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Judgment: approved by the Court for handing down | *Delivered:* **25/09/2014**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Between:

DOROTHY MOFFAT

Plaintiff;

and

LAURENCE MOFFAT PERSONAL REPRESENTATIVE OF JOHNSTON MOFFAT (DECEASED) AND FLORENCE MOFFAT (DECEASED)

Defendant.

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal by Dorothy Moffat (hereinafter called "the appellant") from a decision of Burgess J of 12 December 2013 to stay proceedings under the inherent jurisdiction of the court brought by way of Originating Summons by the appellant pursuant to Article 3 of the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 ("the 1979 Order")("the plaintiff's current proceedings"). The stay was to remain in operation until such time as costs ("the relevant costs") awarded against the appellant in respect of an earlier unsuccessful construction summons before Girvan LJ and an appeal therefrom were discharged in full.

[2] The appellant appeared as a personal litigant. The respondent, who is the personal representative of Johnston Moffat (deceased) and Florence Moffat (deceased), the father and mother of the appellant and the respondent, was represented by Mr McBrien.

Background

[3] Although even the factual backgrounds set out by Burgess J and Girvan LJ in their respective judgments were not free of trenchant criticism by the appellant, certain background factors can be discerned from those judgments together with the papers before this court as follows:

(a) The appellant's late father, John Johnston Moffat ("the Testator") died on 9 March 1994 leaving a will made on 29 July 1993.

(b) The will appointed his wife, Florence Preston Moffat, and the respondent to be the executors and trustees. Probate in respect of the will was granted on 7 June 1994 to his widow and the respondent, the elder brother of the plaintiff.

(c) The will, inter alia, provided as follows:

> "I devise my farm of land on to my said wife, Florence Preston Moffat, for her life and after her death or if she pre-deceases me, I devise the same unto my said son John Laurence Moffat …… subject as aforesaid and to payment of my just debts, funeral and testamentary expenses I give, devise and bequeath and appoint all the residue of my estate and effects unto my said wife Florence Preston Moffat in full confidence but without creating any binding trust or obligation that she will on her death ensure that what she has left thereof at her death shall pass to my son John Laurence Moffat …. I have not made any provision in this my Will for my daughter Dorothy or my son James Brian as I consider they are not in need of any provision from me and would not expect such provision."

[3] The testator at the time of the making of the will and at the date of his death was the owner of lands comprised in Folio 21433 Co Down. As well as the lands, there was an old cottage (No: 52 Glasswater Road, Crossgar), and the main dwelling (No: 54 Glasswater Road, Crossgar).

[4] The widow, Florence Moffat, died intestate in October 2007. Her estate accordingly passed to the three children, the appellant, the respondent and their brother Brian in equal shares.

[5] Over the years, the appellant has consistently made a number of arguments in the course of a series of court actions which include the following:

(a) On the proper construction of the testator's will the dwelling house and the old cottage did not fall within the devise of the testator's farm of land which passed to the respondent but rather fell within the gift of residue which passed to the widow. If the property devolved in that way then the appellant would be entitled to a one third interest in those properties. (This was the subject of the construction summons before Girvan LJ when he found against the appellant's contention and declared that the devise under Clause 3 included both the agricultural land on Folio 21433 Co Down and the existing and former dwelling house on the said Folio).

(b) That the plaintiff's mother and father had told her that she could have the house or alternatively that the testator and her mother had told her that the house was to go to herself and her children.

(c) That she has spent some £2,000 in assisting her mother in making a planning application to renovate the house. In short, as an alternative to her claim that the Will should be construed in the way that she unsuccessfully asserted, she raised arguments seeking equitable relief.

[6] Girvan LJ, in the course of his judgment dealing with the construction summons, adverted to this alternative claim at paragraph [8] in the following terms:

> "The plaintiff in para 7 of her grounding affidavit asserted that her mother and father told her that she could have the house. In paragraph 2.32 of her skeleton argument she argues that the testator and her mother told her that it was to go to her and her brothers (*this probably should have read "and her children")*. In paragraph 7 of her affidavit she averred that she spent some £2,000 in assisting her mother in making a planning application to renovate the house. The plaintiff in the conclusion to the skeleton argument raises an argument seeking equitable relief apparently as an alternative to her claim that the Will should be construed in the way which she asserts. The originating summons, however, is a construction summons which simply raises a question of construction. Accordingly, in the proceedings as presently constituted I propose to deal only with the issue of the proper construction of the Will."

