

THE HIGH COURT

COMMERCIAL

[2011 No. 4336 P.]

BETWEEN

**CIARA QUINN, COLETTE QUINN, BRENDA QUINN,
AOIFE QUINN, SEÁN QUINN JR. AND PATRICIA QUINN**

PLAINTIFFS

AND

IRISH BANK RESOLUTION CORPORATION LIMITED AND KIERAN WALLACE

DEFENDANTS

AND

SEÁN QUINN, DARA O'REILLY AND LIAM MCCAFFREY

THIRD PARTIES

JUDGMENT of Mr. Justice Kelly delivered on the 4th day of July, 2012

The Issue

1. Does Seán Quinn (Mr. Quinn), the first named third party, who is a bankrupt, have an entitlement to defend these third party proceedings brought against him in circumstances where the Official Assignee in Bankruptcy (the Assignee) has declined to defend them? That is the question that I have to answer.

Background

2. The plaintiffs in the action are all members of Mr. Quinn's family (the family).

3. The first defendant was formerly known as Anglo Irish Bank Corporation (Anglo) and the second defendant (Mr. Wallace) was appointed as share receiver by Anglo on foot of a number of share pledges and charges on 14th April, 2011.

4. In these proceedings, the family seek a series of declarations of invalidity in respect of charges of shares and personal guarantees made between Anglo and members of the family. The charges and the guarantees were given in respect of borrowings which had been made on a colossal scale. The family also seek declarations of invalidity concerning the appointment of Mr. Wallace as share receiver.

5. It is not necessary for me to dwell in any detail upon the extremely serious allegations which are made by the family against Anglo in support of their claim for declaratory relief. The allegations have already been synthesised by Charleton J. in a judgment in these proceedings which he delivered on 23rd February, 2012, [2012] IEHC 36. He said:-

"If a series of financial transactions can be called horrific, that epithet would apply to the allegations made as plaintiffs by the Quinns against Anglo and against Seán Quinn."

6. Paragraph 74 of the family's statement of claim pleads as follows:-

"The sole or dominant motivation of Anglo in making these advances was to support and maintain its share price. Anglo senior management, including its chief executive, supported and encouraged the [contracts for difference] position built up in Anglo shares for the said purpose (including the allocation by Anglo of a significant number of Anglo shares as part of a share placing on the 1st February, 2007, proportionate to what Mr David Drumm estimated to be Bazzely's total exposure to Anglo at that time). The requirements of Anglo in this regard were further motivated by Anglo's own knowledge that the affairs of the bank were being, and had been, managed in a fashion that paid no, or no adequate, heed to the requirements of corporate governance or the interests of its shareholders. It is the plaintiffs' case that insufficient, misleading and inaccurate information was being made available to brokers, shareholders and potential investors, some of the details which are set out below."

7. On 27th July, 2011, Anglo delivered a defence and counterclaim. Mr. Wallace delivered a defence on the same date. All of the wrongdoing alleged against Anglo is denied and there is a counterclaim against each member of the family.

8. On 10th October, 2011, I granted Anglo leave to issue and serve third party notices on each of the third parties.

9. The third party notice served on Mr. Quinn claims an indemnity from him in the following terms:-

"[Anglo] claims against you an indemnity against the plaintiffs' claims, insofar as same are grounded on an assertion that securities in the form of share charges and personal guarantees that were obtained by the first defendant from the plaintiffs and which are the subject of the proceedings between the plaintiffs and the first defendant were invalid or otherwise unenforceable, on the grounds that same were obtained in circumstances of improvidence, undue influence, unconscionability or lack of autonomy, to such extent as the court shall determine to be just and equitable, on the

grounds that any loss and damage as was allegedly sustained by the plaintiffs (all of which is denied) was caused wholly or alternatively was contributed to by reason of your breach of warranty of authority and/or negligent misstatement and/or negligent misrepresentation and/or deceit."

10. The statement of claim fleshes out the factual basis upon which this claim is made. But it goes further. In addition to claiming an indemnity it also seeks damages for misrepresentation, breach of warranty of authority, fraud, negligence and conspiracy.

11. On 6th December, 2011, Mr. Quinn delivered a full defence to this statement of claim.

12. Meanwhile, Mr. Quinn, on 10th November, 2011, presented a bankruptcy petition to the High Court of Northern Ireland seeking his adjudication as a bankrupt. The petition was heard by the Master in Bankruptcy who acceded to the application. In his petition, Mr. Quinn asserted that although not then a resident of Northern Ireland, his centre of main interest was at Derrylin, Co. Fermanagh.

13. On 17th November, 2011, Anglo filed an application in the High Court in Northern Ireland to annul the bankruptcy on the basis that that court lacked jurisdiction to open main bankruptcy proceedings under Article 3(1) of EC Regulation 1346/2000. It asserted that the *ex parte* bankruptcy order had been obtained through misrepresentation and/or non-disclosure.

14. Anglo's application came for hearing before Deeny J. who reserved judgment. On 10th January, 2012, that judge, in a comprehensive judgment, acceded to Anglo's claim and annulled Mr. Quinn's bankruptcy in Northern Ireland.

15. Thereafter, Anglo applied to have Mr. Quinn adjudicated a bankrupt in this jurisdiction and succeeded in so doing.

16. Following adjudication, the Assignee instructed counsel to appear in this litigation and I was informed that it was not the intention of the Assignee to defend Anglo's claim made against Mr. Quinn in these third party proceedings.

