THE HIGH COURT

[2009 No. 1827 P.]

BETWEEN

IRISH LIFE AND PERMANENT PLC TRADING AS PERMANENT TSB

PLAINTIFF

AND

SIMON KENNEDY AND LILIAN KENNEDY

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 12th day of April, 2019

Background Facts

1. The first defendant (Mr. Kennedy) was formerly a practising solicitor and the second defendant (Mrs. Kennedy) is his wife. These proceedings brought by the plaintiff ("the Bank") concern two loan agreements entered into in 2006 and 2007 respectively. The 2006 loan was in the amount of €501,250 advanced by the Bank to Mr. Kennedy. That loan was to be secured on Mr. Kennedy's practice premises known as 4 Charles Street, New Ross, County Wexford. In entering into that agreement, Mr. Kennedy furnished the Bank with a solicitor's undertaking to procure a first legal charge over the property in favour of the Bank.

2. The 2007 loan was in the sum of €320,000 and was advanced to both Mr. and Mrs. Kennedy. On the Bank's case, that loan was to be secured by a first legal charge over Mr. and Mrs. Kennedy's family home known as Ardlegréine, Duncannon, Co. Wexford. The Bank says that it was a term of the agreement that the Bank would be granted a first legal charge over Ardlegréine and Mr. Kennedy gave a solicitor's undertaking in that respect. Although not necessarily relevant for the purposes of the application now before the court, Mr. Kennedy disputes that there was to be a charge over the family home and says that the solicitor's undertaking was inadvertently signed by his wife on his behalf when he was abroad in the United States.

3. In respect of the 2006 agreement, the Bank claims that contrary to the terms of the agreement and his solicitor's undertaking, 4 Charles Street was already the subject of prior incumbrances so that it was not then possible for the Bank to obtain a first legal charge, in breach of Mr. Kennedy's undertaking. This is effectively admitted by Mr. Kennedy at para. 8 of his defence and in his replying affidavit herein. It is also common case that subsequent to the institution of these proceedings, Mr. Kennedy rectified the position so that ultimately the Bank's security was put in place.

4. In connection with the 2007 loan, Mr. Kennedy says that the loan was part of a larger transaction which he agreed with the Bank's manager in New Ross whereby an additional €180,000 making in total €500,000 would be advanced by the Bank to enable him to build an extension to the family home Ardlegréine. He claims that in breach of that agreement, the Bank refused to advance the additional €180,000 but concedes that he obtained the money subsequently from Bank of Scotland (Ireland) Ltd who obtained a first charge on Ardlegréine. The Bank again claims this to have been a breach of the conditions of the 2007 loan and of his solicitor's undertaking, as the Bank was thereby precluded from obtaining a first legal charge over Ardlegréine.

5. It is common case that Mr. Kennedy defaulted on the payments due on foot of the loans and this ultimately resulted in the within proceedings being issued on the 25th February, 2009. Another of the complaints made by Mr. Kennedy in these proceedings is that he had a sum of €100,000 in his account which the Bank, he says unlawfully, set off against the debt due leaving him in a situation where he could no longer continue in practice.

6. A statement of claim was delivered by the Bank on the 2nd April, 2009 and the defendants delivered their defence on the 6th November, 2009 at which time Mr. Kennedy's firm, Simon W. Kennedy & Co., was on record for both defendants. The defence is accompanied by a counterclaim by Mr. Kennedy only which commences with the words:

> "The first named defendant repeats the defence herein and counterclaims as follows:-
>
> The plaintiffs were at all material times the defendant's bankers herein. In respect of the property at Ardlegréine, Duncannon attempted to intimidate the first named defendant and the second named defendant by …"

7. The counterclaim goes on to set out five instances of the alleged intimidation which are broadly, first, that the Bank refused Mr. Kennedy access to the €100,000 referred to above, second, threatened to report him to the Gardaí, the Law Society and to sue him, third, threatened the viability of his practice causing him damage, fourth, discontinued his banking facilities and fifth, notified the Credit Bureau of his default. In the next paragraph, Mr. Kennedy pleads:

> "(f) In the context of the foregoing paragraph the first named defendant reserves his right to amend the counterclaim herein to include a claim for defamation, negligence, misrepresentation, abuse of power and position, negligence misstatement and arising therefrom, the infliction of emotional distress."

