarantee and indemnity dated 1st of June 2006 executed by the Vico Limited in favour of the First Named Plaintiff in respect of the liabilities of Hibernia (2005) Limited;
- (iv) Guarantee and indemnity dated 19th of October 2006 executed by Vico Limited and the First Named Plaintiff in respect of the obligations of Brian and Mary Patricia O'Donnell;
- (v) Deed of Confirmation dated 15th of June 2007 executed by the Vico Limited in favour of the First Named Plaintiff in respect of the Guarantee and indemnity dated 19th of October 2006;
- (vi) Guarantee and indemnity dated 24th of March 2011 and executed by Vico Limited in favour of the First Named Plaintiff in respect of the liabilities of Brian O'Donnell, Mary Patricia O'Donnell, Vico Swiss Holdings Ag and Grey Stoke Société Anonyme;
- (vii) Any other Deed or instrument which purports to create a charge or other security of any kind in favour of the First Named Plaintiff over Vico Limited in respect of, inter alia, the liabilities of Brian O'Donnell, Mary Patricia O'Donnell and various corporate entities (the "Security Documents")."

9 The Defence and Counter-Claim also sought a declaration that in the alternative that the said documents should be declared void on the basis that the second defendant had not been legally advised separately from her husband. The remaining reliefs were identical to those claimed by Mr. O'Donnell.

10 On the 13th July, 2015, the Official Assignee brought an application in these proceedings for an order restraining the defendants from litigating the proceedings by way of either Defence or Counter-Claim on the grounds that the subject matter of the proceedings formed part of the estate of the bankrupts and was therefore vested in the

Official Assignee. The application was grounded on the affidavit of Christopher Lehane, the Official Assignee. That affidavit exhibited the settlement agreement and a handwritten letter relied upon by Mr. O'Donnell as establishing the right of residence. The handwritten letter is dated the 20th October, 2000, and provides as follows:

“Portofino,
Castle Place,
Dalkey, Co Dublin.

20 October 2000

The Trustees
Aindyr Trust Company Limited
International House
Victoria Road,
Douglas, Isle of Man.

Re: Settlement 16th December 1997

Dear Sirs,

Following due consideration we the undersigned confirm and assure you the trustees that we shall at all times care and support the beneficiaries of the settlement namely Blake, Bruce, Blaise and Alex O'Donnell.

We confirm that we shall use the residence Gorse Hill, Vico Road as a residence of ourselves and the beneficiaries for so long as the Trustees on behalf of the beneficiaries shall permit. It is acknowledged by the Trustees and the beneficiaries that any notice given to us to vacate the residence shall be in writing and shall in the absence of our consent be at least 2 calendar years prior to the vacation date to allow sufficient date for alternative arrangements to be made.

We confirm that in return we will at all times keep Gorse Hill Vico Road in a state of good repair at our expense. We shall also pay the outgoings and shall repair and renew the fabric of the holding and its gardens at all times. We shall as appropriate pay all external service providers and in general do all things necessary in terms of care and expenditure to maximize the residence and gardens for the benefit of the beneficiaries.

Yours sincerely,

Brian O'Donnell
MP O'Donnell."

11 The exhibit also contained a letter of the 18th of July 2012 from IFG International Limited. This, it will be recalled was at a time when the summary proceedings had been instituted. It stated:

"IFG International Limited,
International House,
Castle Hill,
Victoria Road,
Douglas,
Isle of Man,
IM24RB

18 July 2012

Mr Brian O'Donnell,
8 Barton Street,
Westminster London,
SW1P 3NE.

Dear Mr. O'Donnell,

Our in-house trust company was trustee of the Avoca settlement from 16 December 1997 to 18 October 2006. The sole asset of the settlement was the Isle of Man company, Vico Limited, which we managed throughout the same period.

Vico Limited acquired the property, Gorse Hill, which was redeveloped with the benefit of contributions from the settlors/borrowings taken out by them (the trust document of course allowed for further contributions to be made thereto by the settlors). The trustees were absolutely happy for the settlors to occupy the property with their then young children who were the named beneficiaries of the trust as this was clearly in the interest of the beneficiaries.

The property could not have been occupied unfurnished and it is consistent with the way the property was redeveloped for the settlors to have treated furnishings etc as additions to the trust.

Yours sincerely,

David A. Harris
Director
IFG International Ltd.”

12 The motion was responded to by Mr. Brian O'Donnell. He swore a detailed affidavit referring to other proceedings before the Court and raised issues as to the involvement of a member of the Official Assignee's staff. The affidavit mixed evidence with assertions of law. In particular he asserted that the right of residence was incapable of assignment and therefore did not vest in the estate and that there was no “contractual term for damages in terms of the right of residence and the only order the contract envisages is specifically for injunctive relief for a breach of the agreement”. In relation to the counter-claims, he contended that an order dismissing a relief sought by the plaintiff was not capable of vesting in the Official Assignee. He also sought, declarations that the settlement agreements and the judgment were void or nullities and that the judgment of Mr. Justice Kelly given on the 12 December, 2011, should be rescinded. He claimed that the counter-claims for fraud, deceit and misrepresentation were rights which were sub judice and that along with the claim for damages for breach of the Constitution, were all personal rights incapable of vesting in the Official Assignee. Furthermore in relation to the second named defendant, he contended that reliefs claimed under the Family Home Protection Act 1976 were personal rights which did not create any beneficial interest and accordingly did not vest in the Official Assignee.

