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Judgment: approved by the Court for handing down | *Delivered:* **20/05/2005**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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IN THE MATTER OF SAMUEL E COOPER, A BANKRUPT

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BETWEEN:

SAMUEL E COOPER

Applicant;

-and-

1. JOHN HOUSTON AND IAN FINNEGAN AS TRUSTEES IN BANKRUPTCY OF THE ESTATE OF SAMUEL E COOPER, A BANKRUPT

2. JOSEPH HASSON AS OFFICIAL RECEIVER

Respondents.

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WEATHERUP J

The Application.

[1] There follows a cautionary tale to those who delay the settlement of disputed debts. This is an application by Samuel E Cooper, a bankrupt, for an order that –

(i) the Court determines the appropriate fees and expenses of the trustees in bankruptcy and

(ii) that the bankruptcy order dated 1 October 1999 be annulled pursuant to Article 256(1)(b) of the Insolvency (Northern Ireland) Order 1989

on the grounds that the debts and expenses of the bankrupt have all been paid or secured.

The issue that arises between the bankrupt and the trustees concerns the jurisdiction of the Court to determine the fees and expenses of the trustees, with the trustees contending that the Court does not have such jurisdiction. Ms Anyadike-Danes BL appears for the applicant and Mr McEwen BL appears for the first respondent.

The Bankruptcy Order.

[2] On 10 August 1999 the Inland Revenue presented a bankruptcy petition against the applicant founded on a debt of £8,603 in respect of an interim assessment of income tax liability for the year ending 1996. A bankruptcy order was made on foot of that petition on 1 October 1999. On 21 January 2000 the first named trustee in bankruptcy was appointed (later to be replaced by the second named trustee in bankruptcy) and the trustees reported from time to time. The applicant claimed that his tax return had not been submitted due to ill health but that in any event he was not indebted to the Inland Revenue but was entitled to repayment from the Inland Revenue. Eventually repayment was made by the Inland Revenue and retained in the account. The applicant is a substantial landowner and while there have been variations in the valuation of the lands it is apparent that there are assets of several million pounds. By a statement of account dated 7 February 2005 the applicant's creditors amounted to some £9,500 which together with interest totalled some £13,600. Expenses were listed at some £98,600 and the final amount required to discharge liabilities was stated to be £109,611.06. With the aid of a third party that sum has been paid or secured and there is no objection to the annulment of the bankruptcy, subject to the resolution of the issue that arises in respect of the trustees' costs and expenses. It is indeed extraordinary that a dispute about relatively small debts owed by a person with substantial assets should generate such disproportionate costs and remain a matter of contention after almost six years. In the last report the trustees blame the bankrupt who it is said has offered total non-cooperation throughout.

The Expenses of the Bankruptcy.

[3] The total expenses of some £98,600 includes the following disputed items
- trustees' fees £46,320.20
- trustees' bond and insurance £4,461.73
- estate agent's fees £8,988.75
- valuer's fees £3,525.00

Legal fees of some £30,000 have been in dispute and by agreement will be referred to taxation. The applicant's solicitors sought a breakdown of the trustees' fees. On behalf of the trustees a table was forwarded by letter of 22 November 2004 setting out dates, times and rates of charge from 2000 to 2004.

The applicant's solicitor objected that there was no description of the work carried out and on 10 December 2004 gave notice of intention to challenge the fees and expenses of the trustees. The trustees undertook to furnish further particulars if the applicant paid the cost of preparing such particulars, but this was not agreed.

[4] It is necessary to give separate consideration to the fees charged by the trustees on the one hand and on the other hand the expenses incurred by the trustees in relation to the estate agent's and valuer's fees.

In relation to the trustees fees the applicant complains that while the time spent and the rate charged have been specified the work done during that time has not been identified. Particular emphasis has been placed on the increase in trustees' fees from the report of 6 February 2004 when the fees were £26,491.26, so that the fees had therefore increased by some £20,000 by the report of 7 February 2005 when according to the applicant there was very limited work to be done to account for such an increase.

In relation to the estate agent's and valuer's fees the applicant contends that a breakdown has not been provided and that in any event the work was undertaken negligently and the fees should be challenged by the trustees.

The Order, the Rules and the Practice Statement.

[5] Article 276(1) in Part IX of the Insolvency (NI) Order 1989 provides for the general control of trustees by the High Court -

"If a bankrupt or any of his creditors or any other person is dissatisfied by any act, omission or decision of a bankrupt's estate, he may apply to the High Court; and on such an application the court may confirm, reverse or modify any act or decision of the trustee, may give him directions or may make such other order as it thinks fit."

