Neutral Citation No. [2015] NICA 61 | *Ref:* **GIL9748**

Judgment: approved by the Court for handing down | *Delivered:* **29/09/2015**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DOROTHY MOFFATT

Applicant;

-and-

LAURENCE MOFFATT

Respondent.

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Before: Morgan LCJ, Gillen LJ and Weir LJ

GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal which, according to the Notice of Appeal, is an appeal from "that part of the Judgment and Order" made by Deeny J on 9 January 2015. The applicant Ms Dorothy Moffatt was a litigant in person and Mr Moffatt was represented by Mr McEwan of counsel.

[2] The hearing before Deeny J was an application by the respondent Laurence Moffatt for a declaration that an assignment by his sister Dorothy Moffatt, the appellant, to her adult children, Daire Moffatt, Conall Toland and Meabh Toland of a garden and house off the Ormeau Road, Belfast, made on or about 31 October 2012, constituted a transaction at an undervalue within the meaning of Articles 367-369 of the Insolvency (Northern Ireland) Order 1989 ("the 1989 Order"). Mr Moffatt further sought a declaration that the transaction was entered into for the purpose of either putting assets beyond the reach of Laurence Moffatt or that it prejudiced him in relation to a claim which he was making in respect of the recovery of legal costs arising out of litigation between Dorothy Moffatt and himself.

[3] This assignment and registration of ownership of the premises in the names of the children had been made after the Court of Appeal in Northern Ireland had

dismissed Ms Moffatt's appeal from the Order of Lord Justice Girvan of 12 October 2011 finding against her on the construction of the will of her late father. The order of the Court of Appeal was made on 24 October 2012 and the assignment was on 31 October 2012, only a week later. Both courts had made orders for costs against her ("the costs orders ").

[4] The matter of the costs orders had arisen in the context of other proceedings brought by Ms Moffatt pursuant to Article 3 of the Inheritance Provision for Family and Dependants (NI) Order 1979 ("the 1979 Order"). That matter was heard by Burgess J as a Chancery judge and concluded by him on 10 January 2014 when he granted a stay on the basis that the costs orders should be satisfied first before the estate had to bear the further costs of defending the proceedings then before him.

[5] When that matter came on appeal before this court, judgment was delivered on 25 September 2014. This court found that Burgess J had applied the wrong test in deciding the matter before him i.e. that he was putting the onus on Ms Moffatt to show that there were exceptional circumstances to justify the case proceeding. On the issue of the costs, the court noted that Mr Moffatt had obtained certificates of taxation ("the two certificates ") in respect of them but that he and his advisers had then proceeded to serve a statutory demand on Ms Moffatt as a necessary precursor of seeking to have a bankruptcy order made against her. This court determined on that occasion that a stay on the proceedings pending the payment of the relevant costs should not have been granted because 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.

[6] In the case the subject of this appeal, Deeny J exercised his discretion to adjourn the proceedings on the basis that it would not be right to hear the application to set aside the transfer of the property in question until the legal status of the two certificates had been finally resolved. As he opined at [15]:

> "… It is best that that point is not left unresolved before I decide on whether this is a transaction which ought to be set aside pursuant to Article 367 to 369 of the Insolvency Order 1989."

[7] The grounds of the appeal set out in the Notice of Appeal of 3 February 2015 were:

(1) That there was an appearance of judicial bias in the judgment "as regards facts in the matter".

(2) The judge was wrong in his declaration in his judgment regarding service.

(3) That the matter should (not) continue by way of review on 4 February 2015.

(4) The solicitor for the applicant communicated to the judge and the judgment was amended.

[8] The applicant sought to amend that Notice of Appeal by adding a number of additional grounds which included:

(a) That there were seven different proceedings referred to by the judge in the judgment which were "mixed up as regards law and principle".

(b) The judge had used his discretion to overreach the decision of the Court of Appeal order dated 25 September 2014.

(c) That the judge should recuse himself from hearing the matter.

(d) A number of grounds arising out of an independent action brought by the plaintiff under the Inheritance (Provision for Family and Dependants) Northern Ireland Order 1979.

[9] It is clear that a number of the grounds relied on were in substance appeals against the exercise of discretion by the learned trial judge. There are many well trammelled authorities for the proposition that an appeal will not be entertained from an order which it was within the discretion of the judge to make unless it has been shown that he exercised his discretion under a mistake of law, in disregard of principle, under a misapprehension as to the facts, that he took into account irrelevant matters or that the conclusion which the judge reached in the exercise of his discretion was "outside the generous ambit within which a reasonable disagreement is possible" (G v G [1985] 1 W.L.R 647).

[10] Many of the cases in this area are decisions refusing to interfere with a judge's discretion in making an interlocutory order. Classic examples are giving directions for a trial as in Mangan v Metropolitan Electric Supply Company [1891] 2 CH. 551 or to the granting or refusing of an adjournment of the trial as in Maxwell v Kenn [1928] 1 K.B. 6-15.

[11] We pause to note for the sake of completeness that subject to well established exceptions, a judge exercising a judicial discretion must give reasons for his decision; but the particularity with which he is required to set out his reasons will depend on the circumstances of the case and the nature of the decision concerned.