17. On 22nd February, 2012, Anglo brought a motion before the court seeking directions concerning the hearing of the third party proceedings. In particular, Anglo asked the court what, if any, further steps should be taken in the third party proceedings against Mr. Quinn in circumstances where he had been adjudicated a bankrupt and the Assignee did not intend to defend the proceedings. As an alternative, I was asked to make an order that Mr. Quinn be deemed to admit the validity of and be bound by any judgment and/or decision given in the action and on any question specified in the third party notice. In the further alternative, I was asked that, in the event of Anglo being held liable in respect of all or part of the plaintiff's claim, that an order be made that Mr. Quinn be deemed to admit liability in respect of the indemnity and contribution and further relief claimed against him in the third party notice and that Anglo be at liberty to proceed by way of a motion for judgment in default against Mr. Quinn.

18. When this motion first came on for consideration by the court on 27th February, 2012, Mr. Quinn appeared and indicated a desire to argue that he should be permitted to defend Anglo's third party proceedings. The matter was adjourned to enable him to prepare to argue that proposition. When the application came to hearing, Mr. Quinn was represented on a *pro bono* basis by senior and junior counsel.

19. This is my judgment on the question which I identified in the first paragraph of this judgment.

Effect of Adjudication as a Bankrupt

20. Section 44 of the Bankruptcy Act 1988 (the 1988 Act) is contained in Part III of that Act. That Part is headed "*Administration of Property*". The subheading is "*Effect of Adjudication on Bankrupt's Property*". Section 44 provides as follows:-

"(1) Where a person is adjudicated bankrupt, then, subject to the provisions of this Act, all property belonging to that person shall on the date of adjudication vest in the Official Assignee for the benefit of the creditors of the bankrupt.

(2) Subject to the provisions of this Act, the title of the Official Assignee to any property which vests in him by virtue of subsection (1) shall not commence at any date earlier than the date of adjudication.

(3) The property to which subsection (1) applies includes –

(a) all powers vested in the bankrupt which he might legally exercise in relation to any property immediately before the date of adjudication;

(b) all property which was the subject of any conveyance or transfer which sections 57, 58 and 59 declare void as against the Official Assignee, subject to the rights of any persons which are preserved by those sections.

(4) The property to which subsection (1) applies does not include –

(a) property held by the bankrupt in trust for any other person, or

(b) any sum which vests in the Official Assignee under section 7 (1) (a) of the Auctioneers and House Agents Act, 1967, or section 30 (i) of the Central Bank Act, 1971.

(5) 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."

21. The word "*property*" is defined in s. 3 of the 1988 Act, as amended by the European Communities (Personal Insolvency) Regulations 2002, as including things in action. Things in action, of course, include litigation.

22. These statutory provisions divest a bankrupt of his property automatically upon adjudication by operation of law. The bankrupt no

longer maintains any interest in the property.

23. As is clear from the section, the property vests in the Assignee. What are the Assignee's powers in respect of the property?

The Assignee's Powers

24. Section 61 of the 1988 Act deals with the functions of the Assignee both in bankruptcy and vesting arrangements. Section 61(3) sets out the particular powers which the Assignee has in the performance of his functions. Only some of them are relevant to this application. They are those that are contained in subs. 3(b) – (d). They provide that the Assignee has power:-

"(b) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages whereby the bankrupt or arranging debtor may be rendered liable,

(c) to compromise all debts and liabilities capable of resulting in debts and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the bankrupt or arranging debtor and any debtor and all questions in any way relating to or affecting the assets or the proceedings on such terms as may be agreed and take any security for the discharge of any debt, liability or claim, and give a complete discharge in respect thereof,

(d) to institute, continue or defend any proceedings relating to the property."

25. The decision by the Assignee not to defend the third party proceedings was made by reference to Section 61(3)(d).

26. The Assignee was unable to discern any benefit to be derived for Mr. Quinn's creditors from defending the third party claim. That was a perfectly proper basis for the Assignee to decide not to defend.

Creditors of a Bankrupt

27. Section 136 of the 1988 Act, deals with the effect of adjudication as a bankrupt on creditors. It provides:-

"(1) On the making of an order of adjudication, a creditor to whom the bankrupt is indebted for any debt provable in bankruptcy shall not have any remedy against the property or person of the bankrupt in respect of the debt apart from his rights under this Act, and he shall not commence any proceedings in respect of such debt unless with the leave of the Court and on such terms as the Court may impose.

(2) This section shall not affect the power of a secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been enacted."

28. The effect of this statutory provision means that unsecured creditors are deprived of any remedy against the person or property of a bankrupt in respect of the debt apart from whatever rights they are given under the Act. Thus, unsecured creditors have no choice but to participate in the bankruptcy process. They rank equally with one another. They will be paid a dividend once the preferential creditors and the fees and expenses of the bankruptcy have been discharged in full.

29. In the present case, Anglo makes a twofold claim against Mr. Quinn. The first part of the claim is for an indemnity as contemplated by the Civil Liability Act 1961. The second is for damages for negligence, breach of warranty of authority and deceit. Whilst these are framed as separate claims, counsel on behalf of Anglo assured me that the claim for damages would not be pursued should the family fail in their action against Anglo. Thus, although two separate heads of claim have been identified, they will be pursued only in circumstances where there is a finding in the principal action in favour of the family against Anglo.

30. What is not in doubt is that the claim made by the Bank against Mr. Quinn is for damages and is directed towards the assets or estate of Mr. Quinn. This is an important matter to bear in mind for the following reasons.

31. There is a distinction between proceedings which seek to enforce a legal obligation sounding in damages against a bankrupt and those which relate to his personal conduct or misconduct.

