Neutral Citation Number: [2014] EWCA (Civ) 681

Case No: A2/2011/0066

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr J Bowers QC (sitting as a Deputy Judge)
[2010] EWHC 3085 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2014

Before:

LORD JUSTICE MAURICE KAY
(VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
LADY JUSTICE RAFFERTY
and
LORD JUSTICE FLOYD

- -

Between:

RAJESH PATHANIA	**Claimant/ Respondent**
- and -	
(1) EDMOND ADEFOLU ADEDEJI	**Defendants/ Appellants**
(2) GRACE ADEBOLA AJAYI	
- and -	
BANK OF SCOTLAND PLC	**Intervener**

- -
- -

Carlton Christensen (instructed by **Grayfield Solicitors**) for the **First Appellant**
Steven Gasztowicz QC (instructed by **Thames Chambers Solicitors**) for the **Respondent**
Nicholas Broomfield (instructed by **Walker Morris**) for the **Intervener**

Hearing date: 7 May 2014

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Approved Judgment

Lord Justice Floyd:

Introduction

1. This is an appeal from the judgment of Mr J. Bowers QC sitting as a deputy judge of the Queen's Bench Division dated 17 December 2010, and from his consequential order. The claim before him was for repayment of sums of money lent by the claimant and respondent, Mr Rajesh Pathania, at the time a solicitor in the firm of Newland Solicitors, to the first appellant and first defendant, Dr Adedeji, for the purposes of enabling Dr Adedeji to discharge his mortgage liability in respect of a property at 99 Winsor Terrace, London E6. The judge ordered Dr Adedeji to pay to Mr Pathania the sum of £230,558.98 together with interest to the date of judgment of £55,132.02.

2. Unknown to the judge, a bankruptcy order was made against Mr Pathania on 29 June 2010, at a time when the proceedings against Dr Adedeji had been pending for nearly two years, but some six months before judgment. The issue in the appeal is concerned with the effect, if any, which Mr Pathania's bankruptcy has on the judgment which he went on to obtain. There is now no challenge to the judge's judgment on the issues which were before him. Dr Adedeji contends that we should nevertheless set the judgment aside because of what he contends to be the effect of the bankruptcy on the subsequent judgment.

3. The Bank of Scotland ("the Bank") has been given permission by an earlier order to intervene in the proceedings. The Bank contends that it loaned money to Mr Pathania with which he made good the depletion of the Newland Solicitors client account from which Mr Pathania had taken or borrowed the money which he used to effect the loan to Dr Adedeji. The Bank claims to be entitled to recover this money from Mr Pathania and also to be subrogated to charges on the property. The only relief which the Bank asks for on this appeal is that any money recovered by Mr Pathania is paid into court to await the outcome of the Bank's pending claims. Mr Pathania did not oppose that relief. The Bank is neutral as to the outcome of the appeal.

The statutory framework

4. On the making of a bankruptcy order the official receiver is appointed receiver and manager of the bankrupt's estate. His estate does not thereupon vest immediately in the official receiver. This reflects the terms of section 287(1) of the Insolvency Act 1986 ("the 1986 Act"):

> "Between the making of a bankruptcy order and the time at which the bankrupt's estate vests in a trustee under Chapter IV of this Part, the official receiver is the receiver and … the manager of the bankrupt's estate and is under a duty to act as such."

5. The bankruptcy order in the present case reflected the terms of section 287. It said:

> "The/One of the/ official receiver(s) attached to the Court is by virtue of this Order Receiver and Manager of the Bankrupt's estate."

6. By section 293 of the 1986 Act, the official receiver is under a duty (subject to defined exceptions) within twelve weeks of the date of the bankruptcy order to decide whether to summon a general meeting of creditors for the purpose of appointing a trustee. If he decides not to do so, he must within the same period give notice of that decision (not to call a meeting) to all creditors known to him and to the court. The consequence of giving such a notice is that the official receiver becomes the trustee of the bankrupt's estate.

7. Section 306(1) of the 1986 Act (which is in Chapter IV) is in the following terms:

> "The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee."

8. The bankrupt is, however, not free to deal with his property as he wishes before the trustee is appointed. Section 284 of the 1986 Act renders void all dispositions of the bankrupt's property in the period between the presentation of the petition and the vesting of his estate in the trustee. Section 284(1) is in the following terms:

> "Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court."

