Neutral Citation No: [2017] NICh 24 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HOR10424** *Delivered:* ***13/10/2017***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF POSSESSION OF LAND

BETWEEN:

BERNADETTE HEANEY SOLE EXECUTRIX OF GRACE McEVOY DECEASED

Plaintiff;

-and-

JACQUELINE McEVOY
MICHELLE McCARTNEY

Defendants.

IN THE ESTATE OF GRACE McEVOY (DECEASED)

AND IN THE MATTER OF THE INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ORDER (NORTHERN IRELAND) 1979

Between:

JACQUELINE McEVOY AND MICHELE McCARTNEY

Plaintiffs;

and

BERNADETTE HEANEY
(AS EXECUTRIX OF GRACE McEVOY (DECEASED))

Defendants.

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HORNER J

A. Background

[1] The defendants are in possession of 52 Rathfriland Road, Newry ("the house"). The first defendant is the daughter of Grace McEvoy ("the deceased") and the second defendant is the first defendant's daughter. When the deceased died the defendants were living at the house along with their brother and two of the deceased's grandchildren. Under the deceased's Will the deceased left her property equally to all her 12 children. The entitlement of the first defendant is the same as if the deceased had died intestate. The deceased's executor, Bernadette Heaney, issued Order 113 proceedings for possession of the family home ("possession claim"). The defendants made a claim under the Inheritance (Provision for Family and Dependants) Order 1979 ("the inheritance claim"). No other proceedings were issued.

[2] The defendants who were legally aided and had solicitors and counsel acting for them, compromised the inheritance and the possession claims by entering into a Tomlin Order. The terms of the order provided as follows:

> "(1) The plaintiffs' originating summons under Order 99 Rule 3 of 26 January 2016 be withdrawn with the plaintiffs' costs to be paid from the deceased's estate.
>
> (2) The defendant's Order 113 summons dated 20 November 2015 shall be adjourned until the first available date in January 2017. No defence will be put forward by the plaintiffs in relation to this summons."

[3] In effect the defendants withdrew the inheritance claim and agreed to judgment in the possession claim.

[4] The defendants sought to set aside the Tomlin Order made on 26 September 2016. I refused their application in a judgment delivered on 21 February 2017. I concluded:

> "There are no grounds disclosed that would allow the defendants in this case to set aside the compromise agreement they signed."

[5] That decision was appealed to the Court of Appeal. Further submissions were made to the Court of Appeal alleging, inter alia, that the Tomlin Order had been procured by fraud. The case was sent back to the Chancery Court to hear the application to set aside the Tomlin Order on grounds of fraud. Indeed at one stage I was told by the defendants that the Court of Appeal had set aside the Tomlin Order. In fact, I did check with the Court of Appeal and listened to the recording of that day. This revealed that what I had been told was inaccurate and that I had simply been asked to hear the case which the defendants were now putting forward in order to have the Tomlin Order set aside. The application came on for hearing before

me on 14 September 2017. I heard both plaintiffs, who gave sworn testimony. I also heard Mr Fee, junior counsel for Mrs Heaney, because there was a dispute as to who had written out the terms of the settlement.

[6] The grounds relied upon by the defendants in seeking to set aside the Tomlin Order were set out in various submissions, all of which I have carefully considered. They include the following:

(a) The Tomlin Order was written out by B Heaney. It was not entitled a Tomlin Order, it had no draft notes and no schedule.

(b) The terms prevent the defendants from "bringing strong evidence of fraud" against B Heaney and the fraudulent Will. The fraud appears to be that Mrs Heaney was not authorised to act as a solicitor in Northern Ireland, and that she was impersonating a solicitor here in order to obtain professional fees from the estate. The defendants complain that their legal team failed to expose Bernadette Heaney and the fraudulent Will; the Will is fraudulent and their legal team had failed to obtain the deceased's health records. They also complained that any documents mentioning the fraud of B Heaney had mysteriously disappeared but they chose not to identify which documents those were.

(c) The defendants were pressurised and tricked into signing a "ridiculous document", that is the terms of settlement. A few days later they regretted so doing. In June 2017 they were officially informed by the Law Society that their solicitor "has finally accepted that he has misrepresented us".

