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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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2011/30427 & 30428

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

Kathleen Ginniff & William Ginniff

Applicants:

and

Anglo Irish Bank Corporation Limited, Michael Jennings & Brian Murphy

Respondents:

MASTER KELLY

INTRODUCTION

[1] These are applications by Mr & Mrs Ginniff (“the applicants”) to annul or, alternatively, rescind bankruptcy orders made against them on 13 April 2011. The application to annul the bankruptcy orders is brought under Article 256(1)(a) of the Insolvency (Northern Ireland) Order 1989 (“the 1989 Order”). The rescission of the bankruptcy orders is sought under Article 371 of the Order. The applications were filed on 5 November 2014, more than three and a half years after the bankruptcy orders were made. By the time the matter came on for hearing on 3 November 2015, a further year had passed. Accordingly, the bankruptcy orders are now 4 ½ years old.

[2] The first respondent is the petitioning creditor (“the Bank”). The second and third respondents are the applicants’ joint trustees in bankruptcy. Mr McCausland appeared for the applicants and Mr Dunlop for the respondents. I am grateful to counsel for their helpful and learned oral submissions.

[3] Articles 256(1)(a) and 371 of the 1989 Order respectively provide:

“256.—(1) The High Court may annul a bankruptcy order if it at any time appears to the Court—

(a) that, on any grounds existing at the time the order was made, the order ought not to have been made.”

“371. The High Court may review, rescind or vary any order made by it in the exercise of the jurisdiction under this Order. “

The words “ought not” in Article 256(1)(a) denote that the court in the exercise of its jurisdiction under this Article is concerned with remedying any injustice caused by the making of the bankruptcy order. Consequently, relief under this provision renders the bankruptcy order null and void. However, relief under Article 371 has no such effect. Rather, it has the effect of re-instating the bankruptcy petition and restoring the parties to the position they were in immediately prior to the making of the bankruptcy order.

[4] While the court has a wide discretion in the exercise of its jurisdiction under Article 371, it is not discretion to be exercised lightly. In *Papanicola v Humphreys* [2005] 2AER 218 Laddie J held at para 25 that the court’s exercise of its discretion under Section 375(1) of the Insolvency Act 1986 (E&W equivalent of Article 371 of the 1989 Order) should be informed by the following principles:

- (1) The [Article] gives the court a wide discretion to review vary or rescind any order made in the exercise of the bankruptcy jurisdiction.
- (2) The onus is on the applicant to demonstrate the existence of circumstances which justify exercise of the discretion in his favour.
- (3) Those circumstances must be exceptional.
- (4) The circumstances relied on must involve a material difference to what was before the court which made the original order. In other words there must be something new to justify the overturning of the original order.
- (5) There is no limit to the factors which may be taken into account. They can include, for example, changes which have occurred since the making of the original order and significant facts which, although in existence at the time of the original order, were not brought to the court's attention at that time.

(6) Where the new circumstances relied on consist of or include new evidence which could have been made available at the original hearing, that, and any explanation by the applicant given for the failure to produce it then or any lack of such explanation, are factors which can be taken into account in the exercise of the discretion."

[5] I turn now to the factual background of the matter. The applicants are husband and wife. For 30 years or so they traded in partnership with their son, David. The nature of that work is described as "groundworks contractors". On 20 October 2006 they acquired a shareholding in a property development company known as Ballybreeze Estates Limited ("BEL"). Their son David was a director and shareholder as was William Samuel Thompson ("Sam Thompson").

[6] By letter of 22 April 2009 BEL received an offer of finance from the Bank in the aggregate amount of .£10m. The offer was subject to several conditions. One of those conditions was that the facility was repayable on demand. Another was that the applicants, David Ginniff and Sam Thompson would each personally guarantee the facility being offered to BEL. A further condition was that the Board of Directors of BEL was required to pass a resolution accepting the Bank's offer and forward a certified copy of the resolution to the Bank.

[7] On 7 May 2009 the applicants attended a meeting of the Board of Directors to consider the Bank's offer. At that meeting the Board passed a resolution to accept the Bank's offer of finance to BEL. On 19 May 2009 the applicants along with David Ginniff and Sam Thompson signed the terms of the Bank's offer of facility to BEL. On 4 June 2009 the applicants executed personal guarantees in favour of the Bank limited to the aggregate sum of £10,562,000. Pausing there, I should add that this was not the first time that the applicants had played a part in BEL securing financing from the Bank. The same process had taken place between the Bank, BEL, the applicants, David Ginniff and Sam Thompson at various times between 2006 & 2009.

