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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **24/9/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Between:

RONALD KERR

Plaintiff/Appellant;

and

AGNES JEAN JAMISON

Defendant/Respondent.

Before: McCloskey LJ and Huddleston J

McCloskey LJ (delivering the judgment of the court)

Introduction

[1] This is the judgment of the court, following a hearing on 17/09/19, to which both members have contributed, determining this appeal against the judgment and order of McBride J whereby the Plaintiff's application for an order entering judgment in default of defence was dismissed.

This Litigation

[2] By Writ of Summons issued on 06 January 2017 the Plaintiff seeks a declaration that the Defendant is bound by the terms of an agreement dated 11 March 2010 executed between her and the other beneficiaries of the estate of Thomas Kerr ("*the deceased*") whereby, it is said, they agreed to transfer their respective interests in the lands and premises situate at and known as 71 Saintfield Road, Ballygowan ("*the disputed lands*") to Tracey Kerr (formerly Singleton). The alternative forms of relief sought are an order requiring the Defendant to take all necessary steps and execute all necessary documents to transfer her interest and damages for breach of contract. On 20 January 2017 an

Appearance to the Writ was entered on behalf of the Defendant by Stewarts solicitors.

[3] In the Statement of Claim it is averred that following the death of the deceased on 27th November 1995 a dispute concerning the validity of his Will ensued. It is accepted that the Defendant, who lives close to the disputed lands, is one of the beneficiaries of the estate of the deceased. The aforementioned dispute gave rise to proceedings in the Chancery Court (the "*earlier proceedings*" – *infra*) which it is averred, were compromised by the mechanism of a Tomlin Order reflecting an agreement said to have been made among the litigating parties and others on 11 March 2010 (the "*contentious agreement*") in the precincts of the Royal Courts of Justice (the "*RCJ*").

[4] The Plaintiff's case is simplicity itself. It rests on the core contention that the Defendant has failed to abide by the terms of the contentious agreement.

The Protagonists

[5] Tracey Kerr is the niece of the deceased. Ronald Kerr, the Plaintiff, is a brother of the deceased and father of Tracey Kerr. The other protagonists are all siblings of the deceased and potential beneficiaries of his estate. They are:

(a) Agnes Jean Jamison, the Defendant.

(b) Samuel Kerr, one of two Plaintiffs in the earlier litigation.

(c) Myrtle Mayne, the second Plaintiff in the earlier litigation.

(d) John Kerr.

(e) Joyce Kerr.

(f) Margaret Kerr

The last two mentioned siblings are now deceased. It is unclear whether either has any surviving children

[6] The two Plaintiffs in the earlier litigation (identified above) were – then – the administrators of the estate of the deceased. It is averred that in March 1996 Tracey Kerr (the sole Defendant) had unlawfully taken possession of the contested lands. The twofold relief sought was (a) an order for possession of the disputed lands and (b) mesne profits from March 1986 totalling some £52,000. The Plaintiff's claim was contested, as appears from the Defence.

The Compromise of the 2007 Litigation

[7] The Order of the court dated 11 March 2010 is the formal instrument which disposed of the earlier litigation. It contains no scheduled terms of

settlement or other form of appendix. The description of "Tomlin", scattered throughout the papers, is a misnomer. The Order is in the following terms:

"

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
CHANCERY DIVISION

BEFORE THE HONOURABLE MR JUSTICE DEENY

on THURSDAY THE 11TH DAY OF MARCH 2010

Between

SAMUEL KERR
MYRTLE MAYNE

Plaintiffs

and

TRACY KERR FORMERLY KNOWN AS TRACY SINGLETON

Defendant

and by counterclaim

TRACEY KERR FORMERLY KNOWN AS TRACEY SINGLETON

CC Plaintiff

and

SAMUEL KERR
MYRTLE KERR

CC Defendants

THIS CASE HAVING been listed for Hearing this day,

AND UPON READING the documents recorded on the Court file as having been read,

AND UPON HEARING Counsel for the Plaintiffs and Counsel for the Defendants,

IT IS HEREBY AGREED between the Plaintiffs of the first part, the Defendant of the second part and all those beneficiaries other than the Plaintiffs who are entitled to benefit under the intestacy of Thomas Kerr Deceased ("the Beneficiaries") of the third part that:

(1) Margaret Kerr (known as Peggy) shall release her right of residence and support conferred by the will of Thomas Henry Deceased dated 3rd January 1982.

(2) The Plaintiffs shall resign as personal representatives of the estate of Thomas Kerr Deceased and be replaced by a person to be nominated by the Beneficiaries (hereinafter "the New Personal Representative")

(3) The New Personal Representative shall pay to the Plaintiffs I full and final settlement of all claims under the said estate the sum of £82,500 inclusive of the costs of this action and the costs of the administration of the estate to date (but does not include the costs incurred in respect of the proceedings 1997 No 6 Family Probate and Matrimonial).

(4) The New Personal Representative shall assent to the vesting of 71 Saintfield Road, Ballygowan and environs ("the Property") on the Beneficiaries but subject to and conditional upon the said charge being executed in favour of the Plaintiffs as per paragraph 3.

(5) The said charge shall become due and payable on 11th September 2010.

(6) On the 11th June 2010 if the said payment of £82,500 or any part thereof has not been made to the Plaintiffs any balance thereof shall carry interest at the prevailing court rate until payment.

(7) The Plantiffs shall be responsible for all costs of the administration of the estate to their removal. The legal representatives of the New Personal Representative shall be responsible for all costs incurred thereafter including the preparation of the said charge.

(8) The Beneficiaries other than the successors of Joyce Kerr ("the Deceased Beneficiary") shall indemnify the Plaintiffs and hold harmless in respect of any claim that the estates of the Deceased's Beneficiaries may have.