8. This would appear to be a concession that the matters set out in that paragraph are not the subject matter of the counterclaim as it stands but may become so in the future. In the concluding paragraph headed "Particulars", Mr. Kennedy pleads that particulars will be furnished following discovery and also the remedies and orders sought will be furnished on completion of discovery. He concludes by pleading that a claim for general and special damages will be made.

9. The nature of the cause of action pleaded in the counterclaim is somewhat unclear. What is clear however is that the counterclaim is made solely on behalf of the first defendant, Mr. Kennedy, and that the gravamen of the claim is that Mr. Kennedy's practice was damaged by the alleged wrongful acts of the Bank. Whilst he pleads that he suffered damage and injury, there is no overt plea that his personal or professional reputation has been damaged but rather he reserves the right to make a claim for defamation, suggesting by implication that no such claim is contained in the counterclaim as it stands. Nor does the counterclaim contain any plea that Mr. Kennedy has suffered personal injuries as a result of the matters complained of.

10. Following delivery of the defence and counterclaim, a notice for particulars was raised by the Bank on the 26th October, 2010, and a reply and defence to counterclaim was delivered on the 11th March, 2011. The defendant's replies to particulars were delivered on the 8th July, 2011 and the Bank raised further particulars on the 22nd November, 2011 at the same time as issuing a motion for

discovery. The motion for discovery was dealt with on the 6th June, 2012.

11. In the meantime, the Revenue Commissioners, to whom Mr. Kennedy was substantially indebted in respect of tax arrears, issued bankruptcy proceedings against Mr. Kennedy.

12. On the 18th June, 2012, Mr. Kennedy was adjudicated bankrupt by order of the High Court (Dunne J.). This had the immediate effect of precluding Mr. Kennedy from continuing to practice as a solicitor. An application by Mr. Kennedy to show cause was dismissed on the 14th June, 2013.

13. As noted above, Mr. Kennedy ultimately perfected the Bank's security in respect of 4 Charles Street and in 2011, the Bank issued separate proceedings by way of special summons seeking an order for possession on foot of the security.

14. Arising from the institution of the special summons proceedings, Mr. Kennedy brought an application to have those proceedings consolidated with the within proceedings. On the 11th February, 2014, the High Court (Barrett J.) acceded to Mr. Kennedy's application and consolidated the two claims. The Bank appealed to the Supreme Court and ultimately the appeal was transferred to the Court of Appeal which determined the matter on the 3rd May, 2017 by allowing the appeal. This left the Bank free to continue the special summons proceedings and accordingly the Bank obtained an order for possession of 4 Charles Street on the 23rd June, 2017.

The Issue Arising on This Application

15. In this motion issued on the 8th February, 2018, the Bank seeks an order giving directions in respect of the proceedings and in particular, a direction that the Official Assignee in bankruptcy is the only party with standing to defend (including by way of counterclaim) the plaintiff's claim herein together with an order striking out the defence and counterclaim. In that respect, it is important to note the position of the Official Assignee. By letter of the 8th January, 2015 to the Bank, the Official Assignee said:

> "As Official Assignee of (Mr. Kennedy's) estate I am satisfied the Bank has an entitlement to obtain a money judgment against Mr. Kennedy for the loan advanced to him and that Mr. Kennedy has no right to defend such proceedings nor to pursue a counterclaim for damages…
>
> Please provide this letter to the court confirming my position to it in respect of Mr. Kennedy litigating on his own behalf, which I again confirm he has no right as a bankrupt so to do, as I have no funds in the matter to be represented before the court. In that regard I agree with your analysis of my position as Official Assignee as set out in your legal submissions provided to me in your letter. Please provide me with details of exact amounts in respect of which you seek judgment and I can compromise the claims and admit them as proven claims within the bankruptcy, without need for any further litigation in respect of Mr. Kennedy."

