Neutral Citation No. [2015] NICh 3 | *Ref:* **DEE9485**

Judgment: approved by the Court for handing down | *Delivered:* **16/01/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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BETWEEN:

SHEILA McATEER AS EXECUTRIX OF THE ESTATE OF JAMES KEVIN McATEER, DECEASED

Applicant

and

WALTER LISMORE AS FORMER TRUSTEE OF THE INSOLVENT ESTATE OF JAMES KEVIN McATEER, DECEASED

Respondent

AND

Between
IAN FINNEGAN AS TRUSTEE OF THE INSOLVENT ESTATE OF JAMES KEVIN McATEER, DECEASED

and

WALTER LISMORE AS FORMER TRUSTEE OF THE INSOLVENT ESTATE OF JAMES KEVIN McATEER, DECEASED

and

SHEILA McATEER AS EXECUTRIX OF JAMES KEVIN McATEER, DECEASED, AS NOTICE PARTY TO THE SUMMONS OF IAN FINNEGAN (Notice Party)

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DEENY J

[1] By summons of 21 November 2014 Mr Ian Finnegan, as the present trustee of the insolvent estate of the late James Kevin McAteer, deceased, seeks certain directions pursuant to Article 276(2) of the Insolvency (NI) Order 1989 (the Order). He also sought an order for abridgement of time for service of this application, (01/3115/05) which I have granted.

[2] The summons raised certain interesting questions arising out of prolonged litigation between the original applicant, Mrs Sheila McAteer, executrix of the estate of her late husband James Kevin McAteer (Mrs McAteer) and Mr Walter Lismore (Mr Lismore).

[3] The matter arises in this way. Mr Lismore, a licenced insolvency practitioner, who, the court was informed, has retired this year, was trustee in bankruptcy to the insolvent estate of the late James Kevin McAteer from 4 April 1995. The estate was a difficult one to administer and I shall have to return to some aspects of that. In the discharge of his duties Mr Lismore obtained possession of and sold the former home of James Kevin McAteer, his wife, Sheila McAteer and their three, by then adult, children. Mrs McAteer contended that the sale had been at an under value and that Mr Lismore was in breach of the duty of care owed to the estate of her late husband. In my judgment, McAteer v Lismore [2012] NICh 7, I found in favour of Mrs McAteer on the basis, principally, that the property had not been marketed or advertised for nearly five years before 15 March 2005 when it was sold. The assessment of the loss to the estate was a difficult matter. Experienced valuers retained by Mrs McAteer suggested that very large sums of money might have been paid for the house and adjoining land at that time in the property market in Northern Ireland. I concluded that the proper award had to be one that represented, on the balance of probabilities, the difference between the price actually received and the price that would have been obtained if there had been the more active marketing in 2004 and 2005 which there ought to have been. I found the quantum of loss to be £122,500.

[4] The issue of costs was adjourned at the request of the parties and came back before the court on 23 March 2012. That order (as amended without dispute) reads, so far as relevant, as follows:

> "IT IS ORDERED that the Applicant should have her costs against the Respondent from 1 October 2009 taxed in default of agreement and further the costs of the respondent, and of his estate agent, arising from the conduct of the sale of Folios 16606 and 24432 Co Down from 1 December 2004 are disallowed (but those of the conveyancing solicitors are allowed)."

The assessment of costs was finally taxed at £129,662.90 in respect of the fees of the late Mr T T Ferris QC, his junior and his solicitors Messrs R P Crawford & Company.

