[2012] UKUT 174(TCC)

Appeal number
FTC/21/2011

Capital gains tax – appeal by taxpayer to First-Tier Tribunal – taxpayer previously a bankrupt – application to strike out appeal – whether taxpayer had* locus standi *to appeal – whether appeal settled by trustee in bankruptcy in accordance with s. 54 Taxes Management Act 1970

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DAVID McNULTY	**Appellant**
- and –	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 2 May 2012

Philip Engelman, instructed by Tax NetWorks Ltd, for the Appellant

James McClelland, instructed by the General Counsel and Solicitor to HMRC, for the Respondents

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MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from a decision by the First-Tier Tribunal (Tax) (Tribunal Judge Michael S. Connell and Alan Redden FCA) ("the Tribunal") dated 21 October 2010 [2010] UKFTT 509 (TC) to strike out the Appellant's notice of appeal to the Tribunal. The Tribunal held that (1) the Appellant had no *locus standi* to bring the appeal because any right to appeal had vested in his trustee in bankruptcy and (2) the appeal had been settled by the Appellant's trustee in bankruptcy in accordance with section 54 of the Taxes Management Act 1970 ("TMA 1970"). It is common ground that the Appellant must overturn both of these conclusions in order to succeed on this appeal.

Factual background

2. The Appellant is a chartered accountant by profession. He participated in a tax avoidance scheme known as the Castle Trust ("the Scheme"). In his 1997/1998 self-assessment he claimed a capital loss purportedly generated by the Scheme. Having investigated the Scheme, the Respondents (at that time the Commissions for Inland Revenue, "HMRC"), concluded that the loss was artificial. Accordingly HMRC refused the Appellant's claim for relief.

3. HMRC engaged in settlement discussions with the various taxpayer participants in the Scheme. In common with other taxpayers, in January 2004 the Appellant was offered a settlement on the basis that his claim for capital loss arising from the Scheme failed. Those proposals were conditional upon the Appellant accepting the offer within a specified period. The Appellant did not do so.

4. Accordingly, on 17 May 2004 HMRC issued a closure notice amending the Appellant's self-assessment resulting in a tax due of £951,790.80.

5. On 20 May 2004 HMRC imposed a penalty of 40% of the tax due amounting to £380,716. That penalty was subsequently vacated, however, and forms no part of the liabilities presently in dispute.

6. On 2 June 2004 the Appellant appealed the closure notice. HMRC accepted that appeal on 3 June 2004. The Appellant made two applications for postponement of the tax due dated 14 September 2004 and 23 November 2004 which were referred to the General Commissioners. They decided that no part of the tax charged should be postponed. Postponement having been denied, HMRC sought to collect the tax due. It was not paid.

7. As a result of the non-payment, on 20 October 2004 a surcharge of 5% of the tax due (£47,589.37) was incurred pursuant to section 59C(2) TMA 1970. On 26 January 2005 a further surcharge in an identical amount was incurred pursuant to section 59C(3) TMA 1970. In order to challenge those surcharges, the Appellant was obliged to bring an appeal within 30 days of their imposition: section 59C(7) TMA 1970. The Appellant did not do so. Indeed, no appeal has ever been lodged against them.

8. On 8 February 2005 HMRC obtained judgment against the Appellant in the Durham County Court in the sum of £1,364,448.78 reflecting the outstanding tax, together with interest under section 86 TMA 1970 and costs. The Appellant did not appeal that judgment.

9. On 11 November 2005 HMRC served a statutory demand in respect of the judgment debt. The Appellant did not apply to set aside the statutory demand.

10. On 7 March 2006 HMRC presented a bankruptcy petition for a debt of £1,522,664.88. That figure included the judgment debt of £1,364,448.78, the two surcharges of £47,589.37, a sum of £3,206 relating to the Appellant's self-assessment for the 2002/2003 tax year and interest. The petition was heard on 8 December 2006, and Registrar Nicholls made a bankruptcy order on that day. The Appellant applied for permission to appeal against that order, but was unsuccessful.

