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Judgment: approved by the Court for handing down | *Delivered:* **11/02/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION **11/013743**

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OFFICIAL RECEIVER FOR NORTHERN IRELAND

v

CATHERINE GALLAGHER

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DEENY J

[1] This appeal by the Official Receiver (the Appellant) from Master in Bankruptcy raises a point of law of general application relating to ancillary divorce proceedings which involve putative bankrupts. The Appellant by Originating Summons of 25 May 2013 sought a declaration that three dispositions under a matrimonial agreement between the Respondent and her former husband Ciaran Gallagher made a rule of court by Order of 18 November 2011 were void. By summons of 14 November 2012 the Respondent sought an Order of ratification of the same agreement.

[2] The point in issue arises from Article 257 of the Insolvency (NI) Order 1989. The relevant paragraphs read as follows.

> "(1) Where a person is adjudged bankrupt, any disposition of property made by that person in the period to which this Article applies is void except to the extent that it is or was made with the consent of the High Court or is or was subsequently ratified by the Court.
>
> (2) Paragraph (1) applies to a payment (whether in cash or otherwise) as it applies to a disposition of property and, accordingly, where any payment is void by virtue of that paragraph, the person paid shall

> hold the sum paid for the bankrupt as part of his estate.
>
> (3) This Article applies to the period beginning with the day of the presentation of the petition for the bankruptcy order and ending with the vesting, under Articles 278 to 308, of the bankruptcy state in a trustee."

[3] On 15 November 2011 Ciaran Gallagher and Catherine Gallagher, with the assistance of their respective legal advisors, reached an agreement dealing with ancillary relief pursuant to the decree nisi of divorce between them.

[4] On 18 November 2011 the agreement was considered and approved by Master Redpath of the Family Division who made it a rule of the court pursuant to the Matrimonial Causes (NI) Order 1978.

[5] Master Redpath was at this time also seised of a bankruptcy petition which had been issued by HMRC against the husband Ciaran Gallagher. The bankruptcy petition was listed before him also on 18 November. Ms McGrath of the Crown Solicitor's Office on behalf of HMRC was present, as he noted in the bankruptcy file as was, obviously, the solicitor for the debtor. HMRC was the petitioning and only creditor known at that time.

[6] Part of the agreement provided for the payment of £21,500 by the husband to discharge the statutory demand on which the petition was based. The Respondent was to receive 20,000 euro and a building site in Co. Donegal. These were the three dispositions under the agreement to which the Appellant took exception. The experienced solicitor for HMRC does not seem to have opposed the making of the Order by the Master.

[7] Mrs Gallagher's counsel, Mr Peter Girvan, submits that Master Redpath's approval meant that the High Court therefore consented to the disposition of property by Mr Gallagher pursuant to Article 257(1). He subsequently became bankrupt on 13 January 2012. It is not in dispute that this matrimonial order involved disposition of property by him i.e. the building site in County Donegal as well as the sum of money. It is not in dispute that the dispositions fell within the period governed by Article 257(1).

[8] It is not now in dispute that the decision was one of the High Court. The High Court is defined in Section 42 of the Interpretation Act 1954 and again in the Judicature Act 1978 Section 2(2); see also Sections 5(2) and (4), 16, 17 and 70. It is clear that the judges of the High Court and, where appropriate, the Masters, have authority across the range of jurisdiction in the High Court. It is not in dispute that the Master acting in this way could make an order of the High Court.

[9] The point made on behalf of the Official Receiver by Mr William Gowdy of counsel is that that consent of the High Court under Article 257 of the Insolvency (NI) Order 1989 must be made within the insolvency proceedings and on application to the High Court.

[10] Master Redpath's Order does not purport to be in that form. There is no typed order but his note records that "the injunction can be varied". This is a reference to a Mareva Injunction made by Weir J sitting as a judge of the Family Division on 14 May 2009. The Master then adjourned the bankruptcy petition.

[11] There can be no doubt that "High Court consent" was given to the dispositions under the agreement by the Master. The issue is whether that consent needs to be given expressly in the bankruptcy proceedings on an application to a Master or Judge of the High Court to comply with Article 257.

