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Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **8/10/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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OFFICIAL RECEIVER

-v-

SEAN McWILLIAMS
& MARY McWILLIAMS

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DEENY J

[1] On the 17th of February 2012 the Deputy Official Receiver for Northern Ireland applied to the Chancery Division of the High Court of Justice in Northern Ireland to extend the period of discharge from bankruptcy in respect of Mr Sean McWilliams. A similar application was made on the same day in respect of his wife, Mrs Mary McWilliams. Mr McWilliams had been made bankrupt on the petition of the AIB Group UK PLC on the 20th of June 2011, as had Mrs McWilliams.

[2] I enquired from counsel in chambers, and was told that the AIB Group were now not at the forefront or heart of the dispute between the parties. Mr Tom Keenan (of Keenan CF) was appointed the trustee in bankruptcy on the 7th of August 2011 to both bankrupts. The parties exchanged correspondence as the Court knows because the matter has come before this Court on appeal from the Bankruptcy Master. She heard the matter on the 12th of June 2012 and on the 19th of June gave a judgment in favour of the bankrupts, refusing to extend their period of discharge as sought by Mr McCappin (the Deputy Official Receiver) in those applications of the 17th of February. The position is that a discharge under the current legislation, the Insolvency (Northern Ireland) Order 1989, as amended and re-amended, would follow after twelve months, but, subject to a right to come in and seek the order of the Court under Article 253 of the original Order as amended by the Insolvency (Northern Ireland) Order 2005. The Court has a power under paragraph (3) of Article 253 on the application of the Official

Receiver, or the trustee of a bankrupt's estate, to order that the paragraph (1) discharge after one year shall cease to run:

> "(a) until the end of a specified period, or
>
> (b) the fulfilment of a specified condition.
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> (4) The High Court may make an Order under paragraph (3) only if satisfied that the bankrupt has failed or is failing to comply with an obligation under this Part".

[3] The obligation under this Part is most appropriately set out at Article 306 of the Order, helpfully set out in one of the two learned skeleton arguments provided in this matter and as relevant it reads at Article 306(1):

> "The bankrupt shall –
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> (a) give the trustee such information as to his affairs;
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> (b) attend on the trustee at such times; and
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> (c) do all such other things, as the trustee may for the purposes of carrying out his functions under Parts 8-10 reasonably require".

So this matter comes before the High Court on Appeal from the Master's refusal to grant to the Official Receiver, acting on the prompting of the trustee, to order that the Article 253(1) period should not take effect.

[4] The particular point that comes before me today is the material that the Court should take into account in deciding this matter, there being a dispute between counsel as to what material was appropriate. I think in the course of the exchanges on Friday, when the matter was first listed and today, the 8th of October, we have clarified that there is no objection on the part of the bankrupts to the Court taking into account any correspondence between the parties or their solicitors prior to the hearing before the Master on the 12th of June. This apparently was subsequently exhibited to an affidavit of Mr Keenan (the trustee) on the 3rd of August 2012. Mr Jonathan Dunlop the then and present junior for the Official Receiver, but he is now led by Mr Stephen Shaw QC, had attempted to put this in but perhaps because of lateness of the notice was not allowed to do so by the Master. That material should go in. But in the interval since

June, between June and October, Mr Keenan did not down tools but continued to make enquiries as to the affairs of the bankrupts.

[5] The bankrupts were engaged, at a very substantial level, in dealing in property in France (including Cap Ferrat) and the United States and perhaps elsewhere of a valuable kind and they achieved a significant number of sales, apparently, but their business went into decline following the alteration in the world financial markets after 2007 and 2008, and led to their bankruptcy. The trustee wishes to draw to the Court's attention continuing issues about which he has concerns.

[6] Now it is right that, very sensibly, both parties have been corresponding and the bankrupts (through their solicitors) have been seeking to address the concerns of the trustee. The underlying point here, of course, is that the creditors should not be deprived of their right to recover the debts which would be expunged once this period of bankruptcy is over without a proper and adequate opportunity to ascertain that the bankrupts do not, in truth, own or control monies or valuable assets which should be put to the benefit of the bankruptcy and the creditors rather than retained by them. The position of the Official Receiver (through Mr Shaw) is that clearly these matters, which Mr Keenan has continued to investigate, should be before the Court.

[7] He points to the character of the application, that it is a rehearing from the Master, before this Court, which might carry that implication but Mr David Dunlop (for the bankrupts) draws attention to the decision of Girvan J, as he then was, in the case of Lough Neagh Exploration Ltd v. Morrice & Other [1999] NIJB 43. In that case the judge (my predecessor) was considering the admission of evidence that was not before the Master, and at page 44h he says:

> "On an appeal from the master to the judge in a case such as the present the matter comes by way of a rehearing and in the normal course of events is determined on the evidence put before the master. Frequently the parties will seek to put before the Court fresh evidence and not infrequently such further evidence is admitted, either by agreement of the parties, or by leave of the Court in the exercise of its discretion. The position is thus stated in the Supreme Court Practice [1999] Volume 1, paragraph 58/1/3:
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> "It is common practice for the judge in chambers, subject of course, to the question of costs, to admit further or additional evidence by affidavit to that which was before the Master or District Judge; but if a

> party has taken his stand on the evidence as it stood before the Master or District Judge, the judge in chambers may in his discretion, by analogy with the practice in the Court of Appeal, refuse to allow him to adduce further evidence (see Krakauer v. Katz [1954] 1 WLR 278".

