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Judgment: approved by the Court for handing down | *Delivered:* **17/11/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

IN THE MATTER OF THE BANKRUPTCY OF PAUL DOUGAN

BETWEEN:

DAVID AGNEW AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF PAUL DOUGAN

Applicant;

and

MOYOLA ESTATES LTD

Respondent.

McBRIDE J

Application

[1] This is an appeal from the decision of Master Kelly dated 16 September 2016 whereby she refused the applicant's application and reserved costs.

[2] By summons the applicant sought:-

(a) A declaration that a conveyance by the bankrupt, Paul Dougan, of premises at 15 Broagh Road, Castledawson, County Londonderry ("the property") be declared void on the ground it was a transaction which granted a preference to the respondent

(b) An order that the respondent convey and deliver vacant possession of the premises to the applicant and

(c) An order restoring the position to what it would have been if the transaction referred to in paragraph (a) above had not been entered into.

[3] By notice of appeal dated 22 September 2016 the appellant appealed the entire decision of the Master on the following grounds:-

(a) The learned Master erred in law in her interpretation of the provisions of the Insolvency (Northern Ireland) Order 1989 and more especially in the definition of the term "associate",

(b) The learned Master erred in law in her interpretation of the provision of the Insolvency (Northern Ireland) Order 1989 and more especially Article 4(7) and

(c) The learned Master erred in law in refusing to hold that the transfer to the respondent constituted a preference within the meaning of the provisions of the Insolvency (Northern Ireland) Order 1989.

[4] Mr Gibson appeared on behalf of the appellant and Mr AJS Maxwell appeared on behalf of the respondent. I am grateful to both counsel for their well researched and marshalled skeleton arguments which were ably augmented by oral submissions.

Background

[5] The property was purchased by the bankrupt and his wife in 1996.

[6] The parties then separated. On foot of a matrimonial financial settlement the bankrupt agreed to pay £600,000 to his wife in full and final settlement of all her claims against him arising out of the breakdown of the marriage.

[7] The bankrupt financed this payment to his wife by obtaining a loan of £600,000 from the respondent. This was accounted for as a loan within the Respondent's accounts.

[8] The respondent company was incorporated on 15 February 1974. The Managing Director of the company is Patrick Dougan who is the bankrupt's father. His wife Mary Dougan was a Director of the company until her death in December 2015. Ciara Dougan who is Pat Dougan's daughter and a sister of the bankrupt is a Director and the Company Secretary. The initial issued share capital was two issued and paid up shares at £1. One share is held by Patrick Dougan and the other was held by his late wife. There has been no change to the shareholding save that upon the death of Mary Dougan her share will be transmitted in accordance with the Articles of Association. The bankrupt, Paul Dougan has never been a member or shareholder of the company. At no time has he ever been a Director of the company. In his affidavit dated 16 June 2016 Patrick Dougan averred, "at no time has [the bankrupt] ever been a director of the company and the directors have never been accustomed to act or acted on the directions or instructions of [the bankrupt]"

[9] In or around 2011, according to the affidavit of Patrick Dougan, he as managing director of the respondent company was being pressed by the company's accountants to recover or secure the debt owed by the bankrupt to the company.

[10] In or around 23 March 2012 the bankrupt transferred the property to the respondent for the sum of £830,000. In accordance with the special conditions and as the completion statement shows, once the bankrupt discharged the mortgage due on the property and the debt to the respondent company together with interest and other expenses, no balance was due to him from the sale proceeds.

[11] On 7 January 2014 a Bankruptcy Petition was presented against the bankrupt.

Relevant statutory provisions

[12] The relevant provisions in relation to preferential transfers are set out in Article 313 of the 1989 Insolvency (Northern Ireland) Order 1989 ("the 1989 Order") which provides as follows:-

> "(i) Subject to the following provisions of this Article and Articles 314 and 315, where an individual is adjudged bankrupt and he has at a relevant time (defined in Article 314) given a preference to any person, the Trustee of the bankrupt's estate may apply to the High Court for an order under this Article.
>
> (ii) The High Court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if that individual had not given that preference.
>
> (iii) For the purposes of this Article and Articles 314 and 315, an individual gives a preference to a person if –
>
> (a) that person is one of the individual's creditors or a surety or a guarantor for any of his debts or other liabilities, and
>
> (b) the individual does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the individual's bankruptcy, will be better than the position he would have been in if that thing had not been done.
>
> (iv) The High Court shall not make any order under this Article in respect of a preference given to any person unless the individual who gave the preference was influenced in deciding to give it by a

> desire to produce in relation to that person the effect mentioned in paragraph (3)(b).
>
> (v) An individual who is given a preference to a person who, at the time the preference was given, was an associate of his (otherwise than by reason only of being his employee) is presumed, unless the contrary is shown, to have been influenced in deciding to give it by such a desire as is mentioned in paragraph (4)."

