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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **15/02/24**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

IN THE MATTER OF JAMES CRAIG BEST (in bankruptcy)

THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

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Mr Gowdy KC for the trustee in bankruptcy (instructed by King & Gowdy)
Mr Atchison BL for the Notice parties (instructed by Napiers)

MASTER KELLY

Introduction

[1] On 29 July 2020, the trustee in bankruptcy of James Craig Best ("the trustee") issued three sets of proceedings without first obtaining the requisite sanction to do so under the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order"). In the proceedings, ("the substantive proceedings"), the trustee seeks a declaration that assets transferred by the bankrupt to third parties prior to the presentation of a bankruptcy petition against him variously came within the provisions of Articles 312 and 315, and 367 and 369 of the 1989 Order and were unlawful under the said Order. The trustee now seeks retrospective sanction from the court citing inadvertence as the reason for his failure to seek sanction prior to issuing the substantive proceedings. The notice parties are respondents in the fully contested substantive proceedings.

[2] In the course of the substantive proceedings, the notice parties/respondents raised two material issues of concern. The first issue is that the proceedings were issued without the necessary sanction as required under the 1989 Order. The second issue is that the trustee is conducting the proceedings by virtue of a Conditional Fee Agreement and litigation funding. These the trustee, an insolvency practitioner licensed to practise in England, Wales and Northern Ireland, entered into with the assistance of an English firm of solicitors. Those solicitors are not on the roll of solicitors in Northern Ireland or authorised to practise here. Substantial costs have already been accrued on foot of this agreement with the most significant sums being paid to the English solicitors.

[3] I have had the benefit of considering all the evidence before me as well as helpful and learned submissions, both written and oral, from Mr Gowdy on behalf of the trustee and from Mr Atchison on behalf of the notice parties/respondents. I have carefully taken all of those into account even if I do not make express reference to all of them in this judgment.

[4] It is not a matter of dispute that the court has power to grant retrospective sanction where appropriate. Indeed, ordinarily, this type of application is one in which an ex tempore judgment would suffice however I accept that there are legal points of importance with which I have to deal. The starting point in this matter is that a trustee in bankruptcy is an officer of the court.

The trustee

[5] The 1989 Order is clear that every bankruptcy and trustee is under the general control of the court. Accordingly, the trustee does not act in a private or independent capacity. On the contrary, the authorities are clear that a trustee is an officer of the court – or, more accurately, the court's officer. For present purposes, the relevant court is the Northern Ireland High Court.

[6] The trustee has but one function under the 1989 Order. That is set out in Article 278 (2) which provides:

> "the function of the trustee is to get in, realise and distribute the bankrupt's estate in accordance with the following provisions of this Chapter; and in the carrying out of that function and in the management of the bankrupt's estate the trustee is entitled, subject to those provisions, to use his own discretion."

It follows then that the powers conferred on a trustee under the 1989 Order are for the purposes of discharging that function. However, while it is clear that a trustee is conferred with considerable discretion in or about the exercise of his statutory function, he does not have unfettered discretion.

Undue delay /inadvertence

[7] The manner in which the trustee has conducted himself in both the substantive proceedings and in this present application must be considered to be less than satisfactory. His failure to obtain sanction and attributing that failure to mere inadvertence is in my view difficult to justify. So, too, is his apparent lack of awareness that legislative requirements apply in Northern Ireland under the 1989 Order that may not apply in England & Wales (para 28 of his affidavit). The trustee is an insolvency practitioner licensed to practise in both Northern Ireland and England and Wales. He thus has a duty to the court to know, understand and apply the law of the appropriate jurisdiction in which he is practising.

[8] The court must also record its concern with the trustee's attitude to it. As stated earlier, the trustee is the court's officer and as such this means that the court will normally expect compliance with any of its orders or directions. The trustee, however, was reluctant to produce copies of the funding agreements when directed by the court to do so, and also reluctant to confirm whether or not he had obtained sanction for the substantive proceedings. The funding agreements were eventually produced in redacted form, but the sanction question was evaded with the regrettable result that the court was left to draw its own conclusions, yet it is inconceivable that the trustee did not know the answer to that question.

[9] As a result of the trustee's failure to obtain sanction prior to the issue of the substantive proceedings, sanction is now sought 3 years after the event. This is a delay which I consider to be unacceptable and for which no reasonable explanation has been offered. While the failure to seek sanction may have been inadvertent as in *unintentional*, it was not in my view excusable. I am therefore unable to accept that the trustee's failure to seek sanction can be dismissed as mere inadvertence. However, that in itself is not fatal to the application. The real question for the court is the question of whether it considers the granting of the sanction to be of benefit to creditors.

Benefit to creditors

[10] The trustee suggests that the substantive proceedings enjoy a reasonable prospect of success. However, those proceedings are speculative, contested, and also in the nature of declaratory relief. A successful outcome would only consist of the court making certain declarations but not necessarily lead to actual realisations. I will return to that issue shortly, but it is enough for now to say that I am unable to attach significant weight to the trustee's suggestion. Of greater significance is the question of the trustee's costs and how the proceedings are being funded, and whether that can be said to be of benefit to creditors.