32. The matter is put succinctly in the *Law of Insolvency* (4th Ed.) (2009) written by Prof. Fletcher. At para. 7-008. he says:-

"Furthermore, a distinction is made between proceedings which are designed to enforce a legal obligation owed by the debtor and those which are of a punitive character and are brought on account of his personal misconduct. In the latter type of case – for instance proceedings for contempt of court or for committal of a defaulting trustee – the court of bankruptcy will not intervene."

This notion is developed in the case law which I will consider later.

33. The claim made against Mr. Quinn in these third party proceedings is not one of the personal claims envisaged in that passage which would exclude the intervention of the bankruptcy court.

Irish Law

34. Anglo says that there is no case law in this jurisdiction which deals precisely with the issue that I am called upon to decide here. It says that the Assignee has a power to continue to defend or to restrain the continued prosecution of litigation against a bankrupt. Where, however, the Assignee chooses that existing litigation will not be restrained or defended, there is no person who has the legal entitlement to defend the case. This, it is said, is subject only to the exception of litigation dealing with personal misconduct of the type described in Fletcher. As this is not such a case, Mr. Quinn cannot defend the third party proceedings.

35. The position in English law is that a bankrupt has no standing to continue to defend or prosecute litigation after his adjudication save in the exceptional circumstances already alluded to. Anglo argues that a similar position obtains in this jurisdiction. It is with a view to obtaining a determination to that effect that the current motion is brought.

English Law

36. The position in English law on the ability of a bankrupt to defend a claim which the trustee in bankruptcy is unwilling to defend is dealt with by a decision of the Court of Appeal in *Heath v. Tang* [1993] 1 WLR 1421. In that case there were two appeals before the Court of Appeal. In each case, the applicant, who had been adjudicated bankrupt, sought to appeal against the judgment for a

liquidated sum on which the bankruptcy proceedings had been brought. In the first case, the trustee in bankruptcy indicated his unwillingness to pursue any such appeal. In the second case, no trustee had yet been appointed. On applications for leave to appeal, it was held that no special considerations applied to the judgments on which the bankruptcy orders were founded to justify departing from the general principle that on adjudication a bankrupt was divested of an interest in his property and liability for his debts. Accordingly, neither applicant had *locus standi* to institute an appeal.

37. The judgment of the court was delivered by Hoffmann L.J. (as he then was).

38. In the course of his judgment, he said:-

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

39. The statutory provisions in the English legislation cited by Hoffmann L.J. do not differ materially from the provisions of s. 44 and s. 136 of the 1988 Act.

40. The judge then went on to consider the question of the bankrupt as plaintiff. Whilst that is not of direct relevance in the instant case, there are some observations which are pertinent. He pointed out that the property which vests in the trustee includes *"things in action"*. The same position obtains in this State. He said:-

"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'."

41. He pointed out that actions for defamation and assault are obvious examples of such cases. He pointed out that bankruptcy does not affect the bankrupt's ability to litigate such claims. He went on:-

"But all other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or unliquidated damages, vest in his trustee. The bankrupt cannot commence any proceedings based upon such a cause of action and if the proceedings have already been commenced, he ceases to have sufficient interest to continue them."

42. The judgment went on to deal with the bankrupt as a defendant. Hoffmann L.J. had this to say on that topic:-

"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 of 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. As we have seen, section 285(3) deprives the plaintiff of any remedy against the bankrupt's person or property and confines him to his right to prove."

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] W.N. 177 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, at p. 177, 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.'

This implies that the bankrupt would not have been entitled to appeal against an order which was enforceable only against his estate. This appears clearly from the decision of the House of Lords in Rochfort v. Battersby (1849) 2 H.L. Cas. 388. The bankrupt was entitled to estates in Ireland subject to an annuity in favour of his mother. He had mortgaged the estates to a creditor who brought foreclosure proceedings in which he joined the bankrupt, his assignees and the annuitant. The action raised the question of whether the mortgage had priority over the annuity and the Lord Chancellor of Ireland decided in favour of the annuitant. The bankrupt alone appealed to the House of Lords which dismissed his appeal on the ground that he had no locus standi. Lord Cottenham L.C. said, at p. 406, that the question was whether he had 'that interest in the subject matter which would entitle [him] to appear here [as a party] questioning the propriety of the decision below.' The bankrupt did not:-

'the courts have always considered these acts of Parliament as divesting the insolvent of all title and interest in the property, which would authorise and justify him in entering into any litigation respecting it.'"

43. Hoffmann L.J. pointed out that in that particular case, the bankruptcy had occurred before the foreclosure proceedings were commenced and the House of Lords had said that the bankrupt should never have been joined as a party in the first place but he went on:-

"the reasoning would equally have precluded him from appealing if bankruptcy had supervened after the Irish proceedings had been concluded. As in the case of a trustee's refusal to bring proceedings as plaintiff, the bankrupt may in such a case apply to the court exercising bankruptcy jurisdiction to direct the trustee to appeal or to allow the bankrupt, on providing suitable security, to use the trustee's name."

44. Lest it might be thought that the decision in *Heath v. Tang* was based solely on elderly authorities, one finds the following at p. 1427 of the judgment of the court:-

"The insolvency law has of course changed a great deal since the time of Lord Eldon and In re Smith (A Bankrupt), Ex parte Braintree District Council [1990] 2 A.C. 215 is authority for taking a fresh look at the construction of the Insolvency Act 1986 in modern conditions. 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."

