Neutral Citation No: [2018] NICA 4 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **MOR10545** *Delivered:* **25/01/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BERNADETTE HEANEY, SOLE EXECUTRIX OF GRACE McEVOY DECEASED

Plaintiff/Respondent

-v-

JACQUELINE McEVOY
MICHELLE McCARTNEY

Defendants/Appellants

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Before: Morgan LCJ and Stephens LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] These are two appeals against rulings made by Horner J. In his first judgment delivered on 21 February 2017 he held that the respondent was entitled to possession of premises at 52 Rathfriland Road, Newry, County Down ("the property)" as sole executrix of the estate of Grace McEvoy deceased. In a second judgment delivered on 13 October 2017 Horner J dismissed an application by the appellants to set aside a Tomlin Order made on 26 September 2016 whereby the appellants withdrew their claim and agreed that they would not defend the application for possession by the respondent.

Background

[2] Grace McEvoy ("Grace") was the mother of the first named appellant and the owner of property. The second named appellant is the daughter of the first named appellant. Both appellants have resided at the property with other members of their family and continue to do so. In July 2014 Grace became ill as a result of which she was admitted to Daisy Hill Hospital. She was discharged and returned home some weeks later. On 9 August 2014 there was an incident involving a dispute between the first-named appellant and her brother about the care of Grace as a result of which the police were called.

[3] On 15 August 2014 Susan and Margaret, two daughters of Grace, moved Grace from the property to reside at Susan's house in Camlough. Grace was subsequently re-admitted to Daisy Hill Hospital in September and October 2014 and on discharge on each occasion returned to Susan's house in Camlough. On 1 January 2015 Grace made a will in which she left all her property in equal shares between her 12 children. The will expressly stated that the first-named appellant was "to vacate my house and property currently occupied by her and her children." The respondent, who was described as a solicitor, was appointed as executrix and the will was witnessed by the respondent and Paul Tiernan both of whom were again described as solicitors. It is common case that the respondent and Mr Tiernan are married, that when the will was made Mr Tiernan was a solicitor practising in Northern Ireland and the respondent was a solicitor practising in the Republic of Ireland. The respondent did not hold a practising certificate in respect of practice in Northern Ireland but was on the Roll of Solicitors in Northern Ireland.

[4] On 3 April 2015 Grace died and was brought back to the property to be waked. On 4 June 2015 the will was read to the appellants by Mr Tiernan. On 30 July 2015 probate was granted. On 20 November 2015 the respondent issued proceedings pursuant to Order 113 of the Rules of the Court of Judicature ("RCJ") seeking possession of the property with a view to sale in accordance with the will. On 26 January 2016 the appellants issued an Originating Summons under Order 99 RCJ claiming that the deceased did not make reasonable financial provision for them under the will and seeking an order under Article 4 of the Inheritance (Provision for Family and Dependents) (Northern Ireland) Order 1979 ("the 1979 Order").

[5] Both parties were represented by a solicitor and counsel in connection with the claim under the 1979 Order. On 26 September 2016 the parties attended court and entered into an agreement which was then handwritten and scheduled to the Order of the court that all further proceedings in the action should be stayed except for the purpose of carrying those terms into effect. This is sometimes referred to as a Tomlin Order. The agreed terms were that the appellants' summons in respect of the inheritance claim should be withdrawn with the costs of the executrix to be paid from the deceased's estate and that the summons for possession under Order 113 should be adjourned until the first available date in January 2017. The appellants agreed not to put forward any defence in relation to that summons.

[6] The summons for possession came before Horner J who gave judgment on 21 February 2017. He noted that the appellants had not vacated the property and remained in occupation together with two other children of the first-named appellant and the first-named appellant's brother. The appellants sought to defend the possession proceedings on the basis that they were forced to sign the agreement

by counsel. It was alleged that their legal team was bribed and that they had conspired with the other side. It was also contended that the respondent's solicitors conspired with the siblings of the first-named appellant to create the fraudulent will. The first-named appellant also claimed that she had an expectation of being able to raise the money to purchase the property as a result of an ancillary relief claim that she was pursuing.

[7] The learned trial judge noted that the appellants had complained to the Law Society of Northern Ireland ("the Law Society") that the respondent had described herself as a solicitor whereas she did not hold a practising certificate in Northern Ireland. That did not, however, prevent her from being appointed as executrix of the deceased's estate. There had been no challenge to the grant of probate. The only challenge to the will had been made under the 1979 Order and that had been compromised. No application had been made to set aside the Tomlin Order. The Order had been signed by each of the appellants and unless it was set aside they were bound by it. In any event the executrix had shown title to the property and the appellants had shown no basis upon which they were entitled to continue in occupation.

[8] On 28 February 2017 the appellants lodged a summons seeking leave to appeal. In particular they contended that the respondent had impersonated a solicitor throughout the case, that the trial judge had given the respondent possession of their home and that they were in a position to buy the property. It was also contended that the will was fraudulent, that there had been a previous will, and that the Tomlin Order should not have been made. At a review of the appeal it was pointed out that there had been no challenge to the grant of probate and no application to set aside the Tomlin Order on the grounds of fraud.

