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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION (BANKRUPTCY)

BETWEEN:

THOMAS CAMPBELL MacLENNAN, TRUSTEE IN BANKRUPTCY OF THE
ESTATES OF BEATRICE WALKINGTON AND BRIAN TERENCE DOLWAY
WALKINGTON

Applicant:

-and-

BEATRICE WALKINGTON ON HER OWN BEHALF AND AS
REPRESENTATIVE OF THE ESTATE OF BRIAN TERENCE DOLWAY
WALKINGTON DECEASED

Respondent:

The Applicant appeared as a Litigant in Person
William T Gowdy KC (instructed by A&L Goodbody NI LLP) for the Applicant

Before: McCloskey LJ, Colton J and Kinney J

McCLOSKEY LJ (*delivering the judgment of the court, ex tempore*)

Introduction

[1] In this judgment we shall maintain the descriptions of the parties in the pleadings and orders *et al* to date. Thus, while the appealing parties are the respondents in the substantive proceedings, they shall retain that designation for the purposes of this judgment. We shall describe the applicant, the Trustee in Bankruptcy, as "*the Trustee*."

[2] This somewhat uncommon species of appeal proceeding comes before this court in the following way. By originating application dated 4 July 2022, the Trustee brought proceedings against the respondents seeking various forms of relief. The primary relief pursued is leave pursuant to article 310(2)(a)(i) of the Insolvency (NI) Order 1989, (the “1989 Order”) for the eviction of the respondents from 23 Movilla Road, Newtownards, Co Down, (the “premises”). Before continuing the narrative a little background is required.

[3] On 10 August 2017, Stranraer Sheriff Court made an order of sequestration in respects of both respondents’ assets. The Trustee was appointed by the court on the same date. By letter dated 21 August 2017, addressed to the first-named respondent at the premises, the Trustee explained that from the date of the order of the court the respondents’ assets vested in him. Continuing, the Trustee explained that it was his duty to safeguard and realise the assets for the benefit of respondents’ creditors. This letter employs the terminology of “the firm.” It appears to be uncontentious that this denotes a business entity which both respondents were involved. The letter also drew attention to the Bankruptcy (Scotland) Act 2016 (the “2016 Act”). A saga had thus begun. Some eight years later the parties remain in dispute and there is continuing live litigation in the jurisdiction of Northern Ireland, the originating application having passed its third anniversary.

[4] The first-named respondent, then represented by solicitors, responded to the originating application an affidavit sworn on 18 November 2022. From this affidavit one learns that she was declared bankrupt in Scotland (under the 2016 Act) and avers that she has never had the status of bankrupt in Northern Ireland. Her bankruptcy appears to have pre-dated the sequestration order. She was then (and is now) residing in the premises. The affidavit outlines certain factual disputes between the Trustee and the first respondent. The headline dispute appears to concern the date when the Trustee first became aware of the first-respondent’s interest in the premises. The Trustee claims that this was February 2020 – this is vigorously contested by the first respondent.

[5] Part of the first respondent’s aforementioned affidavit also foreshadows one significant element of the continuing dispute between the parties. The relevant averment is:

“... I am advised that the provisions of Article 256(A) of the Insolvency (NI) Order 1989 apply namely that upon the three year anniversary of my bankruptcy order, the property shall revert in my name without further court order.”

We shall describe the aforementioned measure of legislation as the “1989 Order”, while the “property” denotes the premises.

[6] While not germane at this juncture, it is noted that there is a substantial issue regarding the first respondent's credibility. This is particularly evident from a skeleton argument on behalf of the Trustee dated 30 November 2023. This has one further feature of note. It records the parties' "agreement" that as the Trustee derives his powers from the sequestration order made pursuant to the 2016 Act the latter (Scots Act) should govern the Northern Ireland proceedings. In passing, this would appear to be contentious. This is followed by an assertion that the Chancery Court "agreed and directed that the Scottish Act would apply to this application pursuant to section 426 of the Insolvency Act 1986" (the "1986 Act"). This skeleton argument further identifies the "key question" as:

"... whether the [premises] constituted the respondent's family home as of 9 August 2017, being the date immediately preceding the day the sequestration order was granted."

[7] Some two years then elapsed. The next milestone is the order of the Chancery judge dated 8 April 2025. The terms of this order indicate that a choice of law issue was raised before the court. The order records that this gave rise to the receipt of submissions from both parties. The operative part of the order is as follows:

"THE COURT RULES that as:

- (1) The bankruptcy (sequestration) in this matter arose in Scotland; and
- (2) Section 426(5) of the Insolvency Act 1986 gives power to this court to apply Scot's law to the facts and circumstances of this case

THE COURT ORDERS that Scot's law will be applied on the hearing of this matter on 12 June 2025 to the issues between the parties."

There is no written judgment pertaining to this order.