[12] It is clear that the decision of Deeny J was an interlocutory order in that it was no more than an adjournment of the proceedings and certainly did not determine the merits of the case in any way. Accordingly, it being an interlocutory order, leave of either the High Court judge or the Court of Appeal was necessary pursuant to

Section 35(g) of the Judicature (Northern Ireland) Act 1978. The applicant in this case had not sought the leave of the judge making the order.

[13] It is well established law that the test to be applied on a leave application is that leave should be granted unless there is no realistic prospect of success on appeal. See Smith v Cosworth Casting Processes Ltd. Practice Note [1997] 1 WLR 1538G. Accordingly, before deciding if we would grant leave, we considered the merits of the appeal.

[14] We are satisfied that the decision of Deeny J was an entirely proper exercise of his discretion which was not flawed in any of the matters set out in paragraph [8] above. The decision to adjourn pending resolution of the costs issue and thereafter to further review the matter was a perfectly rational exercise of his discretion as to how these proceedings should be case managed and eventually determined.

[15] We found no substance in the applicant's contention that the summons by Mr Moffatt had not been served on the adult children. This was a matter for proper determination by the judge. We concluded, as did Deeny J, that the applicant had been in touch with her children who were obviously aware of the proceedings implicitly from what she said to the learned judge about a "family get together" in late September. She made exactly the same concession, perhaps unwittingly, to this court albeit she attempted to resile from that position by widening the definition of the use of the word "family get together". We found this completely disingenuous and we are satisfied that the learned judge was perfectly entitled to come to the conclusion on service at which he arrived at paragraph 4 of his judgment.

[16] There was no evidence to substantiate the allegation of bias against the judge or the suggestion that he should have recused himself from hearing the matter. The allegation of bias against a judicial figure is of course an extremely serious allegation to make. This court pressed the applicant for any basis upon which she could found such a proposition. So bereft was her argument of any substance that any confidence this court might have had that she had ever given real or responsible thought to this most serious allegation soon ebbed away. It seems to have been based on the fact that the judge at one stage assumed that she was married to Mr Toland (an understandable mistake perhaps given that two of the adult children are named Toland) and some other peripheral allegations of factual inaccuracy upon which she relied. Hence, it is unnecessary for us to invoke any of the authorities on the concept of bias given the complete absence of substance on this ground.

[17] We found no evidential basis for the allegation in the Notice of Appeal that the solicitor for the applicant had communicated with the judge without notice to the applicant or that any amendment of the judgment was made in the absence of such notice. Such amendment as was made had nothing to do with the substance of the appeal in any event.

[18] The learned judge had not used his discretion to overreach the decision of the court of Appeal dated 25 September 2014 but had simply come to the conclusion that the question of costs needed to be resolved before the application before him should proceed.

[19] We would not wish to leave this case without one important final observation and exhortation. During the course of the hearing the applicant appeared unable to divorce herself from other proceedings which were not the subject of this appeal and which have yet to be determined by another court. She seemed incapable of grasping the fact that this appeal was confined solely to the decision of Deeny J to put the application of Mr Moffett back for review pending resolution of the costs issues. However it is clear that there is currently outstanding a number of other pieces of litigation concerning the same parties and family.

[20] Recently a number of cases have come before this court, mainly involving personal litigants, where separate claims with some common threads at various stages of the process have been issued by or against the same individual but which have not been dealt with in a joined up fashion. Such threads might include for example the same parties or family, the same or similar property in dispute or the same or similar family issues.

[21] In some instances this court has discerned a disinclination to conjoin those proceedings or order that they be heard sequentially before the same judge on the same occasion albeit that process might take several days.

[22] We make three observations. First the overriding objective of Order 1 r 1A requires courts to ensure that the most efficient and convenient remedy will be determined having regard to the interests of other litigants and the overall administration of justice, not just the interests of the applicant and respondent before the court. The convenience to litigants should not be permitted to disrupt the apt distribution, management and determination of cases in an orderly, timely and cost effective fashion. This may ultimately require the cases being heard together or sequentially at the one hearing.

[23] Secondly such cases as the instant application need to be firmly case managed together with all the connected cases—even those in other Divisions such as the Commercial Division or Chancery Division -- by one judge from an early stage in order to progress the matters through to a single hearing in timely fashion. The Court Office must ensure where possible that the Court is appraised of all such connected cases to facilitate this step. As other connected proceedings are launched they should be added to the designated judge's list. Hopefully this will avoid multiple reviews, disparate preliminary points, various interlocutory hearings, skeleton arguments, rulings potentially by different judges with conflicting findings and separate appeals with an attendant increase in costs and delay in resolving a plethora of issues which have a common thread. If the same judge is hearing all these matters it will also serve to avoid the confusion of litigants such as the litigant

in this case who clearly thought she could raise and argue the issues under the 1979 litigation in this appeal.

[24] Thirdly, steps should be taken in the instant matter as soon as possible to have all the relevant litigation involving these parties listed before the Chancery judge to address the case management of all these case in this fashion and to consider what steps are to be taken to ensure the issues are all resolved in a single or sequential manner.

[25] In all the circumstances we find no realistic prospect of success on appeal. We therefore refuse leave and we shall hear now the parties on costs.