16. The issue again arose a year later when, by letter of the 5th January, 2016, the Bank wrote to the Official Assignee saying, *inter alia*:

"The plenary proceedings

> In the plenary proceedings, the Bank seeks, *inter alia*, judgment against the defendants, Mr. and Mrs. Kennedy, in respect of which Mr. Kennedy has made a counterclaim.
>
> As regards Mr. Kennedy, my understanding from your letter dated 8th January, 2015 is that you are satisfied that the Bank is entitled to a money judgment against Mr. Kennedy and further, that Mr. Kennedy has no right to defend the plenary proceedings or to pursue a counterclaim for damages. You indicated that, as Official Assignee, you would not be defending the Bank's claim for judgment nor pursuing the counterclaim and asked that this fact be drawn to the attention of the appellate court as you have no funds for legal representation.

Request for confirmation

> I note that in your letter of 8th January, 2015 you agreed with the Bank's analysis of your position as Official Assignee as set out in the supplemental legal submissions filed by the Bank in the appeal. In order that the Bank might now draw to the court's attention your position, set out in correspondence, I should be grateful for your assistance as follows:
>
> 1. For the avoidance of doubt, I should be grateful if you could confirm that there has been no change in your position since your letter of 8th January, 2015 that is to say:
>
> (a) That Mr. Kennedy has no entitlement to challenge the surrender by the Official Assignee of the 4 Charles Street premises;
>
> (b) That conduct of the plenary proceedings is a matter for the Official Assignee, not Mr. Kennedy: Mr. Kennedy is entitled neither to defend the Bank's claim for judgment nor to prosecute the counterclaim.
>
> (c) That you, as Official Assignee, do not intend to defend the Bank's claim for judgment or to prosecute Mr. Kennedy's counterclaim."

17. The Official Assignee replied to this letter on the 8th January, 2016 as follows:

> "I refer to your letter dated 5th January, 2016.
>
> I can confirm that there has been no change in my position as set out in my letter of 8th January, 2015. Mr. Kennedy has no entitlement to challenge the surrender by me of the 4 Charles Street premises.
>
> The conduct of the plenary proceedings is being conducted by Mr. Kennedy without my authority or approval.
>
> I do not intend to defend the Bank's claim for judgment or prosecute Mr. Kennedy's counterclaim."

18. Subsequent to the issuing of the within motion, the bank sought confirmation from the Official Assignee as to whether he wished to file an affidavit in this motion. In a letter of the 14th March, 2018, the Official Assignee yet again reiterated his position in the following terms:

> "I refer to your letter of the 12th March seeking confirmation of whether I wish to file an affidavit in the matter and I confirm that I do not.
>
> My position in relation to above proceedings is that Mr. Kennedy does not have locus standi to defend these proceedings nor prosecute the counterclaim in his sole name as such authority and right vested in me as Official Assignee on his adjudication as a bankrupt on the 18th June, 2012. The claim is clearly in my view not a *personal* right claim that continues to vest in Mr. Kennedy."

The Official Assignee went on to set out a detailed analysis of the legal position with reference to statute and case law and went on to conclude his letter:

> "As there are no funds in Mr. Kennedy's estate to engage counsel or solicitor I do not intend appearing in person or be legally represented at any hearing of this matter and request the court to accept this letter as proof of my position on the matter. I consent to judgment in the matter which will be a proven debt in the bankruptcy on basis no cost order is sought against me as Official Assignee."

Legal Principles

19. Section 44 of the Bankruptcy Act, 1988 as amended provides at subs. 1:

> "(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."

20. Property is defined in s. 3 of the Act:

> " 'property'
>
> (a) includes money, goods, things in action, land and every description of property, whether real or personal…"

21. "Things in action" evidently includes litigation claims by the bankrupt. Section 61 of the Act provides for the functions of the Official Assignee which include the power to compromise any claim against the estate of the bankrupt and under subs. (3) (d), to institute, continue or defend any proceedings relating to the property of the bankrupt.