11. John Bell of Clarke Bell Ltd was appointed as the Appellant's trustee in bankruptcy ("the Trustee").

12. On 21 August 2007 HMRC wrote to the Trustee noting that "the …. appeal against the assessment remains open" and asking how the Trustee proposed to deal with the appeal now that permission to appeal against the bankruptcy order had been refused.

13. On 20 September 2007 HMRC wrote again to the Trustee noting that the Appellant had written in May and July 2007 to request that the appeal be heard by the Commissioners and asking the Trustee to confirm "whether this application by Mr McNulty was made with your knowledge and that you approve the action?" On the same day HMRC wrote to the Appellant saying "I have written to your Trustee in Bankruptcy asking him whether he approves your request to have the appeal heard by the Commissioners".

14. On 28 September 2007 the Trustee replied to HMRC stating "we had no knowledge of nor did we approve the application of appeal made by" the Appellant.

15. On 1 October 2007 HMRC wrote to the Appellant saying "I have now been notified … that the Trustee … has not authorised your request to have your appeal heard by the Commissioners. Under the circumstances I am unable to proceed with your request."

16. On 8 December 2007 the Appellant was discharged from bankruptcy.

17. On 22 February 2008 HMRC wrote to the Trustee noting that the appeal against the 1997/98 closure notice remained open and asking whether "you can agree and accept the amendment to the self assessment or intend to request that the appeal be heard by the General Commissioners".

18. On 25 February 2008 the Trustee replied stating that "the Trustee does not intend to be a party to any proposed litigation in this respect".

19. On 27 February 2008 the Trustee wrote again in the following terms:

> "Further to our telephone conversation yesterday, and your letter dated 22 February, I can confirm that your Unsecured claim of £1,599,449.39 was agreed on 19th September 2007.
>
> In the absence of any accounting records, I can confirm that as Trustee, I am happy to accept your claim, which I assume is based on assessments raised."

I presume that the figure of £1,599,449.39 represents the petition debt and accumulated interest.

20. On 5 March 2008 HMRC replied in the following terms:

> "Thank you for your letter of 27 February 2008.
>
> I hereby determine the appeal against the closure notice issued for the enquiry into the 1997/1998 return in accordance with S.54 Taxes Management Act 1970.
>
> The additional tax charged by the HMRC amendment to the self assessment is £951,790.80."

The figure of £951,790.80 is the figure stated in the 17 May 2004 closure notice.

21. On 21 December 2009 the Institute of Chartered Accountants in England and Wales wrote to the Appellant saying that it had recently been informed that he had been adjudged bankrupt "during or after 2004". The letter pointed out that the Institute's Principal Bye-law 7(a) provides that "a member shall thereupon cease to be a member if he has a bankruptcy order made against him". The letter went on to invite the Appellant to complete a readmission form and pay the relevant readmission fees in order to the resolve the matter.

22. On 22 February 2010 the Appellant wrote to the Tribunal stating "I appeal against my assessment". On 8 March 2010 he filed a notice of appeal stating that that decision he was appealing against was dated 3 June 2004, that the appeal was against the penalty of £380,716 (which had in fact already been vacated) and that he had appealed to HMRC on 2 June 2004. HMRC have not disputed that these documents should be interpreted as an appeal against the closure notice of 17 May 2004.

23. On 1 April 2010 HMRC applied to strike out the Appellant's notice of appeal. The application was heard by the Tribunal on 3 September 2010. At the hearing the Appellant produced what was represented to be a transcript of a telephone conversation between himself and Ms Lynne O'Grady of Clarke Bell Ltd which I was informed had taken place some time during the preceding week. No proper evidence to that effect was adduced before the Tribunal or before me. The key passage in the transcript reads as follows:

> "DBM They're [HMRC are] using that letter [the letter dated 27 February 2008] to claim you've abandoned the case on my behalf.
>
> Lynn [sic] That's not we say [sic]. We don't intend being party of it, like I explained to you at the time we will not support it with funds but it's up to you."

Does the Appellant have *locus standi* to bring the appeal?