[13] Article 314 sets out the relevant time provisions. It provides as follows:-

> "(1) Subject to the provisions of this Article, the time at which an individual enters into a transaction at an undervalue or gives a preference is a relevant time if the transaction is entered into or the preference given –
>
> (a) in the case of a transaction at an undervalue, at a time within the 5 years immediately preceding the day of the presentation of bankruptcy petition on which the individual is adjudged bankrupt;
>
> (b) in the case of preference which is not a transaction at an undervalue and is given to a person who is an associate of the individual (otherwise than by reason only of being his employee) at a time within the two years immediately preceding that day; and
>
> (c) in any other case of a preference which is not a transaction at an undervalue, at a time within the 6 months immediately preceding that day."

[14] Therefore, before the High Court can make any order to set aside a transfer pursuant to Article 313, the trustee of the bankrupt's estate must establish, on the balance of probabilities, that the bankrupt has:-

(a) Given a preference to any person ("preference provision") and

(b) The preference was given at a relevant time, as defined in Article 314 ("time provision").

Preference Provision

[15] There are 3 elements to the preference provision, which the trustee in bankruptcy must establish to the requisite standard. They are:-

(a) The person to whom the preference is made is one of the individual's creditors or a surety or guarantor of any of its debts or other liabilities, and

(b) The bankrupt has done something or suffered something to be done which has had the effect of putting that other person into a position which, in the event of the bankrupt's bankruptcy, will be better than the position he would have been in if that thing had not been done, and

(c) The bankrupt was influenced in deciding to give the preference by a desire to produce in relation to that other person, the effect that he would be in a better position than he would have been, in the event of the bankrupt's bankruptcy ("intention requirement").

[16] In accordance with Article 313(5) the intention requirement is presumed when the bankrupt gives a preference to a person who is an "associate" of his.

Time Provisions

[17] When a preference is made to a person who is an associate of the individual the preference must be given within 2 years immediately preceding the date the bankruptcy petition was presented. When the preference is not given to an associate the preference must be given 6 months immediately preceding the date the bankruptcy petition was presented.

Associate

[18] The meaning of the term associate is set out in Article 4(1) which states:-

> "For the purposes of this order any question whether a person is an associate of another person is to be determined in accordance with the following provisions of this Article …
>
> (2) A person is an associate of an individual if that person is –
>
> (b) A relative of –
>
> (i) the individual, …
>
> (7) A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it.

> (8) For the purposes of this Article a person is a relative of an individual if he is that individual's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant …
>
> (10) For the purposes of this Article a person is to be taken as having control of a company if –
>
> (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, or
>
> (b) he is entitled to exercise, or control the exercise of, one-third or more of the voting power at any general meeting of the company or of another company which has control of it …"

Submissions of counsel

[19] The parties agreed that the court should rule on the question whether the respondent was an associate of the bankrupt, as a preliminary point,. The parties considered that this approach could save court time and expense for the parties as the answer to this question may dispose of the entire appeal. In the event the court ruled that the respondent was not an associate of the bankrupt the appeal would be dismissed as the transfer of the property took place more than 6 months before the issue of the bankruptcy petition.

[20] Mr Gibson submitted that, on the true interpretation of Article 4(7), the respondent was an associate of the bankrupt. As the bankrupt's family members had control of the respondent company (by virtue of being directors and 100% shareholders), this was sufficient, he submitted, to make it an associate of the bankrupt. In his submission the provisions of Article 4(7) did not impose any requirement that the bankrupt himself had to have any control over the company by being either a director or shareholder in the company. It was sufficient if members of the bankrupt's family had such control.

[21] He further submitted that the mischief of the Insolvency Order was to prevent transfers to family members or friends or to someone who would hold it on trust for the bankrupt. To achieve this mischief the provisions of the 1989 Order must be interpreted to include all such transfers by a bankrupt. Accordingly Article 4(7) should be interpreted to include as an associate of the company a bankrupt who, although he has no actual control over a company, had family members who exercised the necessary control over the company. A bankrupt in such a position, he

submitted, had control over the company by virtue of his familial ties and he could use these to influence decision making by the company.

[22] He further submitted that this interpretation of Article 4(7) was supported by considering the legislative provisions relating to preferential transfers by a company to an individual.

