

**THE HIGH COURT**

**BANKRUPTCY**

**[2012 No. 2479 BANKRUPTCY]**

**[2012 No. 2480 BANKRUPTCY]**

**IN THE MATTER OF BRIAN O'DONNELL (A BANKRUPT)**

**AND MARY PATRICIA O'DONNELL (A BANKRUPT)**

**BETWEEN**

**BRIAN O'DONNELL (A BANKRUPT) AND**

**MARY PATRICIA O'DONNELL (A BANKRUPT)**

**APPLICANTS**

**AND**

**CHRISTOPHER LEHANE**

**OFFICIAL ASSIGNEE**

**JUDGMENT of Ms. Justice Costello delivered on 18th day of April, 2016.**

1. On 12th December, 2011, before Kelly J. in the High Court in proceedings entitled *The Governor and Company of the Bank of Ireland v. Brian O'Donnell and Mary Pat O'Donnell*, [Rec. no. 2010/610 S] [2011 No. 5 COM] ("the summary summons proceedings") the plaintiff ("the Bank") obtained judgment against the defendants in the sum of €71,575,991.29 together with costs of the proceedings when taxed and ascertained. The defendants failed to pay the sum due to the Bank on foot of the judgment and the Bank brought petitions to bankrupt each of the defendants to the summary summons proceedings based upon the judgment of 12th December, 2011. Ultimately, on 2nd September, 2013, Charleton J. in the High Court adjudicated Mr. Brian O'Donnell and Dr. Mary Patricia O'Donnell bankrupt on foot of the petitions presented by the Bank. In this judgment they are referred to as the Bankrupts.

2. By virtue of the positions in s. 44 of the Bankruptcy Act 1988, as amended, all of the property belonging to each of the Bankrupts vested in the Official Assignee for the benefit of the creditors of the Bankrupts. The property of the Bankrupts included the chose in action comprised in the summary summons proceedings referred to above.

3. The Bankrupts say that on 30th June, 2014, they became aware that the learned trial judge was a personal shareholder in the Bank for a period of time including the period when he presided as the trial judge in respect of the summary summons proceedings. They wished to appeal the judgment obtained on 12th December, 2011, on the grounds, inter alia, of objective bias on the part of the learned trial judge. In view of the fact that the time for appealing the judgment had long since expired, it was necessary for the Bankrupts first to apply to the Supreme Court for leave to extend time to appeal the order. By notice of motion issued on 23rd July, 2014, the Bankrupts applied to the Supreme Court for leave to extend time to appeal the order of Kelly J. dated 12th December, 2011, in the summary summons proceedings. As this was prior to their adjudications, they had capacity to issue the motion at that time.

4. The Official Assignee, the respondent to this motion, was not a party to the motion before the Supreme Court. However, as the motion was heard by the Supreme Court after the moving parties had been adjudicated bankrupt, the Official Assignee intervened in the appeal. He asserted that the right to appeal the summary summons proceedings vested in the Official Assignee pursuant to ss. 3 and 44 of the Bankruptcy Act 1988 and he did not wish to pursue it. On that basis he submitted that the appellants/Bankrupts did not have a locus standi to bring the application.

5. He submitted that the appellants could have brought an application to the High Court in bankruptcy requiring the Official Assignee to apply for the extension of time to appeal but they had not done so. However, he accepted that the Supreme Court could consider an extension of time application by its nature and, while maintaining that the correct forum was elsewhere, submitted that if the parties and the Court believed that the matter could be determined more quickly and less expensively by the Court determining the motion for extension of time, he would not interfere.

6. As the Court adjourned the motion to allow for legal submissions and proceeded to hear the motion, it is to be concluded that this was the basis upon which the motion continued and was dealt with by the Supreme Court.

7. Denham C.J. delivered the judgment of the Court on 8th December, 2015. While noting that certain actions personal to a bankrupt do not vest in the Official Assignee, she stated:-

*"37. As Hoffman L.J. said in Heath v. Tang at p. 701:-*

*'The consequences for the bankrupt's right to litigate do not seem to us inconvenient or productive of justice. 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.'*

*38. In this case the extension of time application is in relation to the proposed appeal in a case about property claimed*

to be owned by the appellants who are bankrupts. It is not personal litigation. It is thus a matter for the Official Assignee.

39. In spite of the appropriate forum for an application regarding litigation by a bankrupt being an application to the Official Assignee, or thereafter an application to the Bankruptcy Court, in the special circumstances of this case, the Court exercises its discretion and determines the application for an extension of time for leave to appeal in this case.

40. However, it is emphasised that the appropriate route is to request the Official Assignee to commence or continue litigation. If the Official Assignee refuses then the bankrupt may apply to the Bankruptcy Court. The Bankruptcy Court may then assess the situation, with the benefit of submissions from the Official Assignee. All such applications should be made in that manner. Thus, if there are claims where the litigation may be hybrid, i.e. some of which relates to the estate and some of which may be personal claims, the Bankruptcy Court can hear and determine such applications. However, it was accepted that in the circumstances of this case that the Supreme Court should hear and determine an application seeking an extension of time.

