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Judgment: approved by the Court for handing down | *Delivered:* **01/02/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY HEATHER MILDRED BRANGAM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE LAW SOCIETY FOR NORTHERN IRELAND MADE ON OR AROUND 27 JUNE 2007

GILLEN J

[1] This is an application by the widow of George Brangam, deceased, for leave to apply for judicial review. It is to quash a decision of the Law Society of Northern Ireland ("the Law Society") made on or around 27 June 2007 .The Law Society decided, in the exercise of its power of attorney over the property of the applicant's late husband George Brangam, ("the deceased ") to create a mortgage of the interest of the deceased in the former matrimonial home to the Law Society of Northern Ireland as trustees of the solicitors' compensation fund ("the mortgage"). Leave is sought to seek a declaration that the decision was ultra vires, unlawful and void, to quash the mortgage and a declaration that the mortgage was unlawful ultra vires and void.

[2] The notice party and intended respondent ("the Law Society") in this matter is the Incorporated Law Society of Northern Ireland which was incorporated by Royal Charter in or about 1922 and was granted certain regulatory authority, powers and duties in relation to the practice of solicitors within Northern Ireland by the Solicitors (NI) Order 1976 ("the 1976 Order").

Statutory background

[3] The 1976 Order, where relevant, states at paragraph 36:

> "Control of solicitors' property in certain cases
>
> Powers of Council to deal with property in control of certain solicitors and other persons

> **36.-(1)** Where the Council have reasonable cause to believe and have passed a resolution stating that they have reasonable cause to believe, that –
>
> . . .
>
> (ii) Any sum of money due from the solicitor or his firm to, or held by him or his firm on behalf of, his clients or subject to any trust of which he is sole trustee or co-trustee as aforesaid is in jeopardy while in the control or possession of the solicitor or his firm,
>
> the provisions of Schedule 1 shall apply in relation to that solicitor and the other persons mentioned in that Schedule."

[4] Schedule 1 Part I of the 1976 Order, where relevant, states:

> "13.(2) Without prejudice to sub paragraph (1)(b)(ii), a judge of the High Court may at any time, on the application of the Society, by order appoint the Society as the attorney of any solicitor named in a resolution passed by the Council under Article 36".

[5] Paragraph 23 of Schedule 1 sets out the powers exercisable by the Society as attorney which includes at 13(21) the right generally to act in relation to the solicitors practice and estate as fully and effectively as the solicitor could do.

Factual background

[6] The applicant is the widow of the late George Brangam solicitor and held the former matrimonial home with the deceased as joint tenants. The applicant lives in and has lived in the former matrimonial home at all times material to this application. The Law Society is investigating certain financial matters arising out of the deceased's practice.

[7] The former matrimonial home was one of the central assets in the applicant's long standing claim for financial provision in ancillary relief proceedings.

[8] The Law Society resolved to apply the Schedule of the 1976 order to George Brangam on the grounds that the client funds were in jeopardy. It instructed solicitors to act on its behalf to have it appointed Attorney of Mr Brangam pursuant to paragraph 22 to the First Schedule. In addition it obtained a Mareva injunction restraining Mr Brangam from making any

disposal of any of his assets. The Law Society say that in the wake of an attempted suicide attempt by Mr Brangam, on or around 27 June 2007 it purported to exercise its power of attorney over the property of the deceased to create a mortgage of his share of the matrimonial home with the aim of severing the joint tenancy. The exercise of the powers of Attorney are exclusive to the Law Society and the solicitor is ousted from exercising any of the powers granted to the society by the Order The applicant contends that she was not given any notice of the Law Society's intention to exercise the power of attorney in this way and was not informed of the purported exercise of power of attorney until 4 September 2007. The applicant believes she was treated differently from another joint tenant of property with the deceased who was put on notice of the Law Society's desire to effect a severance of the joint tenancy and was invited to sign a deed of severance.

[9] It is the applicant's case that had she been aware of the Law Society's intention to exercise its power of attorney to create a mortgage over the deceased's interest in the matrimonial home she would have sought an injunction under Article 39(2) of the Matrimonial Causes (Northern Ireland) Order 1978 ("1978 Order") to maintain the status quo in the matrimonial proceedings.

[10] Consequently the applicant contends that the purported exercise of the power of attorney to create the mortgage was in breach of the Law Society's duty to act fairly and in breach of the applicant's procedural legitimate expectations in light of the fact that the Law Society had promised on 22 August 2006 to keep her solicitors "informed as appropriate". She further submits that the Law Society had acted irrationally in denying her the same treatment as was afforded to the other joint tenant, that in acting as it did the Law Society was ultra vires because the deceased was not entitled to take the step which the Law Society did and in any event the Law Society's purported exercise of its power of attorney to create a mortgage of the deceased's interests in the matrimonial home was not capable of affecting the applicant's rights until the applicant was given notice of the exercise of the power of attorney.