22. The courts have long distinguished between claims by the estate of the bankrupt, which vest in the Official Assignee, and those which are to be regarded as purely personal claims, which do not. This was explained by the Court of Appeal of England and Wales in *Heath v. Tang* [1993] 1 WLR 1421. Delivering the court's judgment, Hoffman L.J. discussed the position of the bankrupt in litigation, both as plaintiff and defendant. In dealing with the bankrupt as plaintiff, he said (at p. 1423):

> "The property which vests in the trustee includes 'things in action'; see s. 436. 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 *Declan v. Dale* (1849) 2 HLC as 579, 604, per Erle J. and *Wilson v. United Counties Bank Ltd* [1920] AC 102. Actions for defamation and assault are obvious examples. The bankruptcy does not affect his ability to litigate such claims. But all other causes of action which were vested in the bankrupt at the commencement of the bankruptcy, whether for liquidated sums or on liquidated 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."

23. The court went on to deal with the position of the bankrupt as defendant (at p. 1424):

> "In case 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."

24. *Heath v. Tang* was approved in this jurisdiction by the Supreme Court in *A.A. v. B.A.* [2017] 3 I.R. 498. That case concerned family law proceedings which were determined by the High Court and appealed by both sides to the Supreme Court. While the appeal was pending, B.A. was adjudicated bankrupt. The appeals were subsequently determined by the Supreme Court and thereafter, B.A. issued a motion to set aside both the judgment of the High Court and Supreme Court on grounds of bias. The court directed the trial of a preliminary issue as to whether B.A. as an undischarged bankrupt had l*ocus standi* to maintain the motion. The Official Assignee contended that since the judgments related only to B.A.'s property and not his person, he had no standing to maintain the motion. The Supreme Court determined that B.A. did not have *locus standi* and dismissed the motions.

25. In the course of her judgment, Laffoy J. referred to *Heath v. Tang* being subsequently considered by the High Court of New Zealand in *De Alwis v. Luvit Foods International* (unreported High Court of New Zealand Courtney J. 24th March, 2010) which in turn was considered by the High Court in *Quinn v. IBRC* [2012] IEHC 261. In *De Alwis*, counsel for the bankrupt submitted that allegations made in the proceedings against the bankrupt were of a quasi-criminal nature affecting the bankrupt's personal rights and reputation and he should therefore be entitled as a personal right to set aside the judgment that made such findings against him. She approved the following passage from the judgment of Courtney J. which had also been cited with approval by Kelly J. (as he then was) in *Quinn*:

> "[24] … 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."

26. In *Quinn*, a third party claim for indemnity was brought in which serious allegations of dishonesty and conspiracy were made against Mr. Quinn. He delivered a full defence but before trial, he was adjudicated a bankrupt. The Official Assignee informed the court that it was not his intention to defend the claim. Mr. Quinn sought to defend the claim himself on the basis that the serious allegations against him personally brought the claim into the category of personal claim unaffected by the bankruptcy. Kelly J. rejected this argument saying (at p. 29)

> "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 claim from the purview of the Official Assignee. Accordingly, I am of the 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 Official Assignee. The defence of such a claim is a matter for the Official 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."

27. In the present case, the fact that allegations are made in the proceedings against Mr. Kennedy or by him which could be said to relate to his personal or professional reputation cannot of itself entitle Mr. Kennedy to litigate those issues as personal claims for the same reasons identified in *De Alwis* and *Quinn*. As previously noted, no claim in defamation has been made by Mr. Kennedy.

28. In his judgment in *A.A. v B.A.* Charleton J. discussed the exceptions to the rule that all causes of action in favour of the bankrupt vest in the Official Assignee (at p. 552):

> "[96] On the positive side of the scale, in terms of what actions may be instituted or continued by a bankrupt notwithstanding the bankruptcy, a limited exception to the principle of disenabling any further action by the bankrupt survives, allowing the bankrupt to take proceedings in his own name. These exceptions are personal injury actions, as where the bankrupt was injured in a road traffic or workplace accident either before or after the bankruptcy or where the bankrupt has been attacked physically, as in assault or false imprisonment. In addition, it seems, a bankrupt may defend his character if he has been defamed. A bankrupt may also be personally liable for contempt against court proceedings and may be arrested and charged in the usual way if he is accused of having committed criminal offences. Counsel on behalf of B.A. referred in argument to the possibility of taking a race discrimination case. This, it has been recognised in England and Wales, can be an exception because the injury is to the person of the bankrupt as opposed to the trading name of his estate. Alternatively, the claim may be a hybrid of both: see *Khan v. Trident Safeguards Ltd.* [2004] EWCA Civ 624 , [2004] I.R.L.R. 961 ."