[8] It was followed by a further order of some significance, namely that dated 22 May 2025 whereby the Chancery Court refused the first respondent's application for leave to appeal to this court challenging the choice of law order. This was the stimulus for the step which brings the case before this court, namely the first respondent's notice dated 2 June 2025. With a degree of latitude and interpretation, by this Notice the first respondent applies to this court for leave to appeal against the choice of law order of the Chancery Court dated 8 April 2025.

[9] In support of this application the first respondent has provided a document entitled "Why Scot's law cannot and should not be used in a Northern Ireland High Court." The core submission advanced is:

“.... In conclusion, Scot’s law cannot and should not be used in the Northern Ireland High Court due to the fundamental differences between the legal systems, the distinct historical and legislative contexts and the necessity to maintain legal consistency and certainty. The Northern Ireland High Court possesses its own jurisdictional authority, which must be upheld to ensure the effective administration of justice within Northern Ireland.”

In an associated electronic communication, the respondents adopt a less absolutist stance, with a recognition that in certain circumstances the courts of both jurisdictions “... may consider applicable laws from both jurisdictions.” This court has considered these submissions, together with the further submissions contained in the first respondent’s skeleton argument dated 29 August 2025. The latter mainly (a) repeats the factual disputes between the parties noted above and (b) addresses further issues unrelated to the legal issue of the choice of law.

[10] The first respondent has no right of appeal to this court against the choice of law order of the Chancery Court. The right conferred on the respondent is a right to apply to this court for leave to appeal. This is so because the order which the first respondent seeks to challenge is interlocutory in nature. This is the effect of section 35(2)(g) of the Judicature (NI) Act 1978, as explained *in extenso* in *Patterson v Rathfriland Farmer’s Co-operative Society Limited* [2025] NICA 20 at paras [6]–[12].

[11] In any case where leave to appeal to this court with a view to challenging the order of a lower court is required, the threshold which the putative appellant must overcome is well settled. It is not an onerous one. It is necessary to demonstrate an arguable case with a reasonable prospect of success that the court below has erred in law. The threshold is more exacting in cases where the order of the court below is the product of an exercise of judicial discretion. In such cases the putative appellant must establish “... an arguable case with a reasonable prospect of success that the trial judge had gone plainly wrong”: *Flynn v Chief Constable of PSNI* [2018] NICA 3, para [19]. This more elevated threshold applies in the present case: see *infra*.

[12] This is a classic conflict of laws situation, given that (a) the powers exercisable by the Trustee derive from the order of a court in, and legislation of, another jurisdiction (Scotland) and (b) the Trustee is pursuing remedies via proceedings brought in the jurisdiction of Northern Ireland. Thus the requirement of a “foreign element”, as it is commonly termed, is satisfied. The scenario before this court is one of cross-border insolvency proceedings which involve assets situated in more than one country. The issue raised is one of which law? - rather than jurisdiction. The choice lies between Northern Irish law and Scots law.

[13] In passing, in EU law, Council Regulation 1346/2000 sought to harmonise the laws of Member States in this sphere (the “Insolvency Regulation”). While there is a

comparable United Nations measure, the UNCITRAL model law on cross-border insolvency, there has been no adoption of this measure in domestic United Kingdom law.

[14] In the United Kingdom law system, section 426 of the Insolvency Act 1986 is the dominant statutory provision in the present context. Section 426 applies to the whole of the United Kingdom and, hence, governs the proceedings giving rise to the application before this court. There are three subsections of particular significance in the present context:

“(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

(6) Where a person who is a trustee or assignee under the insolvency law of any part of the United Kingdom claims property situated in any other part of the United Kingdom (whether by virtue of an order under subsection (3) or otherwise), the submission of that claim to the court exercising jurisdiction in relation to insolvency law in that other part shall be treated in the same manner as a request made by a court for the purpose of subsection (4).”

[15] The effect of section 426 in the present case may be summarised thus:

- (i) The Northern Ireland High Court (Chancery Division) is required to assist Stranraer Sheriff Court. This is effected by determining the Trustee’s application to that court seeking possession of the premises.
- (ii) The proceedings which have been initiated by the Trustee are treated as a “request” by Stranraer Sheriff Court to the Northern Ireland High Court.

- (iii) This confers on the Northern Ireland High Court a choice of laws: it may apply "... the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction."
- (iv) In making this choice the Northern Ireland High Court exercises a "discretion" (the statutory word).
- (v) In exercising this discretion, the Northern Ireland Court "...shall have regard in particular to the rules of private international law."

[16] What are the relevant rules of private international law in this context? While the quest to answer this question leads initially to Halsbury's Laws of England (4th Edition Reissue), Volume 8(3), para 508 and Volume 3(2), 2002 Reissue, para 28, no enlightenment is gleaned from these sources. Furthermore, one does not know what rules of private international law, if any, were taken into account by the Chancery Court in making the impugned order, given the absence of a reserved or transcribed judgment.