The issue at this hearing

[11] The key issue to be determined in this judgment is whether or not the Law Society is amenable to judicial review in relation to the decision which is the subject of this application. Did the Law Society, in exercising its powers as attorney of the deceased solicitor, have an interest in the proceedings as a private body indistinguishable from the exercise of powers by any other attorney in private law matters? Mr Maxwell, who appeared on behalf of the Law Society, submitted that this is not a public law dispute but a private law matter. In taking the steps which it did, the Law Society was acting as a

private individual pursuing its legitimate interests as attorney of the solicitor and trustee of the compensation fund.

[12] Ms McGrenera QC, who acted on behalf of the applicant with Mr Gowdy, submitted that the Law Society derives its powers to act in this matter under the 1976 Order. It was counsel's submission that the Law Society, in exercise of its powers under Article 36 of the 1976 Order, had resolved to apply the schedule to that Order to the deceased on the grounds that client funds were in jeopardy. The Society also resolved to instruct solicitors on its behalf to have it appointed attorney of the deceased pursuant to paragraph 22 of the first schedule of the Order and indeed had taken a Mareva Injunction to restrain Mr Brangam from making any disposal of any of his assets. Ms McGrenera argued that the Law Society was therefore exercising its public duty to secure assets on behalf of clients of the deceased who represented a section of the public. This invested the application with a sufficient public law element for the purpose of these proceedings.

The authorities governing whether a function is of a public nature

[13] In Re Phillips Application (1995) NI 322 ("Phillips case") Carswell LJ, at page 334e, advocated an approach of considering the nature of the issue itself and whether it has characteristics which import an element of public law, rather than to focus upon the classification, as in the Phillips case, of the civil servants or office. The court should therefore look at the nature of the dispute to see if a sufficient public element was involved. See also Re Wylie's application for Judicial Review [2005] NILR 359.

[14] In Re McBride's Application (1999) NI 299 Kerr J said at page 310:

> "It appears to me that an issue is one of public law where it involves a matter of public interest in the sense that it has an impact on the public generally and not merely on an individual or group. That is not to say that an issue becomes one of public law simply because it generates interest or concern in the minds of the public. It must affect the public rather than merely engage its interest to qualify as a public law issue. It seems to me to be equally clear that a matter may be one of public law while having a specific impact on an individual in his personal capacity".

[15] In Re Kirkpatrick's Application for Judicial review (2003) NI QB 49("Kirkpatrick's case"), a case dealing with fishing rights on Lough Neagh, Kerr J said:

> "Lough Neagh is the largest inland waterway in the United Kingdom. The conservation of its natural resources is a matter of intense public interest in my view. The public has a legitimate interest as to how fish stocks are maintained and how fishing activities are regulated in this substantial and important natural asset. The licencing system operated by the Society is supplemented by monitoring and regulating of fishing activities by bailiffs. But for the historical accident that fishing rights are privately owned by the Society one would expect that such an important natural resource will be controlled by a public agency accountable to government and ultimately the public. I am satisfied, therefore, that the licencing situation for eel fishing in Lough Neagh is a matter of public law".

[16] In Aston Cantlow PCC v Wallbank 2004 1 AC 546("the Aston Cantilow case") the House of Lords affirmed that a Parochial Church council can take proceedings to recover the cost of chancel repairs from a lay rector. It concluded that a "public authority " for the purposes of s6 of the 1998 Human Rights Act could be a hybrid public authority some of whose functions were of a public nature and some private. Lord Nicholls said at paragraph 12:

> "12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test for universal application. There cannot be, given the diverse nature of government functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service".

[17] In Mohit v DPP of Mauritius [2006]1 WLR 3354 at paragraph 20 ("Mohit's case") the Privy Council confirmed that the principle that if the source of power is a statute then clearly the body in question will be subject to judicial review "now represents the ordinary if not the invariable rule "

[18] More recently in YL v. Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening) (2007) UKHL 27("the YL case") the House of Lords considered functions of a public nature in the context of section 6(3)(b) of the Human Rights Act 1998. Whilst I recognise that section 6 has a different rationale - linked to the scope of state responsibility in

Strasbourg – to the authorities on judicial review, nonetheless the general comments on what amounts to a function of a public nature are of assistance. At paragraph 72 Baroness Hale of Richmond said:

> "The fact that other people are free to make their own private arrangements does not prevent a function which is in fact performed for this person pursuant to statutory arrangements and at public expense from being a function of a public nature. . . . I accept that not every function which is performed by a "core" public authority is necessarily a "function of a public nature"; but the fact that a function is or has been performed by a core public authority for the benefit of the public must, as Lord Nicholls pointed out in Aston Cantlow [2004] 1 AC 546, para 12, be a relevant consideration".