9. It is also relevant to have in mind the terms of section 285, in particular section 285(3), of the 1986 Act which protects the bankrupt against proceedings brought against him:

> "(1) At any time when proceedings on a bankruptcy petition are pending or an individual has been adjudged bankrupt the court may stay any action, execution or other legal process against the property or person of the debtor or, as the case may be, of the bankrupt.
>
> (2) Any court in which proceedings are pending against any individual may, on proof that a bankruptcy petition has been presented in respect of that individual or that he is an undischarged bankrupt, either stay the proceedings or allow them to continue on such terms as it thinks fit.
>
> (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall—
>
> (a) have any remedy against the property or person of the bankrupt in respect of that debt, or
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except

> with the leave of the court and on such terms as the court may impose."

10. In *Heath v Tang* [1993] 1 WLR 1421 the Court of Appeal heard two applications for permission to appeal in cases where the appellant had been adjudicated bankrupt. Hoffmann LJ explained that, in contrast to the position before the Judicature Acts, the modern position was that where a bankrupt was claimant and his estate was vested in a trustee, the action did not abate but the action would be stayed unless the trustee was willing to be substituted as claimant. Where the bankrupt is defendant, no question of any cause of action passing to the trustee arises, but the effect of section 285(3) of the 1986 Act is that no person has any remedy against the bankrupt's person or property other than his right to prove in the bankruptcy. Such actions would therefore also normally be stayed.

11. In the first case a Mr Heath was found liable for a sum in excess of £33,000 on a counterclaim and was subsequently adjudicated bankrupt. Although he wished to appeal, his trustee did not. The Court of Appeal held that he had no *locus standi* to appeal in his own right. In the second case Mr Stevens was liable under the terms of a costs order and was then adjudicated bankrupt. No trustee had been appointed, but on that point the Court of Appeal said:

> "we do not think this matters. Section 285(3) made the costs order unenforceable against Mr Stevens personally as from the date of the bankruptcy order. He therefore had no interest in challenging that order. In any case, the appointment of a trustee is inevitable and it would be pointless to give leave to bring an appeal which would be stayed on his appointment."

12. Those two conjoined cases were concerned with giving permission for further proceedings where the bankruptcy has deprived the bankrupt of any legitimate interest in the further proceedings. In *Pickthall v Hill Dickinson and another* [2009] EWCA Civ 543 (unreported 11 June 2009) this court was concerned in part with preventing a litigant from taking a benefit from a past abuse of the court's process by litigating a cause of action which the litigant knew he did not possess. Mr Pickthall commenced negligence proceedings against solicitors at a time when he knew he did not have a cause of action, but hoped that he would obtain one by assignment from the official receiver who had become trustee of Mr Pickthall's estate. Mr Pickthall had issued proceedings without the benefit of the assignment because of the imminent expiry of the limitation period. The Court of Appeal held that to be an abuse of process, notwithstanding the intention to acquire the cause of action. Mann J (with whom Thomas and Laws LJJ agreed) said, at [15] and [22]:

> "In my view the starting point is that where a man starts proceedings *knowing that the cause of action is vested in someone else*, then it is hard to see why those proceedings are not an abuse. He has started proceedings in which, even if he proves all the facts he wants to prove and establishes all the law he wants to establish, he will still lose because he does not have a right to sue. It is hard to see how that cannot be an abuse. Only people who own causes of action, or who have an appropriate interest in proceedings, have any business asserting

> the cause of action or starting proceedings. Any other use of the court's proceedings is improper. The position would be likely to be otherwise if the claimant does not know, or is uncertain, as to whether he has title to the relevant cause of action. In those circumstances, at least until it is authoritatively determined that the claimant does not own the cause of action, it may well not be appropriate to characterise the proceedings as an abuse, but that is different from the case currently under consideration.
>
> "… the claimant is the wrong person to assert the cause of action *and knows that he is*. The proceedings could immediately be subject to an irresistible application to strike out, precisely for that reason. If those are the only facts the conclusion that the proceedings are an abuse is inevitable." (my emphasis).

13. The court also refused permission to amend to plead the subsequent assignment. This was because:

> "a permitted amendment would not so much cure the abuse of process as be a reward for it."

Mr Pickthall could therefore not pursue his negligence claim at all, as it was common ground that a fresh action would be statute barred.