(9) Any inheritance tax due in respect of the Property shall be borne equally by the Plaintiffs and the Beneficiaries.

(10) The costs of the Defendant shall be taxed in accordance with Schedule 2 to the Legal Aid Advice and Assistance (NI) Order 1981.

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LHaire
Proper Officer
.

Time Occupied: 11 March 2010 10 mins
Filed Date 15 March 2010"

[8] The Order, in its substantive section, consists of ten numbered paragraphs. The first nine reproduce verbatim the nine paragraphs of a separate document *(infra)* which is not appended to the Order. The tenth paragraph recites that the costs of the Defendant shall be taxed as a legally assisted person. The Order contains no provision relating to *inter-partes* costs. Notably the Order has no schedule and, further, makes no reference to any agreement *inter-partes*.

[9] At this juncture certain puzzling features emerge. In the appeal bundle – which, the court was assured, replicates the trial bundle at first instance – the materials described as constituting the "*Court Order and Tomlin Order dated 11 March 2010*" have <u>three</u> components: the formal Order of the court, already discussed; a largely typescript document dated 11 March 2010 and bearing several signatures, also discussed; <u>and</u> a third, further document. The latter is entitled "*Terms of Settlement*".

[10] The second of these documents is mainly, though not entirely, a printed document. The substantive clauses are followed by the date of 11 March 2010. Below the date there is a series of signatures. It is in these terms:

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

SAMUEL KERR AND MYRTLE MAYNE

Plaintiffs

and

TRACY SINGLETON (FORMERLY KERR)

Defendant

It is hereby agreed between the Plaintiffs of the first part, the Defendant of the second part and all those beneficiaries other than the Plaintiffs who are entitled to benefit under the intestacy of Thomas Kerr Deceased ("the Beneficiaries") of the third part that

1 Margaret Kerr (known as Peggy) shall release her right of residence and

support conferred by the will of Thomas Henry Deceased dated 3rd January 1982.

2 The Plaintiffs shall resign as persona! representatives of the estate of Thomas Kerr Deceased and be replaced by a person to be nominated by the Beneficiaries (hereafter "the New Personal Representative")

3 The New Personal Representative shall pay to the Plaintiffs in full and final settlement of all claims under the said estate the sum of £82,500 inclusive of the costs of this action and the costs of the administration of the estate to date (but does not include the costs incurred in respect of the proceedings 1997 No 6 Family Probate and Matrimonial).

4 The New Personal Representative shall assent to the vesting of 71 Saintfield Road Ballygowan and environs ("the Property") on the Beneficiaries but subject to and conditional upon the said charge being executed in favour of the Plaintiffs as per paragraph 3.

5 The said charge shall become due and payable on 11th September 2010.

6 On 11th June 2010 if the said payment of £82,500 or any part thereof has not been made to the Plaintiffs any balance thereof shall carry interest at the prevailing court rate until payment.

7 The Plaintiffs shall be responsible for all costs of the administration of the estate to their removal. The legal representatives of the New Personal Representative shall be responsible for all costs incurred thereafter including the preparation of the said charge.

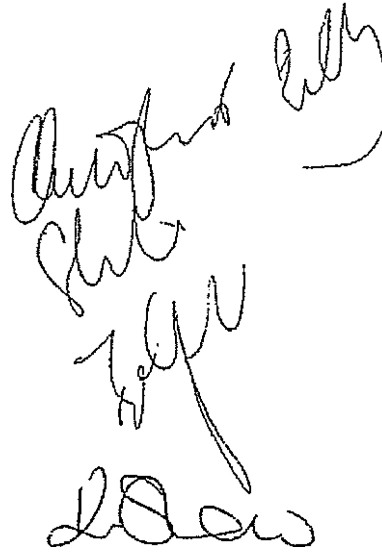
8 The Beneficiaries (other than the successors of ~~Jean Jamison~~ Joyce Kerr ("the Deceased Beneficiaries ")) shall indemnify the Plaintiffs and hold harmless in respect of any claim that the estates of the Deceased's Beneficiaries may have.

4. Any inheritance tax due in respect of the [illegible] shall be borne equally by the Plaintiffs and the Beneficiaries.

Dated 11th March 2010

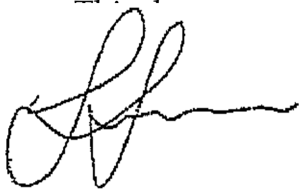
Samuel Kerr

T. Singleton



[11] The third of the documents, entitled "Terms of Settlement", is in the following terms:

> *"1. The Plaintiffs shall have judgment against the Defendant with no order as to costs in respect of the counterclaim.*
>
> *2. The Plaintiffs' claim against the Defendant shall be stayed on terms endorsed on Counsel's brief.*
>
> *3. The Plaintiff shall on the execution of a charge of £82,500 in their favour secured on 71 Saintfield Road, Ballygowan, abandon any claim arising out of or in connection with their claims in the above entitled action.*
>
> *4. Each party shall be responsible for their own costs.*
>
> *5. Liberty to apply.*
>
> *6. The Defendant to have an order for taxation of her costs as a legally assisted person."*



Peggy Kerr

on behalf of John Kerr

[12] Analysis of the signatures (*which are not* *<u>fully</u>* *reproduced above*) yields the following:

(a) The names of the two Plaintiffs and the Defendant are clearly decipherable.

(b) So too are the signatures of "R Kerr" and "Peggy Kerr".

(c) Between the last two mentioned signatures there is what appears to be another signature, which is indecipherable.

(d) Next there is another indecipherable signature to which the words "*on behalf of John Kerr*" are appended.