Conclusion

[19] Applying these principles I have come to the conclusion that in this instance the actions of the Law Society were of a public nature.

[20] As Mr Maxwell conceded, there are clearly instances where the Law Society is self-evidently performing acts of a public nature e.g. when exercising its disciplinary jurisdiction and where, as in R v. Law Society, ex parte Mortgage Express Limited and Others (1997) 1 AER 348 it acted as trustees of the compensation fund and makes decisions as to compensation from that fund.

[21] Mr Maxwell asserts the hybrid nature of the Law Society functions. He distinguished those cases in paragraph 20(1) above from the instant case on the basis that the public law element of the Law Society in the present case was extinguished once it had exercised its powers under Article 36 of the 1976 legislation to obtain a power of attorney. Once it concluded that it had reasonable cause to believe, and had passed a resolution stating that it had reasonable cause to believe, that sums of money held by this solicitor were in jeopardy whilst under his control it embarked on a private function. Thereafter the Law Society applied the provisions of Schedule 1 Part II paragraph 23 of the schedule to the 1976 Order. Once it had gone that far argued, Mr Maxwell, it had completed its quasi judicial function derived from the powers in the 1976 Order. Thereafter its exercise of the power of attorney was a private matter in precisely the same way as any other solicitor or person exercising a power of attorney granted by the court. Effectively it was carrying out private acts on behalf of Mr Brangam claimed counsel.

[22] I am not persuaded by Mr Maxwell's argument. The public has a legitimate concern as to how the Law Society deals with a compensation fund and protects clients who have been put in jeopardy by the activities of solicitors. This is the rationale behind the 1976 legislation which devolves powers to the Law Society for the protection of the public. Ultimately the manner in which the Law Society exercises those powers – whether it be the initial powers to control solicitors' property under Article 36 or the administrative exercise of those powers under Schedule 1 - is a matter of legitimate and profound public concern. To borrow the approach of Baroness Hale in the YL case, the fact that a similar function may be performed by other persons having a power of attorney does not prevent this function by the Law Society ,which is performed pursuant to statutory arrangements, from being a function of a public nature. The fact that this function now performed by the Law Society has its source under the authority of a public statute and is providing a public service must be relevant considerations per the Aston Cantilow case and Mohit's case.

[23] Adopting the approach of Carswell LJ in Phillip's case , it is necessary to consider the nature of the issue itself in this instance and decide whether it has characteristics which imports an element of public law. For my own part I consider that the manner in which the Law Society exercises the powers granted to it under the 1976 Order, as in this instance, is a matter of public interest in the sense expressed by Kerr J in Kirkpatrick's case. It impacts on the public generally who will be anxious to ensure that they as a whole are properly protected by appropriate steps being taken by the Law Society. This is not simply a matter that generates interest or concern in the minds of the public but legitimately affects them in terms of their overall trust and confidence in the legal system and the protection which is afforded in the event of misdeeds by members of the legal profession. It is this aspect which engenders the public law element in the decision.

[24] I consider it an additional important factor in this case that an allegation is made that the Law Society has abused a power derived from statute, has been guilty of procedural impropriety and a failure to act fairly. Public bodies are different to private bodies in a major respect. Their powers are given to them to be exercised in the public interest and the public has an interest in ensuring that the powers are not abused. If the allegation is an abuse of the power the court should, in general, hear the complaint. (See R (on the application of Molinaro) v. Kensington and Chelsea Royal London Borough Council (2001) EWHC Admin 896. Public bodies should not be free to abuse their power by invoking the principle that private individuals can act unfairly or abusively without legal redress. Hence I consider that the nature of the complaint made in this case is another reason why this case attracts a public law element.

[25] I consider it is arguable that the applicant has no equally effective private law remedy outside these proceedings. As Ms McGrenera points out the applicant has little or no knowledge of who her deceased husband's creditors may be and what priority she has over any of those creditors irrespective of any argument the Law Society may raise on her behalf in any matrimonial proceedings. Even if there is an alternative remedy e.g. rights under the Inheritance (Provision for Family and Dependants) (N.I.) Order will they be as efficacious as the current proceedings in resolving the current issue? Re Ballyedmond Castle Farms Ltd's Application [2000] NI 174 is authority for the proposition that the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and the respondent before the court but also the wider public .An additional factor is whether the alternative remedy could in reality be equally efficacious to solve the problem before the court, having regard to the interests of the parties before the court, the public interest and the overall working of the legal system. In light of the allegations made in this case I consider that the applicant has an arguable case that the current proceedings are the most appropriate to put her back in the position she was before the Law Society took steps to sever the joint tenancy.

[26] The outstanding issues to be determined on the leave application can be dealt with at an oral hearing on the handing down of this judgment.