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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) AND THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

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Mr Gowdy KC (instructed by King & Gowdy Solicitors) for the Appellant
Mr Atchison KC (instructed by Napier Solicitors) for the Notice Parties

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HUDDLESTON J

Introduction

[1] This is an appeal against Master Kelly's determination (14/40389). The determination which the Master made was to refuse a Trustee in Bankruptcy application for retrospective sanction pursuant to the provisions of Article 287(1) of the Insolvency (NI) Order 1989 ("the 1989 Order") – Article 287(4) and (5) in particular:

> "(4) Subject to paragraph (5), where the trustee has done anything without the permission required by paragraph (1)(a) or (2), the High Court or the creditors' committee may, for the purpose of enabling him to meet his expenses out of the bankrupt's estate, ratify what the trustee has done.
>
> (5) The committee shall not ratify the trustee's action under paragraph (4) unless it is satisfied that the trustee has acted in a case of urgency and has sought its ratification without undue delay."

[2] Under these provisions retrospective ratification can be given by a creditors committee in a case of urgency where ratification is sought without undue delay. There is, however, no limitation on the court's part to grant retrospective ratification pursuant to Article 287(5). Counsel for the appellant suggests that the power to

grant retrospective sanction is unrestricted, in spite of, as in this case, the considerable delay.

[3] The proceedings which are at issue are three sets of proceedings issued by the Trustee in Bankruptcy on 29 July 2020 viz:

(i) Originating application 20/49510 is brought against Mary Aveen Best and others to set aside (a) (pursuant to Articles 312 and 315 of the 1989 Order), a voluntary transfer of shares in a company known as BB Estates Ltd on 31 May 2009; and (b) (pursuant to articles 367 and 369 of the 1989 Order), voluntary conveyances of the properties known as "the Boat House" and "Seacroft" 99 Shore Road, Rostrevor, Co Down, on 1 December 2008 together with consequential relief.

(ii) Originating application 20/49514 is against Daniel McKevitt for a declaration that a transfer of shares in a company called Mourne Properties Ltd dated 29 July 2014 was void, pursuant to Article 257 of the 1989 Order, together with consequential relief.

(iii) Originating application 20/49515 is against Kyle Best to set aside (pursuant to Articles 312 and 315 of the 1989 Order), a voluntary transfer of shares in Best Property Services (NI) Ltd dated 1 July 2013, again with consequential relief.

[4] I shall collectively refer to these as the "proceedings" without involving myself at this stage in the detail, particularly as matters in respect of some of them may well have advanced since the Master's determination.

[5] The Master, in coming to her decision to refuse the retrospective sanctions sought, looked at a number of factors:

(i) The statutory function of a Trustee appointed under the 1989 Order "to get in, realise and distribute the bankrupt's estate" (per Article 278(2));

(ii) That the delay which had arisen on the specific facts of this case such that the sanction was sought three years after the issue of proceedings. In looking at that issue she discounted the claims of "unintentional inadvertence" pleaded on the part of the Trustee, but also based her refusal on (inter alia):

    (a) her assessment of (and here I paraphrase) the Trustee's perceived cavalier approach to adhering to the requirements of the bankruptcy jurisdiction in Northern Ireland as opposed to the procedural requirements in England & Wales where he was more accustomed to practice; and

    (b) his reluctance to explain (when asked) about the detail of the funding arrangements behind the litigation.

(iii) The main issue which (again summarising) was to consider whether the granting of the retrospective sanction would be in the best interests of the creditors. On this point she found the litigation to be "speculative, contested and…in the nature of declaratory relief (ie the setting aside of certain transactions) [as opposed to]…actual realisations."

[6] In relation to the question of funding, the Master set out the details of the initial indemnity to the bankrupt's estate provided by creditors (originally limited to £20,000) to allow an investigation to be pursued into the bankrupt's affairs but noting, that after that was exhausted, the Trustee of his own volition had obtained third party funding through a conditional fee arrangement.