(e) The penultimate signature is that of the solicitor representing the Plaintiffs, Christopher Reilly of John Boston and Company.

(f) This is followed by yet another inscrutable signature to which the words "*solicitor, Saintfield*" are appended.

To summarise, the signatures on the face of the second and third documents differ markedly.

[13] Yet another document (the fourth) falls to be considered. This is a solicitor's attendance, exclusively in manuscript. The text is as follows:

> *"I Agnes Jean Jamison hereby confirm that I have been advised of my right to obtain independent legal advice and I have declined to do so. I confirm that I consent to transfer any interest or entitlement I obtain or inherit in the property at 71 Saintfield Road to my niece Tracey Singleton."*

This is followed by an indecipherable signature and the date "11/3/10". There are four other documents of the same general character. Three bear signatures purporting to be those of certain of the siblings, the fourth has multiple signatures, one is dated 10/03/10 and the other three are dated 11/03/10.

The Intervening Litigation Chapters

[14] A brief *excursus* into three further litigation chapters in this saga is necessary. From the trial bundle one learns that these further litigation chapters were sandwiched between what is described above as "*the earlier litigation*" and the present litigation. In very brief compass:

(i) By an originating summons issued on 13 March 2015 and naming as defendants Tracey Kerr, Samuel Kerr and Myrtle Mayne, the Plaintiff sought an order appointing him as personal representative of the estate of the deceased in accordance with the Tomlin Order considered above. By Order dated 13 April 2015 the Chancery Master granted leave to the Plaintiff to apply for the grant of letters of administration in the estate of the deceased "*… limited to all acts necessary to transfer the title which the estate holds in 71 Saintfield Road, Ballygowan, County Down*".

(ii) By a further originating summons issued on 06 January 2016 the Plaintiff sought orders appointing him as personal representative of the estate of the deceased and revoking the grant of letters of administration dated 08 August 2007,

together with a declaration that he be at liberty to transfer to Tracey Kerr (first Defendant) the disputed lands pursuant to the aforementioned Tomlin Order. The present dDefendant was also a defendant in those proceedings. The grounding affidavit was sworn by the Plaintiff's solicitor, Ms Shaw. The deponent averred *inter alia* that the Defendant was the only beneficiary declining to co-operate in the transfer. Ms Shaw exhibited a letter from the Defendant, undated but stamped received 22 December 2015. This letter contains the following passage of note:

> "*Tracey came down and said if I wanted my money I was to go to court the next day to get it. That was 10 March 2010 and I said is he paying out the money and she said yes.*"

These proceedings were concluded by an order of the Chancery Master dated 12 January 2017 adjourning the originating summons generally.

> "*Ronald Kerr … told us if we wanted our money we had to sign a paper.*"

According to the solicitor's affidavit the Defendant "*… has indicated that she does not consent to the transfer and denies signing the aforementioned documentation*". The outcome of these proceedings was an order of the Chancery Master dated 29 January 2016 revoking the grant of representation dated 08 August 2007, continuing:

> "*The court directs that the personal representative hereby appointed provide a full written account upon oath to this court of their conduct of the administration of the estate of Thomas Kerr deceased up to the date in* [sic] *the grant of representation was revoked.*"

(iii) The third of the intervening litigation chapters concerned a further originating summons, issued on 05 July 2016, seeking a declaration that the Plaintiff be entitled to execute an assent of the disputed lands into the name of Tracey Kerr. This was grounded on an affidavit sworn by the same solicitor. This exhibits *inter alia* the record of a conversation generated by a telephone call from the Defendant, dated 24 February 2016. The gist of this was that, per the Defendant, although she had signed "*papers … a bit of paper*" at the instigation of the Plaintiff several years previously with a view to securing "*her £30,000*" she had received nothing. The outcome of these proceedings was a further order of the Chancery Master dated 12 January 2017, adjourning the originating summons generally.

[15] At this juncture it is appropriate to reproduce the affidavit of the Defendant sworn on 27 October 2016, in the third of the intervening litigation chapters outlined above.

“2016 No.60334

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE ESTATE OFTHOMAS KERR DECEASED
AND IN THE MATTER OF THE ADMINISTRATION OF ESTATES
(NORTHERN IRELAND) ORDER 1979

Between:

RONALD KERR

Plaintiff:

-and-

TRACEY KERR (formerly SINGLETON) and SAMUEL KERR and MYRTLE MAYNE and AGNES JEAN JAMISON and MARGARET ELIZABETH KERR and JOHN CHARLES KERR

Defendants:

I, Agnes Jean Jamison, being aged 18 years and upwards, of 15 Saintfield Road, Ballygowan, County Down, BT23 6HB make oath and say as follows:

1. I am one of the Defendants in this matter entitled to a share in the Estate of Thomas Kerr deceased ('the deceased').

2. I note from Ms Shaw's affidavit that Ronald Kerr, who is Tracey Kerr's father, has been appointed Personal Representative of the Estate of the deceased by Order dated 29th January 2016 and that he wishes to transfer my interest in the property at 71 Saintfield Road ('the property') to Tracey Kerr pursuant to a Tomlin Order dated 11th March 2010. For the avoidance of doubt and for reasons that hereinafter appear I do not consent to the said transfer of my interest in the property.

3. The deceased died on 27th November 1995. An action was taken at the suit of Plaintiff against Samuel Kerr by way of a Writ of Summons dated 23rd September 1997 seeking that a Will he asserted had been executed by the deceased should be admitted to Probate and a declaration that he be appointed Executor according to the tenor of the alleged Will. This action was defended, inter alia, on the basis that the alleged Will and a further document produced by Ronald Kerr dated 10th March 1994 were

forged. I beg leave to refer to a copy of the said alleged Will and document which I have annexed hereto and marked AJJ1".