[5] Following that, however, Mr Lismore paid the sum personally as he had been ordered to do but he paid it into the account with the Insolvency Service for the insolvent estate of James Kevin McAteer against monies owed by Mrs McAteer to the estate. He had earlier paid the sum in compensation into the estate about which there is no dispute. However, Mrs McAteer's advisers were incensed at him taking

this course. They served a statutory demand upon him for the amount in question. By proceedings with the record number 14/11891 brought by Mr Lismore against Mrs McAteer, he sought to set aside the statutory demand on the basis that he had a substantial defence to the respondent's claim. In effect that meant that he had given a good discharge to the court's order that he pay the costs to Mrs McAteer by paying it to the insolvent estate of her late husband. This matter ultimately came on for hearing before me on 17 November 2014. In an unreported ruling I dealt with the arguments of Mr Lismore, some of which had been abandoned in the course of the intervening period and I declined to set aside the statutory demand. The solicitor for Mr Ian Finnegan, Mr Richard Barbour, appeared at that hearing and, at his request, I relisted the matter for 24 November to deal with any potential application by him. The respondent was not to issue a bankruptcy petition in the interim against Mr Lismore.

[6] Mr Ian Finnegan has become the trustee of the insolvent estate of James Kevin McAteer. Indeed, it seems that he has taken over Mr Lismore's insolvency practice in general.

[7] The matter was ultimately listed for hearing before me on 17 December when I heard Mr Barbour on behalf of Mr Finnegan, Mr Mark McEwen of counsel on behalf of Mr Lismore and Mr John Coyle of counsel on behalf of Mrs McAteer who was made a notice party to Mr Finnegan's summons.

[8] The summons was brought pursuant to Article 276(2) of the Order which reads as follows:

> "The trustee of a bankrupt's estate may apply to the High Court for directions in relation to any particular matter arising under the bankruptcy."

[9] The directions sought can be grouped under three headings and I propose to deal with them seriatim. The first three questions posed were as follows:

> "(i) What is the effect and meaning of the Order of this Court made on 23 March 2012?
>
> (ii) Is the effect of that Order to disallow the respondent from obtaining his remuneration in dealing with the application brought by Sheila McAteer from the estate of the deceased insolvent as and from 1 December 2004, or does it disallow the remuneration of the respondent in connection only with the sale of the lands at 20 Temple Hill Road, Newry?

(iii) Is the effect of that Order to disallow the Respondent from obtaining his legal costs of dealing with the application brought by Sheila McAteer from the estate of the deceased insolvent as and from 1 December 2004, or does it disallow the legal costs of the respondent in connection only with the sale of the lands at 20 Temple Hill Road, Newry."

[10] It is, perhaps, preferable to explain that, having checked the recording of the costs hearing before me on 23 March 2012, senior counsel for Mrs McAteer made no application with regard to the disallowance of Mr Lismore's legal costs although there was some reference by senior counsel for Mr Lismore to correspondence that had passed. The key piece of correspondence was a letter from Mr Leonard Edgar of John McKee & Sons of 22 March 2012 to R P Crawford & Co. It dealt with various issues as to costs that arose from my judgment of 9 March which were to be addressed on 23 March. At no point in that letter was it suggested that Mr Lismore was to recover his costs or remuneration from the bankrupt's estate and nor was that proposed by his counsel at the costs hearing on 23 March.

[11] Mr Mark McEwen for Mr Lismore confirmed that his client had not taken his costs from the bankrupt's estate even to the extent that there were assets to meet it but he submitted that the costs should not be disallowed. I have taken his submissions into account. He said there was a paucity of authority directly on the point but he helpfully drew attention to two relevant cases. The first of these was Armitage v Nash and Others [1998] Ch. 241; [1997] EWCA Civ 1279. The main question to be addressed on that appeal was the true construction of an exemption clause in a settlement in favour of a trustee. The respondents were the personal representatives of deceased trustees of the settlement of which the plaintiff was the principal beneficiary. The judge, having found that the exemption clause was valid and enforceable, awarded the respondents 80% of their costs depriving them of the remaining 20% because they were unsuccessful on two of the points which had been argued. Lord Justice Millett at page 4 said the following:

> "After hearing further argument, he directed that the respondent should not be at liberty to reimburse themselves out of the trust fund to the extent of that 20%. He considered that the respondents were defending themselves and, having taken points which cost money and in respect of which they were unsuccessful, ought to bear those costs themselves.
>
> The Judge recognised that there was longstanding authority to the contrary, but held that it was displaced by the terms of RSC Order 62 Rule 6.2. That rule entitles a trustee to recoup his costs out of the trust fund and

> authorises the court to order otherwise 'only on the ground that he has acted unreasonably or, in the case of a trustee or personal representative has in substance acted for his own benefit rather than for the benefit of the fund."

