Neutral Citation No. [2013] NICh 11 | *Ref:* **DEE8919**

*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **12/06/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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OFFICIAL RECEIVER

-v-

WILLIAM JAMES SINNAMON
AND
ELIZABETH ANN SINNAMON

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DEENY J

[1] On 20 August 2008 the Official Receiver for Northern Ireland issued applications against William James Sinnamon and Elizabeth Ann Sinnamon, the respondents to this matter. Mr Patrick Good QC attended on behalf of the Official Receiver, out of courtesy, as the application before the court was not principally one that affected the Official Receiver. Mr Mark Heaney appeared for the Sinnamons and Mr William Gowdy appeared for an intended party, Mary Frances Kearney.

[2] The original application of the Official Receiver was, inter alia, for an order pursuant to Article 310(2)(a)(i) of the Insolvency (Northern Ireland) Order 1989 for leave for the eviction of the said William James Sinnamon from the premises known as 22 Lurganeden Road, Pomeroy, County Tyrone being the lands being comprised in Folio TY6053 County Tyrone, the folio. (In fact the premises are now occupied by his 93 year old mother Ada Sinnamon whom the Plaintiff does not seek to evict.) Further he sought an order that the premises be sold in lieu of partition and that proceeds of the sale thereof be divided between the applicant and the second named respondent in equal shares or in such other shares as the court shall deem appropriate and other related reliefs. The application was grounded on an affidavit of the then Official Receiver Mr Joseph Hasson in which he avers that by an order of the court of 16 December 1992 the first respondent William James Sinnamon was adjudged bankrupt. Although not dealt with in Mr Hasson's affidavit it was common case that his initial trustee in bankruptcy was the proposed new party

Mary Frances Kearney. I will return to her in a moment. The Official Receiver avers that immediately prior to the adjudication of the bankrupt the respondents were the joint owners of the folio in question containing a dwelling house. He averred that the interest of the bankrupt in the premises is vested in him as trustee in bankruptcy and has not been disclaimed by him. He discloses a charge in favour of Alliance and Leicester Plc in the sum of £31,000 and he recites that there are ordinary unsecured creditors of the former bankrupt, as he is now, William James Sinnamon in the sum of £90,151.27. They have received an interim dividend of only 1.1 pence in the pound.

[3] The essence of the matter arises thus. Ms Kearney was the initial trustee. She entered into negotiations with Mr Jim Rafferty, now deceased, then solicitor to the bankrupt with a view to monies being obtained from relatives or friends of the then bankrupt who are named in the papers with a view to getting back not only this folio, the respondents would say, but three other folios. There were charges against other folios. One charge was in favour of the National and Provincial as a lender on folio 7337 County Tyrone, 32 Lurganeden Road. On other folios TY 20159, 20090 and 20188 there were charges in favour of Nichol Fuel Oil Limited, the principal creditor at that time against Mr Sinnamon. The parties certainly reached an agreement; that is clearly shown from the competing affidavits and from the correspondence. Unhappily there is an important disagreement now as to what the terms of the agreement were. Mr Sinnamon has averred on affidavit that he dealt through Mr Rafferty with Ms Kearney and that she was prepared to release all the lands and property vesting in the bankrupt if the second named respondent, that is Mrs Sinnamon, with the assistance of others, paid to the trustee in bankruptcy £30,000. He avers that this money was paid to Mary Kearney and he says that that was to cover Tyrone 6053 as well as the other folios. Ms Kearney says that, on the contrary, the sum of money in question was £27,500 to be paid to Nichol Fuel Oils and that the agreement did not cover Tyrone 6053. I will have to return to this in a moment. But the essence of the matter is that the respondents now seek to join Mary Frances Kearney in this matter as a party. They have advanced the defence that I have outlined, that the Official Receiver is not in fact the legal owner of this property because it should not be part of the bankrupt's estate because there was an agreement, a binding legal agreement in effect to transfer it to the second respondent Elizabeth Ann Sinnamon in or about 1995. They have brought a summons to the court to join Mary Frances Kearney and she has responded to that on affidavit opposing the application.

[4] The order sought by the respondents is pursuant to Article 277 of the Insolvency (Northern Ireland) Order or in the exercise of the court's inherent jurisdiction for leave to join the former trustee in bankruptcy to the above proceedings. Mr Gowdy points out that it is not clear from that whether she is to be joined as a necessary party, as a notice party, or as a third party and indeed I think that is a legitimate comment, but not central to the decision at which I have arrived.