24. When a trustee in bankruptcy is appointed, he is automatically vested with the bankrupt's estate by section 306 of the Insolvency Act 1986 ("IA 1986"), which is in the following terms:

> "(1) 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.
>
> (2) Where any property which is, or is to be, comprised in the bankrupt's estate vests in the trustee (whether under this section or under any other provision of this Part), it shall so vest without any conveyance, assignment or transfer."

25. By virtue of section 436(1) IA 1986, the "property" comprising the bankrupt's estate includes "things in action". It therefore includes causes of action and rights of appeal.

26. The effect of these provisions on rights of appeal, including rights of appeal in tax cases, is well established. In this connection counsel for HMRC referred to six authorities.

27. *Soul v Commissioners of Inland Revenue (*1966) 43 TC 662 concerned challenges by a taxpayer to decisions of the Commissioners (in relation to surtax liabilities) and of the Inspectors of Taxes (in relation to income tax liabilities). Having lost in the High Court and then lodged an appeal, the taxpayer was declared bankrupt. On the Crown's application, the Court of Appeal dismissed the appeals. Harman LJ, with whom Diplock and Wilmer LJJ agreed, said at 662:

> "The Crown wants [the appeals] dismissed, and submits that they should be dismissed for this very short reason, that Mr. Soul, having been adjudicated bankrupt, now has no interest left in the matter at all - that it has passed to his trustee in bankruptcy. And his trustee tells us that, having considered the appeals, he does not think they are worth pursuing; he is now unwilling to be a party to the appeals, or to prosecute them. In those circumstances I think that the Court is left with no option but to dismiss the appeals, because Mr. Soul has now no interest in the matter at all, having been adjudicated bankrupt."

28. *Heath v Tang* [1993] 1 WLR 1421 was not a tax case, but is the leading authority for the proposition that a bankrupt lacks standing to appeal against a judgment entered against him even though that judgment itself formed the basis of the bankruptcy petition. Hoffmann LJ (as he then was) delivering the judgment of a Court of Appeal that also included Sir Thomas Bingham MR and Steyn LJ (as they then were) considered first the position of the bankrupt as plaintiff and then the position of the bankrupt as defendant.

29. In relation to the bankrupt as plaintiff, he said at 1424-25:

> "The property which vests in the trustee includes 'things in action': see section 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 *Beckham v. Dale* (1849) 2 H.L.Cas. 579 , 604, *per* Erle J. and *Wilson v. United Counties Bank Ltd.* [1920] A.C. 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 unliquidated damages, vest in his trustee. The bankrupt cannot commence any proceedings based upon such a cause of action and if the proceedings have already been commenced, he ceases to have sufficient interest to continue them. …
>
> The rule that the bankrupt could not sue on a cause of action vested in his trustee was enforced with such rigour that he could not even bring proceedings claiming that the intended defendant and the trustee were colluding to stifle a claim due to the estate and which, if recovered, would produce a surplus. But in any case in which he was aggrieved by the trustee's refusal to prosecute a claim he could apply to the judge having jurisdiction in bankruptcy to direct the trustee to bring an action, or to allow the bankrupt to conduct the proceedings in the name of the trustee. The jurisdiction of the bankruptcy judge to give such directions is now conferred by statute. Section 303(1) of the Insolvency Act 1986 says:
>
>> 'If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a trustee of the bankrupt's estate, he may apply to the court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit.'

> …
>
> Thus the supervision of the insolvency administration by the bankruptcy judge protects the bankrupt from injustice which might otherwise be caused by his inability to bring proceedings outside the bankruptcy jurisdiction."

30. In relation to the bankrupt as defendant, he said at 1425-26:

> "In cases in which the bankrupt is defendant, there is of course usually no question of the cause of action having vested in the trustee. Unless the defence is set-off (a situation to which we shall return later) the bankrupt will not be asserting by way of defence any cause of action of his own. But in cases in which the plaintiff is claiming an interest in some property of the bankrupt, that property will have vested in the trustee. And in claims for debt or damages, the only assets out of which the claim can be satisfied will have likewise vested. It will therefore be equally true to say that the bankrupt has no interest in the proceedings. As we have seen, section 285(3) deprives the plaintiff of any remedy against the bankrupt's person or property and confines him to his right to prove.
>
> On the other hand, there are actions seeking relief such as injunctions against the bankrupt personally which do not directly concern his estate. They can still be maintained against the bankrupt himself and he is entitled to defend them and, if the judgment is adverse, to appeal.
>
> ….
>
> [The] authorities in my judgment demonstrate that in principle a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate vested in the trustee.
>
> Is there anything different about the judgment upon which the bankruptcy petition was founded? ... in my view there is nothing sufficiently special about the petitioner's judgment to take it out of the general principle."