[12] I had the benefit of helpful written and oral submissions from both Mr Gowdy and Mr Girvan. I have taken them all into account even if not expressly set out herein. They referred to Re Flint [1993] Ch. 323. Nicholas Stewart QC sitting as a Deputy Judge of the High Court there found the matrimonial order to be void and refused to ratify the disposition under it. However, in that case the matrimonial order had been made in Crewe County Court and the Bankruptcy Order in Shrewsbury County Court in mutual ignorance one with the other. Master Redpath was careful to and right to have both matters listed before him.

[13] Counsel also referred to Hill v Haines [2007] Ch. 4112; [2007] EWCA Civ 1284; Mountney v Treharne [2003] Ch. 135, [2002] EWCA Civ 1174; Treharne v Forrester [2003] EWHC 2784 (Ch.); Mordant v Halls [1997] 2 FCR 378; Re Holliday [1981] Ch. 405; Re Hastings (No.3)[1959[Ch.368; Whig v Whig [2007] EWHC 1856 and McGladdery v McGladdery [2000] 1 FCR 315. However, it now having been clarified that it is agreed that the Master in the Family Division could make an order on behalf of the High Court and that these were dispositions there is limited assistance in these authorities. Again it is agreed that the wife's settlement of this order on foot of her statutory and common law rights acts as a form of consideration for that agreement.

[14] In Re Holliday neither appeal before the Court of Appeal in that instance was under the Matrimonial Causes Act, hence the comments of Goff LJ. At paragraph 1 of Treharne, Lindsay J states the following:

> "I have before me two applications which together raise questions as to the effect of transfer of property orders made in the Family Division in favour of a former wife, when, unknown to that division, they were made in the interval between presentation of a

> bankruptcy petition against the former husband and the making of a bankruptcy order against him."
> (My underlining).

Clearly the facts of the case before me are quite different form Mrs Gallagher's case. I do not consider that these authorities assist the Appellant.

[15] In support of his contention at [11] above Mr Gowdy advances a number of arguments. Firstly, he says that on a purposive interpretation this should be the meaning. The purpose of the Insolvency Order (Northern Ireland) 1989, he submits, was to assimilate insolvency legislation here with that recently enshrined in England in the Insolvency Act 1986. It may well be that in England and Wales High Court consent pursuant to the equivalent statutory provision there would not be granted in this way. But part of the reason for that is that the legislature decided in the 1989 Order in Council to concentrate proceedings in bankruptcy in Northern Ireland in the High Court in Belfast. In England and Wales, by contrast, insolvency jurisdiction is enjoyed by county courts in the district where the bankruptcy is allocated, although that may include the High Court in London; see s.373 Insolvency Act 1986. The compact nature of this jurisdiction makes that distinction perfectly sensible and pragmatic, qualities the legislature implicitly approved.

[16] Mr Gowdy points out that if Mrs Gallagher's interpretation is correct, as Master Kelly found in her reasoned judgment, it could not apply to the county court here. If there were ancillary relief proceedings in the county court, as there often are, an order of that court, usually made by a District Judge, approving a matrimonial agreement or making such an order, in a case where a bankruptcy petition had issued against one of the parties, could not constitute High Court consent. That is undoubtedly true. It may therefore be wise where a bankruptcy petition is issued against one of the parties to ancillary relief in the county court for the proceedings to be removed to the High Court. In the alternative, where the petition is known of, an application can be made to the High Court for such consent before or after the county court approves the matrimonial settlement. But it is not necessary to have the interpretation which the Official Receiver postulates here, merely because the county court in Northern Ireland has a matrimonial jurisdiction but no insolvency jurisdiction.

[17] The unitary nature of the High Court is reinforced by the provisions of Order 4 r.1 regarding transfer of proceedings between Divisions and Order 1 rule 12A which allows a plaintiff to choose which division in which to bring proceedings.

[18] Mr Gowdy submits that the Insolvency Order is there to regulate bankruptcy, inter alia, and the rights of creditors, and this is particularly so of Article 257. I accept that but I cannot accept his submission that in this case there was any breach of the rules of natural justice prejudicing creditors. As stated above the only creditor who had issued a petition, which no other creditor had elected to support, was

HMRC who were represented at the hearing before the Master at which he listed the bankruptcy petition also.

[19] The Official Receiver's apprehension that creditors will be prejudiced if this court upholds Master Kelly's ruling and Master Redpath's order is, I feel, misplaced. A bankruptcy petition is a public document which, like a writ, is open to inspection. It is not disputed that it can nowadays in fact be searched for on the Court Service website. A careful solicitor therefore, certainly where there is any question mark about the credit worthiness of the opposing party, can search to see if a petition has been issued against their opponent or, indeed, their own client.