Article 334(1) of the 1989 Order provides for the general control of the High Court –

"Every bankrupt is under the general control of the High Court and, subject to the provisions of Parts VIII-X, the court has full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy."

[6] The Insolvency Rules (Northern Ireland) 1991 make provision for the remuneration of the trustee in bankruptcy.

Rule 6.135 provides that the trustee is entitled to receive remuneration for his services; remuneration is fixed either (a) as a percentage of the value of the assets realised or distributed or (b) by reference to the "time properly given" by the Insolvency Practitioner (as trustee) and his staff in attending to

matters arising in the bankruptcy; it is for the creditors' committee (if there is one) to determine whether the trustee's remuneration is to be fixed under (a) or (b).

Rule 6.138 provides for recourse to the Court by the *trustee*. If the trustee considers that the remuneration fixed for him is insufficient he may apply to the court for an order increasing its amount or rate.

Rule 6.139 provides for *creditors'* claims that the remuneration of the trustee is excessive. Any creditor of the bankrupt may with the concurrence of at least 25% in value of the creditors (including himself) apply to the Court for an order that the trustee's remuneration be reduced on the ground that it is in all circumstances excessive. If the court considers the application to be well founded it shall make an order fixing the remuneration at a reduced amount or rate.

[7] Statement of Insolvency Practice 9 (SIP9) provides for the remuneration of insolvency officeholders in Northern Ireland. SIP9 is issued under procedures agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee.

Paragraph 3 deals with provision of information when seeking fee approval. Paragraph 3.4 provides that where agreement is sought to fees during the course of the assignment an up-to-date receipts and payments account should always be provided. Where the proposed fee is based on time costs the officeholder should disclose to the approving body the time spent and the charge out value together with, where appropriate, such additional information as may reasonably be required having regard to the size and complexity of the case. The additional information should comprise of a sufficient explanation of what the officeholder has achieved and how it was achieved to enable the value of the exercise to be assess and to establish the time spent has been properly given. An appendix sets out a suggested format with explanatory notes for producing the information required to enable the assessment to be carried out. Paragraph 4 deals with provision of information after fee approval and with such additional information should also be provided as may be required in accordance with the above principles.

Paragraph 7 relates to a bankruptcy where realisations are sufficient for payment of creditors in full with interest (which is the present case) and provides that -

"It should be remembered that, notwithstanding the right of the creditors or the committee to fix the officeholder's remuneration, it will be the debtor … who will have the principal financial interest in the level of fees. The officeholder should therefore on request provide them with information, in accordance with the principles set out in this statement of insolvency

practice, about how the remuneration, expenses and disbursements have been calculated."

Paragraph 9 relates to transitional provisions. SIP9 dated 1 July 2004 was the third version of SIP9. In respect of cases commenced earlier any analysis or disclosure in any reports should comply with the new SIP as far as the available records reasonably allow.

SIP9 includes "A Creditor's Guide to fees charged by trustee in bankruptcy" which repeats the above requirements in relation to remuneration.

The Appendix contains the suggested format which includes (i) an overview of the case, (ii) explanation of officeholders charging and disbursement, (ii) explanation of officeholders charging and disbursement recovery policy, and (iii) narrative description of work carried out which includes the provision that the narrative should provide details of work undertaken during the period and should be related to the table of times spent for the period.

[8] The 1989 Order and the 1991 Rules do not contain any express provision whereby the *bankrupt* may challenge the fees of the trustee or apply to the Court for a determination of the trustee's fees. The 1991 Rules do provide for the *trustee* to apply to the Court for an order increasing the amount or rate of remuneration otherwise fixed and for the *creditor* to apply to the Court for an order fixing the remuneration at a reduced amount or rate. When there is deficit in the fund available to creditors the amount of the trustee's fees will impact on the amount recovered by creditors and accordingly the creditors will have a direct interest in the amount of the trustee's fees. However, where there is surplus and the creditors are being paid in full, they have no direct interest in the amount of the trustee's fees and it will be the debtor who has that direct interest. SIP9, which is a statement of practice and not a statement of the legal position, recognises the position of the debtor in the event of payment in full and provides that the trustee should on request provide the debtor with additional information about the calculation of fees. That additional information would be equivalent to that provided to creditors. However, the present trustees contend that the bankrupt is not entitled to apply to the Court for any determination in relation to the trustees' fees and the Court has no jurisdiction to make any such determination at the behest of the bankrupt.

Trustees remuneration in England and Wales.