14. We were also referred to *Thames Chambers Solicitors v Azad Miah* [2013] EWHC] 1245 (QB) (unreported 16 May 2013) in which Tugendhat J had to consider an appeal from a wasted costs order made in other proceedings which involved Mr Pathania. Mr Pathania had issued a claim for a sum of £23,000 in debt some four weeks before he was declared bankrupt in June 2010. Those proceedings continued for some time, but the defendant's solicitors did not discover that he was bankrupt until February 2012, and thus until after he had been discharged. The defendant applied to strike out the proceedings. A recorder made an order that the action be struck out unless the trustee consented to the continuation of the action. The trustee assigned the cause of action to Mr Pathania, but did not consent to the action being continued in his name. The defendant then applied for and obtained a declaration that the action stood struck out in accordance with the provisions of the order made by the recorder: an assignment of the cause of action from the trustee was not the same thing as the trustee's consent which the recorder's order had by its terms required. Tugendhat J upheld the wasted costs order, because the solicitors ought to have known that the bankrupt's estate vests in a trustee, and were therefore acting improperly, unreasonably or negligently, as CPR 48.53 requires.

15. Where a bankrupt is commencing or pursuing a claim which he knows he does not have, the abuse of process in commencing or pursuing that claim is obvious. No claimant is entitled to sue on a right which he knows belongs to someone else. The abuse lies in knowingly pursuing a claim which, as presently constituted, is bound to fail. The abuse does, however, depend on actual knowledge of the lack of title to the cause of action, not on what he or she ought to have known.

16. Nevertheless, where an action is commenced or continued after the cause of action has vested in a trustee in bankruptcy, the action does not abate and the position is capable of being regularised by the joinder of the trustee or by the taking of an assignment from him. Whether the court will permit that to happen will involve an exercise of discretion. It will be necessary to have regard to the interests of those likely to be affected, including the creditors in the bankruptcy. The court would be likely to stay the action until the position in the bankruptcy is clarified.

The facts

17. Dr Adedeji is a doctor, whom the judge described as a highly sophisticated man. He owned, or at some time owned, a number of houses, one of which was 99 Winsor Terrace. He had originally bought that property from the second appellant, Mrs Ajayi, a friend of his who was a nurse. He bought it with the assistance of a mortgage from a building society. At the end of 2006 the building society was granted a suspended possession order, which Dr Adedeji subsequently breached. The building society took possession of the property but gave Dr Adedeji a period of time to sell the property back to Mrs Ajayi.

18. Dr Adedeji approached Mr Pathania who at the time was a solicitor at the firm Newland Solicitors. The judge found that Dr Adedeji agreed with Mr Pathania that Mr Pathania would lend Dr Adedeji money to redeem the mortgage, the property would be sold to Mrs Ajayi, and the money loaned to redeem the mortgage would be repaid to Mr Pathania from the proceeds of sale. The loan to Dr Adedeji was made the subject of a promissory note.

19. Although the sale to Mrs Ajayi went through, Dr Adedeji did not repay the loan he had received from Mr Pathania which had enabled him to discharge his mortgage. The action was accordingly commenced on 19 September 2008, naming Dr Adedeji as defendant. He defended the action on the grounds that he had been induced to sign the loan documents by undue influence in circumstances where Mr Pathania, who was advising him in relation to the loan, was in a fiduciary relationship to him. Dr Adedeji said that he was not afforded a reasonable opportunity to read the documents or discuss the terms of repayment. The judge rejected the defence except (partially) in relation to a claimed arrangement fee, and there is no longer any challenge to those conclusions.

20. Mr Pathania had described himself in his witness statement dated 1 September 2010 as a "non-practising solicitor". By the time of trial the judge had been made aware that his firm, Newland Solicitors, had been intervened in by the Law Society in June 2009. Mr Pathania's practising certificate had been suspended pending investigation and he was struck off the roll on 22 September 2010. In his oral evidence he had told the deputy judge that he had not "renewed his practising certificate". The judge, who was made aware of the true position, naturally regarded that as a tendentious and partial account and treated Mr Pathania's other evidence with caution as a result.

21. The second appellant, Mrs Ajayi, was the purchaser of the property at 99 Winsor Terrace from Dr Adedeji. Her involvement in the action was obscure. Although named as such, it would seem she may not have been properly joined as a defendant. The judge's costs order required Mr Pathania's costs to be paid (as to 95%) "by the First and Second Defendants", thus making Mrs Ajayi jointly and severally liable for

all Mr Pathania's costs. She has successfully appealed against that order, and I need say no more about that aspect of the case.