[7] Costs were awarded against the appellant by Girvan LJ which have now been taxed and a Certificate issued. The appellant appealed the decision of Girvan LJ .On 24 October 2012 the Court of Appeal dismissed the appeal affirming the order of the lower court. Costs of the appeal were awarded against the appellant, and again these have been taxed and a Certificate issued on 9 September 2013.

[8] We pause to observe however that although the sprawling historical narrative of this case was opened to Burgess J, he was not informed of a potentially crucial factor. Following the taxation and certification of the costs, the respondent mounted a statutory demand under Article 242(1) (a) of the Insolvency (Northern Ireland) Order 1989 for the sum of £23,025.13 arising therefrom dated 13 November 2013. The appellant, in a document dated 22 November 2013, has applied to have the respondent's statutory demand set aside. The grounds included allegations of misleading information, misrepresentation, that she had no communication from the taxing master's office concerning enforcement of costs against her and she was never served with any formal taxation certificates.

[9] For reasons that were not entirely clear, the respondent has not proceeded further with this statutory demand and the matter remains in abeyance.

The Appellant's current proceedings

[10] Although the appellant criticised the summary by Burgess J of her current proceedings, we consider that he did capture the essence of the contentions that the appellant is now putting forward as to the equitable ownership of 52 Glasswater Road together with land around those premises. He summarised 5 grounds:

- That the land was gifted by her mother and father to her and her children.

- That she has an interest in No: 52 on the basis of proprietary estoppel by reason of the payment of some £2,000 towards the costs of a planning application for the replacement/restoration of No: 52, and that she acted to her detriment in respect of seeking to finance the restoration of No: 52.

- Provision ought to have been made for her in her father's Will under the 1979 Order.

- Alternatively her mother was absolute owner of No: 52 and therefore it formed part of her mother's estate to which the appellant is entitled to a share under her intestacy.

- That the money in bank accounts held by her late mother at the time of her death should be distributed appropriately with a share to her.

The respondent's current proceedings

[11] By way of an amended summons before the Chancery judge, the respondent sought an order staying the proceedings until the appellant had paid the taxed costs pursuant to the inherent jurisdiction of the court and for an order dismissing the plaintiff's application pursuant to Article 6 of the 1979 Order on the ground that it had been brought out of time.

The Hearing before Burgess J

[12] Neither Mr McBrien nor Ms Moffat appeared to have a clear recollection as to the format of the hearing before Burgess J. Self-evidently skeleton arguments had been provided by both sides and the judge was in possession of all the court papers and relevant affidavits relied on by the parties. The appellant was adamant that she had not been afforded an oral hearing to supplement these papers. Mr McBrien's recollection, albeit uncertain because of the passage of time, was that both parties had been accorded an opportunity to make any additional submissions in a context where the case had been reviewed and adjourned on a number of previous occasions.

[13] At paragraph 12 of the judgment Burgess J described the hearing in these terms:

> "[12] At the last hearing it was confirmed by both parties that their positions had been set out in their respective submissions to the court, and that the evidence to substantiate the plaintiff's claims were fully set out in her grounding affidavit and other papers filed in the matter. I have therefore examined all matters to see if any such exceptional circumstances exist in this case."

[14] We consider it likely that the judge has accurately recorded what occurred. Accordingly, whilst we accept Mr McBrien's assertion that an opportunity was afforded to the parties to add any further submissions, oral argument was probably at a minimal level at the hearing itself.

The Judgment

[15] Having determined that the costs of the first action had not been paid and having considered the issues raised in the respondent's summons for a stay, the judge concluded as follows at paragraphs 10 and 11:

> "[10] … that action (*i.e.before Girvan LJ*) reflected the claims of the plaintiff for rights in respect of No:52. This action has the same objective, either directly by way of gift or through her mother's estate or through some "common intention" to divorce No: 52 and some part of its environs from the defendant. The present claims are against the same defendant in respect of the same property and there was nothing that would have prevented the plaintiff including these claims in that earlier action.

> [11] It is essential that Orders of the Court are complied with, and except in exceptional circumstances a party cannot ignore such Orders while seeking to pursue claims in respect of the same objective through further legal action. Therefore, unless I determine that there are exceptional circumstances I would grant the stay sought by the defendant."

[16] The judge therefore went on to examine all matters "to see if any such exceptional circumstances exist in this case".

[17] The judgment explored in detail a number of perceived inconsistencies and flaws in each of the 5 aspects of the plaintiff's claim.

[18] Inter alia it dealt with her dependency claim under the provisions of the 1979 Order. The judgment, having adverted to a number of steps which the appellant had failed to take, concluded:

> "In all of the circumstances it is again difficult to see what grounds there might be for extending the period of limitation in respect of any claim under this statutory provision."