[9] A similar issue came before the Chancery Division in England in Engel v Peri (2002) EWHC 799 (Ch). Under the Insolvency Act 1986 in England and Wales section 303 is the equivalent of Article 276 (High Court control of the

trustee) and section 363 is the equivalent of Article 334 (general control of the bankruptcy by the High Court). The bankrupt applied under section 303 and the inherent jurisdiction of the Court for an order that the trustee's remuneration be fixed and also seeking to challenge the level of legal fees incurred by the trustee. Ferris J found as follows –

(i) The Insolvency Rules 1986 on trustees' remuneration (containing equivalent provisions to the 1991 Northern Ireland Rules) proceed on the basis that they provide a comprehensive code but it is a defective one. There is nothing in the Rules which enables a bankrupt as distinct from a creditor to apply for the remuneration to be reduced (para. 24).

(ii) Before the 1986 Act came into effect the remuneration of a trustee in bankruptcy was governed in England and Wales by Section 82 of the Bankruptcy Act 1914 and the earlier Bankruptcy Rules. Although the wording of those provisions was very different to the wording of the 1986 Rules they were to similar effect in leaving the fixing of remuneration primarily to a meeting of creditors and in prescribing what appeared to be an exhaustive code. However, there were two decisions under that regime which indicated that the Court itself could fix remuneration where by reason of unusual circumstances justice required it (para. 25).

(iii) In Re Colgate (a bankrupt) ex parte Trustee of the Property of the Bankrupt (1986) Ch 439 a trustee in bankruptcy had sought a meeting of creditors to fix his remuneration under section 82 of the 1914 Act but had failed so he applied to the Court for an order fixing his remuneration under section 105(1) of the 1914 Act. (This was a forerunner of section 363 of the 1986 Act - Article 334 of the Northern Ireland Order – general control of the bankruptcy by the High Court). Section 105(1) was "Subject to the provisions of this Act…" and therefore subject to section 82 and the express provision in relation to trustee's remuneration. However the Court of Appeal held that the object of section 105 was to give the Court wide powers of doing justice in a particular case and as the machinery laid down by section 82 of the 1914 Act for the fixing of trustees' remuneration had broken down section 105 would be invoked to do justice.

(iv) In Upton v Taylor and Colley (1999) BPIR 168 the bankrupt claimed that the remuneration of the trustee was excessive and asked for it to be fixed by the Court. The Divisional Court held that the jurisdiction under section 105(1) to fix the trustee's remuneration was not limited to cases where the machinery of section 82 of the 1914 Act had broken down but was a jurisdiction that could be called upon whenever the justice of the particular case demanded it. The Divisional Court also accepted the inherent jurisdiction of the Court under the principle in ex parte James, In Re Condon (1874) LR 9 Ch. App. 699 to take steps to fix the fair remuneration of the trustee.

(v) Ferris J was satisfied that section 363 of the 1986 Act (general control of the bankruptcy by the High Court) was the equivalent of section 105 of the 1914 Act and it was held that the jurisdiction to fix the trustee's remuneration continued to exist. It was stated to be doubtful whether section 303 (Article 276 – High Court control of the trustee) was strictly relevant to the fixing of remuneration because no act, omission or decision of the trustee was involved. In addition Upton v Taylor and Colley was followed to place reliance on the inherent jurisdiction of the Court invoked in ex parte James (para. 33).

(vi) In relation to the legal fees incurred by the trustee the Court had no power to fix the fees. Having decided to obtain legal advice it was for the trustee to decide whether to pay or challenge the solicitor's bill. As incurring legal fees would inevitably be the result of an act or decision by the trustee section 303 (Article 276) afforded a means of bringing the matter before the Court (para. 35).

[10] The jurisdiction to consider the trustee's remuneration in England is further illustrated by Hirani v Rendel (2003) EWHC 2538 (Ch). A bankrupt applied to the Court for a detailed breakdown of the costs of bankruptcy. The Court ordered that the trustee should "provide in appropriate narrative form an explanation as to his remuneration and expenses …" Information was provided and upon the bankrupt's application for an annulment the Court ordered an annulment of the bankruptcy order on conditions. Lawrence Collins J stated that the Courts have repeatedly emphasised (for example Mirror Group Newspapers v Maxwell and Others (No. 2) (1998) 1 BCLC 638 at 651, 652) the limited relevance of time spent, as opposed to value provided, by insolvency practitioners in determining the proper amount of their fees. The task of the Court is to assess the value of the trustee's services to the estate, not the trustee's time costs of providing them (para.47). It was not in dispute that the Court had jurisdiction to determine the issue of trustee's fees (para. 50). Lawrence Collins J stated that there was no doubt that Mrs Hirani may apply to the Court (by application to a registrar, who may remit the matter to a costs Judge) if she was dissatisfied with the level of the trustee's costs (para. 59).