22. Dr Adedeji did not initially appeal against the judge's order at all. However by a notice dated 4 August 2011 he sought permission to appeal for himself. He did not at that stage challenge the judgment of the judge on the merits of the defence of undue influence. However he had by this time discovered that Mr Pathania had been adjudicated bankrupt on 29 June 2010, that is to say at a time between the issue of the proceedings against him but some six months before the entering of judgment.

23. Dr Adedeji's grounds of appeal alleged that, under the 1986 Act, a bankrupt claimant cannot maintain legal proceedings under his own name, but must appoint a trustee in bankruptcy. This would, according to Dr Adedeji, only change if the court orders otherwise. As there was no such order, and as Mr Pathania had not disclosed the bankruptcy order either to Dr Adedeji or to the court, Mr Pathania "lacked the capacity" to continue with the action in his own name. His lack of capacity would vitiate the outcome of the proceedings.

24. Dr Adedeji supported his grounds of appeal with a witness statement dated 12 June 2011, a skeleton argument dated 12 July 2011 and a document signed by him on 11 August 2011 headed "Fresh Evidence". These documents were all prepared by him as a litigant in person. In his skeleton argument Dr Adedeji said that the fact of Mr Pathania's bankruptcy had come to light in March 2011 during the case management conference on Mr Pathania's claim in the Chancery Division for rectification of the register. The bankruptcy registrar had pointed out that a bankruptcy order was made on 29 June 2010 and had stayed the rectification claim until Mr Pathania "*either appoints a trustee in bankruptcy or discontinues the claim*". The skeleton argument went on to repeat the arguments in the grounds of appeal that a bankrupt does not have legal capacity to continue with an action. He cited *Heath v Tang, Stevens v Peacock* [1993] 1 WLR 1421 (see above) in support of his argument.

25. In his witness statement and the document entitled "Fresh Evidence" Dr Adedeji said that he was made aware in April 2011 of the fact that Mr Pathania was an undischarged bankrupt. It would seem to be a fair inference that he learned of this from Ms Ajayi or her solicitors who were involved in the rectification claim.

26. On 19 August 2011 Hughes LJ (as he was then) made a directions order in Dr Adedeji's application for permission to appeal. At paragraph 7 of his directions he said that Dr Adedeji's sole proposed ground of appeal was "*that he contends that Mr Pathania became bankrupt on or about 29 June 2010, long after the action had been begun but six months or thereabouts before the trial*." Hughes LJ went on to say that the effect of the bankruptcy was not to bring the action to an automatic end. Hughes LJ appears to have assumed that a trustee in bankruptcy had been appointed. Thus, citing *Heath v Tang*, he said that the trustee in bankruptcy would have been able to take over the action, control it and take the benefit of it. It was very likely (if not inevitable) that the trustee would have adopted the action and judgment. Although there might be a question as between Mr Pathania and his trustee and creditors, it seemed unlikely that there were any grounds for setting aside the judgment against Dr Adedeji.

27. Hughes LJ did not, however, refuse permission to appeal at that stage. He directed that Dr Adedeji obtain a copy of the bankruptcy order and serve it on the court and the other parties, and that he notify the trustee in bankruptcy of the action and judgment. Mr Pathania was to notify the court and the other parties of the status of his bankruptcy, what exactly were the bankruptcy proceedings against him, what was their status at trial and their status now. He was to identify his trustee, state whether or not the trustee was told of the action or judgment, and what decision his trustee made about it. The trustee was also directed to make his position known.

28. Dr Adedeji filed a further submission dated 11 September 2011 in response to Hughes LJ's directions. He submitted that it was not automatic that the trustee would have adopted the claim in June 2010. He might have declined to do so in the light of the costs of the litigation and the risk of losing. Dr Adedeji had been denied the opportunity of taking advantage of this situation, because he had not known of the bankruptcy order.

29. Dr Adedeji also sought to raise a further issue not canvassed before the judge, related to the way in which Mr Pathania financed the loan to Dr Adedeji. That point is no longer pursued.

30. The trustee, Mr Nigel Fox, made a witness statement dated 27 September 2011 in response to Hughes LJ's directions. In paragraphs 7 and 8 of Mr Fox's witness statement he records the fact of the bankruptcy order, produces a copy of it and records that he was appointed as trustee for Mr Pathania on 14 April 2011 with effect from 19 April 2011. That date is of course more than four months *after* the judgment was entered.