Our own Order 62 Rule 6(2) is in the same terms.

[12] Millett LJ continued:

> "The respondent's appeal from the judge's ruling which, they claim, deprives them of their legal rights. They submit that trustees are entitled to a lien over the trust fund for their costs, and that that this lien extends to the costs of litigation, including the costs of defending themselves against a charge of breach of trust: see Turner v Hancock [1882] 20 Ch D303; Re Spurling's Will Trust [1966] 1 WLR 920. The lien is only lost by misconduct.
>
> But the principle is my opinion overstated. Trustees are entitled to a lien on the trust fund for the costs of *successfully* defending themselves against some action for a breach of trust. That was the position in Re Spurling's Will Trust as it was in Walters v Woodbridge 7Ch D 504 which it followed. But on what principle can one justify their right to recoup themselves out of the Trust fund for the costs of *unsuccessfully* defending themselves against such an action? It offends all sense of justice."

[13] Counsel also referred to a case in Jersey Royal Court before Commissioner Clyde Smith: B v Royal Bank of Canada Trustees Ltd and E [2013] JRC 023. There the commissioner found that in a case about a point of construction or law relating to a trust raised by someone other than the trustee the general principles as to costs of hostile litigation applied and 'so the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, subject to the general qualifications which apply in ordinary hostile litigation'.

[14] I observe that if that is the case about a contested construction of law it must, a fortiori, apply even more strongly where there is actual criticism of the conduct of the trustee in the bankruptcy.

[15] Mr Richard Barbour submitted that Mr Lismore should not be able to recover his costs. The general principle is that a trustee in bankruptcy is personally liable if he instructs solicitors and counsel. In practice there is only £24,000 left in the bankrupt estate if Mrs McAteer is found to be entitled to her costs which Mr Lismore paid into the estate.

[16] Mr Barbour helpfully pointed out that the trustee in bankruptcy could have done what his client is now doing, i.e. seek the directions of the court if he was uncertain about his position. Furthermore, at the time of the controversial sale of the property, which the court found to be at an undervalue after a failure to market it, he could have put the contract before the Chancery Master for the approval of the court. He did neither of those things.

[17] Mr Lismore opposed the grant of leave to bring the proceedings. After the court found that the proceedings were properly brought he contested the substantive proceedings over a prolonged period of time. He made no lodgement into court nor did he write a Calderbank letter seeking to resolve the matter.

[18] Mr Coyle pointed out that Mr Lismore was not a voluntary or charitable trustee. He acted as trustee in the expectation of recovering his fees and had recovered substantial fees.

[19] In reply, Mr McEwen pointed out that initially Mrs McAteer's case against him included an allegation that he had solicited his appointment which he should not have done. This was abandoned immediately before the leave hearing on 1 October 2009.

[20] I find the submissions on behalf of the present trustee in bankruptcy and the notice party entirely convincing here. For the reasons they have set out it seems to me that it would be quite inappropriate for Mr Lismore to recover his costs or remuneration from the estate of the bankrupt, he, albeit on the advice of his then estate agent, having sold the property without marketing it for some 5 years. He had not chosen to seek the approval of the Chancery Master for that transaction, which he knew to be controversial so far as the McAteers were concerned. He had not sought the direction of the court. The general principle should be that he should be liable for the consequences of his own actions and those of his servants and agents. The parties acknowledge that the court has a discretion in the matter but the discretion would not be exercised in favour of Mr Lismore here as he persisted through a full leave hearing and a protracted and adjourned substantive hearing to contest matters which ought not to have been contested.