[7] The Master highlighted that use of such agreements are currently not permitted in Northern Ireland (Part III of the Access to Justice (NI) Order 2003 never having been brought into effect) and it is clear from the judgment that the Master (quite rightly) took a very dim view of:

(a) Attempts on part of the Trustee to circumvent jurisdictional limitations through the instruction of English and Welsh solicitors who in turn retained (in this jurisdiction) agents; and

(b) The quantum of the costs incurred (and being incurred) - estimated (as set out in her judgment) to then be in the region of £500,000 with the potential for further costs to be incurred.

[8] Citing all these issues the Master and relying upon the comments of Mr Justice Lightman in *Ng v Ng* [1997] BCC 507:

> "A trustee in bankruptcy is not vested with the powers and privileges of his office so as to enable him to accept engagement as a hired gun."

led to her refusal of the retrospective sanction sought against which decision the Trustee has appealed to this court.

[9] I thank both Mr Gowdy (on behalf of the Trustee) and Mr Atchison (on behalf of the Best family as the notice parties) for their very helpful written and oral submissions. Since the hearing, and at the direction of the court, the court has now seen the full and unredacted funding arrangements together with some legally privileged documentation upon which I shall say more later.

[10] Mr Atchison, on behalf of the Best family, in addition to highlighting the quantum of costs (as had the Master) also referred to the patent reluctance on the part of the Trustee to disclose (even when asked) the detail of those funding arrangements. He also highlighted the fact that the need for the sanction itself

would not have become a live issue without his clients' diligence and perseverance. Highlighting the duty of candour expected of a Trustee he sought to highlight the existing (modest) level of recovery arising in the bankruptcy to date on the back of the proceedings which he said were in contradiction to the Trustee's positive assertion that there would be "significant recovery [for the bankrupt's estate] if [the proceedings] [were] successful."

[11] Mr Atchison also highlighted that there was a potential involvement by the Trustee in one of the vehicles involved in the funding matrix about which I shall say no more at the moment.

[12] However, Mr Atchison grounded his principal objection to the original sanction (and this appeal) both on the Trustee's failure to be transparent and/or his assertion that the delay was through "mere inadvertence." He exhorted the court not to fall into the trap of treating the application as a "routine" matter for the granting of a sanction and argued that it required the court to engage in "critical scrutiny" of the application in all its respects.

[13] Mr Gowdy, for the appellant, contended:

(a) That the proceedings had a "reasonable to good prospect of success"; and

(b) They were essential if the bankrupt's estate was to be enlarged and that, indeed, without the proceedings being taken there would be zero potential of a dividend being paid to the creditors of the bankrupt's estate. In that context he argued that the use of third-party funding effectively insulated the bankrupt's estate from the risk of costs.

[14] Reliance was placed on the case of *Gresham International Ltd v Moonie* [2009] EWHC 1093 (Ch) at [67] and [68] where Peter Smith J commented:

> "I see no reason why as a matter of principle in most cases where there has been an inadvertent failure to obtain sanction, the court (even if urgency and no undue delay) should not retrospectively sanction the proceedings under its supervisory powers. There is no real justification for punishing a liquidator for such inadvertence and as a result conferring an uncovenanted bonus on the creditors of the company on whose behalf the liquidator is seeking to recover assets."

[15] Mr Gowdy argued that that should be the starting point in any application in order that any office holder may perform his statutory functions.

[16] He further supported that argument with reference to the *Beddoe* applications which are customarily made in respect of the costs of trustee actions pursuant to the provisions of *Re Beddoe* [1893] 1 Ch 547.

[17] On the substance of the application for the sanction, he argued that the delay was "a clear matter of inadvertence" - for evidence of which he relied upon the sworn affidavits of the Trustee in Bankruptcy.

[18] As to the conditional funding agreements, Mr Gowdy relied on the position in England & Wales viz *Akhmedova v Akhmedova* [2020] EWHC 1526 and *Simon v Simon* [2023] EWCA Civ 1048, but also the Northern Irish case of *Front Page Films Ltd v Dundee Resources* [1997] 4 BNIL 87 for his proposition that there is no objection to such arrangements "where the funder provides funding as part of its normal business and does not interfere…in the course of [the litigation]" and sought to downgrade the issue overall to something which should best be seen as the access of justice. In that, he sought to rely on Gillen LJ's Civil Justice Review [at para 6.53].