13 The matter came on for hearing before the High Court on the 9 October, 2015, and the High Court delivered judgment on the 22 October, 2015. Adopting with approval the analysis of the Court of Appeal of England and Wales in *Heath v. Tang* [1993] 4 All E.R. 694, Costello J. granted the Official Assignee the reliefs sought on

the notice of motion holding that the claims asserted by the defendants were now matters for the Official Assignee. The appellants have appealed to this Court the entirety of the High Court judgment, albeit the argument on the appeal proper was more narrowly focussed.

14 There have been a multiple of proceedings relating to the premises at Gorse Hill and matters have proceeded since the issuance of these proceedings, and indeed since the lodging of the appeal in this case. It is in my view, important to clarify what is in issue in this appeal. That consideration applies with particular force I think where it is asserted there are claims which can be brought by persons who have been adjudicated bankrupt. Such parties are not necessarily subject to the same discipline as litigants who may suffer the full burden of an award of damages or a costs order, and Courts should be astute to ensure that proceedings are clearly and precisely focussed. It is important therefore to clarify at the outset, that on this appeal the appellants raised four points: two procedural objections being in essence, (1) that these proceedings should not have been commenced by plenary summons seeking injunction, and (2) that the decision of the Official Assignee was invalid as being in breach of the European Convention on Human Rights Act 2003; and two further points of substance, (3) that the right to assert a right of residence in property in defence of an injunction seeking possession of that property was a personal right which did not vest as part of the bankrupt's estate on adjudication in bankruptcy, and (4) that the right to assert a breach of the Family Home Protection Act 1976 was similarly a personal right which did not vest on bankruptcy and was a personal claim which could be maintained by the bankrupt, and in this case the second appellant. It was, on these four issues that argument focussed on the appeal.

15 It may be useful here to identify precisely the issues raised in the grounds of appeal in the notice of appeal lodged with this Court. They are as follows:

“(1) The learned judge erred in law and in fact in that it was not possible to plead a defence regarding the validity of the judgment of 12th December 2011, on the basis on the basis of fraud, that the motion was not properly served whether Mr Justice Kelly ought not to have dealt with the matter on the basis that he is a judge in his own cause. At the time of the justice of Ms Justice Costello there was an appeal before the Court of Appeal regarding s.85(c) of

the Bankruptcy Act 1988, and motion to extend time to appeal the judgment of Mr Justice Kelly dated the 12th of December 2011. Had the appellants not pleaded the defence it would be adjudged inconsistent but their stated position to both the Court of Appeal and the Supreme Court and failure to raise the defence ought to imply that they had waived it.

(2) That the learned judge erred in law and in fact that a right of residence is a proprietary right and an "interest in property" and therefore vests in the Official Assignee. The right of residence in the case herein is a personal right of the appellants and is unassignable and therefore cannot vest in the Official Assignee.

(3) That the learned judge erred in law and in fact that:

(i) Section 3 of the Family Home Protection Act has no application where a limited company owns the family home. The Act makes no requirement for the house to be owned by the married couple. It states that the spouse must, without the prior consent of the other spouse, "*purport to convey any interest in the family home*";

(ii) Arranging the loans and the guarantees and indemnities, mortgages and charges executed by Vico Limited did not amount to purporting to convey an interest in the family home;

(iii) Section 3 of the Family Home Protection Act 1976 is a proprietary right as opposed to a personal right and any chosen action vests in the Official Assignee.

(4) That the learned judge erred in law and in fact by not addressing in her judgment the fact that the Official Assignee never gave the Appellants the right of reply to explain their defences and counter-claims before deciding that he would not defend or counter-claim or assign the defences and counter-claims to them and applied for injunctions restraining the Appellants. He therefore denied them fair procedures under the Constitution and the European Court of Human Rights and fundamental freedoms and procured that the Court would follow suit. The learned judge's failure to consider this argument which was before the Court is incompatible with the proper administration of justice.

(5) Such other grounds of appeal that shall be relied upon with the hearing of the appeal."

16 Even from the limited account already given, it will be apparent that Ground 1, while put in a tentative way in the Grounds of Appeal, no longer arises, and was not advanced on this appeal. Grounds 2 and 3 raised the arguments that the right of residence and Family Home Protection Act points are personal claims which did not vest on bankruptcy, and Ground 4 raises the fair procedures point in relation to the European Convention on Human Rights Act 2003. It is now necessary to consider the arguments made on this appeal.