[19] There is no reference to any arguments raised by the appellant on this specific issue and the judgment makes no further reference to this aspect of the respondent's application.

[20] At paragraph 24 of the judgment Burgess J summarised his conclusions with a further reference to the concept of exceptional circumstances.

> "[24] I have sought to cover all the grounds upon which the plaintiff now seeks to establish a right to all or some part of No: 52 and its contents, or in respect of any other aspect of her late mother's estate to see if there are exceptional circumstances such as would argue against a stay of the present proceedings in the default of the plaintiff paying the taxed costs in respect of the earlier Construction Summons. In the circumstances of the claims as I have examined them I find no such circumstances."

The Submissions of the Parties

The respondent's submissions

[21] Mr McBrien contended as follows:

- No attempt has been made by this appellant to pay the costs of the proceedings before Girvan LJ or the Court of Appeal in respect of her late father's Will.

- Under the inherent jurisdiction of the court, complemented by the overriding objective as defined in Order 1, rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980, the court should stay the current proceedings, which are the most recent in a series of actions brought by this plaintiff essentially all seeking the same relief, until the relevant costs are paid.

- Although Order 21, rule 5(1) empowers the court to stay further proceedings pending payment of costs only where a party has discontinued proceedings, an analogous approach should be adopted in instances such as the present under the inherent jurisdiction of the court.

- Burgess J had in essence found a lack of any merits in the appellant's case.

- The application by the appellant under the 1979 Order is outside the six month time limit provided in article 6 of the Order.

The appellant's submissions

[22] The appellant laboured under the same difficulties of understanding and focus which beset many personal litigants in cases involving complex legal issues. Her notice of appeal, skeleton argument and submissions before this court constituted a wide-ranging pot pourri of allegations of bias and factual / legal error on the part of judges hearing these matters, negligence against solicitors who had originally represented her and deception and dishonesty on the part of the respondent. In passing we also note that the appellant had sent an email to the Court office suggesting that she had not received the full bundle of papers for the hearing of this appeal. For reasons which will become obvious from our decision in this matter, it was unnecessary for this court to venture down any of these paths during this hearing. In addition the appellant contended that she was deprived of a hearing in open court on the occasion of the original hearing before Burgess J.

Consideration

[23] At the outset of this hearing it became clear that leave had not been granted against the interlocutory order made by Burgess J. Mr McBrien accepted however that it had been agreed at an earlier review that the issue of the grant of leave would

be raised at this court. We are satisfied that grant of leave should be given in this instance.

[24] The inherent jurisdiction of the court was described by Lord Diplock in Hunter v Chief Constable of West Midlands Police (1982) AC 529 at 536 in the following terms:

> "(This case) concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances under which abuse of process can arise are very varied …. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances on which the court has a duty (I disavow the word discretion) to exercise this salutary power."

[25] In Braithwaite and Sons Ltd v Anley Maritime Agencies Limited (1990) NILR 63 at 69, Carswell cited with approval the definition of the concept by Sir I H Jacob in 23 Current Legal Problems (1970) *The Inherent Jurisdiction of the Court* as follows:

> "The reserve of fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

[26] Mr McBrien correctly contended that the powers of the court under its inherent jurisdiction are complementary to its powers under Rules of Court and in particular in this jurisdiction the overriding objective as defined in Order 1, rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980 to enable the court to deal with cases justly.

[27] The first difficulty however that confronted Mr McBrien when invoking the inherent jurisdiction in this instance to order a stay pending the payment of the relevant costs was that although they had been taxed and certified, these costs were still the subject of a dispute on foot of the Statutory Demand. The respondent had

chosen not to complete the enforcement process of the Statutory Demand in the wake of the appellant's application to have it set aside.

[28] Burgess J had not been apprised of this fact. We are not persuaded that had he known of this, he would have invoked the inherent jurisdiction of the court to order the current proceedings be stayed until costs, which were still a matter of legal dispute, were paid. To do so would be to oblige the appellant to pay costs which she is legally entitled to dispute and which are part of an on-going, but incomplete, legal process.

[29] The second difficulty for Mr McBrien was the conclusion of the judge that only in "exceptional circumstances" can a party ignore such cost orders whilst seeking to pursue claims in respect of the same objective through further legal action particularly in circumstances where, unknown to him, she was still contesting the costs issue . To do so would be to impose on the appellant a burden that, on first principles, would seem to be the opposite of what the position should be. In any application where a party seeks a stay of proceedings, the onus should be on that party to persuade the court that the inherent jurisdiction should be invoked. To reverse that onus is a concept unsupported by any authority Mr McBrien could put before us and contrary to orthodox principles. Consequently we consider the judge fell into error in adopting this approach.