[8] BEL subsequently received the said finance from the Bank. For various reasons however BEL's facility was called in by the Bank on 18 August 2010. On 17 January 2011, the Bank called in the applicants' personal guarantees. On 7 February 2011, statutory demands in the sum of £10,306,669.89 were served personally on the applicants. The particulars of the demands state that the said amount claimed is on foot of:

"a Personal Guarantee in respect of the debts and obligations of Ballybreeze Estates Limited dated 4 June 2009 on Account 1025834 - £10,306,669.89 all of which is Guaranteed by the Debtor".

Statutory demands were similarly served on David Ginniff and Sam Thompson.

[9] Within a week of service of the statutory demands the applicants sought legal advice from Greene & Malpas, Solicitors. On behalf of the applicants, Greene &

Malpas wrote to the Bank's solicitors, Carson McDowell, suggesting that the Bank pursue alternative remedies against BEL, David Ginniff and Sam Thompson rather than the statutory demands they had served on the applicants. The letter does not dispute the debt nor make any proposal to discharge it. Carson McDowell replied on 13 February 2011 that the Bank was pursuing the applicants, David Ginniff and Sam Thompson in the same manner, ie by statutory demand followed if necessary by bankruptcy petition.

[10] It is unclear from the papers whether Sam Thompson ever engaged the services of a solicitor. But it is clear that David Ginniff sought advice from John P Hagan & Co Solicitors. They wrote to Carson & McDowell on 4 February 2011 simply indicating that their client was not in a position to pay the sum demanded.

[11] No application to set aside the statutory demands was made by any of the four individuals. Accordingly, on 8 March 2011 the Bank presented bankruptcy petitions against each of them. As in the case of the statutory demands, the petitions were served personally on the applicants. Mr Ginniff was served on 16 March 2011 and Mrs Ginniff was served on 19 March 2011. The petitions were listed for hearing on 13 April 2011.

[12] On 4 April 2011 Greene & Malpas again wrote to Carson McDowell. In that letter, Greene & Malpas address the forthcoming hearing of the petitions. Again, there is no mention of any dispute over the debt or proposal for payment of the debt. Instead, the letter proposes that if Sam Thompson appeared at court on 13 April 2011 requesting time to make proposals to the Bank, then the petitions against the applicants should be likewise adjourned. The letter concludes: "However if there is no appearance on behalf of Mr Thompson and the matter is left to proceed then we would be minded to let the matter against our clients also proceed."

[13] On 12 April 2011, David Ginniff's solicitors, John P Hagan & Co, emailed Carson & McDowell to state that: "we confirm that David Ginniff intends to attend the Bankruptcy hearing tomorrow personally and subject to the other parties not challenging the Petition, he also does not intend to do so." However there was no appearance by or on behalf of any of the four individuals at the hearing. Thus the hearings of all four petitions proceeded on 13 April 2011 undefended and bankruptcy orders were duly made in each case.

[14] The applicants' bankruptcies then took their course. On 12 May 2011 they each completed a Preliminary Examination Questionnaire ("PEQ") for the Official Receiver under Article 10 of the Perjury (Northern Ireland) Order 1979. Material disclosures therein include the following:

- Section 9: the applicants disclose that they transferred property to their son Richard Ginniff and to BEL in the five years prior to the date on which the bankruptcy petitions were presented.

- Section 10: Mr Ginniff discloses that he owes other creditors of some £9785 to the Ulster Bank and some £27,518 to HMRC. Mrs Ginniff discloses states that she owes the same amount to the Ulster Bank; £4887.00 to Robinson & Co and an aggregate sum of circa £43,000 to HMRC;
- Section 11: both applicants disclose that they have not been making regular payments to their creditors;
- Section 12.1 of the PEQ poses the question: “When did you first have difficulty paying your debts?” The applicants answer identically:

“ 14 Feb 2011

Personal Guarantee called in.”

- The next question of the PEQ requests a full explanation as to why the bankrupt is unable to pay his/her debts. Again the applicants answer identically:

“ Money borrowed for housing site

house sales came to a standstill

due to a downturn in the economy

lack of income to furnish interest

payments on borrowings.”