Now, pausing there, I respectfully agree with the comments both of Girvan J, and the Supreme Court Practice.

[8] Girvan J went on.

> "In Baillie v. Cruickshank [1995] reported in [1999] NIJB 47: McCollum J, as he then was, made a number of cogent points which should be taken into account where the question of the exercise of that discretion arises. Thus:
>
> (1) Parties have a duty to put their case properly and fully before the Master and 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."

[9] Pausing there, I am inclined to agree with Mr Dunlop that the material time, at least initially, should be before the Master, and that is what the judge is referring to there.

> "(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".

[10] Mr Shaw addresses that in two ways; firstly that the correspondence predated the hearing before the Master, and his junior had tried to put it in. Well, as I have indicated, the admissibility of that is no longer in dispute. Secondly, he says, the other material has come to light since the hearing before the Master. It has come to light because Mr Keenan has continued to discharge his duties as a trustee in Bankruptcy. I do not see how he can be criticized for doing that.

[11] The Court granted an interim order at the time of the appeal. The Court directed and ordered that the bankruptcy continued in force until the hearing of the appeal. I

think a trustee would be criticized if he then downed tools, in effect, presuming that he would lose his appeal. I think having gained the Interim Order, that the bankruptcy did continue, and he was perfectly entitled to continue to pursue his areas of concern. It seems to me, therefore, that a sound reason for the failure to adduce the evidence before the Master has been adduced - it did not exist - and, so far, I cannot see anything to suggest that it was the Official Receiver or the trustee's fault that it had not come to light then. I say that because I have seen correspondence showing that, from an early stage after his appointment, the trustee was trying to elicit information from the bankrupts.

[12] I return to Mr Justice Girvan's judgment quoting, or at least paraphrasing Mr Justice McCollum:

> "3. A party seeking to adduce such additional evidence carries the burden of establishing that the interests of justice would be better served by the admission of additional evidence rather than by refusing to admit it".

If one pauses there, where does the interest of justice lie here? Am I to decide the matter on the best evidence available up-to-date at this time, or am I to decide it on the evidence that was available, albeit incomplete and imperfect, before the Master some four months ago before the long vacation? One only has to pose the question to think that the proper answer is that the Court should make its decision on the basis of full and up-to-date facts. Justice is the daughter of truth. The Court is more likely to be able to do justice if it has the truth as it currently stands. I appreciate that in some areas of the law, such as employment law, a party may be prohibited from praying in aid information which came to light after a decision, but it seems to me that that is not one of these cases. The area of insolvency where the plaintiff is discharging a public function seems to me one where, as a general principle, one would expect the up-to-date information to be admissible before the High Court. That also is consistent with the continuing obligations on the bankrupts and, indeed, as Mr Dunlop pointed out on Friday, they have continuing obligations even if they are discharged, but they certainly have obligations now.

[13] I think I would add two further points, before returning to the dicta of Mr Justice McCollum. First of all, as always, it is useful to test this by seeing how it would work in the opposite direction. Say you have a bankrupt who foolishly or, even dishonestly, attempts to hide information about his assets and means from a trustee in bankruptcy, and he is detected (or an honest solicitor directs him to disclose it) he will have put himself at significant risk of his bankruptcy being extended because in the words of Article 253(4) they will have "failed… to comply with an obligation under this Part". But between the time of a Master, therefore, extending the time of the bankruptcy and

an appeal they may have repented of their earlier error, or even, conceivably, dishonesty, and sought to remedy it by providing every piece of information that the trustee was reasonably entitled to, to try and show that they have not, in fact, hidden away assets and that it is appropriate that they should enjoy the period of time pursuant to Article 253(1) to bring their bankruptcy to an end. It seems to me it would be quite unfair if the Official Receiver were to say: Oh no, no, no the Court should not hear any of their recent good behaviour because at the time they were in before the Master they had failed to comply. I think that would be unjust, as it would be unjust now for the trustee to be locked out of updating the Court. That is, of course, subject to the proper application of the Rules, to which I will turn in a moment.

[14] I also make one other observation in connection with this aspect of matters. Article 253 expressly refers to the High Court; it does not refer to an application to the Master. Both paragraph (3) and paragraph (4) refer to the High Court and I think it would be paradoxical indeed if a Judge of the High Court, exercising the jurisdiction of the High Court, was to be debarred from knowing of relevant material which was within the knowledge of either (or in this case, subject to one point) both parties.