31. In *Wordsworth v Dixon* [1997] BPIR 337 the defendant was made bankrupt after summary judgment had been granted against him. The Court of Appeal struck out his application in effect for permission to appeal out of time against the summary judgment. Sir Thomas Bingham MR giving the judgment of the Court, which also included Hoffmann and Waite LJJ, said at 338 that *Heath v Tang* "clearly establishes that on the vesting of the bankrupt's estate in the trustee, the right to challenge a judgment which would take effect against the estate vests in the trustee". The defendant's trustee had stated that he did not wish to pursue any application.

32. In *Ord v Upton* [2000] Ch 352 the appellant was a discharged bankrupt. During the bankruptcy he had commenced proceedings against his doctor for medical negligence with regard to treatment for back pain, claiming damages for loss of earnings as well as general damages for pain and suffering. On the appellant's application under section 303 IA 1986, the Court of Appeal held that an action in negligence was a single of cause of action. Since the appellant's claim was a hybrid claim which was partly personal and partly related to property, the entire claim vested in the appellant's trustee. Aldous LJ, with whom Mantell and Kennedy LJJ agreed, said at 360 that "Only if the cause of action was solely personal could it be described as not being the property of the bankrupt as set out in section 436".

33. In *Ahajot v Waller* [2005] BPIR 82 the appellant was a discharged bankrupt and sought to appeal against assessments relating to the period prior to bankruptcy. As in the present case, preliminary issues arose as to whether the taxpayer lacked standing and whether his claims had been settled under s.54 TMA 1970. Dr Nuala Brice sitting as a Special Commissioner determined both issues in the Crown's favour. In relation to the first issue she said:

> "33. For the Appellant Mr Ashford argued that the general principle in *Heath v Tang* did not apply in this appeal because this was a case where the Appellant had a personal interest in the appeals. He argued that the Appellant was potentially subject to penalties or criminal sanctions from which it followed that he had a personal interest in the appeals. He relied upon *Heath v Tang* at 1424G for the principle that actions against the bankrupt personally which did not directly concern his estate could be maintained against the bankrupt himself and he was entitled to defend them. He argued that the penalties were not provable in the bankruptcy and so the effect of the discharge was not to release the Appellant from these contingent liabilities.
>
> 34. For the Inland Revenue Mr Jones accepted that *Heath v Tang* was authority for the view that a bankrupt could defend an appeal if it had an impact on him personally and did not directly concern his estate as vested in the trustee. However, he argued that any penalties, if arising from matters which occurred prior to the bankruptcy order, were provable debts in the bankruptcy and, as the Appellant had already been released from all provable debts on his discharge, it was not open to him to argue that the prospect of the imposition of penalties gave him a personal interest in the appeal. He relied upon *In Re Hurren* [1983] 1 WLR 183. In addition Mr Jones referred to Rule 12.3(2)(a) of the 1986 Rules which provided that a fine imposed for an offence was not provable in the bankruptcy. However, he pointed out that Rule 12.3(2) provided that 'fine' had the meaning given by section 281(8) of the 1986 Act which in turn provided that it meant the same as in the Magistrates' Courts Act 1980 . That defined a "fine" as including any pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction. From this he argued that a penalty under Part X of the Taxes Management Act 1970 was not a penalty imposed

