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	Delivered:	**26/09/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF JAMES CRAIG BEST (A BANKRUPT)

Between:

COLIN DAVID WILSON
(AS TRUSTEE IN BANKRUPTCY OF JAMES CRAIG BEST)

Applicant (Proposed Respondent)

-and-

MARY AVEEN BEST, GEMMA CATHERINE BEST, CHRISTOPHER JAMES BEST AND SHEENA MARGARET BEST

Notice Parties (Proposed Appellants)

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Wayne Atchison and Robert McCausland (instructed by Napiers Solicitors) for the proposed Appellants
William Gowdy KC (instructed by King & Gowdy Solicitors) for the proposed Respondent

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SCOFFIELD J

[1] This is an application for leave to appeal against the judgment (and resulting order, although this presently remains in draft form) of Huddleston J given on 6 June 2025. The need for leave to appeal arises by virtue of section 35(2)(j) of the Judicature (Northern Ireland) Act 1978 ("the Judicature Act"), which provides that an appeal to the Court of Appeal will only lie with the leave of the High Court or of the Court of Appeal from a decision of the High Court under the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order"). I heard the application yesterday and now provide this short written ruling in deference to the quality of argument advanced before me.

[2] It is common case between the parties that leave to appeal is required and that the test for the grant of leave – although occasionally expressed in differing terms – is reflected in para 20.15 of Valentine's text, *Civil Proceedings: The Supreme Court* (1997, SLS). In short, it is appropriate to grant leave to appeal on the merits if there is a prima facie case of error (or, put in more modern terms, an arguable ground of appeal with a reasonable prospect of success); or if there is some other reason in the public interest why leave should be granted, usually involving a question of general principle or importance which ought to be decided or considered by the Court of Appeal. Leave to appeal can therefore be granted on the merits and/or on public interest grounds. By analogy with the grant of leave in judicial review proceedings, leave should not be granted where the proposed respondent to the appeal can rely upon a clear knock-out blow, such as inexcusable delay or some jurisdictional point. If leave is refused by the High Court, the intending appellant can renew the application to the Court of Appeal.

[3] Valentine suggests (see para 20.14) that it is obviously desirable to ask for leave at the time when the judgment or order is given, when the other party will be present. For my part, save in the most urgent or straightforward of cases (for instance, where leave to appeal is required in respect of an interlocutory order) I consider there to be much benefit in the proposed appellant taking at least some time before making an application for leave to appeal. This permits the parties to digest and reflect upon the judgment of the court and will allow the intending appellant to formulate considered and reasoned proposed grounds of appeal. That is what occurred in this case. Although the application for leave to appeal may be made ex parte, it is common practice (again, consistent with the treatment of applications for leave to apply for judicial review) for the proposed respondent to be put on notice of the application and permitted to participate. In the present case, the application for leave to appeal was filed over the Long Vacation. Huddleston J, by order of 30 July 2025, directed that the respondent trustee in bankruptcy ("the trustee") be put on notice of the application, in order that he might object to the grant of leave to appeal if he wished; extended time for the making of the application for leave to appeal to 30 September 2025; and listed the application for inter partes hearing.

[4] Valentine also makes clear that any High Court judge can grant leave. There are obvious advantages to the application being made to the judge whose decision is potentially to be appealed, since he or she will be most familiar with the background and the issues. (There can also be no objection to this in principle where the facility of renewing the application to the Court of Appeal means that the judge to be appealed cannot himself or herself preclude the possibility of appeal.) In the present case, the application was listed before me, rather than Huddleston J, simply by reason of a reassignment of judicial responsibilities by the Lady Chief Justice. Between the date of the judgment to be appealed and the hearing of this application, Huddleston J left, and I was assigned to, the Chancery Division. I raised with the parties at the start of the hearing the question of whether the matter should more properly be heard by Huddleston J. The parties were content to simply proceed with the matter before me rather than seek to arrange a further hearing.