31. Mr Fox stated that his position was in summary, and so far as material to Dr Adedeji's appeal, that:

    i) he opposed Dr Adedeji's application for permission to appeal and any appeal attendant upon that application;

    ii) he asked to be joined to the proceedings in his capacity as trustee in bankruptcy for Mr Pathania in order to maintain that position and so that he could enforce the judgment for the benefit of Mr Pathania's estate;

    iii) he asked for the judge's order to be varied so as to make any sums due under the judgment payable to him.

    In paragraph 13 of his witness statement Mr Fox said that he adopted the proceedings in his capacity as trustee for Mr Pathania.

32. Mr Pathania's response to Hughes LJ's direction is contained in a document signed by him on 30 September 2011. As Mr Christensen, who appeared for Dr Adedeji, pointed out, the document does not carry a statement of truth. Whilst that is true, it has been available to Dr Adedeji since that time. In the document Mr Pathania confirms that he was made bankrupt on 29 June 2010, that he remained bankrupt at the time of the trial but that he obtained his automatic discharge on 29 June 2011. He identified, by name, address and reference number the individual at the Insolvency Service who was "his official receiver". He alleged that on 2 November 2010 he had

notified his official receiver of the trial that would be taking place in December 2010. He alleged that the official receiver had said he could continue with the case and he took no further interest in it.

33. Mr Pathania had proposed an individual voluntary arrangement ("IVA"). The IVA was not accepted by the requisite majority of the creditors at a meeting on 25 November 2010. However in support of the IVA Mr Pathania signed a statement of affairs which is dated 1 November 2010 which lists the claim against Dr Adedeji in a list of debtors, and gives the trial date of the claim as December 2010. In addition, at a hearing on 5 November 2010 Mr Pathania's public examination was adjourned without him being called. The transcript of that hearing records that Mr Pathania had met with the official receiver on 3rd November and shows that the official receiver was aware of the IVA proposal.

34. On 25 October 2011 the papers came back before Hughes LJ who refused Dr Adedeji permission to appeal. His reasons were that the non-disclosure created issues between Mr Pathania and the trustee but did not affect the judgment. He gave the trustee permission to intervene in any renewal by Dr Adedeji of his application.

35. The renewed application foreshadowed by Hughes LJ's direction came before a full court on 19 March 2012. The court adjourned the application indicating that there were a number of matters which required elucidation. Black LJ listed them in her judgment. So far as material these were:

    i) What is the present status of the bankruptcy: is Mr Pathania still bankrupt or not?

    ii) Was he automatically discharged after one year?

    iii) If so what impact did this have on his property and his right in particular in relation to the proceedings?

    iv) What satisfaction have the creditors received in the bankruptcy?

    v) Was the Official Receiver notified of the action, as the claimant alleged, in a document filed in September of 2011?

    vi) Was the claim against Dr Adedeji assigned to the claimant by the OR as the claimant alleged?

    vii) What does the trustee want to do about this claim? Does he want to pursue the sum owed under the judgment by seeking to uphold the judgment on appeal notwithstanding the alleged irregularities in procedure?

    viii) What are the legal authorities on what happens to a claim in circumstance such as this?

36. Following this judgment the court office wrote to the parties seeking their responses to those questions. On 31 May 2012 solicitors for the trustee wrote to say that they had sought confirmation of the official receiver's position in writing on two occasions, once in November 2011 and more recently in May 2012 but had received no response. The trustee had not been aware of any assignment by the official receiver

of Mr Pathania's claim. Nevertheless the trustee was considering an assignment of the claim to Mr Pathania. He explained that such assignments were often entered into within bankruptcies. He explained that he would have to be satisfied that the consideration he was receiving was appropriate.

37. Subsequently, by a deed of assignment dated 27 September 2012, and thus after the end of his bankruptcy, the trustee assigned to Mr Pathania for the sum of £5000 such rights as the trustee had in the cause of action against Dr Adedeji. Also on 27 September 2012 the solicitors for the trustee wrote to Dr Adedeji's solicitors to explain that the claim (which it defined as the claim which Mr Pathania had against Dr Adedeji before the bankruptcy) was "*believed to have vested in the trustee pursuant to section 306 of the [1986] Act*". They explained that, to the extent that the claim had vested in the trustee, it had been assigned in totality to Mr Pathania. The trustee therefore had no further interest in the proceedings.