> for an offence or under a conviction and so was provable in the bankruptcy.
>
> 35. In considering these arguments I first note that no penalties have in fact been assessed on the Appellant. The assessments under appeal are all assessments for income tax and national insurance contributions. As such, they are governed by the general rules that a bankrupt cannot in his own name appeal from a judgment against him which is enforceable only against the estate vested in the trustee. It is, therefore, hypothetical to consider whether, if assessments to penalties were made, they would consist of an action against the bankrupt personally which he could defend. If, however, that question had to be asked, the answer would be found in *Hurren*. There on 6 October 1981 the Inland Revenue commenced proceedings against Mr Hurren before the General Commissioners for the recovery of penalties under the 1970 Act. On 24 November 1981 Mr Hurren was adjudged bankrupt on the presentation of his own petition. A number of questions arose about the future conduct of the penalty proceedings. Walton J at 189D held that the penalties were provable debts in the bankruptcy; that the proceedings before the General Commissioners should be stayed; that the bankrupt, the trustee and the Inland Revenue should try to agree the amount of the penalties; but that if necessary there would be an order granting the trustee leave to agree or compromise the amount with the Inland Revenue. Thus I agree with Mr Jones that a penalty under the 1970 Act is provable in the bankruptcy with the result that the Appellant has already been released from any such debts by his discharge. That means that the Appellant does not have any personal interest in the appeals before the Special Commissioners and so the exception in *Heath v Tang* cannot apply to him."

34. In *Singh v HMRC* [2010] UKUT 174 (TCC), [2010] STC 2020 an undischarged bankrupt applied for permission to seek judicial review in respect of HMRC's decision to submit proof of a tax debt in his bankruptcy. Having reviewed the authorities, Warren J concluded at [28]:

> "The position is, in my judgment, the same [as in *Soul*] where a taxpayer has a statutory right of appeal to the Tax Chamber of the First-tier Tribunal in respect of [an] assessment raised prior to bankruptcy and is subsequently adjudicated bankrupt before he issues his appeal, or after having issued it, before it is heard. This was the conclusion reached by Dr Nuala Brice …. in *Ahajot*. I agree with her decision."

He went on to reject the applicant's contention that he had a personal right which was within the exception to *Heath v Tang*.

35. Counsel for the Appellant did not take issue with the principles outlined above. He nevertheless argued that the Appellant had *locus standi* to pursue an appeal for three reasons. I will deal with these in turn.

(1) The Appellant's right of appeal is personal to him because Article 6(3) ECHR is engaged

36. In summary, counsel for the Appellant argued as follows: (i) either the surcharges or the assessment the subject of the closure notice were "criminal offences" for the purposes of Article 6(3) of the European Convention on Human Rights as that term has been interpreted by the European Court of Human Rights, particularly in *Jussila v Finland* (2007) 45 EHRR 39; (ii) the Appellant would be denied the protections afforded by Article 6(3) if he was not permitted to appeal personally rather than having to rely upon the Trustee; and (iii) accordingly the exclusion of personal rights from the definition of "property" in section 436 IA 1986 recognised in *Heath v Tang* should be interpreted more widely pursuant to section 3 of the Human Rights Act 1998 as extending to the Appellant's right of appeal. This argument was not advanced before the Tribunal.

37. In so far as this argument is based on the surcharges, I agree with counsel for HMRC that there is a very short answer to it, namely that the Appellant has not appealed against the surcharges. As can be seen from my account of the facts, the Appellant's appeal on 2 June 2004 which he sought to bring before the Tribunal by his notice of appeal dated 8 March 2010 was against the assessment the subject of the closure notice. The appeal was originally made before the surcharges had been imposed. The Appellant never appealed against the surcharges once they were imposed, and by 8 March 2010 he was long out of time for doing so. Counsel for the Appellant argued that it was not necessary for him to appeal the surcharges and that his liability to tax should be considered "as a whole". I do not accept that argument: the tax assessment and the surcharges are distinct liabilities subject to distinct rights of appeal. It is therefore not necessary for me to consider whether the surcharges are "criminal offences", or, if they are, whether the second and third steps in the argument are well founded.