[15] Mr Justice Girvan's decision is followed in the 1999 NIJB reports, by Baillie & Cruickshank, at page 47 the decision of Mr Justice McCollum, as he then was. I just want to briefly add two quotations from that judgment. At page 47h the learned judge said:

> "I am quite satisfied [having quoted the Supreme Court practice which I have also done] that that is a correct statement of the practice as it is and should be in Northern Ireland, and I hold that I do have an absolute discretion as to whether or not to admit fresh evidence, and that I am not bound by any requirement to find special reasons or special circumstances before I admit an affidavit that was not before the Master".

And that prefaced his other remarks. And then, again, at page 49d he said the following:

> "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 in 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".

[16] Well it was clearly in issue but it seems to me that otherwise these dicta are helpful to the Official Receiver, in that the matter has evolved from the earlier questions of the trustee. With due respect to Mr David Dunlop's arguments I consider that the Official Receiver is entitled to pray in aid the decision of Sir Andrew Morritt, Chancellor, in Shierson v. Rastogi (A Bankrupt) [2007] EWHC 1266 Ch. and in particular the passages read by Mr Shaw at paragraph 63-66. They do not, it is right to say and acknowledge expressly, deal with the admission of fresh evidence, but they do make remarks, with which I respectfully agree, as to the importance, in the public interest, of ensuring there has been full compliance with the undischarged bankrupt's duty to co-operate with the trustee, and it would be wrong of the Court to undermine that by not allowing the Official Receiver, or the trustee, to put before the Court relevant matters.

[17] Mr David Dunlop, in his helpful submissions, did draw attention to an important matter and that is found in the Rules made under the Insolvency Order which deal with applications for suspension of discharge at 6.213, Chapter 22 of the Insolvency Rules. And he points out that under paragraph (2) the Official Receiver is obliged to file evidence in support, setting out the reasons why it appears to him that such an order should be made, and it is not in dispute that this was done, the Deputy Official Receiver from the beginning referring to his Examiner receiving a letter from the trustee on the 17th of February outlining that the bankrupt had failed to co-operate in full with him, and had not delivered up all the information in respect of that. And that information was contained in a lengthy letter from Mr Keenan, of the 17th of February 2012, to the Deputy Official Receiver which was then sent also to the bankrupts. Now this letter, of some six pages, seems to have been referred to by the Master as pleadings. I would express caution about that term being used. The principle that the bankrupts should know the case they have to meet is an important one, and undeniable, but I do not think we should drift into some kind of position of Victorian or pre-Victorian views of pleadings. It is clear on all the modern authorities that pleading points should not be allowed to prohibit the doing of justice. See Supreme Court Practice vol.1, O. 20/8/6; 1999. Apart from that general comment, the very first category in the letter of the 17th of February is one entitled, 'Property transactions prior to Bankruptcy', which could hardly have been broader, one would have thought and, likewise, the seventh concluding category is, 'Outstanding information requests', and in between there are a number of other enquiries. So that it does not seem to me that the pleading point is an attractive one at all, but I accept Mr Shaw's submissions that he (and I am holding him

to this) that what he is seeking to do is, in fact, within the terms of the letter of the 17th of February. I say this because I did not consider it appropriate to read the new materials until I had ruled on whether they were properly admissible in evidence, save so far as they have been indicated in the submissions of counsel.

[18] However, a different matter is that paragraph (5) of 6.213 is as follows:

> "Copies of the trustee's evidence in support under this Rule, shall be sent by him to the official receiver and the bankrupt so as to reach them at least twenty-one days before the hearing date.
>
> (6) The bankrupt may, not later than seven days before the hearing date, file in court a notice specifying any statements in the official receiver's or trustee's evidence in support which he intends to deny or dispute".

[19] Mr Dunlop says that has not been done here; it's a clear breach of the Rules. Mr Shaw, in reply, says all that he is seeking to do, when he mentions calling Mr Tom Keenan to give oral evidence, is to explain for the assistance of the Court materials that have, in fact, been sent to the bankrupts timeously by way of affidavit or supporting documentation exhibited thereto including correspondence and that, therefore, he has discharged that duty. For the avoidance of doubt I am accepting that, but would be vigilant if Mr Dunlop is able to draw to my attention a departure from the general rule which I intend to enforce that the bankrupt should, indeed, see the trustee's evidence at least twenty-one days in advance. To assist in clarifying this matter and narrow the issues further, the trustee is to serve tomorrow morning (Tuesday the 9th of October) a statement setting out what explanations it is he wants to give, and as long as they are within the bounds of what has already been delivered timeously that will be admissible in oral evidence on Wednesday.

[20] It can be seen, therefore, that in my view the case law can properly and should properly be interpreted in support of the Official Receiver here being allowed to put in the up-to-date matters concerning him. I think I would be acting contrary to the decisions of my brethren, the English decision, the Insolvency Order and to good sense if I were to do otherwise.