29. Charleton J. cited with approval a number of passages from the judgment of Aldous L.J. in *Ord v. Upton* [2000] Ch. 352 which was a medical negligence claim against a doctor claiming damages for pain and suffering and a claim on the same ground for loss of earnings. Such a hybrid claim was held by the court to be under the control of the trustee in bankruptcy and not under the control of the injured party. Aldous L.J. put the matter thus at p. 361:-

> "In modern parlance [the bankrupt's] claim is a single cause of action. However, I cannot accept [counsel for the bankrupt's] submission that the cause of action is personal. It is a claim for damages for injury to his body and mind and also his capacity to earn and can therefore be considered as a 'hybrid' claim, in part personal and in part relating to property. I have come to the conclusion that such an action 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 [Insolvency Act 1986]. To do so it must relate *only* to a cause of action personal to the bankrupt. All causes of action which seek to recover property vest in the trustee whether or not they contain other heads of damage to which the bankrupt is entitled. The authorities … lead to that conclusion."

30. And further at p.553:

> "The authorities are only consistent with the conclusion that the trustee is entitled to the damages for past and future loss of earnings and is not entitled to the damages for pain and suffering. As there is a single cause of action, it vested in the trustee. There is in my view nothing in that conclusion which imposes practical difficulties with which the law cannot deal. The trustee as constructive trustee would have to account to the bankrupt for the property which he obtained inadvertently or by arrangement in an action which vested in him for the benefit of the creditors. The idea that the cause of action should vest in the bankrupt would not be acceptable and compulsory joinder of both could lead to difficulties when the claim for loss of earnings was small compared with the potential costs of the litigation. In such a case the trustee, if the cause of action vested in him, would have to consider carefully his duty to the bankrupt and would probably, if requested, assign the cause of action to him."

Discussion

31. Applying these principles to the facts of the present case, it is clear that the Bank's claim for the residual debt subsisting after realisation of its security is a claim which can only be dealt with by the Official Assignee who has already unequivocally stated his position on at least three separate occasions.

32. With regard to Mr. Kennedy's counterclaim, it is evident from the analysis above that the primary, and perhaps only, complaint of Mr. Kennedy is in relation to damage to his practice with consequent loss to him. That loss can only be financial loss in terms of loss of earnings or loss of profits, however it might be characterised. Either way it seems to me that this is a loss which, if proven, is a loss to his estate which undoubtedly vests in the Official Assignee.

33. Although there is no explicit claim for damages for either defamation or personal injuries, insofar as one could be implied from the terms of the counterclaim, it would at best elevate the counterclaim to the status of a hybrid claim similar to that arising in *Ord v Upton*. Indeed Mr. Kennedy in the course of oral submissions explicitly conceded that the claim is a hybrid claim – see Transcript Day 3 see P 33 – 34. As *De Alwis* and *Quinn v. IBRC* show, the mere fact that allegations of personal impropriety or wrongdoing on the part of the bankrupt are made cannot, without more, cause the claim to be regarded as one personal to the bankrupt. It is equally true to say that claims by the bankrupt to have suffered reputational damage leading to financial loss are either claims against his estate solely or hybrid claims, both of which remain under the exclusive control of the Official Assignee.

34. In the course of his oral submissions, Mr. Kennedy contended that if the law were to be construed so as to prevent him from litigating his counterclaim, this would amount to a breach of his rights under the Charter of Fundamental Rights of the European Union

and Article 6 of the European Convention on Human Rights. He sought to distinguish *A.A. v. B.A.* on the grounds that, by virtue of the State's shareholding in the plaintiff, it ought to be regarded as an emanation of the State.

35. Article 47 of the Charter provides:

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.
>
> Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

36. Article 52 of the Charter provides, *inter alia*, that insofar as it contains rights which correspond to rights under the ECHR, the rights under the Charter shall be the same as those in the Convention.