[5] The position is that Ms Kearney having reached an agreement with Mr Rafferty, the late Mr Rafferty, and having paid off Nichol Fuel Oils then, as she has averred, called a final meeting of creditors on 4 November 1997 and having given the necessary notice pursuant to Article 271(7) of the Insolvency Order 1989 she vacated her office. However, given that the bankrupt was still bankrupt at that time, pursuant to Article 273 of the same Order the Official Receiver then became the trustee in bankruptcy. As Mr Gowdy sets out in his helpful skeleton argument, pursuant to Article 272(3)(d) of the 1989 Order she had her release on vacating her office on 4 November 1997. One sees at Article 272(5) and (6) of the Order the following provisions:

> "(5) Where the Official Receiver or the trustee has his release under this Article, he shall, with effect from the time specified in paragraphs (1) to (4), be discharged from all liability both in respect of acts or omissions of his in the administration of the estate and otherwise in relation to his conduct as trustee.
>
> (6) Nothing in this Article prevents the exercise, in relation to a person who has had his release under this Article, of the High Court's powers under Article 277."

[6] Mr Heaney then must rely on Article 277. I observe, firstly, that Article 277 says at paragraph (4): "where an application under paragraph (3) is to be made by the bankrupt, or if it is to be made after the trustee has had its release under Article 272, the leave of the High Court is required for the making of the application". This is an application for the court's leave to join the former trustee.

[7] I had occasion to address the duties of a trustee in bankruptcy in my judgment in McAteer v Lismore [2012] NI Ch7at [3] to [8] but I think it is not necessary for me to quote in extenso from that but merely to say that a trustee has a duty to take reasonable care with a discretion as to how to discharge that duty. However, this point about the leave, certainly so far as counsel is concerned, appears to be a novel one. Leave was granted in McAteer but was granted by me on foot of an ex tempore and unreported judgment. I do not propose to digress on the matter at any length. But it does seem to me, firstly, that the party seeking to join a trustee who has had his or in this case her release under Article 72 must at the least satisfy the court that they have an arguable or a prima facie case that the trustee will be liable under Article 277(1) of the Insolvency Order; it would be unjust otherwise to the quondam trustee to be forced to expend time and money in defending a specious action. Secondly, and I will turn to Article 277(1) in a moment, I consider it likely that the court has a discretion in the matter. Although circumstances will vary enormously from case to case, and as has been said context is all, I think I can safely say that the period of time from when a trustee has had his or her release, or its

release if it is a corporate body, would be a relevant factor in the exercise of the court's discretion. Here it is almost 16 years since this lady had her release. Counsel submit that there is no time bar under the Limitation Order 1989.

[8] Article 277(1) reads as follows:

> "Where in an application under the Article the High Court is satisfied –
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> (a) that the trustee of the bankrupt's estate has misapplied or retained, or become accountable for, any money or other property comprised in the bankrupt's estate, or
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> (b) that a bankrupt's estate has suffered any loss and consequence of any misfeasance or breach of fiduciary or other duty by a trustee of the estate in carrying out of his functions,
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> the court, may order the trustee, for the benefit of the estate, to repay, restore or account for money or other property (together with interest at such rate as the court thinks just) or, as the case may require, to pay such sum by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just."

I think I need not set out paragraphs (2), (3) and (5) of the Article.

[9] Therefore the court has to consider whether the respondents here in this application have made out an arguable case that the trustee may be liable so that they may succeed in satisfying the High Court that sub-paragraphs (a) and (b) of (1) apply here.

[10] Now one of the issues therefore will be the factual nexus here. But there is another issue which it is right to deal with first. It can be seen that the court's power under Article 277 is to make an order against the trustee for the benefit of the estate. That reflects the words in 277(1)(a) and (b) relating to the trustee of the bankrupt's estate. But is that the claim being made here by the respondents? The claim being made by the respondents is that the then trustee in bankruptcy of William James Sinnamon, Ms Kearney entered into a legally binding contract with Elizabeth Ann Sinnamon to transfer folio 6053 of County Tyrone i.e. to transfer it <u>out of the bankrupt's estate</u> for the benefit of Mrs Sinnamon in consideration of the payment

she made. It seems to me that therefore there is an inherent flaw in this application i.e. that the respondents are not bringing it for the benefit of the estate but for the benefit of Mrs. Sinnamon. The Official Receiver is representing the estate, he is arguing that the folio is still part of the estate and should be sold subject to the rights of the wife and the proper application of Sections 4 and 5 of the Partition Act for the benefit of the creditors. While I have listened carefully to Mr Heaney's submissions it does not seem to me that there is any good answer to that point and therefore that the respondents' application should fail on that ground. But as the application is a somewhat novel one I think it is right and proper to consider whether that aside it would be a proper case in which to exercise the court's discretion and I have reached the conclusion it would not be right and proper to do so.