45. No subsequent English decision appears to have altered this approach so the law in England and Wales appears clear. If Mr. Quinn were in that jurisdiction, he would have no entitlement to appear personally in defence of this third party claim against him.

46. Given the similarity in the statutory provisions being considered by the Court of Appeal in *Heath v. Tang* and those which obtain in this jurisdiction, I am invited to hold that Irish law on this topic is precisely as the same as English law and that therefore Mr. Quinn has no entitlement to defend the third party proceedings.

Mr. Quinn's Contentions

47. In truth there is not a great deal in dispute between the parties as to the effect of an adjudication in bankruptcy on an individual. Mr. Quinn accepts that the property of a bankrupt vests in the Assignee. He accepts that the case law has consistently recognised that rights of actions which are personal to a bankrupt e.g. defamation or slander or personal injury, do not vest in the Assignee. He contends that an alleged personal right to defend himself in the third party proceedings does not vest in the Assignee.

48. Over and above that, however, he alleges that he has a constitutional entitlement to defend proceedings of this type. He alleges that as his good name is put to the hazard in these proceedings he has a personal constitutional right to defend it.

49. He says that this right of defence is one which derives not merely from the provisions of the Constitution but is also guaranteed to him under the European Convention on Human Rights and in particular Article 6(1) thereof. He contends that the Assignee's decision not to contest the proceedings has no relevance. That is because the Assignee only has power to defend proceedings pertaining to the bankrupt's property. The Assignee has no power over and above that, it is claimed.

50. It is said that the court must construe the provisions of the bankruptcy legislation in a manner which is consistent with Mr. Quinn's alleged rights of defence derived from the Constitution and the European Convention on Human Rights.

The Nature of the Claim

51. I have already out in short form, the claim which Mr. Quinn faces in these third party proceedings (see paras. 9, 10 and 29). Mr. Quinn contends that the claim must be looked at in greater detail in order to adjudicate upon his alleged right to defend it. He draws particular attention to the following.

52. Paragraph 45 of the third party statement of claim reads:-

"Further and in the alternative and without prejudice to the foregoing if any of the said representations made by the third parties to the first defendant were untrue in any respect (which is denied), the said representations were made fraudulently and well knowing that they were false and untrue or recklessly not caring whether they were true or false and with the specific intention of inducing the first named defendant to make the loans in an aggregate amount of approximately €2.8 billion to the Quinn Group, or, alternatively some of the said loans and/or to continue the funding and support of the Quinn Group and the companies within it."

53. Paragraph 50 of the statement of claim reads:-

"Further and in the alternative and without prejudice to the foregoing if, which is denied, any of the loan transactions (or any part of them) were tainted by illegality and/or were for an illegal purpose as alleged in paragraphs 103 – 110 of the statement of claim, then the same was due to a conspiracy by the third parties to enter into unlawful loan transactions and/or to effect an illegal purpose and/or to use some of the monies advanced to the Quinn Group of companies for an illegal purpose as pleaded in the aforesaid paragraphs of the statement of claim."

54. In reply to particular No. 135, Anglo pleads:-

"As is clear from the third party statement of claim, the first defendant pleads conspiracy in two respects...accordingly if which is denied, those loan transactions or any of them were illegal or the security given in connection with the loan transactions is determined to be unenforceable or void, the first defendant will contend that the actions of the third parties constituted a conspiracy to enter into and/or give effect to those illegal transactions and/or a conspiracy to use funds lawfully provided by the first defendant for illegal purposes."

Secondly, the first defendant seeks damages as against the third parties for a conspiracy...nevertheless and without prejudice to the foregoing, as is apparent from the third party statement of claim and in particular paragraphs 36 – 57 thereof, the first defendant contends that if the plaintiffs or any of them succeed in obtaining the relief claimed in respect of the security agreements and in particular for the reasons pleaded at paragraphs 89, 90, 91, 100 and 101 of the third party statement of claim then the third parties were guilty, inter alia, of misrepresentation and/or breach of warranty and/or fraud and/or negligence. Further, the third parties conspired and combined together to commit those misrepresentations and to breach their warranty of authority and to deliberately mislead the first defendant with regard to the matters pleaded at paragraph 41 of the third party statement of claim and to fraudulently obtain loans and/or a continuation of loans or facilities from the first defendant. For the reasons comprehensively set out in the third party statement of claim, in the event that the plaintiffs succeed in their claim as described above, the first named defendant will contend that the third parties thereby caused or contributed to any loss or damage that may be suffered by the first named defendant. In those premises, the concerted and coordinated actions on the third parties constituted a conspiracy to injure and harm the first defendant and/or a conspiracy to cause harm to the first defendant by unlawful means."

These passages are relied on by Mr. Quinn to demonstrate the serious allegations of dishonesty and conspiracy made against him.

55. Mr. Quinn has delivered a defence to these allegations. He denied them all. He also alleged that Anglo knew the exact and real purpose of the loans which was for the purpose of meeting the margin calls on the contracts for difference positions held in Anglo and

that it facilitated acquiesced and/or insisted upon him taking the loans so that the margin calls would be met thus protecting the share price of Anglo.