4. The alleged Will states that Ronald Kerr is to take charge of the property and that Tracy Singleton may live there rent free if she so desires. I recall that at the hearing of the action brought by Ronald Kerr the alleged Will was deemed to be a forgery and I note that the deceased was determined to have died intestate. Samuel Kerr and Myrtle Mayne, my siblings, were subsequently appointed as Personal Representatives of the Estate of the deceased on 8th August 2007. As the deceased was deemed to have died intestate and had no children my understanding was that his Estate, including the property, would be split equally between his remaining siblings. I believe that I was and remain entitled to a share in the Estate of the deceased including the property.

5. Subsequent legal action was issued at the suit of Samuel Kerr and Myrtle Mayne against Tracey Kerr. So far as I am aware this was in relation to her occupation of the property. Tracey had been living at the property with Joyce Kerr and, following Joyce's death, was living at the property with her partner. In the course of these proceedings, which settled at the High Court on 11th March 2010, Tracey Kerr had asked me numerous times to sign a form which I refused to do. I believe that this was an effort by her to get me to transfer my interest in the property to her. The issue of me and my siblings getting money for our share in the property had been pertinent during this period.

6. On 7th March 2010 my sister Peggy came down to my home and said that Tracey wanted us to come up to the property and sign a document. I went to the property with Peggy. The Plaintiff was at the property and he said that he had money for us if we signed the document. I asked where this money had come from. I asked what the purpose of signing the document was and he said that it meant we would each be getting £30,000. My understanding at the time was that if I accepted the offer of money it would be on the condition that Tracey Kerr would be entitled to stay in the property. Myrtle and Samuel were not present at the house so I therefore refused to sign it as I did not want to sign any agreement unless they were signing it. I got Peggy to take me home.

7. As appears from Ms Shaw's affidavit the action was settled on 11th March 2010 at the High Court. On 9th March 2010 Tracey Kerr came to my home and said that if I wanted to get my money I should come to court. On the morning of the hearing Tracey drove me to court. Also in the car was the Plaintiff, Peggy Kerr and Tracey's sister, Susan Massey. I didn't enter the court but was asked to sit in the corridor outside court.

Everyone was sat in the corridor outside court. Samuel and Myrtle ·were sat near one of the windows and I was sat down approximately one or two windows further along the corridor. Tracey Kerr, the Plaintiff and their barrister were talking although I could not hear what was being said. Tracey called me over and I came over and stood in front of the Plaintiff. The Plaintiff gave me a kick to the ankle and said "shut your mouth and keep quiet".

8. Ms Shaw, the Plaintiff's Solicitor, came over and said to the Plaintiff, Tracey and their barrister within earshot of me that Samuel and Myrtle wanted £80,000 each. Tracey then said something along the lines of "they're not getting that. Where would I get that?" After they discussed this matter further I suggested that if everyone got £40,000 each that would be alright. I said this in front of Tracey and the Plaintiff. The two sides negotiated and after a period of time Ms Shaw came up and said to the barrister that they were going to take £40,000 each. Shortly thereafter Tracey called me over and told me to "just sign for your money". Ms Shaw came over to me and the barrister held out a piece of paper for me to sign. My understanding was that I would be receiving £40,000 also although this was not explained to me. I was not offered independent legal advice as alleged.

9. I have difficulty reading and have done for a number of years as a result of aged related macular degeneration. I have had deteriorating eye sight for 20 years or more. I believe that the piece of paper I signed was blank but, in any event, I would have been unable to read the document I signed. I beg leave to refer to a letter from my GP confirming my difficulty reading when produced.

10. I refer to the Tomlin Order exhibited to Ms Shaw's affidavit, the terms of which have been explained to me by my Solicitors. I understand that the terms of the Order provided for the property to vest in me and my siblings (other than Samuel Kerr and Myrtle Mayne) but the Plaintiff asserts that I agreed to transfer my interest in the property to Tracey Singleton and that same is allegedly evidenced by way of a document headed 'Record of Attendance'. I deny signing this document and state that I had and have absolutely no desire or motivation to relinquish my interest in the property for the benefit of Tracey Kerr with whom I have no relationship of love and affection. I have three children of my own whom I would much sooner have benefit from my interest in the property.

11. I deny having ever signed the document entitled 'Record of Attendance' and state that, in any event, had the document, its contents and effect been explained to me I would not have do so. I only recall signing a small piece of paper which I belief was blank and which I believed would entitle me to receive £40,000 in exchange for my share of the property. For a considerable period of time the Plaintiff has wanted to

obtain the property for Tracey by whatever means and for minimal cost. The alleged Will and document exhibited hereto evidence this. I respectfully request that this Honourable Court does not execute the deeds and transfer documents as sought by the Plaintiff's Summons."

The application for judgment in default of defence

[16] As noted above, both the issue of the Writ and the entering of an Appearance thereto occurred in January 2017. By order dated 05 September 2017 the Chancery Master acceded to an application by Stewarts solicitors under RCJ Order 67, Rule 5 permitting the discontinuance of their representation of the Defendant. By a summons dated 28 March 2018 the Plaintiff applied to the Chancery Court for the following material relief:

(a) Judgment in default of Defence.

(b) A declaration that the Defendant is bound by the terms of the contentious agreement.

[17] The application, in its original incarnation, was founded on a sole affidavit, sworn by the Plaintiff. This was formulaic and perfunctory in nature, simply exhibiting certain documents: the March 2010 Court Order, the other two documents considered above and sundry items of correspondence. McBride J made two subsequent case management orders whereby scheduled hearing dates of 06 September and 03 October 2018 respectively were vacated. Pursuant to these adjournment orders the hearing was scheduled to proceed on 19 December 2018.