38. The argument with regard to the assessment was so much of an afterthought on the part of counsel for the Appellant that it was not even mentioned in his skeleton argument. He argued that the assessment was a criminal offence because it was backed by criminal sanctions and/or state force. In this regard he relied on two remedies for non-payment of tax, the first being summary proceedings in the Magistrates' Court under section 65(1) TMA 1970 and the second being distress under section 61(1) TMA 1970, both of which are backed by the sanction of imprisonment under section 76(1) of the Magistrates' Court Act 1980 ("MCA 1980") and the latter of which can be enforced with the assistance of a police constable. If this argument were well founded, it would have the startling consequence that all assessments for income tax, capital gains tax and corporation tax constituted criminal offences for the purposes of Article 6(3) ECHR.

39. So far as summary proceedings are concerned, counsel for HMRC pointed out that section 65(1) TMA 1970 (which is headed "Magistrates' courts") provides:

> "Any amount due and payable by way of income tax, capital gains tax or corporation tax which does not exceed £2,000 shall, without prejudice to any other remedy, be recoverable summarily as a civil debt by proceedings commenced in the name of a collector."

Since the tax in dispute in the present case greatly exceeds £2,000, this provision is inapplicable. Thus it provides no support for counsel for the Appellant's argument.

40. With regard to both remedies, counsel for HMRC pointed out that section 96(1) MCA 1980 provides:

> "A magistrates' court shall not commit any person to prison or other detention in default of payment of a sum enforceable as a civil debt or for want of sufficient distress to satisfy such a sum except by an order made on complaint and on proof to the satisfaction of the court that that person has, or has had since the date on which the sum was adjudged to be paid, the means to pay the sum or any instalment of it on which he has defaulted, and refuses or neglects or, as the case may be, has refused or neglected to pay it."

Counsel for HMRC submitted that it was clear from this that an order for committal would only be made where the taxpayer had deliberately or negligently not paid despite having the means to do so i.e. it was a sanction for wilful or negligent non-payment. He argued that, even if a complaint alleging wilful or negligent non-payment attracted the protections of Article 6(3) (which it was not necessary to decide), it did not follow that the tax assessment itself was a criminal offence which engaged Article 6(3). I accept that argument.

(2) The Appellant's right of appeal is personal to him because Article 1 First Protocol and/or Article 8 ECHR are engaged

41. In summary, counsel for the Appellant argued as follows: (i) the Appellant's right to pursue his profession as an accountant was a property right within Article 1 of the First Protocol to the ECHR as that has been interpreted by the European Court of Human Rights, particularly in *Van Marle v Netherlands* (1986) 8 EHRR 483 and/or an aspect of the Appellant's private life within Article 8 ECHR as that has been interpreted by the European Court of Human Rights, particularly in *Sidabras v Lithuania* (2004) 42 EHRR 104; (ii) the Appellant's bankruptcy prevented him from pursuing his profession; and (iii) accordingly the exclusion of personal rights from the definition of "property" in section 436 IA 1986 recognised in *Heath v Tang* should be interpreted more widely pursuant to section 3 of the Human Rights Act 1998 as extending to the Appellant's rights of appeal. Again, this argument was not advanced before the Tribunal.

42. In my judgment there is again a very short answer to this argument, namely that the Appellant's bankruptcy did not in fact prevent him from pursuing his

profession. By the time it came to the ICAEW's attention, he had been discharged and was in a position to obtain readmission.

43. For good measure, counsel for HMRC advanced two other answers to the argument which I accept. First, even if the bankruptcy had had the effect of preventing the Appellant from pursuing his profession, that does not mean that the tax liability the subject of the appeal had that effect. Thus there is no reason to give a wide interpretation to the personal rights exclusion in *Heath v Tang*. On the contrary, the Appellant's argument amounts to saying that his right of appeal is personal to him, and therefore survives the bankruptcy, even though his liability for the tax in dispute was removed by the bankruptcy. That cannot be right, particularly since the same result would follow regardless of the nature of the debt underlying the bankruptcy.