[9] Subsequent to the adjournment of the appeal on 19 June 2017 the appellants applied on 14 July 2017 to set aside the Tomlin Order on the basis of fraud. Both appellants gave oral evidence. The case was being made that the solicitors acting in the inheritance claim had accepted to the Law Society that they were guilty of misrepresentation. The trial judge gave the appellants the opportunity to submit any document upon which they relied in pursuing such claim but no documents were produced from the Law Society or from any other third party. The judge listed the case for explanation and was advised by the appellants that they did not intend to produce any documents in relation to the conduct of their solicitor in the inheritance claim and that they were not pursuing the allegation that the solicitor had admitted misrepresentation.

[10] The judge went on to deal with the issues raised. The status of the respondent as a solicitor in Northern Ireland was not relevant to the issues dealt with in the Tomlin Order which were negotiated between counsel. The respondent did not write out the Tomlin Order but the agreement was written up by junior counsel for the respondent. There was no evidence of fraud against the respondent which was causative of the impugned Order. The failure to obtain the deceased's health records was not relevant to the issues before the court. The judge was not satisfied that the appellants were pressurised or tricked by their legal team into signing the terms of the Tomlin Order. He concluded that they entered into the agreement of their own free will although it was quite obvious that they had changed their minds about the prudence of agreeing such terms some days later. He considered both appellants to be unreliable historians. They had suggested to the court that the Court of Appeal had ordered the Tomlin Order to be set aside. That was blatantly incorrect. They had claimed that the solicitor had admitted that he was guilty of misrepresentation and that there were documents with the Law Society to prove that. No such document was provided and the claim was abandoned.

The Appeal

[11] The appellants submitted that Horner J ought not to have made a decision on the Tomlin Order issue without hearing evidence from the respondent. They submitted that the handwritten document was "a manifestation of misrepresentation and coercion". They noted that Horner J indicated that the outcome would have been the same on intestacy but they point to correspondence from their solicitors dated 1 August 2016 suggesting that there was an earlier will although it appears that they were not beneficiaries of it.

[12] It was further objected that the judge had taken into account an irrelevant consideration being the ability of the first-named appellant to purchase the property. If she had realised that this was in issue she would have provided evidence that she could. The appellants repeated their objection to the respondent having described herself as a solicitor and wanted production of medical evidence in respect of the ability of the testator to make a competent decision. As pointed out, however, no challenge to the grant of probate has ever been made. The appellant submitted that they should not be deprived of the opportunity to challenge the possession order on the basis of a handwritten document drawn up in minutes outside a courtroom.

[13] In the course of oral submissions the appellants indicated that they wanted to be able to buy the property. They both accepted that they had not made an offer and that at this time they were not in a position to make an offer to the executrix. The first-named appellant had outstanding ancillary relief proceedings from which she

expected to recover funds but there was no indication as to when those were expected to conclude.

[14] The appellants maintained that they had been misled by the solicitor into signing the Tomlin Order. Both accepted that they had signed the document but each maintained that they had not read the document. When pressed to identify the manner in which they had been misled it was indicated that the solicitor had told them that they would be able to buy the property from the executrix if they wished. Each accepted that they had not made an offer to buy since the inheritance proceedings and neither was in a position to make such an offer. There is, of course, nothing to stop the appellants making such an offer if they have the means and if the offer was in the interests of the beneficiaries the executrix would be bound to consider it appropriately.

[15] At the end of the oral submissions each of the appellants was asked whether there was anything further that they wished to add and each indicated that they had nothing to add. The appeal hearing was completed by noon on 30 November 2017. On the morning of 1 December 2017 the appellants sent an e-mail to the court indicating that they found the hearing on the previous day very confusing. One of the reasons that they appealed the judgments was because of the allegation of fraud made by them against the respondent. They wished to cross-examine the respondent about this. The e-mail indicated that they were told that they would be able to cross examine the respondent at the hearing. The e-mail did not indicate by whom they were told that they could do so. They indicated that they had a series of questions to put to her but no indication of any such questions was given at the hearing or in the email.

Consideration

[16] It has been the practice of this court for a number of years to conduct a review before the hearing of cases involving personal litigants. The purpose of the review is to alert personal litigants to the nature of the hearing and to make sure that they are aware of what is expected from them in order to best present their case. That will vary depending upon whether the litigant is an appellant, respondent or notice party.

[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and

that the evidence could not with reasonable diligence have been brought before the original trial.

[18] The Court of Appeal is entitled to review findings of fact as well as of law but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.

[19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than the concentration on the appellate challenge to factual findings. Reticence on the part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see DB v Chief Constable [2017] UKSC 7).

[20] Those principles are clearly of material significance in this case. The trial judge had the advantage of hearing the oral evidence of the appellants on the Tomlin Order issue. He considered the appellants to be both unreliable historians eager to mould the facts to their objective as opposed to telling the unvarnished truth. He gave examples in respect of the Order that they said the Court of Appeal had made and the alleged admission by their former solicitor that he was guilty of misrepresentation. There is no indication that the judge did not take all the circumstances surrounding the evidence into account, that he misapprehended the evidence or that he had drawn an inference which there was no evidence to support. In light of the judge's conclusions we see no basis upon which we could interfere with his refusal to set aside the Tomlin Order.

[21] The fact that the respondent at the material time did not hold a practising certificate from the Law Society was no impediment to her appointment as executrix of the deceased's estate. The grant of probate has not been challenged and there was no material before us in any event to indicate the basis of any challenge. The respondent is entitled to possession of the premises. The appellants have put forward no basis upon which they are entitled to resist that application. They have no answer to the possession claim.

Conclusion

[22] For the reasons given the appeals are dismissed.