Consideration

[19] Firstly, may I say, I whole heartedly agree with the sentiments of the Master about the history of these proceedings. On any view, that history and the manner in which the proceedings have come before the court is more than pure "inadvertence", particularly when one considers:

(a) The Trustee's lack of appreciation for the need for a sanction in this jurisdiction – it being indisputably the case that anyone who purports to practice in Northern Ireland needs to know (and follow) the jurisdiction specific rules that apply and argue that failure to observe those should be categorised as "inadvertence" is unattractive. It is certainly not something that would be an attractive defence to a case brought in negligence.

(b) Attempts (if that be the case) to fund the proceedings through the instruction of English representatives who then instruct (as agent) Northern Irish lawyers in order that the current position on conditional fee agreements can be circumvented – in respect of which Article 64 of the Solicitors (NI) Order 1976 is in point – is also to be deprecated.

[20] I shall, however, return to the question of funding, in due course. Where, however, I differ from the Master, is that I think that the function of this court in its supervisory jurisdiction is to look at the core merits of the case before looking at the funding issues. In practical terms the funding tail may wag the dog but that is not, in my view, the correct approach in considering the question of whether or not to grant the sanction.

[21] In the present case, and having considered the legally privileged materials which were not available to the Master, I have come to the conclusion:

(a) That there are three sets of proceedings and that underlying each there is a case to be answered on the facts;

(b) That whilst there has been delay, certainly, in the pursuit of this matter and that delay is a factor to be brought into account, it is not something which, of itself, would be sufficient to deny sanction on the facts - particularly when one considers (albeit by a fine margin) the proceedings themselves were, as a question of fact, brought before the relevant limitation periods expired; and

(c) That the overriding statutory function of a Trustee who (as the Master, indeed, highlighted) has responsibility for collecting in the bankrupt's estate for the benefit of his creditors. To that I will add that the courts deprecate (as obviously did Mr Justice Lightman in *Ng v Ng* supra) any suggestion of the Trustee being a "gun for hire" or, indeed, any suggestion that he/his firm might derive personal or collateral benefit as the antithesis of the statutory obligations which are imposed upon a Trustee in circumstances such as these.

[22] As I have said, I have been privy to information that was not available to the Master that allows me to better consider those issues and the overall merits of the litigation itself. As I have said, I think that there is a triable case and that for the betterment of the creditors it is appropriate that the sanction be provided to allow those proceedings to be taken forward.

[23] As to the question of funding and the use of conditional fee arrangements, I do not think that the censure of those, or indeed, the actual use of the conditional fee agreement in respect of costs, should necessarily be over emphasised as the main determining factor of whether or not retrospective sanction should be given. In reality, in my view, it became the determining factor on the part of the Master in refusing sanction in the court below and was, again in this court, laboured by the arguments advanced on behalf of the Best family.

[24] In my view, standing back and looking at the issue, a court should assess the application primarily on the merits of the litigation itself and, as I have said, on the facts and having considered the legally privileged material, I am satisfied, that there is a triable case that should be allowed to be advanced if the Trustee proposes to pursue it.

[25] That does not, however, mean that within this jurisdiction and the context of these proceedings, that any Trustee has carte blanche to do what he likes in respect of funding. In the final instance, the question of costs will be a matter reserved for the trial judge when issues regarding the actual funding and the approach taken to it and these proceedings on the part of the Trustee may be advanced and considered together with an analysis of the quantum properly incurred. Article 276 of the 1989 Order – the general power of the court to supervise and control bankruptcies – and Article 334 are both very much in point. I am of the view and, indeed, on the facts I

would go so far as to suggest that the matter of costs is a factor that should be considered in full by the trial judge in due course if the litigation is pursued. At this point, however, I will limit myself to the question of the retrospective sanction of the litigation as brought in respect of which I grant consent.

[26] In line with my earlier comments, any question of costs in respect of these proceedings, I reserve to the trial judge or, if the proceedings are not pursued, then may be brought before me on the application of the parties.