56. It is suggested by Mr. Quinn that because of the nature of these allegations, the case can be regarded as one of those "personal" types of cases which are not affected by bankruptcy. In support of that contention, reliance is placed on a number of cases. The first of these was *Howard v. Crowther* [1841] 8 M&W 601. In that case the plaintiff brought a claim for damages against the defendant for the seduction and loss of services of his sister and servant. The defendant pleaded that the plaintiff had become a bankrupt and therefore the cause of action vested in the plaintiffs' Assignee. The plaintiff argued that he had a right of action for a tort which was purely personal and did not pass to his Assignee. Lord Abinger C.B. in the course of his judgment stated:-

"Nothing is more clear than that a right of action for an injury to the property of the bankrupt will pass to his assignees; but it is otherwise as to an injury to his personal comfort. Assignees of a bankrupt are not to make a profit of a man's wounded feelings; causes of action, therefore, which are, as in this case, purely personal, do not pass to the assignees, but the right to sue remains with the bankrupt."

57. This case appears to me to be just another illustration of the type of personal obligation mentioned in *Fletcher* and dealt with in some detail in *Heath v. Tang*. It does not appear to me to advance the argument sought to be made by Mr. Quinn.

58. The next case relied upon is *Beckham v. Drake* [1849] HL 579. The passage relied upon from that case reads:-

"It certainly has been established by a series of authorities ending with the case of Rogers v. Spence in this House that no action can be maintained, either by an executor or by an assignee to recover damages for bodily or mental sufferings or personal inconvenience sustained by the deceased or by the bankrupt; the foundation of which is, perhaps, that it would in many cases be attended with extremely harsh and unjust consequences if the discretion, as to whether a redress for wrongs of this nature should be sought, was to be intrusted to anyone but the very person who has received the injury."

59. Reliance is also placed upon a further passage from that case in the following terms:-

"This principle (that all rights of action passed to the assignee) 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, nor saving from imprisonment by process of law."

60. This passage contains a useful list of the type of personal claims which are excluded from the purview of the Assignee. But it does not, in my opinion, touch upon the contention which is sought to be made by Mr. Quinn in this case. Further authorities such as *Wilson v. United Counties Bank Limited* [1920] A.C. 102 and *Ex parte Vine* [1878] 8 Ch. 364 relied upon by Mr. Quinn do not advance his case any further.

61. The only Irish case relied upon by Mr. Quinn is *Siroko v. Murphy* [1955] I.R. 77. There the Supreme Court had to consider whether a plaintiff who had become a bankrupt was entitled to continue proceedings which he had instituted. Notice of trial had been served in the action but between then and the hearing, the plaintiff became a bankrupt. The Assignee indicated that he did not wish to continue with the action. When the case came on for hearing in the High Court, the Assignee was not represented. The plaintiff told the court that he was not in a position to proceed and the action was dismissed with costs. The plaintiff appealed. Maguire C.J. stated in the course of his judgment:-

"It is plain upon all the authorities, and, I may add, all the text-book writers, that when the plaintiff became a bankrupt this action, not being for a mere personal wrong, was by act of law assigned to the Assignee in Bankruptcy. The plaintiff thereupon became incapable of conducting it."

62. All of these cases are to the same effect. They recognise a form of personal right of action that does not vest in the Assignee or trustee. But they do not appear to me to advance Mr. Quinn's assertion that the claim for indemnity and damages made against him in these third party proceedings are, because of the allegations of misconduct, to be regarded as conferring on him a personal right to defend which does not vest in the Assignee.

63. A New Zealand case called *De Alwis v. Kum* decided by Courtney J. in the High Court on 24th March, 2010, appears to me to be much more on point insofar as Mr. Quinn's contention is concerned. In that case, the second defendant, a Mr. Chean and his former wife applied to set aside a judgment entered against him in 2007. The basis for the application was that the plaintiffs misled the court at the hearing which led to the judgment. The issue which fell for determination was whether either Mr. or Mrs. Chean had standing to bring the application. It was alleged that Mr. Chean did not have standing because he was an undischarged bankrupt whose rights in the proceedings including the right to apply to set aside the judgment vested in the Official Assignee. One of the claims made by Mr. Chean was that the judgment against him contained findings of a personal nature such that the right to set aside the judgment remained vested in him. Courtney J. accepted that there are, of course, some rights of action and some liabilities that are personal to the bankrupt and over which the Official Assignee has no control.

64. Having referred to the judgment of Hoffman L.J. in *Heath v. Tang*, Courtney J. recounted an argument made by Mr. Chean's counsel to the effect that the findings made against him were of a quasi criminal nature and affected his personal rights and reputation. Mr. Chean submitted that he had the right to attack a judgment debt for fraud because his right to do so was preserved as a personal right of action under the New Zealand Bill of Rights Act 1990. The judge rejected those propositions and went on to say:-

"Self-evidently, nearly all claims that result in a judgment enforceable against the estate will involve allegations of wrongdoing by the defendant. It would be a most surprising result if the principle articulated in Heath v Tang were undermined merely by the fact that the proceedings in which the judgment debt was obtained included allegations of wrongdoing against the defendant. I would add that, even where the allegations of wrongdoing could otherwise be regarded as defamation, that fact alone would not change the position in this case where the complaint is about findings of the Court, given that statements made in the course of legal proceedings are privileged."

65. Those observations appear to me to be much more pertinent to the line of argument which Mr. Quinn advances here. They are

against the proposition asserted by him.

66. In my view, merely because the allegations against Mr. Quinn in the third party proceedings involve allegations of wrongdoing, does not remove the defence of such a claim from the purview of the Assignee. Accordingly, I am of opinion that this claim for damages against the estate of the bankrupt is not one of those personal claims which do not vest in the Assignee. The defence of such a claim is a matter for the Assignee. This position is not altered because the claim includes allegations of wrongdoing against Mr. Quinn. Insofar as this argument is concerned, therefore, I reject the entitlement of Mr. Quinn to represent himself further in this litigation.