[21] The court's discretion would in any event not be exercised because of the injustice to Mrs McAteer and her advisors if the estate were to be impoverished by Mr Lismore seeking to recover his costs from the estate when the principal asset of the estate at the present time, out of which his costs would be paid was the very sum of money which Mr Lismore was obliged to pay to Mrs McAteer for her legal costs. For all these reasons therefore I find that the effect of the Order of the Court of 23 March 2012 in law is that Mr Walter Lismore is not entitled to recover his legal costs or remuneration for his own time and that of his servants and agents in relation to the sale of 20 Templehill Road, Newry, and the litigation arising therefrom, with one proviso. That proviso is based on the fact that he, although at fault in the original

sale, was also accused of soliciting his appointment which was not pursued. It may also be right to say that he was entitled to take some legal advice about where he found himself prior to the leave hearing before 1 October 2009. In all the circumstances I consider this should be addressed. I would propose to measure it in the sum of £5,000 but if any of the parties so desire they can have a taxation of Mr Lismore's costs prior to 1 October 2009 based on this paragraph of my judgment. They may not think that this is a fruitful use of resources.

[22] In the circumstances therefore questions (iv)-(vi) in Mr Finnegan's summons of 21 November 2014 are no longer applicable and need not be addressed. I turn therefore to his remaining questions.

[23] The last three questions posed are as follows.

> "(vii) If the answers to (b)(ii) and (iii) above are that the respondent is not entitled to his remuneration and legal costs in dealing the application, is the applicant entitled to retain the monies paid into the insolvency account by the respondent for the benefit of their creditors?
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> (viii) On the making of the order discharging Sheila McAteer from her bankruptcy is she released from any bankruptcy debt which she incurred in respect of any fraud or fraudulent breach of trust to which she was party pursuant to Article 255(3) of the Insolvency (NI) Order 1989?
>
> (ix) If Sheila McAteer is not released from such bankruptcy debt, is she entitled to payment of her costs from the estate of the deceased insolvent until such time as she discharges her liability to the estate for such bankruptcy debt?"

The summons also sought such further or other order as seems meet to the court.

[24] Initially Mr Richard Barbour, for Mr Finnegan, was minded to leave the submissions on this aspect of the case to Mr McEwen on behalf of Mr Lismore but in the event both made submissions in the end in support of the contention that Mrs McAteer should not recover the sum in costs paid into the estate of her bankrupt husband by Mr Lismore in purported discharge of his duty under my Order of 23 March 2012. I take all their submissions into account even if not expressly referred to.

[25] At first glance the matter seems clear enough. As is not now disputed and as is clearly the position in law Mr Walter Lismore was personally liable to pay the

order for costs made against him when he lost the main action brought by Mrs McAteer with regard to the sale of her former home.

[26] By closely analogous reasoning Mrs McAteer was personally entitled to recover those costs. It is true that she was suing as the personal representative of the estate of her late husband. But a personal representative is not automatically entitled to recover his or her costs from the estate. If they are uncertain as to whether they should bring or defend proceedings on behalf of the estate they can bring a Beddoes application to the High Court seeking the directions of the court. Mrs McAteer did not do that, although I observe that she did win the leave application required by statute for bringing the proceedings which she ultimately won. As personal representative she was therefore liable to pay costs if she had lost. On the other hand, as here, having won, she was entitled to recover those costs from the losing party, Mr Lismore.

[27] It was a mistake in law on his part to pay the money into the bankruptcy estate of her husband as the entitlement to the costs was that of Mrs McAteer personally, to reimburse her solicitors and counsel.