Procedural Issues

17 The appellants now contend that the Official Assignee was not a party to these proceedings, was not joined as such, and therefore could not issue a notice of motion or indeed seek the relief contained in it, that is an injunction restraining the further prosecution of the defence of these proceedings. It is probably true that the course of issuing a notice of motion in these proceedings was unnecessary, although it is hard to see how that more formal proceeding caused any detriment or difficulty to the bankrupts. The appropriate procedure was set out by Laffoy J. in her judgment in *AA v. BA & anor* [2015] IESC 102, at paragraph 73:

“However, it should be noted that, where a bankrupt considers that he or she is entitled, as a matter of law, to institute, continue, whether by way of appeal or otherwise, or defend legal proceedings, having regard to the power conferred on the Official Assignee by s. 61(3)(d) of the Act of 1988, he or she should at the outset ascertain the view of the Official Assignee as to whether he or she is entitled so to do. If a dispute arises between the bankrupt and the Official Assignee as to the bankrupt’s right to prosecute proceedings, the resolution of that dispute is a matter, in the first instance, for the High Court.”

Notwithstanding what Laffoy J. described as the unsatisfactory procedural manner in which the application had been brought to the Supreme Court, namely by an application by the bankrupt to set aside the judgment of the Supreme Court and High Court, the Court proceeded to deal with the matter.

18 I do not think that the bankrupts in this case can be heard to complain of something which, even if procedurally unnecessary, and even arguably incorrect, was only so because the bankrupt did not take the course of seeking the Official

Assignee's views, and then if necessary bringing the matter before the Court. If that had been done, the same issues would have been raised between the same parties and determined by the same judge. It matters little whether directions are given by the judge in relation to the bankruptcy, or an order is made on a notice of motion brought by the Official Assignee. The same issue would arise for determination, and would be resolved in the same way. In a sense the point raised by the bankrupts is entirely circular and futile. Given that the effect of adjudication is to immediately vest in the Official Assignee all property of the bankrupts, and that section 61 of the 1988 Act gives power to the assignee, *inter alia*, to continue and defend proceedings, then in appropriate cases the Official Assignee becomes the party entitled to maintain or defend the proceedings. If therefore the Official Assignee is correct that the claims advanced in these proceedings are property of the bankrupt, which become part of the bankrupt's estate and vest in the Official Assignee, then the assignee and not the bankrupts are entitled to defend these proceedings, by asserting the claims in the counterclaim, subject at most to an amendment of the title. In any event, it does not appear that this point was raised in the High Court and it cannot in my view be advanced now for the first time on appeal. I consider that the Court should take a practical approach and treat the proceedings as raising the substantial question as to whether the defence of these proceedings, based as it is upon claims asserted in the Counter-Claim is a matter which is part of the estate of the bankrupts and vests in the Official Assignee, or rather whether these are personal claims which can, and can only, be pursued by the bankrupts.

19 The bankrupts contend that the Official Assignee is a public authority pursuant to the provisions of the European Convention on Human Rights Act 2003, and that accordingly that he is obliged to comply with the provisions of the Convention. It is alleged that his decision to intervene in the proceedings is flawed and invalid on the grounds that it is said the Official Assignee should have sought the views of the O'Donnell's before deciding that the defence of the proceedings was not a matter for the bankrupts. The appellants contended that a decision to intervene is invalid because of the involvement of the official in the office of the Official Assignee whom it appears had previously been employed by the receivers' firm, appointed by the Bank of Ireland, over the property of Vico Limited, and accordingly the applicant in these proceedings.

20 In my view these challenges are quite misconceived. This is not a case where the Official Assignee's capacity to bring proceedings is dependent on an authorisation, in which case conceivably another party could raise the matter by way of defence. Any complaints as to the procedure or decision-making process resulting in the Official Assignee being in court are, at best, matters for another day, and another dispute, the resolution of which would not invalidate these proceedings. The Official Assignee has brought this application and it must be addressed. In the ordinary case, it may well be prudent and sensible for the Official Assignee to seek views from bankrupts, prior to deciding what steps to take, or bringing matters before the court for its direction since if matters can be dealt with by agreement and satisfactorily, there may be no need for proceedings in court. Normally however, if this course is not taken, it would only be relevant to costs, and even then only if a court considered that an application to bring legal proceedings had been unnecessary because the bankrupts might have consented to the course proposed. Given the contentious nature of this bankruptcy, such a course was highly unlikely, and in any event did not transpire.

