Neutral Citation No: [2011] NICh 8 | **Ref: DEEA6050T**

Judgment: approved by the Court for handing down (subject to editorial corrections) | **Delivered: 8/3/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

AIB GROUP

Plaintiff;

and

McELROY

Respondent.

DEENY J

[1] This is an appeal by Emma McElroy against the decision of Master Kelly of 19th January 2011 dismissing her notice of opposition to her bankruptcy petition brought by AIB Group (UK) Plc on the 23rd April 2010. The matter came before this Court on the 7th March in the Reviews and Summonses list. Mr William Gowdy of Counsel for the bank said that he

objected to Mrs McElroy introducing fresh evidence which had not been before the Master when she heard the matter and he wished to take that point in advance of the Appeal. To convenience counsel, the court agreed to sit today Tuesday 8th March 2011, to decide on the preliminary point at least.

[2] Mr Gowdy helpfully refers to two judgments of my brethren on this point. The first in time is that of Mr Justice McCollum in *Baillie v Cruickshank* [1999] NIJB at 47 followed by that of Mr Justice Girvan in Lough Neagh Exploration Ltd. v Morrice [1999] NIJB at 43. His judgment is of 1998 and Mr Justice McCollum's of 1995 but apparently not reported until then. Counsel is perfectly right to refer to those two cases. The two judges are largely ad idem on this point. I will quote briefly from the judgment at page 49. It reports Mr Justice McCollum considering the issue of admitting evidence that was not before the Master on appeal to a High Court Judge. He said as follows:-

> "Obviously with such a wide discretion one would be slow to lay down any general rules, but I would suggest that the court will find as matters of considerable importance – (i) whether the evidence sought to be put before the court is based on information that has only recently come into the possession of the party seeking to put it into evidence, (ii) whether it was possible or feasible for that party to produce the evidence earlier and (iii) whether it related to a matter which was clearly in issue between the parties at the hearing before the Master."

In that case he declined to admit the belated affidavit evidence. Mr Justice Girvan recast this to some degree at p. 45 of the report, in the following way:-

> "1. Parties have a duty to put their case properly and fully before the Master and to adduce all available evidence at that stage. This is just another aspect of the general principle that it is incumbent on parties to put their full case before the court at the material time.
>
> 2. A Party seeking to adduce fresh evidence before the Judge in chambers on appeal should advance a sound reason for the failure to adduce that evidence before the Master.
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> 3. A party seeking to adduce such additional evidence carries the burden of establishing that the interest of justice would be better served by the admission of additional evidence rather than by refusing to admit it."

(He declined to admit the additional material partly because it was proffered within hours of the hearing.)

See also the Supreme Court Practice [1999] at vol. 1, para 58/1/3 which confirms the judicial discretion to refuse to admit further evidence not before the lower court. It seems to me valuable that Mr Gowdy and his solicitors have raised this point before the court because I make it clear that those dicta

are still fully applicable to cases coming before me on appeal from either the Master in Bankruptcy or the Master in Chancery.

[3] Having said that however Mr Shields on behalf of the appellant here draws my attention to the circumstances. There were two petitions here against the husband and wife, the appellant Emma McElroy and her husband Mervyn McElroy. She contends in one of two affidavits she would want to put in - one has already been submitted on the 15th February and she wishes to put in another one this week which is currently in draft - and she says that not only was she not separately represented when the guarantee to the bank which it wishes to rely on was initially created but nor was she separately represented throughout these proceedings before the Master. Indeed, in the present state of papers I do not know whether she consulted with the solicitors and counsel who appeared for her husband. I accept Mr Gowdy's observation that it would appear that experienced counsel practising in this court (but not now instructed) did appear for her as well as her husband and that if she had a defence it is rather surprising that it was not made out. But as I say at the moment I don't know whether in fact she ever consulted with counsel or whether he was concentrating his efforts on the husband's case. The husband had a case basically along the lines that the Bank was fully secured and it would be wrong in the exercise of the court's discretion to make an order of bankruptcy. Nor indeed has such an order as such been granted but only a rejection of the notices of opposition. She avers that she did not consult solicitors independently until the Master's rejection of that

notice of opposition and she has then put in, subject to the leave of the court, an affidavit making the case that she was a housewife of a farmer who then turned to property development and that she signed documents without reading them or without independent advice. It seems to me that in the light of the above and Mr Shield's statement from the Bar that he had some five pages of a further affidavit to put in and that he has prepared an opinion for legal aid with a view to appealing a refusal of legal aid in favour of the defendant, that the court should properly conclude that this is an exception to the general rule that a party should have put their case fully before the Master. But I welcome the opportunity of drawing the attention of the profession to the general rule that the matter must be put fully before the Master and that unless there were the sort of exceptional circumstances which apply here that would be the general rule which I would apply. That is in accordance with the decisions of my brethren and it is in accordance with the good administration of justice that the Masters in both fields are experts in these fields and they should be furnished with all relevant material. So in allowing this intervention I make it clear that there is absolutely no criticism of the Master, nor indeed, of course, am I deciding on this appeal. Mr Gowdy has indicated that the Bank would contest any claim that the lady was entitled to be relieved of the burden of her execution of the guarantee. So that being the case therefore the affidavit of 15th February is admitted.

[His Lordship gave directions about the further service of affidavits.]