Right of Access to the Court

67. Mr. Quinn contends that the bankruptcy legislation has to be construed in conformity with his constitutional entitlements. He does not seek to impugn the constitutionality of the legislation and the Attorney General has not been joined to these proceedings.

68. Much well known case law on the constitutional right of access to the courts was relied upon by Mr. Quinn in support of the argument that a refusal to allow him to defend the third party claim would wrongly deny him access to the court. There is no dispute between the parties but that there is a constitutional entitlement on the part of persons to have access to the courts. In this regard, I need do no more than cite from the judgment of Keane C.J. in *In Re Article 26 in ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 where he said:-

"It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights. In Murphy v. Greene [1990] 2 I.R. 566 at p. 578 Griffin J. observed 'it is beyond question that every individual, be he a citizen or not, has a constitutional right of access to the courts. Stated in its broadest terms, this is a right to initiate litigation in the courts ...'."

69. Mr. Quinn argues correctly that the 1988 Act carries with it a presumption of constitutional validity. He says that as a corollary it may not be interpreted or applied in a way that infringes rights derived from or under the Constitution. He cites in support of that argument, the well known passage from the judgment of Walsh J. in *East Donegal Cooperative v. Attorney General* [1970] I.R. 317, where that judge said:-

"At the same time, however, the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts."

70. It is argued that Mr. Quinn has, by virtue of Article 40.3.1 and Article 40.3.2, a personal right to defend himself in these proceedings.

71. In support of this contention, reliance was placed on the decision of the Supreme Court in *In Re Haughey* [1971] 1 I.R. 217 and in particular the passage from O'Dálaigh C.J.'s judgment where he accepted the proposition that there were four protections which must be afforded to a person whose good name is under attack at an inquiry. Those entitlements are:-

- (a) to be furnished with a copy of the evidence which reflects on his good name;
- (b) an entitlement to cross examine, by counsel, an accuser;
- (c) an entitlement to give rebutting evidence; and
- (d) a right to address the tribunal, by counsel if he wishes, in his own defence.

O'Dálaigh C.J. went on to say:-

"The provisions of Article 38, s. 1, of the Constitution apply only to trials of criminal charges in accordance with Article 38; but in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights."

72. Reliance was also placed upon my own judgment in *In Re Commission to Inquire into Child Abuse* [2002] 3 I.R. 459, where I had to deal with the question of the right to legal representation. I pointed out that the right to legal representation before a Tribunal is a constitutional one and does not depend on statute or any procedural rules which may be generated by the Tribunal. Rather, it derives from the constitutional guarantee in Article 40.3 concerning the citizen's right to his good name.

73. While Mr. Quinn accepts that the right of access to the court is not an absolute one and may be restricted in specific circumstances, he nonetheless contends that his entitlement to assert his right to a good name means that the 1988 Act must be interpreted in such a way as to permit him to defend these third party proceedings.

74. Many of the general principles which were relied upon on this topic of Mr. Quinn's constitutional rights were not disputed by Anglo. It accepts that he enjoys a right to his good name and that in many cases the defence of that would entitle a person to have access to the courts to vindicate or defend it. However, it argued that that right is not one which is engaged at all in these proceedings.

75. First, it is argued that the constitutional entitlement to protection of a good name is engaged only where a court or tribunal will be required to make a finding that adversely affects such good name or reputation. For reasons which I will develop in a moment, it is said that no such engagement will take place here. Second, it is said that when in litigation something is said which is adverse to one's character or may reflect poorly upon one, it does not mean that the constitutional entitlements identified by Mr. Quinn are triggered. Third, it is submitted that it must be recognised that Mr. Quinn is a bankrupt and therefore is not in the same position as any other party to litigation. Bankruptcy, whilst granting some very considerable advantages to a bankrupt, also imposes disabilities. It is argued that significant disabilities are created for creditors or claimants against a bankrupt. The bankruptcy code consists of checks and balances. One of the consequences for a bankrupt is that there is a very limited right of defence of proceedings. I will

consider these propositions in turn.

Good Name

76. The cases which have been relied upon by Mr. Quinn concerning the protection of his good name and reputation are all ones which have to do with tribunals of inquiry. Whether it is *Re Haughey* [1971] I.R. 217 or *Maguire v. Ardagh* [2002] 1 I.R. 385 or *In Re Commission to Inquire into Child Abuse* [2002] 3 I.R. 459, all those cases were concerned with the engagement of rights to good name in an inquiry giving rise to a finding or adjudication. In the present case, Anglo argues, correctly in my view, that if Mr. Quinn is not permitted to appear to defend the third party proceedings, there will be no finding or adjudication touching upon his reputation or good name. What will happen will be that Anglo will apply for judgment against him in the normal way in which such applications are made in respect of undefended claims. If successful, judgment in default of a defence being offered will be entered. The court will not be concerned with making findings or adjudications. A judgment will be obtained but no findings dealing with the allegations of wrong doing will be made. A judgment will be granted by operation of law without the court embarking on a hearing much less making findings on the allegations of dishonesty or conspiracy. That is a real distinction between what will happen in this case and what happens in tribunals of inquiry.

77. Anglo contends that a system of adversarial litigation cannot accommodate a proposition whereby anyone whose conduct comes under consideration or scrutiny in the course of proceedings acquires rights with a view to protecting their good name or reputation. Every witness, it is said, who goes into the witness box is at risk that their testimony will not be believed and that adverse findings may be made against them. But it is not the law that every such person acquires a right to defend their good name or reputation. In support of this argument, reliance is placed upon *De Alwis v. Kum* (supra) and on a number of Irish cases.