[15] Nowhere in the PEQs do the applicants either dispute the petition debt or the bankruptcy order.

[16] On 19 April 2011 Mr Jennings and Mr Murphy were appointed joint trustees of the bankruptcy estates of the applicants. They were similarly appointed in the bankruptcy estate of David Ginniff. In the course of discussions which took place between the joint trustees and the three Ginniffs, it emerged that the aforementioned property transfers to Richard Ginniff were for natural love and affection and took place 8 weeks after the applicants executed the subject personal guarantees to the Bank.

[17] On 7 July 2011, the joint trustees wrote to Richard Ginniff informing him that they considered the transfers to him were transactions at an undervalue and/or preferences under the relevant provisions of the 1989 Order.

[18] On 19 May 2014, the joint trustees filed an application with the court in which they sought inter alia a declaration that the said transfers were transactions at an undervalue under Articles 312-315 and Articles 367 of the 1989 Order, and the

setting aside of the said transfers under those provisions. When the case eventually came on for hearing on 3 December 2014, the court granted the joint trustees' application and set aside the transfers. It further ordered that the position be restored to that which it would have been had the applicants not entered into the undervalue transactions. In other words, the said lands and property have been restored to the applicants' bankruptcy estates for the benefit of their creditors.

[19] Richard Ginniff appealed the order of 3 December 2014 but subsequently withdrew his appeal. Accordingly, the order of 3 December 2014 stands.

[20] Against that factual background, the applicants now seek to annul/rescind the bankruptcy orders made against them on 13 April 2011. This then brings me to the case they are now making for the purposes of this application.

The applicants' case

[21] The main thrust of the applicants' case is that they allege that the personal guarantees which found the bankruptcy orders were executed by them under the duress and undue influence of David Ginniff. They contend that they were "brought" by David Ginniff to the offices of Millar McCall Wylie, Solicitors on three occasions (dates unspecified) to sign legal documentation, including the personal guarantees. However, at para 19 of her grounding affidavit Mrs Ginniff avers:

" My husband and I had no understanding of the nature of the documents signed or their effect. Such documentation was presented to us during the course of meeting and signed at that time. We never had any prior involvement or dealing with this firm of solicitors, were not advised of the meaning or implication of the documentation and were not advised of the ability to seek legal advice."

Significantly, however, the personal guarantees with which we are concerned certify that independent legal advice was given by Simon Fleming, a solicitor with Millar McCall Wylie, Solicitors.

[22] At para 20 of her affidavit Mrs Ginniff avers that David Ginniff brought the applicants to a second meeting with the same solicitors at which they apparently "expressed unease" at what they were being asked to do. At para 28 Mrs Ginniff repeats her contention that the applicants did not understand the nature of the documentation that they signed. She argues that such was the applicants' lack of understanding of what they were signing, that they thought that Mr Fleming was acting for the Bank. It should be emphasised at this point that these allegations are robustly disputed by Mr Fleming on oath.

[23] For present purposes, the applicants' case may be summarised as follows. First, they contend that the personal guarantees which founded the bankruptcy petitions are invalid because, it is alleged, (i), they did not receive independent legal advice

when executing them and (ii), they did not understand what they were signing when they signed them.

[24] There is also a claim by the applicants on affidavit, although not argued at hearing, that the statutory demands served by the Bank were defective for failing to disclose security held by a third party (per Rule 6.006 of the Insolvency Rules (NI) 1991). However that particular argument is misconceived as the Rule must be construed as meaning security held by the individual subject to the relevant statutory demand – not a third party (see Knox J : Re: a debtor (No 310 of 1998) [1999] 1WLR452).

[25] In the last of her three affidavits, Mrs Ginniff makes a new and general allegation that she has a right of action against the Bank for “breach of duty and negligence, misrepresentation, breach of contract”. She does not however expand upon this allegation beyond that bald assertion. In the circumstances, I do not attach any weight to it.

[26] It is clear from the facts I have already set forth that no procedural irregularity or serious mistake occurred in the events leading up to the making of the bankruptcy order. The applicants, who were legally represented at the time, elected not to appear at the hearing of the petition or defend it. Accordingly, the order was properly made and no injustice was caused by it. It follows therefore that Article 256(1)(a) has no application here. I turn then to the relief sought under Article 371 and the relevant legal principles.