21 Nor can I accept that the analysis that the 2003 Act is applicable here. The argument was not developed in any detail by Mr. O'Donnell, other than referring to a suggestion that the Human Rights Act 1998 in the UK might in theory apply in that jurisdiction to decisions of the Official Assignee. Mr. O'Donnell relied on an extract from the journal article: William Trower, *'Human Rights: Article 6 – the Reality and the Myth'*, (2001) 2 Insolv. L. 48. That portion quoted by him discussed the circumstances in which Article 6 of the Convention could be said to apply to decisions by an Official Assignee and concluded, that even if it did, decision-making by an Official Assignee was compliant with Article 6, at least by reason of the fact that they were subject to review by courts having full jurisdiction. That is not in any event the issue here. Furthermore, there are distinctions between the manner in which the 1998 Act applies in the United Kingdom, and the 2003 Act applies in Ireland. None of these matters are addressed by Mr. O'Donnell. Moreover a decision to initiate proceedings, or to continue to defend proceedings, is not a decision determining the civil rights of the bankrupt: it is instead a decision to bring the matter before a court having jurisdiction to hear and determine the matter. For these reasons I do not consider that the procedural issues raised by the appellants have any

substance. Accordingly it is necessary to turn to the substantive issues raised by this application.

Substantive Issues

22 It is necessary to make one preliminary observation on the status of the proceedings and the position of the bankrupts in the proceedings, since the matters raised by the bankrupts must be assessed in that context. It appears to me that on this application both in the High Court and in this Court, the parties have proceeded, on an assumption that if the Official Assignee were to succeed in full in his application that that would mean that there would be an end to the proceedings. But the bank in this case has sought an injunction restraining trespass against both defendants. That is a claim which is personal to both defendants and seeks to restrain their conduct by themselves and not any conduct on behalf of their estates which would vest in the Official Assignee. It would be necessary therefore to pursue that claim in any event to obtain final injunctions. These injunctions if granted will restrain the defendants personally (and not the Official Assignee), and therefore the individuals must remain a party to the proceedings if the orders are to be effective. I approach this aspect of the case therefore on the basis that the bankrupts must remain parties to the proceedings seeking an injunction restraining them from trespassing on the premises. The question then becomes what positive claims the bankrupts may assert in defence of those proceedings.

23 The Defence and Counter-Claim of the bankrupts in these proceedings is extensive and refers to a number of potential claims and proceedings then in being. However, a number of those have been resolved. In particular the Supreme Court (Denham C.J., MacMenamin and Laffoy JJ.) delivered judgment on the 8th December, 2015, [2015] I.E.S.C. 89 (Appeal No. 344/14), refusing the bankrupts application for an extension of time to appeal against the underlying judgment of Kelly J. of the 12th December, 2011, in which he granted summary judgment against both appellants, on foot of which judgment the bankruptcy application was brought. The Supreme Court not only refused to extend time for the appeal of that judgment, but also followed the principle set out in *Heath v. Tung* [1993] 4 All E.R. 694, which was also applied by the High Court in this case, and held that the claim to set aside the judgment had become vested in the Official Assignee on adjudication, and therefore, any appeal.

and any application for extension of time, was a matter for the Official Assignee. It follows from this principle that any claim in relation to the debts or the settlement are matters which if not now already resolved in separate litigation, are claims which vested on bankruptcy and can only be advanced by the official Assignee, if considered appropriate. At the hearing of this appeal the argument focussed on the assertion of a right of residence and the claim on Mrs O'Donnell's behalf under the Family Home Protection Act 1976.

24 In *Heath v. Tang*, the Court of Appeal of England and Wales dealt with two separate appeals raising the question of whether a bankrupt was entitled to pursue an appeal from the judgment in which the bankruptcy order was founded, or whether it had to be brought in the name of his trustee and bankruptcy. In a judgment delivered by Hoffman L.J. (as he then was), the Court of Appeal of England and Wales, (Bingham M.R., Steyn and Hoffman L.JJ.) reaffirmed a fundamental principle of bankruptcy:

"Nevertheless, the principle that the bankrupt is divested of an interest in his property and liability for his debts remains fundamental in the new code. The consequences for the bankrupt's right to litigate do not seem to us inconvenient or productive of injustice. The bankruptcy court acts as a screen which both prevents the bankrupt's substance from being wasted in hopeless appeals and protects creditors from vexatious challenges to their claims".

[1993] 4 All E.R. 694, 701.

However, the Court of Appeal recognised that the historical distinction between causes of action personal to the bankrupt which did not vest in a trustee, and those which affected the bankrupt's estate, and which did vest in a trustee, remained in existence after the introduction of the new statutory code in the United Kingdom in 1986. This applied both to claims brought by the bankrupt, and in claims in which the bankrupt was a defendant.

As Hoffman L.J noted at page 697:

"The property which vested in the trustee include 'things in action': see s 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 --

‘the 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 Erle 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.”