78. The first of these Irish cases is *Barlow v. Fanning* [2002] 2 I.R. 593. In that case, three members of the staff in the Economics Department of University College Cork, sued the professor and head of that department and the university. The claim was for damages, negligence and breach of contract. Serious allegations were made against the professor concerning the way in which he conducted the business of the department. They included the use of abusive and intimidating language to the plaintiffs, discrimination against them, isolation of them and the frustration of their chances of promotions. The plaintiffs claimed that the university was vicariously responsible for the alleged acts or omissions on the part of the professor.

79. Subsequent to the commencement of the proceedings, the plaintiff discontinued the action against the professor. The professor formed the view that the plaintiffs had adopted this procedure in order to prevent him from defending his reputation and that it was a device designed to facilitate a settlement between the plaintiffs and the university on which he would not be consulted. He applied unsuccessfully to be rejoined in the action before the Master whose decision was reversed by Johnson J. On appeal to the Supreme Court, Johnson J. was reserved. The Supreme Court took the view that there were no exceptional circumstances to permit a defendant to be joined against a plaintiff's wishes such as were present in *Fincriz v. Ansbacker & Company Limited* (Unreported, High Court, 20th April, 1987). In the course of his judgment, Keane C.J. said this:-

"It is no doubt the case that, if the plaintiffs succeed in the present action, the good name and reputation of the first defendant may be adversely affected, since, for the most part, the establishment of the plaintiffs' case against the second defendant necessitates the proof by them of damaging allegations against the first defendant. However, that can often be the case in litigation where a party elects to sue one defendant in reliance on his vicarious liability for the wrongdoing of another who is not sued. Thus, the owner of a vehicle is frequently sued as being vicariously responsible for the negligence of a person driving the vehicle with his consent. If the submissions advanced on behalf of the first defendant were well founded, it would be necessary in every such case for the High Court on the application of the driver, to join him as a defendant in the proceedings because his good name and reputation might be adversely effected by what was said during the course of the case or, indeed by the findings of the trial judge. I am satisfied that O. 15, r. 13 cannot be so construed and that a person in the position of the first defendant cannot be regarded as a party who ought to have been joined or whose presence before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."

80. A similar situation arose in the case of *Yap Wai v. Children's University Hospital Temple Street Limited* [2006] 4 I.R. 298. In that a case a consultant paediatrician brought proceedings against her employer, the hospital. The clinical director of the National Centre for Inherited Metabolic Disorders sought to be joined as a notice party to the proceedings on the basis of having an interest in them. Her application was refused by Clarke J. applying the decision in *Barlow v. Fanning*. He said:-

"But it seems to me that it is not possible to distinguish in any material way the facts of this case from the facts in Barlow v. Fanning [2002] 2 I.R. 593, and while I have much sympathy with the position of the clinical director in that it does seem on reading the affidavits that her actions and position will be of no little significance in the course of the hearing and are likely to be ventilated to some significant extent, nonetheless it seems me that the Supreme Court has given a clear and definitive ruling to the effect that any such considerations are outweighed by the obligation on the courts to keep private proceedings down to the parties whom the plaintiff chooses, and in those circumstances I would not propose acceding to the application to join the clinical director."

81. Whilst those two cases are, of course, concerned with the joinder of parties to civil litigation against the will of the plaintiff, they do in my view provide support for Anglo's case against the proposition that Mr. Quinn's alleged constitutional entitlements are automatically triggered in this litigation.

82. It is possible in litigation to have findings made against somebody who is not a party to them without an entitlement of the type for which Mr. Quinn contends. In the current litigation, there may well be findings against Mr. Quinn in the main proceedings between the family and Anglo or indeed in the third party proceedings against the other third parties but he has no entitlement to be heard in respect of those. In the third party proceedings against him, if he is not allowed to defend, judgment will be obtained against him by operation of law and the allegations which have been made and indeed denied by him will remain undecided.

83. Finally, on this aspect of the matter it has to be borne in mind that bankruptcy provides considerable advantages for a bankrupt. But protection from creditors comes at a cost. One of those costs is that when a claim of a non-personal nature is made against the bankrupt which may result in a judgment against his estate, the decision on whether or not to defend such a claim resides in the Assignee. Such a well established construction of the bankruptcy legislation does not, in my view, do violence to Mr. Quinn's rights.

84. I am satisfied that a refusal to allow Mr. Quinn to defend these third party proceedings does not infringe his constitutional rights.

European Convention

85. Mr. Quinn complains that if he is not allowed to defend these third party proceedings, his rights under Article 6(1) of the European

Convention on Human Rights will be infringed.

86. That Article reads:-

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

87. A number of cases were relied upon by Mr. Quinn in support of his argument.

88. The first of them was *Golder v. United Kingdom* [1975] 1 EHRR 524 concerned the entitlement of a convicted prisoner who was refused permission by the Home Secretary to write to a solicitor with a view to instituting civil proceedings for libel against a prison officer.

89. The second was the case of *Holy Monasteries v. Greece* [1994] 20 EHRR 1 which concerned a limitation on the right to bring proceedings to particular interested parties to the exclusion of others. That was held to be a deprivation of the right of access guaranteed by Article 6.

90. Neither of those cases dealt with the position of a bankrupt. The third case relied upon by Mr. Quinn did so. It is *Luordo v. Italy* [2003] ECHR 372.