[20] If however the client, wrongly, fails to disclose to anyone that a petition has been issued against him and proceeds to enter into a matrimonial agreement which in turn is made a rule of the court by the Master, all of which would require a considerable number of people not to notice or ascertain that there are proceedings out against him in the High Court, and goes on to become bankrupt, nevertheless that would not leave his creditors or the opposing party without remedy. Article 35A of the Matrimonial Causes Order 1978 expressly empowers the court to discharge an earlier consent order and I have no doubt that the court would do so if such an important point had been hidden from it. But prevention is better than cure; see [29] below.

[21] Mr Gowdy submits that a creditor would not be entitled to apply in those proceedings between man and wife. I wish to reserve my position on that. It may be that a creditor could apply to be joined to the proceedings for those purposes. But in any event the creditor could do what the Official Receiver is himself doing in this very case i.e. bring an originating application for declarations and further and other relief relating to the dispositions of property of which the Official Receiver complains.

[22] Mr Gowdy submits that the consent of the court could only be granted on an application to it and there was no such application in the bankruptcy proceedings here. I am not persuaded by that submission. There are places in the rules where a court can act of its own motion. In particular, with regard to Article 257, the Order does not expressly require an application. One might say that there was an implied seeking of consent by the parties before the Master who had seisin of the bankruptcy petition at the same time and in the same court as he was considering his responsibilities under the Matrimonial Causes Order.

[23] One might approach it in a different way. Is there a sufficient mischief to read into the Order in Council words to the effect of an application being required in the insolvency proceedings? (No redraft was offered to me, I observe.) It seems to me that is not the case. The remedy, if the Family Division made a Matrimonial Causes Order in ignorance of a bankruptcy petition and to the prejudice of creditors, is to bring an originating application of this type, or, perhaps, an application under Article 35 of the Matrimonial Causes Order. I consider that is sufficient safeguard.

[24] Furthermore, many bankruptcy petitions do not lead to bankruptcy orders. The respondent may pay the debt. He may compromise with the creditor in return for the dismissal of the petition. But if the Official Receiver is right, every time that a petition is issued a party will have to go to the cost of making a formal application in the Chancery Division for the consent of the High Court under Article 257. It is accepted that could be heard by a Master in the Family Division who had seisin of the proceedings but still in every case of a petition such an application will be made. This is in the context, a fortiori, where one of the parties is already threatened with bankruptcy. It seems to me that, that is a burden on the parties, and indeed on the administration of justice which is neither necessary nor proportionate to give effect to the statutory provision at Article 257.

[25] One of the points made by Mr Girvan against the Official Receiver was, as I have indicated above, that Article 257 does not expressly seek an application. That is a valid point but I accept the contrary submission of Mr Gowdy that that is true of a number of quite important provisions in the Order, e.g. Articles 256 and 256A and it is also true of Article 344 regarding extensions of time. Mr Gowdy points out that the Insolvency Rules (NI) 1991 deal at Part 7 beginning with 7.05 with applications and those could readily be applied to Article 257. Incidentally it is there at Rule 7.25 that we find confirmation that insolvency records are indeed open to inspection.

[26] As Mr Gowdy rightly acknowledged the petitioning creditor in this case, HMRC, represents the class of unsecured creditors. No secured creditor subsequently appeared. As it happens, the debts of Mr Ciaran Gallagher, when a bankruptcy order was made, were far larger than was allowed for on 18 November 2011, coming to some £250,000. But there was nothing sinister about that. The petition is based on one debt. Such a petition will be dismissed if the amount claimed on the statutory demand underpinning the petition is paid. If there are more debts fresh demands and petitions may be served. If, on the other hand, a bankruptcy order is made then creditors can prove in the bankruptcy for larger amounts or amounts which had not been claimed on foot of a petition at all.

[27] It is worth bearing in mind that although some might colloquially speak of the Bankruptcy Court or something of that kind the Insolvency Order itself does not specify the Chancery Division let alone a "Bankruptcy Court" of the High Court.

[28] It is a secondary point but counsel pointed out that the order of Maguire J of 26 September 2013, sitting as a Judge of the Family Division, in varying the earlier injunction granted by Weir J makes express reference to the rights of the trustee in bankruptcy even though, although vested with the property of Ciaran Gallagher, the trustee had not been made a party to the action.