25 Hoffman L.J. also recognised that the distinction applied in cases in which the bankrupt was a defendant:

“In cases in which the bankrupt is defendant, there is of course usually no question of the cause of action having vested in the trustee. Unless the defence is set-off (a situation to which we shall return later) the bankrupt will not be asserting by way of defence any cause of action on his own. But, in cases in which the plaintiff is claiming an interest in some property of the bankrupt, that property will have vested in the trustee. And, in claims for debt or damages, the only assets out of which the claim can be satisfied will have likewise vested. It will therefore be equally true to say that the bankrupt has no interest in the proceedings. . . On the other hand, there are actions seeking relief such as injunctions against the bankrupt personally which do not directly concern his estate. They can still be maintained against the bankrupt himself and he is entitled to defend them and, if the judgment is adverse, to appeal. . . This distinction was the basis of the decision of the Court of Appeal in *Dence v. Mason* (1879) 41 LT 573, in which a bankrupt wished to appeal against an order made before the bankruptcy granting an injunction to restrain passing off and ordering him to pay costs. His trustee declined to appeal but the court said that the bankrupt himself could appeal against the injunction -

‘which was a personal order against him, notwithstanding the bankruptcy, though he had no interest in the order as to costs, his estate being now vested in the trustee’. (See 41 LT 573 at 574)” (pp.698-699)

26 It appears that there is a distinction between claims which vest in the Official Assignee on adjudication, and personal claims (and defences) which are personal to the bankrupt and remain with him or her is recognised, at least by implication, in respect of after acquired property under section 44(5) of the Bankruptcy Act 1988, which provides:

“Without prejudice to any existing principle or rule of law or equity, established practice or procedure in relation to damages or compensation recovered or recoverable by a bankrupt for personal injury or loss suffered by him, property which is acquired by or devolves on a bankrupt before the discharge or annulment of the adjudication order (in this Act called “after-acquired property”) shall vest in the Official Assignee if and when he claims it.”

Furthermore the Irish courts, as already discussed, have recently approved *Heath v. Tang*, and applied it. It seems to follow that the distinction is recognised in Irish law and even after the coming into force of the 1988 Act. Accordingly authorities of the UK courts may continue to be of assistance.

27 In *Ord v Upton* [2000] Ch. 352, the Court of Appeal of England and Wales had to address the question of whether a claim made by a plaintiff subsequently adjudged bankrupt, for damages arising out of medical negligence, constituted part of the bankrupt's estate. The damages claimed included claims for personal injuries, which under the traditional rule did not vest in the trustee in bankruptcy, and a claim for loss of earnings which did. The Court of Appeal considered that the claim was a single cause of action and that the action was a thing in action which was included in the bankrupt's property under section 436 of the UK Act and therefore vested in the trustee, subject to an obligation to hold any damages for personal injuries on constructive trust for the applicant.

28 The decision is also interesting for its discussion of the general principle. First, Aldous L.J. explained the rather unusual intersection between the modern statute and the existing authorities. He referred to section 436 of the UK Act, which is essentially similar to section 3 of the Irish Bankruptcy Act 1988:

“Section 436 is not in truth the definition of the word “property”. It only sets out what is included. As will appear later from the cases that have been decided over many years, actions which relate to a bankrupt’s personal reputation or body have not been considered to be property and therefore they do not vest in anybody other than the bankrupt. They relate solely to his body, mind and character, and any damages recovered are compensation for damages to his body, mind and character as opposed to other causes of action which have been considered to be a right of property. Thus causes of actions to recover damages for pain and suffering have been held not to vest in the trustee. That has led to a number of oddities. For example, the parties agree that if at the time of the bankruptcy, the bankrupt had in his bank a sum which included money paid as damages for a libel, that sum would vest in his trustee because the right to the money formed part of his estate and therefore was available to pay off the bankrupt’s creditors. That was to be contrasted with an action personal to the bankrupt such as a libel action, which was not settled before the end of the bankruptcy. In such circumstances the cause of action would remain with the bankrupt as would any damages awarded after discharge. If a cause of action is not personal to the bankrupt, it vests in the trustee and therefore any damages awarded whether before or after the discharge would be available to discharge the bankrupt’s liabilities.” (p.360)

29 Aldous L.J. came to the conclusion in that case that there was a single cause of action which vested in the trustee:

“It would only have remained with Mr. Ord if it fell within an exception established by the authorities to be excluded from the definition of property now found in section 436 of the Act of 1986. To do so it must relate *only* to a cause of action personal to the bankrupt. All cause of action which seek to recover property vest in the trustee whether or not they contain other heads of damages to which the bankrupt is entitled.” (p.361)

30 Some further guidance to the distinction between claims which remain with the bankrupt and those which vest in the trustee, was found by Aldous L.J. in the early

case of *Beckham v. Drake* (1849) 2 H.L. Cas. 579 and which seems of assistance here also:

“The general principle is, that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass, and the right to recover damages may pass though they be unliquidated. . . This principle is subject to exception. The right of action does not pass where the 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. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law; also the right of action does not pass in respect of wages earned by the bankrupt on a hiring after the bankruptcy . . . also the right of action cannot be made to pass to the assignees in respect of contracts uncompleted at the time of bankruptcy, by their adoption and completion thereof, where the personal service of the bankrupt himself is of the essence of the contract.” (1849) 2 H.L. Cas. 579, 603-604.