The statutory position in Northern Ireland.

[11] Mr McEwen for the trustees contends that the approach taken in England has no application in Northern Ireland because of the legislative scheme applicable in this jurisdiction. The Irish Bankrupt and Insolvent Act 1857 amended and consolidated the law in Ireland. The Bankruptcy (Ireland) Amendment Act 1872 provided for a system of administration by a trustee chosen by the creditors as an alternative to administration by the official assignee. In practice the administration of bankruptcy was undertaken by the

official assignee until the 1989 Order followed the 1986 Act in England and Wales and introduced official receivers and insolvency practitioners. In England and Wales the legislation of the 19th century was consolidated by the Bankruptcy Act 1914 which was replaced by the 1986 Act. (See Hunter's Northern Ireland Bankruptcy Law and Practice (1984) and Hunter's Northern Ireland Personal Insolvency (1992).

[12] As set out above in the reference to Engel and Peri the statutory position in England and Wales prior to the 1986 Act contained provision for trustee's remuneration under section 82 of the 1914 Act and a power of general control in the High Court under section 105(1) of the 1914 Act. In Northern Ireland, prior to the 1989 Order, section 66 of the 1872 Act was the equivalent of section 105 of the 1914 Act and provided a general power of control of the bankruptcy in the High Court as follows -

> "Subject to the provisions of (the 1857 Act) and this Act, and in addition to the powers conferred by (the 1857 Act), the court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy or arrangement coming within the cognisance of such court, *or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case ….*" (italics added).

[13] The old form of wording of the general power of control of the bankruptcy contained in section 66 of the 1872 Act was the same as that contained in section 105(1) of the 1914 Act in England and Wales. The modern form of wording of the general control of the bankruptcy in the High Court is set out in Article 334 of the 1989 Order (section 363 of the 1986 Act). The trustees draw attention to the deletion from the modern version of the words "or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case". The trustees accept the correctness of the two decisions under the old English legislation referred to above, but on the basis that they relied on the "justice clause" in the old legislation, and that has been deleted from the modern wording. In Re Colgate May LJ stated at page 445H, "In my judgment the object of section 105 is to give this court or the bankruptcy court wide powers of doing justice in the particular case……" In Upton v Taylor Rimmer J set out the example that arises in the present case of a bankruptcy with a surplus. Where the matter of trustees remuneration was left to the creditors they would have no interest in the trustee's fees. The creditors might vote for excessive remuneration for the trustee, which would be an injustice to the bankrupt, even though there was then a right on the part of the bankrupt to apply to the Board of Trade under section 82 (2) of the 1914

Act to fix the trustees remuneration. Rimmer J stated of section 105(1), "It must be a jurisdiction which can be called upon whenever the justice of a particular case demands it."

[14] I do not accept that in so stating May LJ and Rimmer J were relying solely on the second part of section 105, now deleted. The general power of the Court under the first part of section 105(1), and under section 363 and Article 334, provides that the Court shall have full power to decide all questions of priorities "and all other questions whatsoever, whether of law or fact, arising in any case of bankruptcy …" Those are indeed wide powers and the issue of trustees remuneration must be included in that wording as a question arising in the bankruptcy. Ferris J decided in Engel v Peri that those words in section 363 were sufficient to continue the jurisdiction of the Court to determine the trustee in bankruptcy's fees upon an application of the bankrupt.

[15] The trustees contend that Engel and Peri was wrongly decided and did not refer to any reasons for the change in the legislation effected by the repeal of section 82 of the 1914 Act. However, Ferris J noted the changes in the legislation and did not consider it implicit in those changes that the bankrupt's right to apply for determination of the fees of the trustee in bankruptcy was thereby removed. The terms of section 105(1) were capable of applying to trustee's remuneration when section 82 proved inadequate. The modified terms of section 363 were found to be capable of applying to trustee's remuneration when no equivalent to section 105(1) was available.

[16] I respectfully agree with the approach of Ferris J in Engel v Peri and am satisfied that the same result is achieved in Northern Ireland by Article 334. The wording of Article 334 to the effect that the Court has "full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy" must be capable of including the question of the trustee's remuneration, as a question arising in the bankruptcy. There is no alternative statutory basis for the bankrupt to challenge the trustees remuneration. Accordingly I am satisfied that the Court has jurisdiction to hear a bankrupt's application to determine the fees of the trustee under the power of general control of the bankruptcy in the High Court provided by Article 334 of the 1989 Order.