37. Article 6 of the ECHR was considered in the context of bankruptcy proceedings by the European Court of Human Rights in *Luordo v. Italy* (app. No. 32190/96) (judgment of 17th October, 2003). In that case, the applicant was the subject of a bankruptcy order that continued in force for fourteen years and eight months. The ECtHR found this violated both Articles 1 and Article 6 of the Convention. The court considered that the length of time involved constituted an unreasonable restriction on the applicant's ability to deal with his property and that the necessity to restrict the applicant's rights to achieve a legitimate aim of protecting creditors would diminish over time. The court found that (at para. 70):

> "…the length of the proceedings does 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 securing the peaceful enjoyment of his possessions. The interference of the applicant's right was accordingly disproportionate to the aim pursued."

38. In the subsequent case of *Campagnano v. Italy* (app. No. 77955/01) (judgment of 3rd July, 2006) the ECtHR held that a delay of three years and eight months did not upset the balance referred to in *Luordo*.

39. In *A.A. v. B.A.*, the bankrupt advanced the argument that his rights under Article 6 had been infringed. This was dealt with in the judgment of Charlton J:

> "[104]…it is asserted on behalf of B.A. that there is some kind of personal entitlement once any issue of fair procedures is raised to access the courts despite the opposition of the Official Assignee and to proceed to try an issue that concerns the estate. That cannot be correct. In virtually any case which goes to plenary hearing multiple questions as to fair procedures or the admission or exclusion of evidence might conceivably be raised. Where there is a genuine issue which has had a real effect on the outcome of a case, the rights of a potential litigant are not lost. Instead, it is for the Official Assignee to assess whether a substantial point has been raised which will have the probable effect of increasing the estate in bankruptcy. If such a prospect is genuine, and fact based, it is for the Official Assignee to consider pursuing it. In the event of disagreement, an application can be made to the High Court, as it was made in this case. In so far as it is contended that rights under article 6.1 of the European Convention on Human Rights will be infringed through some form of denial to 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law', those rights remain to be exercised through the sensible filter of the Official Assignee and subject to the direction of the High Court."

Citing the *Luordo* judgment, Charlton J. referred to the fact that the lapse of over fourteen years was considered disproportionate on its particular facts.

40. A *Luordo* argument was advanced in *Bank of Ireland v. O'Donnell* [2015] IEHC 640 and was rejected by Costello J.:

> "27. It is quite clear that the limitation on a bankrupt's right to litigate of itself does not infringe the provisions of Article 6(1) of the Convention. *Luordo* is authority for the proposition that if the restriction on the right continues for a very long period of time that it may become unlawful. It was not suggested by the defendants that the restriction on their right to litigate personally had become unlawful because of the duration of their bankruptcy. This is not surprising given the fact that the date of adjudication was 3rd September, 2011. It could not be said in all the circumstances that the restriction was disproportionate to the aim as set out in the judgment of the Court in *Luordo*".

A similar argument was rejected by Kelly J. in *Quinn v. IBRC* on the basis that the issue of delay in *Luordo* did not have any relevance in *Quinn*. An argument that s. 85 of the Bankruptcy Act, 1988 was unlawful under the Constitution and the ECHR was rejected by the High Court (Laffoy J.) in *Grace v. Ireland* [2007] IEHC 90.

41. Insofar as Mr. Kennedy's argument is concerned, it seems to be confined to the simple contention that the fact that he is unable to ventilate his claim is somehow unfair to him. He does not suggest that there was an excessive delay nor do I believe he could in circumstances where having been adjudicated on the 18th June, 2012, he was discharged from bankruptcy by operation of law on the 18th June, 2015. There is in my opinion no doubt that Mr. Kennedy's counterclaim, as a thing in action, vested in the Official Assignee on the date of his adjudication and on that date, Mr. Kennedy lost the right to deal with his property which included his counterclaim. That is an incident of his bankruptcy which afforded him protection from his creditors. Although Mr. Kennedy did not make direct complaint about it, it is perhaps worth noting that he was the recipient of legal aid, somewhat belatedly applied for in 2018, but he chose to discharge his legal team in advance of the hearing of this application.

Conclusion

42. For these reasons therefore, I am satisfied that the Official Assignee is the only party entitled to either defend the Bank's proceedings or to pursue the counterclaim and I will discuss further with the parties the consequential orders to be made following this determination.