[18] The Plaintiff came to swear a second affidavit. This contains the following material averments:

> "*I confirm that I attended court on 11 March 2010 at the commencement of the action …*
>
> *The remaining beneficiaries, including the Defendant Jean Jamison were not parties to the action but had all attended court to support Tracey's defence. I confirm that* [at] *all times we were on good terms and agreed that Tracey Kerr (Singleton) should have the house at* [the disputed lands] *transferred to her. Her case was that the house had been promised to her and that she had acted to her detriment by maintaining and spending money on the premises and we all knew this to be true including Jean Jamison* [the Defendant]. *….*

> *All of the other beneficiaries at that stage including Jean Jamison were anxious to protect Tracey their niece. We were all on good terms in court that day. …*
>
> *Jean Jamison …. was totally coherent and understood fully what she was signing. My solicitor, Kelly Shaw and Mr Michael Lavery QC and Mr Ronan Lavery BL were in attendance at court that day. I recollect that we were told that we had the right to obtain independent advice before signing the agreement. Ms Shaw and Mr Michael Lavery QC discussed the issue at length with all of us. No issues were raised by Jean Jamison and the suggestion that she signed a blank piece of paper is just completely untrue …. I recall that* [the Plaintiffs] *signed the document first and then Mr Lavery QC brought the documents over to our side …. her* [Jean's] *was fine, she read over the documents, she was aware what she was signing and she was in good health. Jean and Tracey always got on very well …*"

[19] This affidavit has an unorthodox feature of some note. The exhibits are "*a joint statement which has been signed by Tracey Kerr, Margaret Kerr, John Kerr and myself and also separate statements from John Kerr, Tracey Kerr and Margaret Kerr.*"

This is followed by the averment:

> "*John and Tracey can attend to give evidence if required. Margaret Kerr is presently unwell and unable to attend to give evidence.*"

The exhibited "*statements*" purport to attest to *inter alia* an unhappy "*fall out*" providing the stimulus for these further proceedings. They all bear a close resemblance to the following passage in the Plaintiff's second affidavit:

> "*Jean Jamison …….. was totally coherent and understood fully what she was signing. As far as I am aware she had not started any kidney dialysis and her eye sight was perfect. My solicitor, Kelly Shaw and Mr Michael Lavery QC and Mr Ronan Lavery BL were in attendance at court that day. I recollect that we were told that we had the right to obtain independent legal advice before signing the agreement. Ms Shaw and Mr Michael Lavery QC discussed the issue at length with all of us. No issues were raised by Jean Jamison and the suggestion that she signed a blank piece of paper is just completely untrue ….. *"

[20] Before examining the exhibited statements a little further, I draw attention to one further document. This is a draft affidavit. Its putative deponent is a practising barrister who was junior counsel in what is described above as the "*earlier litigation*". It consists of seven substantive lines of generous font, the operative content being the following:

> "*I agree entirely with the version of events as set out in the Plaintiffs' affidavit. I recall attending court on 11 March 2010. The suggestion that she signed a blank piece of paper is not true in any respect and the allegation is gratuitously offensive to the whole legal team. I am happy to attend to give evidence.*"

The hearing bundle contains no sworn version of this.

[21] I return to the "*statements*" exhibited to the second affidavit of the Plaintiff. These invite the following analysis:

(g) All four are entitled "*to whom it may concern*".

(ii) All are in the same font.

(iii) Three of them – those which purport to be signed by "Margaret Kerr", "T Kerr" and "J Kerr" are dated 08 June 2018.

(iv) The fourth, by far the most detailed, purports to be a statement signed by "T Kerr", which is followed by "Margaret Kerr", "J Kerr" and "R Kerr".

(v) All four bear an address (each different) in the same position.

(vi) All five end with "Yours sincerely" followed by an apparent signature.

The provenance of these "statements" must also be considered. The Plaintiff simply exhibits them to his second affidavit, without more. There is no attempt to explain how, by whom or in what circumstances they were generated. Questions such as why three of the statements were being produced to the court some six months after their apparent dates are unaddressed. Equally the averment that John Kerr and Tracey Kerr "*can attend to give evidence if required*" begs certain obvious questions: neither did so and neither swore an affidavit, all unexplained.

[22] At this juncture it is appropriate to take stock of the constitution of the application for judgment in default of defence. The supporting evidence consisted of the Plaintiff's first affidavit, the exhibits thereto considered above, the second affidavit and exhibits, also examined above and the draft affidavit of junior counsel representing the Plaintiffs in the earlier litigation. In addition there was oral

evidence from the aforementioned counsel and the instructing solicitor (considered further *infra*).

Judgment of McBride J

[23] The Plaintiff's application for judgment in default of Defence was heard by McBride J on 19 December 2018. The Plaintiff was represented by counsel (Mr Michael CW Lavery). The Defendant was unrepresented. There was a skeleton argument on behalf of the Plaintiff composed by Mr Lavery. This contains the following passage:

> "*The personal representative is and remains unable to effect the transfer of the property into Tracey Kerr's name because of the obstructive attitude of the Defendant. Relations in the family have broken down and the Defendant continues to oppose any transfer of her interest in the property …*
>
> *The Defendant now denies ever signing the consent and by affidavit dated 27 October 2016 says inter alia that she had simply signed a blank piece of paper.*"

The judge pronounced her decision, dismissing the application, at the conclusion of the hearing. This was followed by a written judgment promulgated on 27 February 2019.