[23] In contrast Mr AJS Maxwell, on behalf of the respondent, submitted that on the true construction Article 4(7) a company would only be an associate of a bankrupt if either:-

(a) The bankrupt had control of the company by virtue of being a director or a shareholder who held more than 1/3 of the voting power at a general meeting of the company or

(b) He had a shareholding which was less than 1/3 but his associates either had control of the company by virtue of being directors or alternatively their shareholding when added to the bankrupt's shareholding amounted to 1/3 or more of the necessary voting power.

[24] He submitted that the provisions of Article 4(7) did not make the company an associate of the bankrupt in circumstances where the bankrupt was neither a director nor a shareholder in the company. He submitted such a person would have no control over a company and for this reason Article 4(7) did not include such a person as an associate. Article 4(7) he submitted was deliberately designed to cover only individuals who had some control over the company either by having individual control or the necessary control collectively with others who were his associates. He submitted that the plain meaning of the relevant provision and the design of the 1989 Order meant it should not be interpreted to include the respondent as an associate of Mr Dougan, given that Mr Dougan had no control over the company as he was neither a director nor shareholder.

Consideration

[25] The answer to the central question in dispute depends on the true construction to be placed upon Article 4(7). Counsel were unable to find any direct authority on the construction of Article 4(7) or a similar provision.

[26] Article 4(7) sets out the circumstances in which a company is an associate of a bankrupt. The first limb of the definition states that a company is an associate of the bankrupt where the bankrupt has control of the company. A person has control, in accordance with Article 4(10) when either the directors of the company act in accordance with his directions or instructions or he is entitled to exercise or controls the exercise of one third or more of the voting power at any general meeting of the company. Both parties agreed that the company was not an associate of Mr Dougan under the first limb of Article 4(7) as he was not a director and the directors did not

act in accordance with his directions or instructions and he did not have the requisite voting power.

[27] Under the second limb of Article 4(7) a company is an associate of the bankrupt where the bankrupt and his associates together have control of the company. The parties agreed that this limb covers the scenario where the bankrupt has a minority shareholding in the company and when this interest is added to the interest of his associates, they collectively have the requisite control over the company. Counsel accepted that the use of the words "and" and "together" in Article 4(7) supported this construction. Thus if Mr Dougan owned even one share in the company, the company would be an associate of his, as his associates, namely family members exercised the requisite control over the company.

[28] The dispute before the court therefore was whether the second limb of Article 4(7) covered a scenario where the bankrupt was neither a director nor a shareholder in the company, but his associates exercised the necessary control over the company.

[29] On a literal construction of Article 4(7) I find that it does not include this scenario. If the legislature had wanted to include in the definition of associate a person who was neither a director nor shareholder it could have done so simply by adding the words, "or if his associates have control of it " at the end of Article 4(7). Parliament did not do this.

[30] The mischief of the 1989 Order is to ensure that preferential transfers can be set aside. Such transfers are usually given to family and friends or to someone who effectively holds the property on trust for the bankrupt and the bankrupt is therefore in a position to have the property returned to him at some future date. To ensure this mischief was met Parliament included as associates, persons who had control over the company either individually as directors or shareholders and persons who held a minority interest which when added to the interests of their associates amounted to the requisite control of the company. It is 'control' of the company which enables individuals to give preferential transfers. A person without control over a company would not be in a position to ensure that property transferred would be returned to him at some future date.

[31] Individuals who are directors or shareholders, even of a minority interest have the ability to control decision making. As directors and shareholders they have legal rights for example to vote at company meetings, have access to company papers etc. Parliament included such individuals as associates because the mischief of the 1989 Order is to prevent transfers to friends and families or to a company which effectively holds a transfer on trust for the bankrupt as he can then use his control over the company to ensure the transferred property is returned to him after the bankruptcy ends. In contrast a person who is not a shareholder has no such legal rights. He cannot attend company meetings and cannot vote. He does not even have a right to see company papers. Such a person is not therefore able to exercise 'control' over the company. For this reason I find Parliament did not intend that such

an individual should be included in the definition of associate. Whilst such an individual may seek to exercise influence over family members in a company this is not the same as having control over the company. Article 4(7) specifically refers to persons exercising 'control' rather than mere 'influence'.

[32] I have considered the provisions relating to preference when a company transfers assets to individuals. The wording of these provisions is markedly different and I therefore do not find them of assistance in the construction of Article 4(7).

Conclusion

[33] Paul Dougan, the bankrupt is neither a Director of the respondent company nor has a shareholding in it. I therefore find that the respondent company is not an associate of the bankrupt.

[34] Accordingly, even if he gave the respondent a preference the requirements of Article 313 are not made out as the preference was made more than 6 months preceding the presentation of the bankruptcy petition.

[35] Accordingly I dismiss the appeal and affirm the decision of Master Kelly.

[36] I shall hear counsel in respect of costs.