[17] As to the exercise of the judicial discretion in play, there is limited guidance to be distilled from case law. One of the clear and consistent themes of the cases is the discretionary nature of the assistance to be provided: *Re Bank of Credit and Commerce International SA (No 9)* [1994] 3 All ER 764 and *Hughes v Hannover AG* [1997] 1 BCLC 497. These cases, and others, however, are not concerned with the specific choice of law discretion. Rather more in point is *England v Smith* [2001] Ch 419 (*sub nom*) *Re Southern Equities Corporation* [2000] 2 BCLC 21.

[18] At the highest judicial level guidance is relatively sparse. In *McGrath v Riddell and Others* [2008] UKHL 21, the framework was broadly comparable to that of the instant case. It entailed a request pursuant to section 426(4) of the 1986 Act by an Australian court to the High Court in London. Lord Hoffmann traced the history of international judicial co-operation in corporate insolvency, noting that while full "universalism" had not been attained the principle of "modified universalism" had nonetheless evolved. Some guidance is found in para 30:

"... The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal."

At para 31 Lord Hoffmann also posed the question of whether remittal of the assets to Australia would “... offend against any principle of justice ...” Fundamentally, the case was essentially concerned with the question of whether the English court should provide assistance to the Australian court, with no issue of choice of law arising.

[19] In contrast, choice of law was a more central issue in *Al-Sabah v Grupo Torras* [2005] UKPC 1. This too was a request case, in which the jurisdictions concerned were the Cayman Islands and The Bahamas. It is noteworthy that the statutory provision considered, section 122 of the Bankruptcy Act 1914, is closely aligned with section 426(5) of the 1986 Act (see para 15). While section 122 has no equivalent of the final sentence of section 426(5), the Privy Council opined that the jurisdiction conferred by the two statutory provisions is essentially the same: para 46. The final substantive paragraph in the unanimous opinion of the Board, delivered by Lord Walker, is germane in the present context:

“47 In reaching this conclusion their Lordships have not overlooked the express provision in section 426(5) requiring the court to have regard to the rules of private international law. If asked to exercise its powers under section 426 the English court may find it necessary to consider whether the requesting court has properly exercised jurisdiction over a debtor with no obvious connection with its territory, and it might also, in some circumstances, have to take account of the general principle against enforcement of the public laws of another country. But that was true of section 122 also: see the judgment of the Court of Appeal of Guernsey in **In re Tucker (A Bankrupt)** (unreported) 27 September 1988. Considerations of private international law may be material in subsequent proceedings which the Bahamian trustee in bankruptcy takes in the Grand Court. But their Lordships have no reason to suspect that there will be any real doubt about the debtor's sufficient connection with the Bahamas, where he is permanently resident. Moreover the larger of the trusts in question, the Comfort Trust, was originally governed by Bahamian law, and the switch to the Cayman Islands seems to have taken place when the English proceedings against the debtor were already imminent. Their Lordships have no criticism of the observations made by the Court of Appeal as to the Grand Court's eventual exercise of discretion in this matter.”

Conclusion

[20] This being an application for leave to appeal against an order entailing the exercise of a statutory judicial discretion, the approach of this court is that set out in *Lord Browne of Madingley v Associated Newspapers* [2007] EWCA Civ 295, at para [45]:

“The approach which should be adopted on an appeal of this kind is not, we think, in dispute. Although the exercise upon which the judge was engaged was not the exercise of a discretion it was similar in that it involved carrying out a balancing exercise upon which different judges could properly reach different conclusions. In these circumstances it is now well settled that an appellate court should not interfere unless the judge has erred in principle or reached a conclusion which was plainly wrong or, put another way, was outside the ambit of conclusions which a judge could reasonably reach.”

This passage reflects the well established practice in this jurisdiction: see for example *Arthurs v News Group Newspapers* [2020] NIJB 103, at [21] ff and *Flynn v Chief Constable of PSNI* [2018] NICA 3, at [19].

[21] Stated succinctly, the first respondent (the moving party) has pointed to no irregularity or vitiating factor or other material infirmity in the order of the Chancery Court under challenge. While there is no written or *ex tempore* judgment underpinning the impugned order it is not for this court to speculate about the judge’s reasons. Standing back, this court considers the decision of the Chancery Court giving rise to the impugned order fell comfortably within the ambit of decisions which the judge could reasonably make in the exercise of the statutory discretion in play. Having regard to the relevant statutory provisions and such guidance as can be gleaned from the case law, the judge’s decision lies far from one which “... cannot reasonably be explained or justified” (*Henderson v Foxworth Investments* [2014] UKSC 41, at [66]–[67]).

[22] We would add that the Chancery Court’s choice of law order is but a staging post in the proceedings in that court. The real battle has not yet materialised. When it does, the Chancery Court will be obliged to adjudicate substantively on the Trustee’s application for eviction. This will entail giving effect to the extent choice of law order and a final order will ensue. The latter will be appealable by either party to this court as of right ie. without the leave of either the court below or this court. This constitutes another potent reason for refusing the application before this court.

[23] For the reasons given, we dismiss the application for leave to appeal and affirm the order of the Chancery Court.