[29] I conclude that the Bankruptcy Master was right in refusing the Official Receiver the relief sought. It does not seem to me that there is any ground of statutory interpretation which would cause the court to imply in Article 257 of the

Insolvency Order an express requirement to bring an application in the insolvency proceedings for the consent of the High Court to approve a matrimonial agreement in Family Proceedings in the same High Court. I commend the practice of the Master in taking seisin of both sets of proceedings when dealing with the same. Indeed in the light of the decision in Mountney op.cit. it is the course to be followed to avoid a clash between any possible equitable interest of the wife under the matrimonial order and any legal interest of the trustee in bankruptcy if a bankruptcy order is made. It is best to make an express order on such occasions referring to Article 257 of the Order but the omission to express it so here does not seem to me to justify discharging the Order that was then made. That would be mere formalism.

[30] For completeness I should say that, in the light of the facts here, where the respondent was a mother of four children who was not only now divorced but bereft of the home and lifestyle which she previously enjoyed, she should not be deprived of the modest settlement which she got as part of the matrimonial agreement of 15 and 18 November 2011. If I had concluded that the Official Receiver's submissions were well-founded I am entirely satisfied that it would have been proper nevertheless to ratify retrospectively, as the court can do, the dispositions made on 18 November 2011. I am satisfied that the Master looked at the matter in the round at that stage and was entitled to reach the conclusion he did.

Addendum

[31] Following the delivery of this judgment counsel for the Official Receiver sought leave to appeal to the Court of Appeal pursuant to the Judicature Act 1978. In support of the same he submitted a skeleton argument. I heard oral submissions from him and from Mr Peter Girvan for Mrs Gallagher. I do not propose to accede to this application, although I did acknowledge that there was a point of law of general application in paragraph 1 of the judgment. I refuse leave, nevertheless, because it seems clear to me that there can only be one outcome on the facts of this case. Mr Gowdy invites me to consider other factual situations and even at one point invited me to address whether the petitioning creditor's solicitor was heard at the hearing before Master Redpath. However I accept Mr Girvan's submission that this would be to speculate, the affidavit on behalf of his client making it clear that she was present and therefore had an opportunity to make submissions. In any event, as he pointed out, the matrimonial agreement approved by the Master made express provision for the payment of the debt in the petition presented against Mr Gallagher.

[32] For the avoidance of doubt the ratio of this decision is that High Court consent consistent with Article 257 of the Insolvency (NI) Order 1989 is sufficiently given by a decision in High Court matrimonial proceedings where the Family Master has listed the bankruptcy proceedings before him on the same occasion and a representative of the petitioning creditor was before the court.

[33] It is true to say that I, out of courtesy, addressed the various arguments put forward by Mr Gowdy in my judgment of 11 February but my remarks in dealing with his submissions are in part obiter dicta.

[34] For the avoidance of doubt again it can be seen therefore that my decision is somewhat narrower than the decision of the learned Master, as summarised at paragraph [13] of her helpful judgment. I do not disagree with her that the property disposition must be on foot of some form of High Court proceedings with the consent or ratification of a judge or Master of the High Court but more is required. I have in my judgment cited with approval the decisions of the English courts holding that consent is not given within the meaning of Article 257 of the Insolvency (NI) Order 1989, or its English equivalent, where the court dealing with the matrimonial arrangements was wholly ignorant that a bankruptcy petition had been presented against one of the parties. If, as I am told, there are cases falling between the facts of the present case and orders made in complete ignorance of bankruptcy proceedings they must be decided by Masters or judges on the particular facts pertaining thereto. It would be inappropriate for me to give judgment on hypothetical facts.

[35] For completeness I accept Mr Girvan's submission that, in hand with the points above, this is not an appropriate case in which to grant leave as I had made clear at [30] above that even if I had found that Article 257 had not been complied with I would have ratified the agreement. For an appeal to proceed now is not only to keep this lady out of her modest entitlement under the agreement but to put her or the Legal Services Commission to the expense of a hearing before the Court of Appeal on what is in effect an academic argument. The Plaintiff is at liberty to seek leave from that court, of course, but may think it preferable to wait for some case on other facts where the estate of a bankrupt has actually suffered injustice.