B. Legal Considerations

[7] A Tomlin Order provides for a consensual stay of proceedings on terms which are agreed save for the purpose of carrying the agreed terms in to effect. This is most often accompanied by a liberty to apply provision. This enables the enforcement of the terms within the existing action by a summary procedure instead of having to issue separate proceedings: see *Hollingworth v Humphrey* [1987] CAT 1244.

[8] A Tomlin Order does not require a separate action to be set aside "on the usual invalidating grounds": see Foskett on Compromise (8th Edition) at 9.33. The usual invalidating grounds include fraud, which the plaintiffs relied expressly upon, and mistake and duress. Fraud is a particularly serious allegation and should not be made unless there is evidence to substantiate it. Valentine on Supreme Court Practice says at 9.06:

> "14. Be careful about pleading fraud, ensuring that there is a credible case for it (Bar Handbook 8-24(iii)).

> The allegation should be approved by senior counsel if instructed."

The position is the same in England where barristers and solicitors may not draft any originating process, pleading, affidavit, witness statement or notice of appeal containing any allegation of fraud unless they have clear instructions to make such an allegation and have before them reasonably credible material which as it stands establishes a prima facie case of fraud: see 57.02 of Bullen and Leake and Jacob's Precedents of Pleadings (18th Edition).

Neither of the defendants are legally qualified but the requirement that an allegation of fraud cannot be made lightly and should only be made where there is "reasonably credible material" should apply equally to those who act without legal representation. Far too often claims of fraud are made by unrepresented litigants against other parties and witnesses, professional or otherwise, when there is no evidential basis for such serious claims.

[9] There are good grounds for stating that fraud is alleged then pleadings have to reach a high level of specificity e.g. see *Richards v Pharmacia Ltd c/o Pfizer Ltd* [2017] CSOH 77. The allegations of fraud in this case were of the most general nature: see above.

[10] In *Royal Bank of Scotland Plc v Highland Financial Partners LP and* Others [2013] EWCA Civ 382 Aiken LJ (with whom Kay LJ and Toulson LJ agreed) at paragraph [106] identified the following conditions for setting aside a judgment obtained by fraud. They were:

> "first, there has to be a **conscious and deliberate dishonesty** in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be **material** (in the sense of being) causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

[11] The allegations made by the defendants at their very height never came near to making a prima facie case of fraud against Mrs Heaney.

[12] Chitty on Contracts Volume 1 (32nd Edition) at paragraph 13-002 states:

> "Where the agreement of the parties has been reduced to writing and the document contained in the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect."

[13] It is up to a party seeking to set aside a judgment, whether consensual or given by the court to adduce evidence of the invalidating matters to the requisite standard.

C. The Evidence

[14] I explained to both defendants that in order to set aside a Tomlin Order they would have to give evidence of any vitiating grounds upon which the court could act, and in particular fraud on which they appeared to rely. I also gave them the opportunity to submit a document which they claimed was acceptance by their solicitor to the Law Society that he had been guilty of misrepresentation. As I have already observed, the defendants came nowhere near to adducing reasonably credible evidence of fraud. For example there was no "conscious and deliberate dishonesty" in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. The fact that Mrs Heaney was not authorised to practice as a solicitor in Northern Ireland, only in the Republic of Ireland, was not relevant to the terms of the Tomlin Order which was negotiated by counsel on her behalf with counsel acting on behalf of the defendants.

[15] I will deal seriatim with the allegations made by the defendants:

(a)&(b) Mrs Heaney did not write out the Tomlin Order. It was written out by Mr Tom Fee, junior counsel, who acted for Mrs Heaney, the executrix of the estate of Grace McEvoy deceased. The fact that there were no draft notes or any schedule attached to the Order is irrelevant to the issue of fraud. There was no evidence of fraud against Mrs Heaney which was causative of the impugned judgment. She purported to act as a solicitor qualified in Northern Ireland which she should not have done. But the defendants did not act upon that representation when entering into the Tomlin Order. Her ability to practice in Northern Ireland had no bearing on the terms of the settlement, which were agreed between counsel. As I have stated in my earlier judgment, I have disallowed her costs. Whether or not the Will was ineffective, and the court has not heard any evidence on that issue, the fact is that the terms of the Will are such that the same

result is achieved as if the deceased had died intestate - the house is to be sold and the proceeds are to be divided equally among the deceased's children.