[11] Mr Heaney's case that the contract was as his clients would wish it to be was framed by him in terms of a misrepresentation by Ms Kearney. I cannot accept that that is a proper description of what happened here. He is suggesting, on instructions no doubt, that she misrepresented that she would transfer all the folios and did not do so. But it does not seem to me that that is a proper legal analysis of the situation. The issue is what she did agree with Mr Rafferty who was acting as solicitor for or agent of Mrs. Sinnamon as well it would appear as William James Sinnamon. I find it difficult to construe that as an issue of misrepresentation whether of fact or of law entitling the other party to relief. I find it difficult to see that therefore she is guilty of a misfeasance. I accept in theory that if she was in breach of contract in not completing a legally binding contract at that time she may well have owed a duty to the other party to the contract, but that was not to the bankrupt's estate, that was Mrs. Sinnamon. Nor is it right to say pursuant to Article 277(1)(a) and contrary to counsel for the respondents' submission that she has retained the property. The estate has not been retained by her. There is absolutely no question that the lady at any stage did anything for her own interest. On the contrary the modest fee that appears to have been charged is very creditable to her. If anybody retained the estate it is the Official Receiver as her successor in title as the trustee in bankruptcy. So the respondents, the applicants to this summons face very real difficulties there.

[12] But they face further difficulties even on a substantive claim. Mr Sinnamon avers that £30,000 was paid to Mr Rafferty to pay for all these folios. Well that is possibly so, but that is inconsistent with Ms Kearney's sworn averment that she received £27,500. Is the difference to be explained by legal costs charged by Mr Rafferty? That seems quite possible.
Mr Heaney points to a manuscript document prepared apparently by Mary Kearney and he notes that there is a reference to Tyrone 6053 and a valuation of £5,000 making up part of a total valuation of £26,607.97. I do note that is there but one would have to describe it as rather slight evidence that that meant that 6053 was to be conveyed.

[13] Against him is the third piece of evidence. A lot of the correspondence is gone. I am not going to make any finding against Ms Kearney on the basis that she or her then firm of solicitors, Messrs. McManus Kearney, are at fault, because they have not retained an entire file of documents since October/November 1995. It seems to me it would be quite unreasonable to make such a finding. I make no finding adverse to Ms Kearney that she only has some documents left after that period of time. Indeed as Mr Heaney acknowledged Rafferty's, who were acting for the Sinnamons, have also been unable to locate a file or certainly a full file in relation to the matter. It would be quite unreasonable to expect solicitors in my view to retain a full volume of all the documents they have relating to every transaction for a period of time of that length. It is not my understanding that, for example, Her Majesty's Revenue and Customs expect taxpayers to retain files for that length of time. I cannot see why solicitors should be obliged to do it for their clients.

[14] The letter of 16 October 1995 is relied on by the Sinnamons but it seems to me a very double-edged sword indeed, because in it Mr Rafferty writes to Ms Kearney, thus.

> "I refer to your letter of 11 inst. and note the contents thereof. For the sum of £27,500 I require a release of 32 Lurganeden Road the lands in folios 20159, 20090 and 20188 County Tyrone, not just from Nichol Fuel Oils Limited but also from you as trustee in bankruptcy so that save for 32 Lurganeden Road, Pomeroy to which the National and Provincial Building Society mortgage will still apply all charges and encumbrances in respect of all properties will be removed. I have a copy of the land certificates for Tyrone 7337 and folio 20188 County Tyrone but do not have copies of the other two folios and I shall require same."

[15] So one considers that letter and it seems clear evidence that the agreement was as Ms Kearney remembers it i.e. for £27,500 and for some but not all of the folios. That fits in with Mr Sinnamon's own affidavit. He sets out the five folios concerned in his affidavit, received by the court on 9 April 2013 in support of this summons and he acknowledges therein and properly sets out that the folio in question TY6053 as already mentioned was the subject of a mortgage to the Alliance and Leicester which at that time apparently stood in the sum of £27,269.37. The lands and property he avers were valued at that time at £25,000. That makes it entirely understandable that that folio may have been excluded from this transaction. If it was to be included one would expect an express reference to it. Nichol Fuel, the creditor, had charges on three of the folios and they were to be paid the £27,500. Mrs Sinnamon was to get the folio of 7337 which on Mr Sinnamon's

own averment had a modest equity at that time, but the rights of the National and Provincial Building Society as mortgagee of it were to be preserved.

[16] So it seems to me that taking those documents together and all the helpful submissions of counsel that the respondents' case here is such a weak one that I could not be satisfied they have an arguable case of any misfeasance against this lady leaving aside the other points that have been relied on and I refuse the application on that independent ground. If I were wrong on any those of considerations I would have taken into account the very lengthy effluxion of time as a factor leaning against the exercise of the court's discretion in favour of the respondents.

[17] Finally I observe that the whole application may be misconceived because it seems to me that if there was a binding legal contract for the transfer of Tyrone Folio 6053 which, I have to say, seems very unlikely on the evidence before me, that would appear to bind the successor in title of Ms Kearney, the Official Receiver and therefore can be advanced as a defence to these proceedings. Whether it is wise for the respondents to persist in that is something they will have to carefully reflect upon. I refuse the application pursuant to the Insolvency Order and my inherent jurisdiction.

[Ms Kearney was awarded her costs against the Applicant/ Respondents.]