A **FREDERICK GEORGE ARCHIBALD**

v.

LUKE KIDAI AND OTHERS

[COURT OF APPEAL, 1965 (Mills-Owens P., Marsack J.A., Gould
B J.A.), 25th, 27th May, 18th October]

Civil Jurisdiction

Bankruptcy—leave to bring action against debtor—granted only in special circumstances—Bankruptcy Ordinance (Cap. 37) ss.9(1),94.

C The policy of the bankruptcy law is to restrain proceedings against the debtor in respect of debts provable in the bankruptcy. Leave to a creditor to bring an action will be granted by the court only in special circumstances as, for example, in the case of punitive proceedings, or, if the circumstances justify it, proceedings in a foreign court.

D Case referred to: *Re Benzon, Bower v. Chetwynd* [1914] 2 Ch. 68; 110 L.T. 926.

Appeal from order giving leave to bring action under section 9(1) of the Bankruptcy Ordinance.

T. McNally for the appellant.

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H. B. Gibson for the respondents.

Judgment of the court: [25th October, 1965]—

The appellant, in respect of whom a receiving order was made on a petition in bankruptcy, appeals against an order giving leave to the F respondents under section 9(1) of the Bankruptcy Ordinance (Chapter 37) to bring an action against him for alleged breach of contract. The receiving order was made on the 16th January 1959; it remains in force, no adjudication of the appellant as a bankrupt having been made. The cause of action in respect of which the order appealed against gives leave to sue is alleged to have arisen in the year 1956. The claim is for £1,500 but the respondents, acting on advice, are G prepared to abandon £1,100 thereof in order to bring their action in a Magistrate's Court. The order appealed against was made on motion in the Supreme Court on the 18th September 1964. On the hearing of the motion counsel then instructed by the appellant opposed the making of the order on the ground of gross delay on the part of the respondents. Counsel for the respondents then submitted (*inter alia*) that the receiving order prevented time from H running under the Statutes of Limitation; counsel for the appellant stated that he conceded this.

On the hearing of the appeal at the last sitting of this Court in May 1965 we were informed by counsel now appearing for the appellant that he would undoubtedly plead the Statutes in answer to any action which might be brought pursuant to the order appealed against if he were unsuccessful in his appeal against the order. This appeared to us to create an entirely different situation from that in which the learned judge was persuaded to make the order, for the reason that there is considerable authority to support the view that it is only with respect to proceedings in bankruptcy that time is prevented from running by the receiving order (see e.g. *Re Benzon, Bower v. Chetwynd* [1914] 2 Ch. 68). Accordingly the further hearing of the appeal was adjourned in order that the respondents might consider their position and, if so advised, take steps to have their claim adjudicated upon in the proceedings in bankruptcy.

On the appeal coming on for further hearing we are informed by counsel for the appellant that a fresh proof, in the sum of £400, has been lodged with the Official Receiver. Nevertheless both counsel maintain their respective positions; counsel for the appellant seeking the discharge of the order appealed against, and counsel for the respondents seeking to have the order maintained. We consider that it is not for us, at least in the appeal now before us, to decide the question raised on the Statutes of Limitation, which indeed neither counsel has argued; prima facie, the respondents in seeking to maintain the order appealed against appear to be inviting a defence under the Statutes, while the appellant in seeking to have the order discharged appears to be anxious to have the claim adjudicated upon in the bankruptcy proceedings, in which proceedings the Statutes will afford him no assistance. Evidently, also, the respondents are reluctant to choose whether to proceed by action under the order or by proof in the proceedings in bankruptcy.

In the circumstances as they now appear we are unable to perceive any reason why the ordinary machinery of the bankruptcy law should not be employed to determine the respondents' claim. If their proof is rejected they have, in the ordinary course, their right to appeal to the Supreme Court (or if an order were to be sought and made under section 94 of the Bankruptcy Ordinance, to a Magistrate's Court) when, again, in the ordinary course, the claim may be subject of full investigation, with the aid of *viva voce* evidence if necessary. It is clear, in our view, that the policy of the bankruptcy law in general is to restrain proceedings against the debtor in respect of debts provable in the bankruptcy; that is to say, that leave will be granted only in special circumstances as, for example, in the case of punitive proceedings or, if the circumstances justify it, proceedings in a foreign court (2 *Halsbury Laws of England* (3rd Edn.) paras. 613-4). In the ordinary case the trustee in bankruptcy has adequate powers of examining the claim including power to call for further evidence, and, as we have mentioned above, a trial of issues of fact may be had on appeal from him. It is not suggested that the respondents' claim in the present case presents any unusual features, whether of fact or law; on the face of it, it raises straightforward issues of fact, whether there was such a contract and breach thereof as is alleged, and, if so, what damages are awardable. Accordingly we allow the appeal,

discharging the order made on the 18th September 1964 and relegating the respondents to such remedies as they may have in the bankruptcy proceedings.

A We would add that it is a matter for concern that the receiving order has been in force for a period of nearly seven years; although we do understand that at least with respect to part of that period the bankruptcy proceedings could not be pursued owing to the appellant's incapacity.

As we have observed above, the present situation may well have B been brought about by counsel's concession before the judge in the Supreme Court on the question of limitation — a concession now resiled from. In the circumstances we think that it is proper to make no order for costs of either party.

Appeal allowed.