The failure to obtain the deceased's health records was not relevant to any of the issues before the court. Even if the records did suggest that the deceased was unfit to make a Will, her estate would then be dealt with on an intestacy and the end result would be the same.

(c) The evidence did not begin to satisfy me that the defendants were pressurised or tricked by their legal team into signing the terms of the Tomlin Order. I concluded from having heard their testimonies and watched them give their evidence that they entered into the agreement of their own free will although, it is quite obvious that they changed their minds about the prudence of agreeing such terms some days later.

I did permit the defendant seven days to produce the documentary evidence from the Law Society which they said amounted to an admission from their solicitor that he had made a misrepresentation to them. I did this because if his solicitors were simply passing on a misrepresentation made by the other side then it might, depending on the nature of the misrepresentation, provide grounds for invalidating the settlement. If their solicitor was acting on his own account, then this might give the defendants a cause of action against him rather than invalidating the settlement.

In any event no documents were produced from the Law Society or from any other third party whether within seven days or at all proving misrepresentation on the part of the defendants' solicitor. I listed the case for explanation and was told by the defendants that they did not intend to produce any documents in relation to the conduct of their solicitor whether from the Law Society or from any other third party. They also told me that they were not pursuing the allegation that the solicitor had accepted that he had made a misrepresentation to them. Accordingly the court was given no information from the defendants about the nature of the alleged misrepresentation or the circumstances in which it was allegedly made

[16] The defendants seemed to believe that because they wanted to have a trial, this was a good reason to allow them to set aside a Tomlin Order which they had signed. As I have recorded I have no doubt that each of the defendants knew exactly what they were agreeing to when they signed the Tomlin Order. I have also no doubt that they had second thoughts after reaching that agreement and signing the terms. It may be that this was because it proved impossible for them to buy the house, as they had hoped to do. However the reason why they had second thoughts is immaterial. I have looked closely at their evidence to see if there has been a common mistake, or a unilateral mistake of which the other side was aware or duress whether exercised by Mrs Heaney (or her own legal team). I am satisfied from having observed the defendants give evidence that there are no grounds that would invalidate the Tomlin Order. They were legally advised and signed the terms

with their eyes open. They did complain subsequently about the quality of the advice received by their solicitors and counsel and their conduct. I do not know enough about their circumstances to reach any view on this issue. However, they can sue their solicitor and/or counsel if their legal team has failed to exercise the requisite degree of care and skill. But they will have to prove this to the requisite standard.

[17] Finally, I considered the defendants to be both unreliable historians eager to mould the facts to their objective as opposed to telling the unvarnished truth. Two examples should suffice:

(i) They suggested to the court that the Court of Appeal had ordered the Tomlin Order to be set aside although they did resile somewhat from this when pressed. In any event it was patently incorrect.

(ii) They claimed that their solicitor had admitted that he was guilty of misrepresentation and that there were documents with the Law Society to prove it. No document from the Law Society has been provided and this claim has now been abandoned.

D. Conclusion

[18] I have had the opportunity of seeing both the plaintiffs give evidence. I am wholly satisfied that they knew exactly what they were agreeing to when they signed the terms of the Tomlin Order. There was not even the beginning of a case for fraud. I emphasise, because of the potential for damage to the legal representatives instructed by Mrs Heaney (and for those who had previously acted for the defendants), that any claim of fraud or dishonesty was baseless. Furthermore, there was no evidence of any other vitiating factors which would require the court to set aside the Tomlin Order. I would also point out that the plaintiffs have remained in the house since 3 April 2015 when the deceased died to the exclusion of almost all the others who are entitled to benefit under the deceased's Will. They have prevented the house being sold, the estate being wound up and the first defendant's siblings from receiving their shares under the Will.

[19] I will hear the parties on the issue of costs.