38. Mr Pathania's response was contained in a letter dated 27 September 2012 from his solicitors. The letter repeated the facts that the bankruptcy order had been made on 29 June 2010 and that the trustee had been appointed on 14 April 2011. Finally it recorded the details of the assignment of the claim back to him by the 27 September assignment.

39. The operative clause of the deed of assignment is as follows:

> "2. In consideration of the sum of £5,000 paid by the Assignee to the Assignor …. the Assignor hereby assigns and transfers absolutely to the Assignee such right, title and interest as the Assignor may have in and to the Cause of Action howsoever arising including:
>
> > 2.1.1 such rights as the Assignor may have to pursue the Cause of Action in respect of monetary sums claimed whether for debt, interest, costs or howsoever otherwise arising against the Defendants; and
> >
> > 2.1.2 such rights as the Assignor may have to recover and receive from the Defendant all sums of money and/or property and/or benefits as shall be awarded to be due after the date of this deed."

40. The recitals to the agreement record the following as regards the Cause of Action:

> "Prior to the making of the Bankruptcy Order the Assignee had or may have had a claim against Mr Edmond Adedeji and Ms Grace Ajayi ("the Defendants") in respect of an unpaid loan and arrangement fee, as more particularly detailed in Claim No. HQ08X3673 in the Queens Bench Division and also under reference A2/2011/0066/A+B proceeding in the Court of Appeal ("the Cause of Action") which is accordingly believed at the date of this deed to be vested in the Assignor."

41. Ultimately, on 13 June 2013, Dr Adedeji applied for his renewed application for permission to appeal to be restored for oral hearing. In a letter dated 12 July 2013, his solicitors made it clear that the sole ground relied on was Mr Pathania's bankruptcy during the High Court proceedings. Citing a number of the authorities referred to above, they submitted that as the official receiver "*acted in the same capacity as his trustee*" and had not taken over the action, Mr Pathania ought to have disclosed his bankruptcy and the action would have been dismissed.

42. A skeleton argument dated 29 July was filed by counsel on behalf of Dr Adedeji. The skeleton asserted at paragraph 4 that the claim vested in Mr Pathania's trustee on 29 June 2010, that is to say on the making of the bankruptcy order. That of course is wrong. At paragraph 10, it repeated the assertion that the trustee had expressly declined to be substituted. Thus Mr Pathania should have disclosed his bankruptcy and the claim should have been dismissed.

43. The oral hearing of Dr Adedeji's application for permission to appeal came before Patten LJ on 6 November 2013. Counsel appeared for Dr Adedeji and the Bank, but not, in accordance with the usual practice, for Mr Pathania. The attention of Patten LJ was not drawn to the question of when precisely the cause of action vested in the trustee. Whilst he recognised there were arguments on both sides, he gave permission to appeal.

44. In his skeleton argument on behalf of Mr Pathania on the appeal Mr Gasztowicz QC submitted that as the action had not abated on Mr Pathania's bankruptcy the judgment was regular and should not be set aside. He submitted that the appeal depends on fresh evidence, and Dr Adedeji could not satisfy the test for the admission of such evidence. Thus Dr Adedeji could have discovered the fact of Mr Pathania's bankruptcy, as it was a matter of public record.

45. Mr Gasztowicz goes on to submit that until the appointment of a trustee in bankruptcy the bankrupt is not divested of his assets. The official receiver is simply the receiver and manager of the estate until either he or another trustee is appointed as such. He submitted that as the trustee was not appointed until after judgment, judgment was entered at a time when the cause of action remained vested in Mr Pathania.

46. Mr Gasztowicz's skeleton is dated 27 January 2014 and is stamped received by the court the following day. There was a dispute which we cannot resolve about whether it was sent at the same time to Dr Adedeji's solicitors. It was, however, included in the bundle sent to Dr Adedeji's solicitors at the end of March or beginning of April, at least a month before the hearing of the appeal. This does not appear to have shaken anyone into action on the part of Dr Adedeji until very shortly before the hearing of the appeal.