[24] In the introductory paragraphs of her judgment, the judge refers to another segment of evidence, at [5]:

> "*During the course of case management the Defendant's daughter corresponded with the court on behalf of the Defendant. This correspondence, which attached two letters from the Defendant's GP dated 05 March 2018 and 27 September 2018 explained that the Defendant, aged 86, had significant health problems which meant she was unable to attend court.*"

In a further letter the Defendant herself reiterated her inability to attend court on medical grounds. It is convenient to interpose here the reference in the Defendant's letter of 22 December 2015 (*ante*) to her kidney disease and almost complete loss of eyesight.

[25] The judge then summarises the sworn oral evidence of Mr Ronan Lavery QC, junior counsel in the 2007 litigation, noting that he testified "*… in a dispassionate, professional and straightforward manner*": see [25], adding that he very properly volunteered that his recollection of events was imperfect and continuing at [29] –

> "… [Mr Lavery QC] *was unable to proffer any explanation why these agreements had not been recited in the Tomlin Order and had not otherwise been brought to the attention of the court and did not form part of the court order, despite the fact that these agreements fundamentally changed the ownership of the premises from the beneficiaries to Tracey Kerr*."

McBride J added that Mr Lavery QC could not say whether the contents of these documents had been read and explained to the Defendant prior to her apparent signature.

[26] Ms Shaw, who had been the solicitor representing Tracey Kerr in the 2007 litigation, similarly confirmed that her recollection of events was incomplete: see [36]–[37]. She suggested that senior counsel had spoken to all of the beneficiaries, including the Defendant, explaining the proposed terms of settlement and advising each "*… to seek independent legal advice before entering into the agreements*", each of them responding that they did not wish to do so. The judgment continues:

> "*Senior counsel then dictated the terms of the agreement to her which she then transcribed into documents entitled 'Record of Attendance'. Ms Shaw said she was clear in her memory that senior counsel then read the agreements separately to each of the beneficiaries including the Defendant before the agreements were respectively signed by them. After the agreements were signed Ms Shaw recalled that she then read the Tomlin Order to the Defendant and (Margaret Elizabeth Kerr) together and they then each signed the Tomlin Order and she witnessed their signatures.*"

Ms Shaw asserted that there had been no agreement for the Defendant to receive a payment in consideration of transferring her interest in the premises to Tracey Kerr. This court would observe that Ms Shaw's interaction with the Defendant in the 2007 litigation was plainly minimal.

[27] The judge, having referred to Ms Shaw's attendance note (evidently dated 11 March 2010) made the following specific finding at [43]:

> "*I am satisfied that the terms of the proposed agreement were discussed when all the beneficiaries were together in a group. The attendance note does not state that before each beneficiary signed the agreement it was read out and explained to him or her, individually.*"

At [44] the judge explains in some detail her rejection of Ms Shaw's assertion to the contrary.

[28] The judge then considers the affidavit of the Defendant sworn on 27 October 2016, considered in [21] above. The judge, in conducting this exercise, adverts to the material assertions and denials of the Defendant. Next she summarises the medical evidence documenting, as of September 2016, the Defendant's chronic kidney disease and significant visual impairment which (per the medical evidence) prior to the commencement of dialysis treatment had been worse. At [48] the judge says the following:

> *"Although the defendant did not attend court and was not subject to cross-examination I nonetheless give some weight to her affidavit evidence because it was corroborated by other evidence. Firstly, the reason she did not attend court was due to her advanced years and ill health and there was medical evidence before the court indicating she was not fit to attend. Secondly, the allegation of alleged forgery is supported by the fact the court made an order on consent not to admit the purported Wills to probate and made an order condemning the plaintiff in costs. Thirdly, her evidence about contributing to the discussions at court is corroborated by the evidence of Ms Shaw who accepted that the defendant "chipped in to the discussions" as they were ongoing. Fourthly, the defendant's reference that she was to receive a payment of £40,000 rings true as her two siblings, who were the personal representatives, each received £40,000 in consideration of transferring their respective interests in the premises to Tracey Kerr. Fifthly, the defendant's own evidence about her eyesight is corroborated by the medical report provided by her GP. "*

The judgment continues at [50]:

> *"The central issue to be determined is whether the Defendant entered into a binding agreement on 11 March 2010 and if so whether the court should grant the equitable relief sought."*

[29] The judge next, by reference to authority, outlines the time honoured requirements for the formation of a binding contract: a meeting of minds, the intention to create legal relations and consideration. At [54] the judge states:

> *"…. It is necessary for the Plaintiff to establish that Tracey Kerr provided consideration for the promises made by the Defendant."*

The Plaintiff's case, the judge noted, was that there was consideration consisting of natural love and affection. The sole underpinning of this contention was the aunt/niece relationship. It was confounded by the Defendant's affidavit (*ante*). Reasoning in this way, the judge made the following finding at [57]:

> *"On the basis of the evidence I am satisfied that there was no consideration given by way of natural love and affection. In addition, even if, contrary to my view, there was consideration given by way of natural love and affection, this would not constitute legal consideration for the promise in any event."*

This alternative conclusion was based upon *Mansukhani v Sharkey* [1992] 2 EGLR 105 per Fox LJ at ….:

> *"… Consideration by way of love and affection is a familiar recital in deeds of gifts and voluntary settlements. It is difficult to imagine it normally having any place in a sale document."*

The judge further highlights at [59] the absence of any reference in the Tomlin Order or related documents to Ms Kerr agreeing to forbear the bringing of future proceedings against the Defendant. The judge concludes, at [60]:

> *"…. I find that the promise made by the Defendant is unenforceable because it is not supported by consideration."*