44. Secondly, even if the bankruptcy had had the effect of preventing the Appellant from pursuing his profession, it is self-evident that section 306 IA 1986 involves a direct interference with the bankrupt's rights under Article 1 of the First Protocol and, to the extent that they are engaged, his rights under Article 8 ECHR. Both those Convention rights are qualified rights, however. The interference with them is one which is prescribed by law, necessary and proportionate in the pursuit of legitimate purposes, namely the protection of creditors and the orderly management of personal insolvency. It cannot be suggested that section 306 IA 1986 as a whole is non-compliant with the ECHR. The vesting of the bankrupt's rights of appeal in his trustee is inherent in the scheme created by section 306, since if appeal rights exist which permit assets to be recovered or liabilities abated, then they are rights properly to be exercised by the trustee for the benefit of the estate, and hence the creditors. As Hoffmann LJ pointed out in *Heath v Tang*, the bankrupt is protected by section 303(1) IA 1986.

(3) The Trustee assigned the right of appeal to the Appellant

45. Finally, counsel for the Appellant argued that the passage in the telephone conversation between the Appellant and Ms O'Grady set out in paragraph 23 above amounted to an assignment by the Trustee of the right of appeal to the Appellant. Once again this argument was not advanced before the Tribunal. I do not accept it for two reasons. First, in my judgment the words "but it's up to you" do not amount to an assignment of the right of appeal. Secondly, counsel for the Appellant accepted that the assignment did not qualify as a legal assignment within section 136 of the Law Property Act 1925, but argued that it was an equitable assignment. The problem with that argument is that there is no suggestion that the Appellant gave any consideration for the supposed assignment.

Has the appeal been settled by the Trustee?

46. Since I have concluded that the Tribunal was correct to hold that the Appellant had no *locus standi* to appeal against the closure notice dated 17 May 2004 because that right had vested in the Trustee, I shall deal with the second issue fairly briefly.

47. Counsel for the Appellant challenged the Tribunal's conclusion that the Trustee had settled the appeal on three grounds. One of these grounds was predicated upon the correctness of the contention that the right of appeal was personal to the Appellant. Counsel for the Appellant argued that in that event it followed that the Trustee had no authority to settle the appeal. Counsel for HMRC did not dispute this argument, and I accept it. Since the premise for the argument has not been established, however, it does not arise.

48. Secondly, counsel for the Appellant argued that there was no agreement between the Trustee and HMRC to settle the appeal within section 54(1) TMA 1970, which provides:

> "Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the tribunal, the inspector or other proper officer of the Crown and the appellant come to an agreement, whether in writing or otherwise, that the assessment or decision under appeal should be treated as upheld without variation, or as varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the tribunal had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be."

49. Counsel for HMRC submitted that the question whether an agreement had been concluded was a question of fact for the Tribunal, that upon the evidence it had been entitled to reach the conclusion it had and that no error of law in its reasoning had been identified. I accept that submission. In any event, I agree with the Tribunal's conclusion on this point. Read in the context of the preceding correspondence set out in paragraphs 13-18 above, I consider that the Trustee's letter dated 27 February 2008 quoted in paragraph 19 above amounted to an agreement by the Trustee not to challenge the assessment under appeal i.e. an agreement that it should be "upheld without variation" in the words of section 54(1).

50. Secondly, counsel for the Appellant argued that there was no notice complying with section 54(3) TMA 1970, which provides:

> "Where an agreement is not in writing—
>
> (a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the inspector or other proper officer of the Crown to the appellant or by the appellant to the inspector or other proper officer; and
>
> (b) the references in the said preceding provisions to the time when the agreement was come to shall be

> construed as references to the time of the giving of the said notice of confirmation."

51. Counsel for HMRC again submitted that the question whether such a notice had been given was a question of fact for the Tribunal, that upon the evidence it had been entitled to reach the conclusion it had and that no error of law in its reasoning had been identified. I again accept that submission. In any event, I agree with the Tribunal's conclusion on this point too. Read in the context of the preceding correspondence, and having regard to the express reference to section 54 TMA 1970, I consider that HMRC's letter dated 5 March 2008 quoted in paragraph 20 above amounted to notice that the Trustee had agreed that the assessment the subject of the closure notice should be upheld without variation.

Conclusion

52. For the reasons given above, the appeal is dismissed,

Mr Justice Arnold

Release date: 25 May 2012