[27] The principles formulated by Laddie J in Papanicola v. Humphreys are clear that the onus lies on the applicants to demonstrate the existence of new and exceptional circumstances which justify the overturning of the original bankruptcy orders. However the circumstances in which the applicants signed the personal guarantees were well known to them prior to the making of the bankruptcy orders. Furthermore, they had legal representation for two months prior to the making of the bankruptcy orders. In the circumstances I find it inconceivable that the issue of the personal guarantees was not the subject of that legal advice. For those reasons, I do not accept that the applicants’ allegations about the personal guarantees are new and exceptional circumstances. To this I would add that no opportunity was lost to them at the appropriate stages in the process to make the case that they are now making. They could have defended the proceedings but they did not. They offer no explanation as to why they did not. Nor do they explain the delay in bringing this application. These are all material factors which I take into account, especially since the applicants’ recollection of events - which they now describe somewhat memorably - would have been much clearer then than now. So to make these allegations now, after many years delay, for no apparent reason, seems extraordinary. For these reasons, I am by no means satisfied that the applicants have discharged the onus placed upon them for the purposes of Article 371.

[28] Even if, contrary to my finding, the applicants’ case did demonstrate new and exceptional circumstances to justify the rescission of the bankruptcy orders, the

matter would not end there. There are other material considerations which must be taken into account. The lapse of almost 5 years since the bankruptcy orders were made means that the debts due to those creditors have increased as a result of accrued interest, surcharges and penalties. Those creditors have been unable to pursue the applicants over their debts because of the existence of the bankruptcy orders. If the bankruptcy orders were rescinded, creditors' rights to pursue the applicants may be lost due to passage of time. It follows therefore that if any creditors' debts are now statute-barred, they would be prejudiced by any rescission of the bankruptcy orders. I note that those creditors' interests are not addressed by the applicants at all. Nor is there any evidence that the applicants could or would pay them. In addition to that, the official receiver and the joint trustees have incurred substantial costs in and about the discharge of their statutory duties under the insolvency legislation and by virtue of Rule 6.222 of the Insolvency Rules (Northern Ireland) 1991, the bankruptcy estates are required to indemnify those costs.

[29] Finally, even if I was minded to rescind the bankruptcy order the matter still would not have ended there because a rescission of a bankruptcy order is not a final order. The petition would be re-instated and the provisions of Article 240(3) of the 1989 Order once again engaged. Article 240(3) provides:

“The High Court may, if it appears to it appropriate to do so on the grounds that there has been a contravention of the rules or for any other reason, dismiss a bankruptcy petition or stay proceedings on such a petition; and, where it stays proceedings on a petition, it may do so on such terms and conditions as it thinks fit.”

In all the circumstances I have just outlined, if the bankruptcy orders were rescinded the interests of creditors would need to be protected. That could only be done by staying the petitions under Article 240 (3). But where would that leave the applicants? After all, their allegations about the validity of the personal guarantees are just that - allegations; nothing more. If they failed to have the guarantees declared invalid by the court, they could find themselves re-adjudicated bankrupt on foot of the original petition. Furthermore, it would be a waste of time and costs if a bankruptcy order was obtained by another creditor (in all likelihood HMRC) by way of fresh petition, substitution or change of carriage order.

[30] For these reasons I must reach the conclusion therefore that if the applicants sought legal advice from Greene & Malpas following service of the relevant legal documents yet did not challenge the bank's debt or oppose the making of the bankruptcy orders when they had every opportunity to do so, then either they had no proper or legitimate basis for disputing the validity of the guarantees or, for some reason, they made an informed decision not to. Either way, the applicants had every opportunity to raise the issues they now raise at the appropriate stages in the process either by applying to set aside the statutory demands or opposing the making of the bankruptcy orders. But they did not avail of the opportunities to do so. It is also

apparent from the thrust of their solicitor's correspondence with Carson McDowell that it was the applicants' intention to submit to the bankruptcy orders if Sam Thompson did likewise. Accordingly, I find that the applicants willingly submitted to the bankruptcy orders on 13 April 2011 and that the decision to do so was informed by legal advice. In the circumstances, I refuse the relief sought. I will now hear argument on costs.