[30] Part of Mr McBrien's argument rested on the contention that the appellant's proceedings should have been brought at the same time as the construction summons before Girvan LJ. Without making any final determination on the point, we observe that the thrust of such a point might have been better suited to an application to strike out as an abuse of the process of the court rather than the application for a stay until costs are paid especially in the vexed circumstances of the costs issue in the instant case.

[31] An instructive case in this regard is Lough Neagh Exploration Ltd v Morrice and Another (1999) NI 258. In this matter the Court of Appeal dealt with a case where proceedings had been issued by the plaintiff in both the Republic of Ireland and Northern Ireland arising out an alleged breach of contract and duty of confidentiality. In the former proceedings, an order for security of costs had been made which, not being complied with, had led to the action being struck out without a decision being made on the substantive issues in the case.

[32] Similar proceedings were issued thereafter in Northern Ireland. The court struck out these proceedings on the basis that inevitably an order for security of costs would be made in this jurisdiction and since the plaintiff had no prospect of complying with any such order, it would be unfair to all the parties to allow the matter to proceed.

[33] Carswell LJ at page 13 said:

> "A plaintiff should ordinarily bring his full case against the defendant at the one time so as to avoid unnecessary duplication of proceedings, repetition of evidence and the incurring of unnecessary costs … bearing in mind that the key word in this context is "ordinarily" since justice in given situations may lead to the conclusion that a plaintiff should not be faulted in any given situations for not concluding a particular aspect of a claim."

[34] The judge in the instant case, in the course of his quest to find exceptional circumstances that would argue against a stay of the proceedings, did analyse the weaknesses in the plaintiff's current proceedings and the reference to them before Girvan LJ. However other than to assert that nothing would have prevented the appellant including these claims in the earlier claim no real analysis was made as to whether in justice the appellant should be faulted for failing to so do. Doubtless this was so because the case was not presented to the judge in the context of the principles in the Lough Neagh case.

[36] We retain an open mind on this issue given that a plausible argument might well be made on behalf of the appellant that it was reasonable to mount a succinct cost effective construction summons to determine the matter conclusively without embarking on the potentially more costly and time consuming witness based current proceedings.

[37] Whilst therefore abuse of process might have been a more appropriate vehicle to carry the arguments of the respondent in this matter, the case was not argued on such a front and accordingly this court cannot deal with the matter on that basis.

[38] Finally, turning to the application to dismiss the relief sought under the 1979 legislation as being out of time by virtue of the fact that the grants in respect of both estates were extracted some years ago, we are not satisfied that this issue was fully addressed or a final determination made by the court. Whilst the court did refer to the failure on the part of the appellant to take appropriate steps to process this matter, the conclusion was couched in terms that:

> "It is again difficult to see what grounds there might be for extending the period of limitations in respect of any claim under this statutory provision."

[39] That does not carry the hallmark of a final determination and reflects perhaps the approach of the court to conduct a general review of the appellant's proceedings in order to find the presence or absence of exceptional circumstances.

[40] The nature of the hearing – confined as it was largely to a hearing on the papers – may have inhibited the appellant from understanding or focusing on the

legal issues involved in such an application and making a comprehensive response on the matter.

[41] This court recognises that litigants who are represented must not be prejudiced because the opposition is unrepresented. Indeed, we take this opportunity to endorse the views expressed by Kay LJ in Tinkler and Another v Elliott [2012] EWCA Civ 1289 where he said at paragraph 32:

> "An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the view that the litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him … does not entitle him to extra indulgence … The fact that if, properly advised, he would or might have made a different application then cannot avail him now. That would be to take sensitivity of the difficulties faced by a litigant in person too far."

[42] Moreover a judge is entitled in many circumstances to invite the parties to stand on their written submissions and the court papers in circumstances where he has accorded a real opportunity to the parties to augment the written material with oral argument.

[43] On the other hand, courts dealing with personal litigants are well advised to identify key issues in the case wherever possible at review stages or the trial itself and thus focus the mind of a personal litigant. The absence of any informed reference to this matter in the appellant's skeleton argument, the lack of any substantive oral hearing, and the uncertain nature of the court's determination, all persuade this court that the issue requires further consideration before there is a decision shutting out the appellant from the relief sought.

Conclusion

[44] We have concluded that this appeal should be allowed to the extent that both aspects of the application should be remitted to be heard by a different judge of the High Court. We will hear the parties on the issue of costs.