31 Later in the judgment Erle J. offered some explanation of the principle underlying the distinction:

“The skill and labour of an industrious man are in the nature of his stock and trade; they would in general be a source of a continuous profit, which could be foreseen, and might be prudently relied on as a ground for giving credit, and the creditors therefore have reason for saying that the benefit of all contracts relating to that source of value, on which they may have relied when they gave credit, ought to pass to them. At all events, the reason assigned in deciding some of the cases to be within the exception, does not apply, namely, that the creditors cannot legitimately have looked to the pain of the bankrupt from a broken limb, or wounded affection, or blasted character, as a source of profit, they being in their nature casual and unforeseen, and unconnected immediately with property. There is a manifest distinction between damages from such sources as these last mentioned and damages in respect of a contract for labour, which is the ordinary and constant lot of a large portion of society.” (pp. 608-09)

- 32 Cresswell J. stated the general rule:
“It seems to me, therefore, that according to the construction which has been put on the Bankrupt Acts from 34 and 35 Hen. 8 to the present time, rights of action vested in the bankrupt before his bankruptcy passed to his assignees, either as goods or as part of his personal estate. Such being the general rule, have the courts of Westminster Hall by their decisions engrafted any exceptions upon it?” (pp. 611-612)
- 33 Whiteman J.’s judgment is also useful in understanding the general principle:
“In cases where the personal estate is only affected through some wrong or injury to the person or to the feelings of the bankrupt, and the loss or gain to the personal estate would be greater or less according to the compensation given for such injury, whether by breach of contract or otherwise, the right of action would not pass to the assignees. Rights of action for breach of promise to marry, for torts to the person, for libel or slander, are instances of exceptions to the general rule. It may also be that the right to enforce unexecuted contracts will only pass to the assignees in cases where the assignees themselves could perform that which the bankrupt himself was to perform . . . ”
(pp. 611-612)
- 34 In my view, there is something unsatisfactory in interpreting modern legalisation by reference to concepts from the mid-Victorian era. It is also difficult to ascertain the underlying principle when it is expounded by reference to concepts such as the action for criminal conversation or breach of promise of marriage, both of which have long been abolished in Irish law. By the same token, it cannot be said as confidently today as in 1849 that creditors do not extend credit on faith of a claim for broken limbs. Nor should the cost of proceedings be disregarded. A claim by a bankrupt, who by definition will not be able to meet any award of costs, may impose a significant burden upon potential defendants facing a claim with no realistic prospect of recovery of costs if it is defeated. At the same time, liability for costs if awarded against the estate of the bankrupt may add reduce further the amount available to creditors. Difficult issues of theory and practicality may arise . As Hoffman L.J.

observed, the fact that a person has been adjudicated a bankrupt is a justification for some supervision of their conduct of litigation. Thus, in *Heath v. Tang* at page 701, he observed “the bankruptcy court acts as a screen which both prevents the bankrupt’s substance from being wasted in hopeless appeals and protects creditors from vexatious challenges to their claims.”

In cases where claims have been vested the Official Assignee, he or she may elect to pursue the claim if there is some substance to it, and where he or she does not, they may be prepared to assign the claims to the bankrupt in some cases on terms of the provision of satisfactory security. It is not obvious why actions deemed personal by the judges of the 19th century should be excluded from this screening mechanism. Modern day creditors might find it difficult to understand why a bankrupt should be allowed secure and retain a large award for defamation. *Ord v. Upton* is an example of a general principle being applied that actions are property of the bankrupt’s estate, and the exception being construed strictly. Given the significant change over time in attitudes to financial matters, and the importance of personal insolvency has assumed even in recent years, it is surely desirable that the question of continued litigation by and against a bankrupt, should be subject to review against the background of changes in attitudes to insolvency, and the nature of claims which may now be litigated. It is quite possible that such a review may reaffirm the precise distinction made by 19th courts, but if so, such a distinction would have to be considered positively as consistent with modern circumstances of finance, debt and insolvency, rather than simply because judges, however distinguished, said so 200 years ago.

35 It is clear however that this case must be approached on the basis that the law recognises one class of claims of a bankrupt which does not vest on adjudication. Here we must consider in particular whether the two claims, both unique to the Irish law, fall within that class of claims. These are the contentions raised by both defendants that they are entitled to a right of residence in Gorse Hill, which has not been validly terminated, and the claim made on behalf of Mrs. O’Donnell that the mortgage executed by Vico Limited is invalid because of the failure to secure her consent in writing pursuant to the Family Home Protection Act 1976. What both these claims have in common is that it is difficult to see how they arise in fact.

