JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 76/99

MOTION

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A.**
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	**JOHN MORGAN**	**DEFENDANT/APPELLANT**
A N D	**PREMIUM FINANCE LTD.**	**PLAINTIFF/RESPONDENT**

Nancy Anderson instructed by **Crafton Miller & Co.** for appellant

A.J. Dabdoub instructed by **Clough, Long & Co.** for respondent

February 28, 29, and March 3, 2000 and May 16, 2002

LANGRIN, J.A:

This is a motion to strike out the appeal of the defendant/appellant against the order of Ellis J, granting Specific Performance of an agreement.

On March 3, 2000 we struck out the defendant's appeal and promised to put our reasons in writing. We now give our reasons for doing so.

The facts upon which the question before us arises are shortly stated that the defendant/appellant and his common law wife are the

shareholders of C.J.'s Rent-a-car Ltd., (hereinafter called "C.J.'s). The latter is indebted to the plaintiff company. The amount of that indebtedness remains a disputed fact. In consequence of the debt remaining unsatisfied, the plaintiff company obtained an order to wind-up C.J.'s. That order was made by the Supreme Court on the 16th May, 1996 and upheld by the Court of Appeal on the 30th October, 1996. The Trustee in Bankruptcy was then appointed provisional liquidator.

Subsequently, negotiations began between the plaintiff/company and the liquidator which resulted in two agreements dated:

1. March 1997 (Exhibit 13); and
2. August 1997 (Exhibit 2)

Exhibit 13 purported to transfer certain parcels of lands and a Mercedes Benz motor car to the plaintiff company, as contained in the schedule thereto. The assets contained in the schedule were subsequently replaced with four other properties. This agreement, though undated, was signed by the defendant and bears the seal of C.J.'s Limited: (Exhibit 13).

A new agreement was later concluded (Exhibit 2) which incorporated some terms of the first agreement (Exhibit 13). This new agreement was however, not signed by the defendant; in fact, the defendant denies any knowledge of this document.

The defendant maintains that he is not personally indebted to the plaintiff company and admits that C.J's is the entity that owes the money.

On the 7th December, 1998 the defendant/appellant was provisionally declared a bankrupt by an order of the Supreme Court. A copy of the order was served on the appellant on 7th January, 1999.

The plaintiff company therefore brought an action to obtain specific performance of the agreements for sale. However, this claim failed because it was not a party to the agreement. Therefore, the learned trial judge allowed an amendment to the statement of claim on the 17th November, 1998. The effect of the amendment was to enable the plaintiff company to seek specific performance of both exhibits 13 and 2.

At the trial, the Trustee in Bankruptcy, said that when he embarked on the liquidation of C.J.'s, he discovered that the assets of the company were insufficient to satisfy the debt owing to the plaintiff company. The Trustee made arrangements to sell parcels of land which belonged to C.J.'s, but the defendant refused to sign the agreements for sale. It should be noted that the agreements for sale were drafted pursuant to Exhibit 2 which was not signed by the defendant.

On the 27th day of May, 1999 the learned trial judge ordered that the plaintiff company was entitled to specific performance of the

agreements. He further ordered that if, for any reason, specific performance became unachievable, then the plaintiff company was to have damages in the amount of $12,250,000.00.

The defendant filed a Notice of Appeal against the said judgment on the 28th day of June, 1999. Since that application was out of time the defendant/appellant made an application to extend time within which to file record of appeal by 12 weeks from the date of the summons which was the 4th day of January, 2000.

The plaintiff/respondent then filed Notice of Motion dated the 24th January, 2000 asking that the defendant's appeal be struck out.

On the 18th day of February, 2000, the defendant/appellant by his attorney-at-law, Nancy Anderson instructed by Crafton Miller & Company filed an affidavit. The affidavit purported to show that Mr. Ransford Braham of Livingston, Alexander & Levy has made an application for the provisional order and the Bankruptcy order to be set aside in the Supreme Court. This was to be heard on the 30th day of March, 2000 and the Court of Appeal was asked to dismiss the respondent's motion or adjourn it until after the matter of the defendant's bankruptcy has been determined in the Supreme Court.

Miss Anderson, counsel on behalf of the appellant made the following submissions. In the Bankruptcy Act, property includes things or choses. A chose in action is defined in the eighth edition of Osbourn's

Concise Law Dictionary as a right of proceeding in a court of law. Section 42 of the Act then states that when a provisional order has been made against a debtor, the property of the debtor shall immediately vest in the Trustee. Section 84 of the Act further states that the Trustee may bring, institute or defend any action or other proceeding relating to the property of the debtor.