[5] I neither propose, nor need, to set out the factual background in any significant detail for the purposes of this application. It is in any event summarised in both the decision of the Master (Bankruptcy) ([2024] NIMaster 3) and the judgment of Huddleston J. The issue is whether Huddleston J ought to have granted sanction – both retrospective and prospective – to the trustee to commence and pursue litigation against the notice parties ("the substantive proceedings") pursuant to Article 287(4) of the 1989 Order. The application was initially refused by the Master in circumstances where it appears that the trustee (i) has incurred very significant costs to date (described as "frankly startling" by the Master); and (ii) has entered into arrangements which are unconventional (at least in this jurisdiction) involving third party litigation funding and conditional fee arrangements (CFAs) in order to pursue those proceedings. On appeal, Huddleston J allowed the trustee's application. It is that decision which the notice parties now wish to appeal.

[6] Both Master Kelly and Huddleston J were critical of the trustee's actions in a variety of respects. In simplistic terms, however, the Master focused on the funding concerns and refused sanction for the substantive proceedings, whereas Huddleston J focused on the potential benefit to the creditors of the substantive proceedings and granted sanction. He considered that the funding and costs issues, including what costs were ultimately payable out of the estate, could be reserved to the trial judge and dealt with comprehensively at the conclusion of the proceedings (or, as necessary, on a further application to him). For the intending appellants, Mr Atchison KC's primary complaint in relation to the approach of Huddleston is that (it is submitted) he wrongly left out of account or deferred questions relating to costs and the funding arrangements which are an integral part of the exercise of the court's supervisory jurisdiction of a trustee in bankruptcy as its officer. For the respondents, Mr Gowdy KC submitted that the judge's approach was correct, orthodox, or (at the very least) within his discretion.

[7] It is obviously no part of my function in this application to seek to determine which of the above arguments is correct. However, Mr Atchison has done enough to persuade me that there is a case on the merits which is worthy of consideration by the Court of Appeal. In reaching this conclusion, I am influenced by a number of factors:

(a) First, Mr Gowdy rightly accepted that the threshold on the merits is relatively modest.

(b) Second, it is significant that the Bankruptcy Master and the Chancery Judge, both with significant experience in this field, reached completely contrary conclusions.

(c) Third, it is clear that, in a situation where sanction was sought timeously by the trustee from the Department, in the vast majority of cases (if not all) detailed enquiry would be made of the trustee about the proposed

expenditure on the proposed substantive proceedings. Budgetary indications would be required and a cap or caps might well be imposed on expenditure. It is arguable that, in granting sanction on a retrospective application, and doing so with both retrospective and prospective effect, the court has failed to adequately take into account the potential costs of the proceedings to the trustee, particularly in circumstances where costs had apparently been escalating at a significant rate and no up-to-date or reliable figure or forecast for expenditure was available to the court. Put another way, it is arguable that the court wrongly divorced consideration of the best interests of the creditors from any consideration of the funding arrangements for the proposed litigation (whether as to the propriety or efficacy of those arrangements or the quantum of funding likely to be required) when the proper exercise of the court's supervisory jurisdiction required consideration of both those issues.

(d) Fourth, there is a novel question about whether, under our current statutory arrangements which do not permit CFAs, it is appropriate in principle to grant sanction to a trustee in bankruptcy to pursue proceedings where, in some circumstances, his use of CFAs will or may result on a call on the estate's funds to discharge legal costs inflated by success fees. Although Mr Gowdy submitted that this would only arise in limited circumstances, it cannot be excluded (particularly where the trustee's claims in the substantive proceedings are unsuccessful and the trustee's costs exceed the £500,000 limit of litigation funding, which does not appear wholly unlikely; or perhaps where the trustee's claims are successful but, once the relevant transfers have been set aside, the defendants in those proceedings are not a mark for any adverse costs order against them). Additionally, there is a concern about whether the third-party litigation funding arrangements cede direction and control of the litigation to those third parties to any extent or in a manner inconsistent with the trustee's role as an officer of the court and/or the overall control of the court.

(e) Fifth, applying the guidance in *Gresham International Ltd and Another v Moonie and Others* [2009] EWHC 1093 (Ch); [2010] Ch 285, it is arguable that, the Master and Huddleston J having found that the delay in applying for sanction could not be explained by mere inadvertence, it was wrong in principle to grant retrospective as well as prospective sanction for the substantive proceedings.