The Family Home Protection Act

36 This claim is advanced on behalf of Mrs. O'Donnell alone. It is argued that the absence of her valid consent under the Family Home Protection Act has the effect of invalidating the mortgage by Vico to Bank of Ireland. The origins of this claim can be traced to paragraph 9 of the Counter-Claim which records that the solicitors for the Bank of Ireland requested that Brian O'Donnell and partners "procure that the Second Named Defendant [Mrs. O'Donnell] execute a Family Home Protection Act 1976 Declaration at the time Vico Limited executed the Deeds of Mortgage and Charge over Gorse Hill. This never happened". By a process of reverse reasoning, it is then apparently suggested on Mrs. O'Donnell's behalf that because the solicitors for the first named plaintiff once sought family home consent that it must have been necessary. This is self-evidently threadbare. It would be at least as logical, if not more so, to conclude that the fact that the solicitors for the bank did not press the request shows that a Family Home Protection Act declaration was not necessary. In any event, the question is not what the solicitors believed was required at any given time but what the statute required as a matter of law. Section 3(1) of the 1976 Act provides that:

"Where a spouse, without the prior consent in writing of the other spouse, purports to convey any interest in the family home to any person except the other spouse, then, subject to subsections (2) and (3) and section 4, the purported conveyance shall be void."

37 Given that the transaction here was between Vico Limited and the bank, it is very difficult to see how this case can be made to come within the section. Paragraph 39 of the appellants' written submissions states that "Brian O'Donnell's solicitor firm conveyed the interest in the family home"—apparently on the basis that this satisfied the statutory provision that a spouse purported to convey any interest in the family home. Both in the High Court and in this Court, Mr. O'Donnell was not able to show how in this case a spouse (and in this case Mr. O'Donnell himself) had purported to convey any interest in the family home so as to give rise to a requirement for prior spousal consent under the Act.

38 However, I do not consider that the obvious frailty of this point, can resolve this issue on this appeal. This is an application brought on behalf of the Official Assignee which contends that the claim, whatever its merits, cannot be pursued separately by the bankrupts. The only question is who is entitled in law to assert the claim. It is thus necessary to consider what the nature of a claim is, in circumstances where there has been an alleged failure to comply with the provisions of the Family Home Protection Act 1976.

39 In my view, the answer to this question may require careful scrutiny of the pleadings and indeed the underlying assertions of the parties. Such a claim is not a cause of action in its own right: instead what is said it is a declaration of a failure to comply with a statutory requirement. The consequences of such a failure may well depend on the circumstances of the individual case. The Family Home Protection Act 1976 was an unusual provision which was designed to provide protection to spouses, particularly those who were not on the title of the land. It sought to do this by making prior consent a requirement of a transaction and sought to enforce this by providing for the invalidity of any transaction which did not have the required consent. The Act sought therefore to provide a measure of practical protection for spouses reinforced by the sanction of invalidity. Accordingly, a claim under the Act does not itself give rise to any right to property. It is perhaps conceivable in theory (although more difficult to imagine in fact) that a party might allege non-compliance with the Act in circumstances where if the transaction is avoided that would leave a party with an interest in the land. Here however, no such claim is made by or on Mrs. O'Donnell's behalf. Accordingly the claim although raised in the Counter-Claim is really being raised by way of defence: it is a denial of the title of Bank of Ireland to the property, since Bank of Ireland's capacity to initiate the trespass proceedings is based upon the mortgage which is alleged to be invalid for failure to comply with the 1976 Act.

40 In my view, this cannot be said to be a right of property which vests on adjudication. It is not, at least in its own terms, something which is convertible into money which would benefit the estate of the bankrupt. Although Mrs. O'Donnell may be exposed to costs if she is unsuccessful in this contention, that in itself is not enough to mean that the right to raise this claim is one which vests in the Official

Assignee, and for what it is worth, it may accordingly be maintained by Mrs. O'Donnell if she wishes to continue to defend the injunction claim on this basis.

Right of Residence

41 Mr. O'Donnell contends that he and his wife have had the benefit of a general right of residence which has not been validly terminated. The terms of the letter upon which he relies have already been set out. The paucity of evidence which supported this belated claim is striking. There is a 12 year gap between the only two documents alleged to evidence the grant of the right, and its terms. The letter from IFG Limited in 2012, makes no reference to the handwritten letter dated October, 2000. The parties to the correspondence appear to be different, and even assuming (which is by no means clear) that Mr. O'Donnell's letter was sent or delivered in October, 2000 to the trustees of the settlement, there is no evidence of the grant of a right of residence by Vico Limited, the shareholders of the company, or by trustees or beneficiaries of any settlement. The letter from IFG Limited falls markedly short of evidencing any such agreement, let alone establishing a right of residence granted by the owner of the property. Furthermore it is difficult to see how any such right could be maintained against the Plaintiff in the light of the agreement to provide vacant possession

42 Nevertheless, Mr. O'Donnell contends that there is a right of residence, and that as a matter of law such a right of residence is personal in the sense the benefit of the right cannot be assigned, although the burden passes to a successor in title. In that respect, he contends it is like a UK statutory tenancy which the Insolvency Act 1986 exempts from that the definition of property, meaning that a statutory tenancy does not vest on assignment. It is argued that this is a statutory recognition and that a right of residence should be treated as analogous to such a statutory tenancy and deemed to be property which does not vest on insolvency. Again, although the house at Gorse Hill is on unregistered land, the appellants rely on the terms of section 81 of the Registration of Title Act 1964:

“A right of residence in or on registered land, whether a general right of residence on the land or an exclusive right of residence in or on part of the land, shall be deemed personal to the person beneficially entitled thereto and

to be a right in the nature of a lien for money's worth in or over the land and shall not operate to create any equitable estate in land."