She argued that this particular appeal should not be included in the definition of property. The case of ***Rose v Buckett*** [1901] 2 K.B. 449 is cited in support of the above proposition. In that case, an action for trespass and conversion of goods was brought by the plaintiff who was also a bankrupt. It was held that upon the bankruptcy of the plaintiff, the right of action did not pass to his trustees in bankruptcy. Cotton L.J. said, in his judgment, that the proper construction should be that the statute does not transfer all rights of action which would pass to an executor but only assets. Rights of action or choses in action are deemed personal estate, and would not pass to the trustee.

The case referred to above cannot in my view properly be relied on in light of the clear provisions of the Bankruptcy Act.

In the alternative, she asks the Court of Appeal to:

(a) substitute the trustee for the appellant; or

(b) add the trustee as a co-appellant

She cited the case of ***Gooroochaum Sein v R.*** [1857] 14 E.R. 623 as an instance where (a) was adopted. Similarly in ***Ewan v Clarke*** 17 Ch.D. 169 (as referred to in ***Bailey v Thurston & Company Ltd.***) [1902] 1K.B137), the trustee was added as a co-plaintiff and given conduct of the action, as in (b).

Mr. Dabdoub on behalf of the respondents sought to strike out the appeal based on two grounds:

(1) That at the time for the filing of the Notice and Grounds of Appeal, the appellant/defendant had no *locus standi*

(2) That the appellant/defendant has failed to file the record of appeal within the prescribed time.

Regarding ground 1, the respondent says that from the date of the provisional order for Bankruptcy, the appellant ceased to have *locus standi* in the matter.

The respondent contends that the appellant knew of the provisional order, as it was served on him on the 7th day of January, 1999 and if he wished to appeal he should have engaged the trustee, instead of attempting to conduct the matter personally.

To support the fact that the appellant had no *locus standi,* two cases were cited. The first of which was ***Weddell and Another v. J. A. Pearce and Major*** [1987] 3WLR 592. There it was decided that as a consequence of the plaintiff's bankruptcy, his cause of action in

negligence became vested in law in his trustee in bankruptcy without any need for written notice of the bankruptcy to be given to persons subject to the choses in action. The second case was ***In Re Wolverhamption Steel and Iron Company Ltd.*** [1977] 1 WLR 860 which reiterated the *ratio decidendi* of the former case.

Counsel for the respondent adverted to the request of the appellant to stay the proceedings until the application in the Supreme Court to revoke the provisional order is determined. He argued that the appellant had no *locus standi* at the time for filing the Notice and Grounds of Appeal. Further, any subsequent restoration of his *locus standi* cannot have a retroactive effect or bestow a right retroactively which he could not have had at the material time.

In the alternative, the respondents asked that the appeal be struck out as a result of the appellant's failure to file the record within the prescribed time.

The English Court of Appeal in ***Heath v Tang and Another*** [1993] 1 WLR 1421 provides support for the respondent's submission. The case concerned an applicant who had been adjudged bankrupt. The trustee in bankruptcy indicated his unwillingness to pursue an appeal on his behalf. In consequence, the appeal was brought by the bankrupt who was held to lack the *locus standi* so to do. Hoffman L.J. said in his judgment that the property which vests in the trustee includes "things in

action", which reiterates the point in section 42 of the Bankruptcy Act. There are however, exceptions to this broad statement, as was noted by the learned judge. The exception includes cases where damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body. Bankruptcy would not affect his ability to litigate claims in defamation and assault, for example. 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 the trustee. The instant case, where the appellant seeks to contest liability for a liquidated sum, would be one such cause of action which should properly vest in the Trustee in Bankruptcy.

CONCLUSION

The relevant principles in this area of the law are summarized as follows:

1. All rights of action which relate directly to the bankrupt's property and can be converted into assets for the payment of debts pass to the trustee; and
2. Where a cause of action arises from the bodily or mental suffering of the bankrupt or from injury to his person or reputation, then the right of action remains within the bankrupt.

The respondent's submissions accord with the summarization of the relevant principles. We therefore acceded to the respondent's request to

strike out the appeal rather than allow an amendment so that the trustee could be added or substituted as co-appellant. Accordingly, the appeal is struck out.

There will be costs to the respondent to be agreed or taxed.

DOWNER, J.A.

I agree.

HARRISON, J.A.

I agree.