[8] Leaving aside the merits of the proposed appeal, this is also a case where I have been persuaded that it would be appropriate to grant leave to appeal on a public interest basis. It is clear from the previous judgments that the funding arrangements which have been entered into are unusual in the Northern Ireland context. Counsel and solicitors from this jurisdiction are engaged but their costs (which I understand are not conditional in any respect) are simply to be treated as disbursements on the part of the English solicitors with carriage of the matter on

behalf of the trustee, with the Northern Ireland solicitors acting as mere agents. The arrangements appear, at least at first glance, to be constructed in such a way as to operate as a CFA in this jurisdiction in both purpose and effect but technically circumventing any professional restriction in that regard. (Mr Atchison additionally complained that, in doing so, the arrangements operate contrary to the procedure and priorities set out in, or anticipated by, the 1989 Order as to the distribution of estate funds.) It seems to me that the use of such arrangements, including their effectiveness and propriety in this jurisdiction, is a matter of general interest which has not been addressed before, the consideration of which by the Court of Appeal would be of assistance. Unusually, the issue arises in this context at the commencement of the proceedings – given the requirement for sanction of the trustee's actions – rather than at their conclusion in an argument about costs. However, this is clearly an issue which is of wider public significance, potentially applicable in a much broader field of civil litigation, which has not been considered by the Court of Appeal. I note that the Master considered there were "legal points of importance" which meant that she should give a written ruling on the matter, which is unusual for an application of this type. I was also informed from the Bar that there has been considerable interest in that ruling from those practising within this area.

[9] For the reasons given above, I would be inclined to grant leave to appeal. However, the proposed respondent to the appeal also takes issue with the proposed appellants' right to appeal or their standing to do so. This was advanced as the trustee's main objection to the application. He argues that they are mere notice parties to his application for sanction and did not apply to be respondents. He further argues that they have no standing to invoke or rely upon the court's supervisory jurisdiction over the trustee, relying in particular upon the case of *Brake and Another v The Chedington Court Estate* [2023] UKSC 29. Is either of these (separate but related) points a knock-out blow? I do not consider that either is.

[10] Mr Atchison relied upon the fact that his clients became notice parties to the trustee's application for retrospective sanction by express direction of the Master on 21 September 2023. Further to the direction that papers be served on the notice parties, the trustee duly did so. From that point on, they participated in the hearings before the Master and the subsequent appeal to the judge, making written and oral submissions and being treated in all respects as a notice party, without objection from the trustee. It is well recognised that the High Court can permit a non-party with a legitimate interest in the cause or matter before it to intervene, usually (although not necessarily) upon that person's application, in both public and private proceedings: see, for instance, Practice Direction 1/2013 on third party interveners. In the present case, it seems to me that the notice parties (so described in both the written ruling of the Master and that of Huddleston J) have that status, having been put on notice of the trustee's application by direction of the Master and in light of their subsequent participation in the proceedings. I note the wide definition of "party" in section 120(2) of the Judicature Act in the following terms:

> ""party" includes every person served with notice of or attending any proceeding, although not named on the record;"

[11] It seems to me that the proposed appellants have been made party to the proceedings, albeit as notice parties, and that that is sufficient warrant for them to be able to invoke the general right of appeal to the Court of Appeal contained in section 35(1) of the Judicature Act. In the circumstances of this case, an insistence on the notice parties having to apply to be joined to the proceedings in some other capacity (for instance, as respondents to the trustee's application) for the purpose of appeal would be a triumph of form over substance.

[12] In my view the nub of Mr Gowdy's objection based on the notice parties' standing is (in reality) a complaint that they should never have been permitted to become involved in his client's application for sanction. It cannot be said that there is no foundation for that approach. The *Brake* authority certainly gives strong indications that those entitled to rely upon the court's supervisory jurisdiction over trustees in bankruptcy are principally those with an economic interest in the bankruptcy's proper and efficient administration. That is classically the creditors and, in the case of a surplus, the bankrupt or contributories. Moreover, there is a strong indication that it will rarely be appropriate for counterparties to the litigation for which the trustee seeks sanction invoking that jurisdiction (see paras [8]-[9] and [75]-[76] of the judgment). I accept Mr Gowdy's submission that permitting that may be to countenance a species of satellite litigation where such parties can pursue their private interests in a jurisdiction not designed (or certainly not principally designed) for their protection and in a way designed to thwart or impede the hearing and determination of the substantive claims against them.