91. In that case the applicant had a bankruptcy order made against him. One of the effects of that order was that he was prevented from taking legal proceedings to defend his interests. In that regard he alleged a violation of Article 6(1) of the Convention. Whilst Signor Luordo wished to bring a case as opposed to defend one, the principle is the same.

92. The European Court of Human Rights in the course of its judgment on the Article 6 claim said this:-

"81. The applicant said that the loss, as a result of bankruptcy, of the capacity to take legal proceedings was highly damaging to the bankrupt. At the same time, there was a conflict of interest between the trustee in bankruptcy, who acted in lieu of the bankrupt and the bankrupt."

82. The Government contended that the purpose of preventing bankrupts from taking legal proceedings was to protect a third party right, namely 'the interests of the bankrupt's creditors'. Furthermore the restriction applied solely to issues concerning pecuniary rights and, accordingly was within the State's margin of appreciation. The Government added that the bankrupt was in any event represented in court by the trustee in bankruptcy. Lastly, the applicant had not sustained any loss, as he had instituted various court proceedings while the bankruptcy proceedings were pending (for instance, an application on 5 April 1996 for a referral to the Constitutional Court and an application on 17 April 1996 for a stay of execution of the order for sale)."

93. The court then set forth its assessment. It said:-

*"83. The Court, considers, firstly, that the restriction on the applicant's ability to take legal proceedings must be considered from the perspective of the right of access to a court. It reiterates that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way it embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect (see *Golder v. United Kingdom*, judgment of 21 February 1975). This right extends only to disputes ('contestation') over 'civil rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law (see, inter alia, *James & Ors v. United Kingdom*, judgment of 21 February, 1986 and *Powell & Rayner v. United Kingdom*, judgment of 21 February, 1990."*

84. The court notes that the restrictions on the applicant's ability to take legal proceedings concerned disputes over issues of a pecuniary nature. The civil limb of Article 6 is therefore applicable."

*85. Furthermore, the 'right to a court' is not absolute. It is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (see *Ashingdane v. United Kingdom*, judgment of 28 May 1985). However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired; lastly, such limitations will not be compatible with Article 6(1) if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim to be achieved (see *Levages Prestations Services France*, judgment of 23 October 1996).*

86. The court considers that the purpose of the restriction on the applicant's capacity to make legal proceedings is to assign the role of representing the bankrupt in court in respect of issues arising over the bankrupt's pecuniary rights to the trustee in bankruptcy as, once the bankruptcy order has been lodged, he is responsible for the administration of the bankrupt's assets. Indeed, it is self evident in the court's view that disputes over such matters may have major repercussions on the assets and liabilities of the bankrupt estate. The court consequently finds that the restriction is intended to protect the rights and interests of others, namely those of the bankrupt's creditors. The court must go on to examine whether the consequences suffered by the applicant were proportionate to the legitimate aim pursued."

87. The restriction on the applicant's right of access to a court is not in itself open to criticism. However, the risk with such a system is that it may unreasonably limit the right of access to a court, particularly if the proceedings are protracted, as they were in the instant case which they lasted fourteen years and eight months. In that connection referring to its findings with respect to Article 1 of protocol No. 1, the Court considers that, contrary to what the Government have affirmed, the delays in the proceedings were not attributable to the failure of the attempts to sell the applicant's house at auction or the applicant's conduct."

Consequently, it finds that there was no justification for restricting the applicant's right of access to a court for the full duration of the proceedings, since, while in principle, a restriction on the right to take legal proceedings is necessary to

achieve the aim pursued, the necessity will diminish with the passage of time. In the Court's view, the length of the proceedings thus upset the balance that had to be struck between the general interest in securing the payment of the bankrupt's creditors and the applicant's personal interest in having access to a court. The inference with the applicant's right was accordingly disproportionate to the aim pursued."

94. The court concluded that there had been an infringement of the right of access to a court as guaranteed by Article 6(1) of the Convention. But it did so on the very limited basis set out in the passages cited above.

95. The court held that a restriction on the applicant's right to access was not in itself open to criticism. The restriction was intended to protect the rights and interests of the bankrupt's creditors. It went on to examine whether the consequences suffered by the applicant were proportionate to that legitimate aim. A restriction on the right to take legal proceedings was necessary to achieve that aim. The court held that necessity diminished in time and, given the length of time that Signor Luordo was to be deprived of his entitlement, the restriction was disproportionate.

96. The provisions of ss. 44 and 61 of the 1988 Act and in particular s. 61(3)(d) have as their object, the protection and rights and interests of Mr. Quinn's creditors. As the European Court of Human Rights has held, the restriction on Mr. Quinn's right of access to a court is not in itself open to criticism. The proceedings in Signor Luordo's case lasted fourteen years and eight months. It was because of the length of time involved that the European Court of Human Rights found in favour of the applicant.

97. I do not accept that there is any comparison to be made between the facts in the *Luogo* case and the position of Mr. Quinn. The decision in *Luogo* does not have the wide ranging implications which are contended for by Mr. Quinn. It is narrow and confined and the facts are not at all comparable to his case.

98. Mr. Quinn has not, in my view, demonstrated that his rights under Article 6(1) of the Convention are infringed or likely to be infringed by answering the question posed at the outset of this judgment in the negative.

Disposal

99. Mr. Quinn, being a bankrupt, does not have a personal entitlement to defend these third party proceedings. The decision on whether to defend the proceedings or not is vested in the Assignee. He has declined to defend them and in my view was entitled to so decide.

100. I answer the question posed at para. 1 of this judgment in the negative.