The inherent jurisdiction of the Court.

[17] In addition, Upton v Taylor and Colley and Engel v Peri relied on the inherent jurisdiction of the court, with specific reference to ex parte James. A creditor in receipt of the proceeds of sale of a bankrupt's goods paid the proceeds to the trustee in bankruptcy under a mistake of law that the trustee was entitled to the proceeds. It was held that the Court had jurisdiction to

grant relief against the mistake of law and to order that the money be repaid by the trustee to the creditor. James LJ stated:

> "I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given to him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the court of bankruptcy ought to be as honest as other people."

[18] The trustees object that ex parte James is not authority for there being any inherent jurisdiction in relation to the remuneration of the trustee. Hunter's Northern Ireland Bankruptcy Law and Practice at paragraph 19.07 refers to the official assignee "being subject to the principle of fair dealing, commonly referred to as 'the rule in ex parte James', which is applied to a trustee in bankruptcy as an officer of the court". The rule in ex parte James is discussed in Berry, Bailey, Millar's Personal Insolvency (3rd Edition) 365-369 as involving enrichment of the bankrupt's estate and the requirements of fairness being imposed on the trustee despite strict legal entitlement. It may not be appropriate to invoke the rule in ex parte James as a basis for determining the trustees' remuneration under the inherent jurisdiction of the Court. As I am satisfied that the Court has statutory jurisdiction I do not find it necessary to examine further the inherent jurisdiction of the Court.

Estate agent's and valuer's fees.

[19] The dispute also extends to the estate agents fees and valuers fees. Rule 7.29 of the 1991 Rules applies Order 62 of the Rules of the Supreme Court (taxation of costs) to insolvency proceedings. Rule 7.30 provides that the trustee may refer to taxation any third party fees that are not agreed by the *trustee and the payee.* Hence there is a mechanism for the resolution of a dispute between the trustee and an estate agent or a valuer. Further, if the bankrupt is dissatisfied by any act, omission or decision of the trustee in relation to estate agent's fees or valuer's fees, such as a decision to pay the fees and not refer to taxation, then the bankrupt may apply to the Court under Article 276 of the 1989 Order (High Court control of the trustee).

[20] In the present case the trustees contend that there has been no application made to the trustees to refer the estate agent's and valuer's fees to taxation, there has been no notice of the applicant being "dissatisfied" in relation to estate agent's fees or valuer's fees and there has been no

application made under Article 276. In correspondence the applicant has sought and obtained a schedule of trustees' fees and expenses that has included, and was clearly intended by the applicant and the trustees to include, not only the trustee's remuneration but other fees and expenses incurred by the trustee. The applicant has given notice in writing of an intention to challenge the fees and expenses of the trustee and by affidavit grounding this application has outlined the nature of the objection in relation estate agent's and valuer's fees. It is clear that the applicant is "dissatisfied" with the estate agent's and valuer's fees and with the act or decision of the trustees not to refer the fees to taxation, or the omission to refer the fees to taxation. The present application relates generally to a determination of the appropriate fees and expenses of the trustees without reference to any specific statutory or other basis for such determination, but it is apparent from the grounding affidavit that the application extends to the trustees' remuneration and the third party fees and expenses, and at the hearing the applicant's Counsel outlined the basis on which the application was made. In so far as it may be necessary the applicant's Summons may be amended to refer to the statutory and inherent jurisdiction basis on which the applicant has advanced this application.

[21] The Court has jurisdiction to determine the trustees' remuneration under Article 334 of the 1989 Order. The trustees will furnish to the bankrupt in appropriate narrative form particulars of the work completed during the time charged. The assessment of the trustees' fees is referred to the Master.

For the purposes of Article 276 of the 1989 Order the applicant is dissatisfied with the act, omission or decision of the trustees in relation to the estate agents and the valuers fees, in not taking steps to contest the fees. While Rule 7.30 may provide for taxation of such fees, the issue in the present case is not merely a matter of taxation but the allegations in relation to the conduct of the estate agents and the valuers in the performance of their duties. The issue of the estate agents and valuers fees is referred to the Master for determination under Article 276.

The costs of this application will be the responsibility of the trustees. They will not be indemnified by the bankrupt or from the estate.

The bankruptcy order will be annulled pursuant to Article 256(1)(b) of the 1989 Order on conditions, and I will hear Counsel on the terms of the order.