The appellants also cite Lyall, *Land Law in Ireland*, 3rd Ed., (Dublin, 2000): "A right of residence is right peculiar to Irish law and consists of a personal right to occupy a house or a room or rooms in a house and often includes also the right of support or maintenance out of the profits of the land, by provisions of food, fuel, or other products." (pp. 525-526)

43 What is alleged here is general right of residence. Rights of residence are unique to Irish law. They are well described in Coughlan, *Property Law*, 2nd Ed., (Dublin, 1998) in the following passage:

"Awkward questions relating to rights against third parties are raised by rights of residence, which are extremely common in Ireland. These entitlements usually arise where land is either conveyed *inter vivos* or devised to one person subject to the right of another to live on the property and, in some cases, to receive support in the form of food, fuel and other material benefits. In practice a significant proportion are found in farmers' wills where the land is left to offspring or to other relatives who will continue to run the farm, with a right of residence and the farmhouse being used as a means of providing for the widow for the rest of her days. The legal right of surviving spouse to a proportion of the estate under section 111 of the Succession Act 1965 has undoubtedly reduced the incidents of such rights actually taking effect. Nevertheless, the fact remains that many rights of residence became operable before the coming into force of the 1965 Act, and that such rights can be created in favour of persons who do not have alternative entitlements under that legislation." (p.299)

44 The precise analysis of the right of residence has caused difficulties for courts and text book writers. It appears that the provisions of the Registration of Title Act 1964 adopt the approach taken by Murnaghan J. in *National Bank v Keegan* [1931] 1 I.R.344. The provisions of section 81 are relevant inasmuch as they suggest the endorsement of the Oireachtas of a concept that such rights are at least analogous to liens. Coughlan observes out at page 302: "aspects of other conventional mechanisms

are also listed by the section so as to produce a hybrid somewhere between a bare licence and a proprietary interest". It is not however necessary to resolve or even address these difficulties in this case. It is sufficient to describe the general right of residence and then to consider whether it is property which vest in the Official Assignee on adjudication.

45 A general right of residence as understood in Irish law has features pointing in different directions. It is true to say that it is personal in the sense it cannot be assigned by the person entitled to it. This might suggest that it does not vest on adjudication since assignment is one test of whether it can be held to vest in a person who is after all described as the Official Assignee. On the other hand, property becomes vested in the Official Assignee not by assignment, but rather by operation of law. In her judgment in *AA v BA & anor* [2015] I.E.S.C. 102, Laffoy J. at paragraph 36 referred to Milman on *Personal Insolvency Law Regulation and Policy* (Aldershot: Ashgate, 2005), which suggested that the acid test seemed to be whether a right was assignable and if so, it is capable of being brought within the boundaries of the estate. However, Laffoy J. observed that the authorities discussed by Milman leading to that conclusion, involved an assessment of whether the relevant personal right had economic value, so as to vest in the trustee in bankruptcy. A general right of residence is undoubtedly a right touching on or concerning property and perhaps more importantly has an economic value. However, it is not possible to conceive of the Official Assignee being able to assert a right that is concededly personal to the bankrupt, and not assignable by them. The grantor of the right or his or her successor would not be obliged to permit the Official Assignee to reside in the property. If so it follows that the Official Assignee cannot assert the economic value of the right, or that the right be converted into money, since it has no such value in his hands. He cannot assert or enforce the right for his own benefit and accordingly there is nothing to convert into monetary value. The right is on its own terms both personal and non-assignable. While I consider that the correct approach is to treat the general rule as a statutory vesting of all causes of action on adjudication, and that the Court should be slow to enlarge the exceptions to that rule the principle already established and recognised must apply to the case of a right of residence, which on analysis I consider, a personal right which does not vest on adjudication.

Conclusion

46 Accordingly, I would affirm the decision of the High Court inasmuch as it holds that all the claims and asserted defences (such as invalidity of the judgment, and claims for damages for fraud, deceit and misrepresentation) now vest in the Official Assignee, with the exception only of the claim made in respect of the Family Home Protection Act 1976 on behalf of Mrs. O'Donnell, and the claim made in respect of the right of residence. These are now the only matters, whatever their merit or substance, which, given the developments in these and related proceedings, the scope of the appeal and the matters advanced, may now be raised by the bankrupts in the defence to the claim. The counterclaim adds nothing to the strength or otherwise of these matters and even if the appellants were to succeed the only relief would be a refusal of the injunction. Accordingly I consider the matter can proceed where these two claims may be maintained as defences to the claim for an injunction by the bankrupts. It is a matter for the bankrupts whether they wish to pursue these two matters as a defence to the injunction claim, and if so whether there are applications which can be made by either party by which they can be expeditiously determined.