47. Thus it appears that on 1 May 2014 Dr Adedeji's solicitors wrote to the Official Receiver's Office, and that office replied on 2 May. Their reply explained that the official who had dealt with the file had left the Insolvency Service. The file had not yet been recalled from storage, but the information on the system apparently indicated that the official receiver was appointed trustee on 28 August 2010. He did not at this stage explain how he thought that this had occurred. The letter also contains this:

> "Having attended the interview [in November 2010] with the Official Receiver, Mr Pathania planned to apply for IVA to be set up and when agreed, then to pursue an annulment. No appointment was made at a meeting of creditors for the purpose of agreeing his IVA proposal to pursue an annulment on the grounds of an IVA being approved on 25th November 2010 (*sic)*. The Official Receiver then made an application for a Secretary of State appointment on the grounds that creditors ... agreed to the appointment of Nigel Ian Fox …"

48. It appears that Mr Pathania's solicitors also wrote to the Official Receiver's Office on 2 May 2014. A reply was received on 6 May 2014. The reply states that a report to creditors was issued to all creditors in the bankruptcy on 23 August 2010. It continues:

> "As there was no meeting of creditors or appointment of a private sector insolvency practitioner, the Official Receiver became the Trustee of your client's bankrupt estate."

49. The letter went on to confirm the later appointment of Mr Fox as trustee in April 2011 and asserted that on this occurrence the official receiver was no longer the trustee. The letter attached a report to creditors which does not bear a date, but merely the words "[insert date of RTC]" i.e., according to the covering letter, 23 August 2010. Paragraph 7 of the report stated:

> "As a result of the issue of the notice of no meeting attached, I am trustee of the bankruptcy estate."

We have not been provided with the "Notice of no meeting" said to be attached to the report to creditors, if indeed it exists.

50. These two letters from the Official Receiver's Office reached the members of the court on the morning of the hearing. I have recited above the efforts which the court has made to encourage all parties to explain the position in the bankruptcy: firstly in Hughes LJ's directions in August 2011, secondly in the judgment of the full court given by Black LJ in March 2012 and subsequently in the court office's letters. Moreover, it should have been plain to Dr Adedeji's advisers at the latest by the beginning of April this year that the non-existence of a trustee between bankruptcy and judgment was at the heart of Mr Pathania's case on the appeal. It is, to use moderate language, highly unsatisfactory that the question of whether or not Mr Pathania's assets had vested in a trustee should still be shrouded in any degree of mystery.

51. There is, as it seems to me, still no clear evidence that the formalities necessary for the appointment of the official receiver as trustee were complied with in this case. There are other indications in the case that he was not so appointed, such as Dr Adedeji's statement that in March 2011 the rectification proceedings were to be stayed until a trustee was appointed, suggesting that one had not yet been appointed at that time. Moreover the document appointing Mr Fox as trustee contains no reference to a previous trustee or his discharge.

Discussion

52. I do not accept Mr Gasztowicz's argument that we should not have regard to the fact of Mr Pathania's bankruptcy at all. It seems to me that if the cause of action did vest in Mr Pathania's trustee, he had a duty to disclose this to Dr Adedeji. It does not lie in his mouth to argue that his opponents could or should have found out about it from elsewhere. Nevertheless it was for Dr Adedeji to make out a case on appeal which justified setting aside the judgment. Dr Adedeji's appeal was, as it seems to me, from the start founded on the false premise that the making of the bankruptcy order immediately deprived Mr Pathania of his cause of action. That was the premise of his grounds of appeal and the various skeleton arguments and other documents which he filed and which were filed on his behalf. The premise is incorrect. Under the provisions of the 1986 Act which I have set out above the effect of the bankruptcy order was that the official receiver was appointed receiver and manager of Mr Pathania's estate on 29 June 2010. The bankruptcy order did not vest Mr Pathania's estate in anyone else.

53. If Dr Adedeji was to make good his complaint that Mr Pathania lacked an interest in pursuing the proceedings, it was necessary for him, firstly, to show that Mr Pathania's property had passed to a trustee in bankruptcy before judgment was entered. In my judgment he has failed to show this. The only thing which is clear is that Mr Fox was appointed trustee on 14 April 2011. The flurry of correspondence in the days and hours before the hearing of the appeal does not persuade me that the official receiver became trustee under the provisions of section 293 of the Act. The Official Receiver's Office has not been able to contact the officer who was in fact dealing with the case. Although there is reference to a "notice of no meeting" it has not been produced and the document which refers to it is undated. In so concluding I do not cast any doubt on the good faith of the officer who wrote the letters on behalf of the Official Receiver's Office, but with respect to him, he had no direct knowledge of whether the vital formalities were in fact complied with.