However, for clarity, it is stressed that applications in relation to proceedings in an estate in bankruptcy, either commencing or continuing litigation, are firstly a matter for the Official Assignee, and thereafter the Bankruptcy Court.

41. The only issue for the Court to determine is whether the appellants have locus standi to move the application.

42. In the proceedings in issue, the order of the High Court of 12th December, 2011, relates to property in the estate of the appellants, who are bankrupts. Thus, the property is vested in the Official Assignee. Therefore, it is for the Official Assignee to determine whether these proceedings are to be continued or not.

43. The appellants do not have locus standi to bring this application, the property and the right to litigate being vested in the Official Assignee.

44. The appellants raised the issue that the order of the 12th December, 2011, founded the bankruptcy decision. I am satisfied that this is not relevant. I agree with, and would apply, the analysis in *Heath v. Tang* [1993] 4 All ER 694 where Hoffmann L.J. stated at p. 700:-

*'Is there anything different about the judgment upon which the bankruptcy petition was founded? It is submitted that the difference is that in such a case the bankrupt does have an interest, because if he can get rid of the judgment he may be able to have the bankruptcy order annulled on the ground that it should never have been made. Whether it is set aside or not will depend upon whether apart from the judgment the bankrupt would have been solvent or whether an order would in any event have been made on the application of supporting creditors: see *Re Noble* (a bankrupt), ex p the bankrupt v Official Receiver [1964] 2 All ER 522, [1965] Ch 129. On the other hand, it may equally be said that if only the bankrupt could pursue a claim for a large sum which he claims to be owing to him he would be able to pay all his creditors and have the bankruptcy annulled on that ground. It is clear, however, that this is not a ground upon which he may bring proceedings. Furthermore, an exception for the petitioner's judgment would give rise to anomalies in cases in which the defence was a claim of set-off, such as the applicant Mr. Heath asserts in this case.'*

45. The appellants have made submissions raising issues of objective bias of the High Court judge, and fraud in relation to the parties. On these issues I agree with the analysis of Hoffman L.J. in *Heath v Tang* where he stated at p. 701.

*'[The bankrupt] criticises the conduct of the trial and contends that the decision against him was obtained by false evidence and fraud. The trustee does not wish, or is not in a position, to pursue the appeal. In my judgment [the bankrupt] has no locus standi to do so and his application must be refused.'*

The fundamental principle in law is that the right to litigate is vested in the Official Assignee and it is for him to decide whether to litigate or not.

46. Accordingly, in this case the right to seek an extension of time for leave to appeal vests in the Official Assignee. The appellants have no locus standi.

47. The Official Assignee has indicated that he does not intend to proceed with this appeal.

48. Consequently, I would dismiss the application of the appellants on the grounds that they do not have locus standi to bring the motion."

8. Thus the application issued by the Bankrupts in July, 2014 for leave to extend time to appeal the order of 12th December, 2011, has been dismissed by the Supreme Court.

9. In response to this decision, the Bankrupts sought belatedly to mend their hand by addressing the issue of locus standi. They requested the Official Assignee to assign the chose in action to them so that they could lodge a motion to extend time to appeal before the Supreme Court and pursue the appeal if successful. The Official Assignee did not agree to assign the chose in action and accordingly the Bankrupts brought a notice of motion where they each sought the following orders:-

"1) That the Official Assignee shall permit the Applicants lodge a motion to extend time to appeal before the Supreme Court against the Judgment Order of 12th December 2011 (perfected 14th December 2011) and the appeal if successful;

2) And/or in the alternative the Official Assignee shall assign the chose in action regarding the Judgment Order of 12th December 2011 (perfected 14th December 2011) to the Applicants so that they may lodge a motion to extend time to appeal before the Supreme Court and pursue the appeal if successful".

10. It is thus clear that the purpose of the motion before this Court is to enable the Bankrupts to bring a new motion before the Supreme Court to extend time to appeal the judgment of 12th December, 2011.

11. At the hearing of the motion the Bankrupts argued that the Supreme Court merely determined that they lacked locus standi to pursue the litigation due to their bankruptcies. If the Official Assignee conducted the litigation he would have locus standi or, in the

alternative, if he assigned the chose in action to them they would have locus standi. Either way, a new application could then be brought before the Supreme Court for leave to extend time in which to appeal and, if successful, to conduct the appeal.

12. This is impermissible and is based on a misunderstanding of the judgment and order of the Supreme Court. The issue of locus standi was the ground upon which the Supreme Court reached its decision but the decision itself was to dismiss the application to extend time for leave to appeal. Thus, the issue whether there should be an extension of time in which to appeal the judgment and order of the High Court has been determined by the Supreme Court whether the motion is brought by the Official Assignee or the Bankrupts. Even if the Bankrupts subsequently acquired the required locus standi by the assignment of the summary summons proceedings to them, it is not now open to them to bring the self same application before the Supreme Court again. To do so would amount to an abuse of process. It follows that any relief granted pursuant to the notice of motion would serve no purpose. I therefore refuse the application and dismiss the notice of motion.

13. As it is not necessary for my decision to consider whether or not to make an order pursuant to either ss. 61(7) or 71 of the Bankruptcy Act 1988, I have not dealt with the arguments raised by the parties on these issues and leave the issues raised to be determined on another occasion.