[28] Since the decision of the House of Lords in Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, on an application of the principle of unjust enrichment money paid under a mistake of law, as of fact, is subject to restitution. However, Mr McEwen ingeniously constructed an argument in which Mr Barbour joined to seek to deprive Mrs McAteer and her advisors of the costs. He drew the attention of the court to the Order of the late Master Glass of 25 September 1995. This order declared that the payment of £270,000 by Mrs McAteer as personal representative of her deceased insolvent husband James Kevin McAteer to her son Paul McAteer was void against Mr Lismore as the trustee of the estate of the above-named deceased insolvent. He pointed out that the order of the court referred to Article 367(1) (a) of the Insolvency (NI) Order 1989. He relied on the fact that the rubric immediately above that Article reads: "Transactions defrauding creditors". Such rubrics or labels are not in fact part of the statutory provisions but they are to assist in interpretation. Article 367(1) (a) does not involve any finding of fraud but merely making a gift or entering into a transaction. I reject his submission that there is a finding of fraud here for that reason by the Master.

[29] In any event, as Mr Coyle pointed out, Mr McEwan's own client did not in fact allege fraud in the affidavit which supported that application. It was an ex parte application although the Order was not in fact appealed or sought to be reviewed. It hardly lay in the mouth of Mr Lismore's counsel to allege fraud now when it had not been alleged 20 years before.

[30] Furthermore in the light of the decision of this court in Official Receiver v O'Brien [2012] NI Ch. 12 applying the European Convention on Human Rights and in particular Article 6 it would be most surprising if the court were to permit the enforcement of an order against this lady some 20 years after it was made.

[31] In fact a little research shows that to do so would be quite unlawful. The relevant provision in the Limitation (NI) Order 1989 is at Article 16.

> "16-(1) An action may not be brought upon a judgment after the expiration of 6 years from the date on which the judgment became enforceable."

This is a clear bar by analogy to what Mr McEwen and Mr Barbour would now seek to do i.e. to enforce the Master's order by sequestering these funds 20 years later, which have only come into the account of the estate in bankruptcy due to the wrongful lodgement by Mr Lismore.

[32] A further strong indication of the inappropriateness of these submissions is to be found at Article 17 of the Judgments (Enforcement) (NI) Order 1981.

> "17-(1)An application under Article 22 or 23 shall not be accepted by the office …
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> (b) without the leave of the Office, after the expiration of 6 years from the date on which the judgment became enforceable; or
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> (c) after the expiration of 12 years from the date on which the judgment became enforceable …".

If a judgment cannot be enforced by the Enforcement of Judgments Office after these time limits it seems to me quite wrong to attempt to do so by the back door because of the wrongful decision of Mr Lismore not to pay Mrs McAteer her costs via her solicitor at the time he ought to have.

[33] If it is the case that I have any discretion in the matter it is quite clear how the discretion should be exercised. As set out above Mr Lismore pursued the defence of these proceedings both through a leave hearing and through a protracted and adjourned substantive hearing despite the fact that he knew at all relevant times that he and his agent had failed to market the property for 5 years before selling it. He was palpably in the wrong. He made no payment into court nor wrote a Calderbank letter. He did not seek to appeal the judgment of this court.

[34] Mrs McAteer was at risk of costs if she had lost the proceedings. There are considerable indications that she would not be in a position to discharge her obligations to her former legal advisers. But, regardless of that, it would be quite unfair if somebody was at risk of paying costs if they lost, and who was vindicated in the proceedings that they brought, should see those costs diverted from their legal advisors because of an order of 1995, some 20 years ago. Although not necessary to

my decision I observe that the finding against her on that occasion was because she had paid the benefit of certain insurance policies to her son rather into the estate of her husband. Even if, as contended, she did so deliberately or even with a conscious avoidance of paying the insolvent estate that is all so far removed from the present situation as to the costs of the action for an undervalue that it should not preclude her recovery of these costs now.

[35] In response therefore to question 7 of Mr Finnegan's summons the answer is "no". In response to his questions 8 and 9 and his application for further or other order I direct that the sum of £129,662.90 (with any interest accrued) paid by Mr Lismore into the estate of the deceased bankrupt James Kevin McAteer be paid within 21 days directly to the account of Messrs R P Crawford to enable them to discharge their fees and those of their counsel.