Funding

[11] From the evidence, it appears that one of the bankrupt's creditors initially agreed to indemnify the bankruptcy estate in the sum of £20k. This was to enable the trustee to investigate the bankrupt's assets. However, it seems that sum was quickly expended. The trustee then sought and secured third-party funding outside the bankruptcy estate. The funding comprises a Conditional Fee Agreement, litigation funding and insurance. As appears from the trustee's evidence, creditors were then informed that funding had been arranged to bring the substantive proceedings. The creditors so informed expressed a view that they were either in favour of the proceedings or neutral to the idea of them.

[12] What the trustee omitted to tell the creditors was that the use of Conditional Fee Agreements is not permitted in Northern Ireland. Nor did he inform them that litigation funding is untested and arguably contrary to public policy here. Indeed, Mr Gowdy could not direct me to any legal or evidential basis upon which this court could properly conclude that such funding arrangements are in use in Northern Ireland. As Mr Atchison wisely points out, and I agree with him on this, the testing of such funding arrangements is not a matter for this court but rather for a wider

consultation process and possibly legislation. I suspect the attitude of the creditors might have been quite different had they been properly informed that there were major obstacles to the proposed funding.

The Bankrupt's estate

[13] The property referred to in the substantive proceedings does not come within the wide statutory definition of "property" in Article 2 of the 1989 Order. Simply put, the property which is the subject of those proceedings did not form part of the bankrupt's estate at the date of his adjudication, still does not form part of the bankruptcy estate, and so does not vest in the trustee. That will lawfully remain the case unless and until the High Court in Northern Ireland exercising jurisdiction under the 1989 Order rules otherwise. In addition, it is important to bear in mind that the substantive proceedings are capable of defence on all issues and that the notice parties/respondents, in whom the assets currently lawfully vest, are indeed defending them. While other related applications may have settled, the sums involved were nominal.

[14] It is acknowledged that a trustee in bankruptcy may sometimes find himself in a position whereby he feels that a certain course of action should be taken but there are no funds in the bankruptcy estate to allow him to do so. However, that difficulty is not resolved by seeking litigation funding in a jurisdiction outside Northern Ireland and instructing solicitors in that particular jurisdiction to act for him. But that is what the trustee did here. The fact that the Northern Ireland solicitors are being treated as a disbursement under the funding agreements does not alter the fact that they are also acting in the case.

Costs

[15] The costs that have accrued in this case are frankly startling. As of 2021, two years prior to the issue of the substantive proceedings, the costs accrued on foot of the agreements were over £200k. The single largest expense was the legal costs of the English solicitors which were in excess of £135k. The forecast costs at that stage were estimated to be £500k. This court does not need an updated assessment of costs to predict that they will have now substantially increased. Moreover, as previously stated, even if the trustee were successful in obtaining the declaratory relief sought, unless the parties reach settlement – an unlikely scenario as things stand - more proceedings would necessarily have to follow before asset realisation could or would occur. This leads me to conclude that costs being generated under the funding agreements may well reach in the region of seven figures if they have not done so already.

Conclusion

[16] Taking all those issues into consideration, I am led to conclude that retrospective sanction is to be refused. My reasons are as follows.

[18] By virtue of the funding agreements, the trustee, in conjunction with the English firm of solicitors entered into a Conditional Fee Arrangement and litigation funding. Together it seems they agreed to assign to funders realisations from assets which

currently do not form part of the Bankrupt's estate, and which do not vest in the trustee. Even if that were not the case, the realisation and distribution of assets must take place in accordance with the provisions of the 1989 Order and the Insolvency Rules (Northern Ireland) 1991. These provisions are clear as to how the realisation of assets is to be applied and distributed. A trustee who misapplies the realisation of assets risks personal liability for doing so.

[19] If this court were to allow matters to continue as they are, it would be tacitly approving the use of a Conditional Fee Agreement not permitted in Northern Ireland, and litigation funding which is:

> (i), untested and arguably contrary to public policy in this jurisdiction;
> (ii), arguably champertous; and
> (iii), governed by the laws and courts of a different legal and geographical jurisdiction.

In addition, the nature of such agreements are such that they would in the circumstances of this case require the trustee to assign considerable control over the proceedings to third parties: in other words, control of his powers, discretion, duties, and ultimately, his statutory function. I am not aware of any means by which he can do so under the 1989 Order. By virtue of the provisions of the said Order, the trustee can only cede control of any of his statutory function to the High Court in Northern Ireland. Yet under these agreements the trustee could well find himself acting at the behest and direction of third parties who have no valid connection either to this case or to the jurisdiction of this court. As Lightman J stated 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 able him to accept engagement as a hired gun."

It is difficult not to conclude in all those circumstances that the substantive proceedings are now so tainted by the costs issue that they cannot be said to benefit creditors. It also seems to me that to reach any other conclusions would produce undesirable and unworkable results.