54. More importantly, however, if Dr Adedeji is to establish that Mr Pathania's conduct was such as to justify setting aside the judgment, it is not enough for him to show that his cause of action in fact vested in the official receiver in August 2010. He must show that Mr Pathania knew that the official receiver had become trustee, that his estate had become vested in the official receiver and that he knew that was so before judgment on the claim was entered: see *Pickthall v Hill Dickinson* (discussed above). I am not satisfied on the materials we have been shown that that is so. The lack of clarity, even at this stage, surrounding the question of whether the official receiver was in fact appointed trustee is hardly a secure foundation for a finding that Mr Pathania must have known what the position was.

55. We could of course give yet further directions so as to enable these outstanding facts to be investigated, both as to whether the formalities were complied with and as to Mr Pathania's knowledge as to whether his cause of action had become vested in the official receiver. The possibility of a fact-finding exercise of this kind was canvassed in argument. It is not a desirable option in the light of the already lengthy history of this case, and the ample opportunity already afforded to all parties to clarify the position. It was for Dr Adedeji to make out his case that fresh evidence had come to light which undermined the judgment and he has failed to do so.

56. It is also material, in deciding whether Mr Pathania's conduct was so serious as to justify setting aside the judgment, to consider what would have happened in the event that Mr Pathania had informed Dr Adedeji in August 2010 that the official receiver had become trustee of his estate (on the assumption that that is what occurred). I put aside for this purpose Mr Pathania's belatedly disputed account that he was told by the official receiver that he could proceed with the action. The likely outcome of such disclosure is that the action would have been stayed, just as happened with the rectification action some months later. This would have resulted in an adjournment of the trial. However given that the trustee was ultimately prepared to assign the cause of action to Mr Pathania for £5000, even after judgment was entered, it seems highly probable that he would have ultimately authorised Mr Pathania to continue with it in one way or another, even if this would have involved some delay. By contrast it seems far less likely that Dr Adedeji would have succeeded in having an action for such significant sums dismissed. Whilst none of this would excuse Mr Pathania's failure (if it was such) to inform Dr Adedeji that his cause of action had passed to the official receiver, the limited consequences of that failure are, as it seems to me, a powerful mitigating factor. To put the matter another way, this is not a case, like *Pickthall*, where the claimant could not have achieved his objective without an abuse of process.

57. I would therefore dismiss the appeal on the ground that Mr Pathania's failure to disclose his bankruptcy and any effect which the bankruptcy may have had on his cause of action, was not such as to justify this court in setting aside the judgment.

58. Mr Christiansen submitted in the alternative that there remained an abuse of process consisting in the continuation of the action without informing Dr Adedeji of the bankruptcy, even if Mr Pathania was not divested of the cause of action at any material time. That is a very different allegation to the one made in the grounds of appeal. It is true that if the fact of the bankruptcy order had been disclosed, Dr Adedeji might still have successfully applied to stay the proceedings, even if Mr Pathania's estate had not yet vested in a trustee. That fact alone does not seem to me to render the continued proceedings an abuse, or at least so serious an abuse that we should set aside the judgment obtained. It is certainly not analogous in any way to *Pickthall*.

59. We raised in argument the question of whether, on the assumption that the cause of action remained vested in Mr Pathania until judgment, the obtaining of the judgment was a void disposition of it by virtue of section 284(1) of the 1986 Act, and if so whether that would have any impact on the validity of the judgment. That raises a number of questions which, on reflection, would benefit from much fuller argument than we received on this appeal. I think however that Mr Gasztowicz is right that, even assuming that there is a disposition of the cause of action when it merges into the judgment, the court can consent to or ratify the disposition. Accordingly taking into account (a) the fact that the point is taken only after judgment; (b) that the judgment was wholly beneficial to the creditors; (c) that the trustee stated in his witness statement that he wished to adopt the judgment; (d) Mr Pathania has now obtained an assignment of such cause of action as the trustee had; and (e) the court has power to consent to or ratify any void transaction, I do not think, in the end, that the section 284 point would take Dr Adedeji anywhere. To the extent that we need to do so, we would ratify the judgment.

60. I would therefore dismiss the appeal, but I would allow the Bank's unopposed application that any sums recovered on the judgment be paid into court to await the outcome of the Bank's claims.

Lady Justice Rafferty:

61. I agree.

Lord Justice Maurice Kay:

62. I also agree.