[30] The judge's alternative conclusion was that there was no binding agreement by virtue of the doctrine of *non est factum*. At [63] the judge made the twofold findings that the Defendant did sign a document and, in doing so, believed she was signing a blank document. This, the judge considered, was supported by the medical evidence relating to her defective eyesight. The judge then made a third, related finding that the Defendant upon signing the document believed that she would receive £40,000 in consideration of transferring her interest in the disputed lands to Tracey Kerr, reasoning thus at [64]:

> *"I believe her evidence in this regard in particular because it was corroborated by Ms Shaw who accepted that the Defendant chipped into discussions. It also chimes with the facts. I consider it significant that her two siblings who were the personal representatives and who held exactly the same interest in the premises as the Defendant each received £40,000 when costs are deducted from the lump sum that was made payable to them."*

This is followed by a further finding at [65]:

> *"I am also satisfied the agreement was not read out and adequately explained to the Defendant before she signed it."*

[31] This is a reiteration of the earlier finding at [43] – [44]. The judge's findings continue at [65]:

> *"I am satisfied that the Defendant failed to understand the terms of the agreement even though I accept that the 'gist' of the agreement was explained to her when she was with the other beneficiaries by* [senior counsel]. *I accordingly accept her evidence that she believed she would be entitled to receive £40,000 in the event she signed away her interest in the premises to Tracey Kerr ….*
>
> *[66] Further, even if the agreement was read out to the Defendant I find that it was either not adequately explained to her or she misunderstood its effect."*

The judge explains this finding in these terms:

> *"I have formed this view because it is clear from the applications made to the Master and the supporting affidavits that the Plaintiff and his solicitor, Ms Shaw, each believed that the Tomlin Order required the Defendant to transfer her interest in the premises to Tracey Kerr …*
>
> *The Tomlin Order however did not require the Defendant to transfer her interest in the premises to Ms Kerr. Rather it provided that the premises were to be vested in the Defendant and the other non-party beneficiaries. Given the mistaken belief of Ms Shaw as to the effect of the Tomlin Order I am satisfied that she did not fully understand the terms and effects of the Tomlin Order and therefore I am satisfied that she could not have adequately advised the Defendant ….* [and] *… it is likely that the Defendant also misunderstood the effect of the agreement she signed."*

[32] This is followed by the omnibus conclusion, at [66]:

> *"Accordingly, I find that when the Defendant signed the agreement she signed a document which was essentially different from that which the Defendant intended to sign and accordingly the doctrine of non est factum applies."*

There follows an alternative conclusion at [67]:

> *"If I am wrong about my conclusion that the doctrine of non est factum applies I find that any agreement entered into by the Defendant to transfer her interest in the premises to Tracey Kerr was varied by the terms of the Tomlin Order which was signed subsequent to the agreement. In accordance with the terms of the Tomlin Order the premises were to be transferred to the Defendant and the other non-party beneficiaries. Accordingly, I find the agreement was superseded by the later Tomlin Order and subsequent court order."*

Finally, at [70] – [72], the judge elaborates still further on her assessment of and significant misgivings relating to the compromise of the 2010 litigation.

The Appeal

[33] The somewhat diffuse grounds of appeal were distilled by Mr Lavery into the following central interrelated submissions:

(i) The judge's findings of *non est factum*, no consideration and ultimately that there was no binding agreement are perverse on the facts and wrong in law.

(ii) The judge's findings were largely based on an affidavit of the Defendant. The judge erred in rejecting the evidence of solicitor and counsel representing the Plaintiffs in the 2010 litigation and attached undue weight to the Defendant's affidavit.

[34] Certain of the judge's findings were attacked, in uncompromising terms. In particular:

(a) The attendance note "*… clearly and unambiguously corroborated the Plaintiff's case that the Defendant knew what she was agreeing to, but bizarrely the trial judge used it to simply infer that the agreements were not read out to the beneficiaries individually as if this in fact provided further evidence that the Defendant was not aware of the nature of the agreement which finding we submit is perverse.*"

(b) "*The scarcely veiled suggestion by the trial judge that senior counsel, junior counsel and solicitor colluded to deceive* [the Defendant] *by mispresenting the position and getting her to sign a blank piece of paper at that time is in our submission a perverse finding ….*"

(c) The judge "*… placed undue weight on the affidavit evidence of the Defendant without the benefit of any opportunity to observe her demeanour under cross examination*".

(d) "*The finding of non est factum was … based on over reliance on untested evidence. It is contrary to the evidence of experienced counsel and solicitor who testified that she knew what she was agreeing to*".

(e) "*The corroboration relied upon by the trial judge cannot in any way be regarded as proper corroboration of untested evidence strenuously rejected by evidence of experienced solicitor and counsel*".

(f) The trial judge "*irrationally … attached no weight to the evidence of counsel and solicitor that at all times* [the Defendant] *was fully aware of what it was she was signing up to, that she was offered and declined independent advice and having made a serious and damaging allegation that she was deceived, failed to file a defence, appear at court, seek representation or if indeed medically unfit, which is not accepted, apply to have her evidence heard on commission*".

(g) "*The trial judge's finding* (regarding the Defendant's expectation of receiving £40,000) *that this was corroborated by Ms Shaw because she accepted the Defendant chipped into a discussion with money is a non-sequitur and is a perverse finding*".

(h) The trial judge's finding that Ms Shaw had a mistaken belief as to the effect of the Tomlin Order and did not fully understand its terms and effect is "*an aberrant finding*".

(i) The trial judge "*attached undue weight to the fact that the Plaintiff was not called to give evidence*".

All of the above is drawn from counsel's helpful skeleton argument. In summary this court is invited to reverse the order and judgment of McBride J on the ground that they are contaminated by a series of irrational, perverse and aberrant findings. (It may be observed that these three adjectives are interchangeable).