[13] Nonetheless, I have not been persuaded – to the degree required for this to constitute a knock-out blow in the trustee's favour – that it is entirely inappropriate or impermissible for the notice parties to be permitted to argue against the grant of sanction in this case and so, also, to be permitted to appeal. The judgments in *Brake* anticipate that there will be exceptional circumstances where persons other than those in the classic categories will have standing to invoke the court's supervisory jurisdiction. It is arguable that, in the particular circumstances of this case, the notice parties fall within such an exception as parties connected to the bankruptcy whose rights or interests are directly affected by the grant of sanction to the trustee. In their skeleton argument they relied upon the discussion of such exceptions in paras [25]-[30] of the judgment of Lord Richards in *Brake.* I also note that in the *Gresham* case the respondents were noted as having a twofold interest in objecting to the grant of sanction to the liquidator, both as creditors but also as respondents to the proceedings for which she sought sanction (see para [38] of the judgment).

[14] More prosaically, the fact is that the both the Master and Huddleston J permitted the notice parties to participate fully in the argument and plainly found their submissions of assistance. Whether or not they ought to have been joined to

the proceedings as notice parties, that bridge has been crossed some time ago. It seems to me that, given the novel issues which arise in this case, the Master's intention in directing them to be put on notice was probably that there would be a legitimus contradictor ensuring that full argument on the relevant issues was available. They were invited into the proceedings by the court rather than seeking, through their own initiative, to rely on the court's general power of control over the trustee under Article 276 of the 1989 Order.

[15] By reason of the foregoing, I grant leave to appeal to the notice parties on both the merits and in the public interest, in view of the novel issues which arise by reason of the funding arrangements adopted in this case. These have implications not only for the practice to be adopted by trustees in bankruptcy or where they seek sanction from the court but, in my view, possibly much more widely.

[16] In granting leave, I make a number of additional observations as follows:

(i) I have not found the trustee's objections on the basis of jurisdiction or standing to be sufficiently persuasive or clear-cut to refuse leave to appeal. However, if he wishes to pursue these issues before the Court of Appeal he would be at liberty to do so.

(ii) The (amended) proposed notice of appeal is extremely detailed and involves some degree of repetition. Consideration should be given to its refinement in order to identify more clearly and crisply the main points intended to be pursued on appeal. For present purposes, I do not intend to parse it. I will grant an extension of time for service of the notice of appeal to a date fourteen days after the giving of this ruling.

(iii) The grant of leave is obviously no indication of the ultimate outcome of the appeal, which will be determined by the Court of Appeal after full argument. It is merely an indication that there is an arguable case for appeal.

(iv) It is easy to see the logic behind the approach adopted by Huddleston J, which was that (having formed the view that the substantive proceedings were in the best interests of the creditors) the trustee should be left to get on with them. That is the import of paras [22] and [24] of his judgment. It is arguable that his approach did not sufficiently consider the potential cost of the proceedings as well as their potential benefit; but there is obvious force in any suggestion that the fundamental issues between the trustee and the notice parties in the substantive proceedings need to be resolved in the interest of the creditors. It is also important to note that the judge had access to additional legally-privileged materials not available to the Master on which he formed his view. (However, the notice parties also complain that there was no proper application to introduce this additional evidence on appeal; and that they were not given an opportunity to make further submissions once it had been received. They also claim, ambitiously in my view, that they

should have been entitled to see all of the redacted portions, including those redacted on grounds of legal professional privilege.)

(v) Neither the grant of leave to appeal, nor the service of a notice of appeal, operates as a stay on the order of the court below. (Absence of sanction also does not invalidate the substantive proceedings but is primarily relevant to the trustee's indemnity in costs from the estate.) The trustee remains free to make his own assessment of how, if at all, to progress the substantive proceedings in the meantime.