Governing Principles

[35] Some basic dogma must be recognised at this juncture. This is not a court of first instance. It is rather an appellate court. The adjectives perverse, irrational and aberrant have a legal grounding, being traceable to a series of principles to be derived from the decided cases. The jurisdiction of the Court of Appeal to review findings of both fact and law is clear. See for example *Ulster Chemists v Hemsborough* [1957] NI 185 at [186] – [7]. Where invited to review findings of primary fact or inferences the appellate court will attribute weight to the consideration that the trial judge was able to hear and see a witness and was thus advantaged in matters such as assessment of demeanour, consistency and credibility: see for example *Kitson v Black* [1976] 1 NIJB at 5 – 7. The review of the appellate court is more extensive where findings are made at first instance on the basis of documentary and/or real evidence. However even where the primary facts are disputed the appellate court will not overturn the judge's findings and conclusions merely because it might have decided

differently: *White v DOE* [1988] 5 NIJB 1. The deference of the appellate court will of course be less appropriate where it can be demonstrated that the first instance judge misunderstood or misapplied the facts. See generally *Northern Ireland Railways v Tweed* [1982] 15 NIJB at [10]–[11].

[36] There is a valuable exposition of the role of this court in *Heaney v McAvoy* [2018] NICA 4 at [17]–[19]:

> *"[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)."*

The judgment continues at [20]:

> *"The foregoing 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."*

[37] This was noted and applied in a comparatively recent decision of this court: *Herron v Bank of Scotland* [2018] NICA 11 at [24]. This court's formulation of the correct approach in *Heaney v McAvoy* took cognisance of the guidance contained in *DB v Chief Constable of PSNI* [2014] NICA 56 at [78] – [80]. There Lord Kerr stated at [80]:

> *"The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."*

To paraphrase, reticence on the part of an appellate court will normally be at its strongest in cases where the appeal is based to a material extent on first instance findings based on the oral evidence of parties and witnesses.

Conclusions

[38] The first element of the centrepiece of this appeal is rehearsed at [33] above. So too the second. The two overlap. As the formulation of this ground makes clear, there is no suggestion of misdirection in or misunderstanding of the law. This is, rather, an unvarnished complaint of perversity, a recurring theme of Mr Lavery's submissions, written and oral. His fundamental contention is that the appeal falls to be allowed because insufficient weight was given to the evidence of the solicitor and junior counsel instructed in the 2007 litigation.

[39] This court is satisfied that the judge examined the facts as alleged by the Plaintiff with manifest care. This exercise included the reception of oral evidence from two important witnesses, followed by an assessment of the weight, if any, to be attributed thereto. The judge also considered the other material evidential sources, in particular the various documents reproduced above and the affidavit sworn by the Defendant in 2016. The central theme of the judgment is that of a balancing exercise. The judge balanced all material aspects of the evidential matrix and made findings accordingly.

[40] The appropriate focus is not on the "facts", as the grounds of appeal contend, but on the trial judge's <u>findings</u>. The matrix before the judge was one of <u>alleged facts</u>, with nothing agreed or conceded. This court's function is one of review, applying the principles set forth at [35] – [37] above. Through this prism, we consider this to be a paradigm case for non – interference by this appellate court. The impugned findings of McBride J bear the consistent hallmark of care, attention and rationality, in a context where a significant part of the evidential matrix consisted of oral evidence.

[41] Elaborating on the foregoing by reference to our outline of the more detailed outworkings of the Appellant's central ground of appeal at [34] above:

(a) The judge was clearly entitled to examine the "*record of attendance*" documents for *inter alia* the purpose of evaluating the cogency of the Plaintiff's case generally. She committed no error in doing so and, specifically, fell into no error in her finding that the relevant documents were not read out to the Defendants individually, coupled with her consequential finding that the Defendant was not aware of the nature of the agreement. This finding was manifestly within her purview.

(b) As this court observed during the hearing, the "*scarcely veiled suggestion*" asserted by Mr Lavery in argument plainly belongs to the *orbiter* compartment of the judgment and is a matter which should not be of concern to any of those involved. It has not influenced this court.

(c) The "*undue weight*" complaint falls for the reasons explained in [39] – [40] above.

(d) *Ditto.*

(e) *Ditto*, to which we would add that the judge's consideration and evaluation of the evidence and consequential findings did not entail any error of the kind which would entitle this appellate court to intervene.

(f) *Ditto.*

(g) *Ditto.*

(h) *Ditto.*

(i) *Ditto.*

[42] It is appropriate to expand on [41](a). We consider that the judgment of McBride J, in tandem with this court's outline of and commentary on the key documentary materials above, make abundantly clear that this case was never a proper candidate for judgment in default of defence. The evidence raises a plethora of doubts, gaps, uncertainties and questions. These, or some of them, could in

principle have been addressed in further affidavit and/or oral evidence on behalf of the Plaintiff. This did not occur. By reason of the numerous chinks in the evidential matrix, the judge's conclusion that the case was not an appropriate candidate for an order granting judgment in default of defence was not simply one available to her within the ambit of the governing principles: we consider that on any reasonable objective showing it was both inevitable and irresistible.

Omnibus Conclusion and Order

[43] For the reasons given this appeal is dismissed.

[44] If the Plaintiff is desirous of proceeding to trial in the wake of the judgment of this court it is clearly desirable that the case advance henceforth as expeditiously as possible. This sadly protracted family dispute is crying out for finality. To this court the case appears ready for trial. The possibility of a mediated solution should be earnestly considered. It is not too late to effect some reduction in legal costs, anxiety and uncertainty.

[45] Given that the Defendant has taken no active role either at first instance or on appeal we make no order as to costs *inter-partes*, as at first instance. The judgment and order of McBride J are affirmed in all respects.