Neutral Citation No: [2018] NICh 27	*Ref:* DEV10810
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered: 20/12/2018*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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2018 No. 55095

BETWEEN:

NICHOLAS BRENNAN AS FIXED CHARGE RECEIVER OF PINPOINT PROPERTY LTD T/AS MORTON PINPOINT

IRAJNA KERR AS FIXED CHARGE RECEIVER OF PINPOINT PROPERTY LTD T/AS MORTON PINPOINT

Plaintiffs;

-and-

JOHN DOHERTY AND MARY DOHERTY

Defendants.

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HIS HONOUR JUDGE DEVLIN

[1] These are Order 113 proceedings in which the Plaintiffs acting as Fixed Charge Receivers seek possession of premises situate at and known as 32, Culmore Point, Londonderry. The proceedings were issued on foot of a summons issued on 5th June 2018. A grounding affidavit in support of the application which the proceedings encompasses was sworn herein by Nicholas Brennan on 5th June 2018, and on 22nd June 2018 a supplemental affidavit from Simon McCullough was also sworn herein on behalf of the Plaintiffs. By way of response, on 16th July 2018 a replying affidavit was sworn and filed by Mr Doherty both on his own behalf and also on behalf of his wife Mary Doherty. Mr Doherty is unrepresented, and attends before the Court today as a personal litigant. Mr Doherty at all times conducted himself today before the Court with courtesy and politeness.

[2] The matter which the Court is required to currently address concerns the identity of a McKenzie Friend whose assistance Mr Doherty has procured, and whom he has indicated he now wishes to engage in connection with the ultimate hearing of this matter, to give him support and assistance. The proposed McKenzie Friend is a certain Mr Ben Gilroy. The Plaintiffs object and take issue with the involvement of Mr Gilroy in the proceedings. The Court at this current hearing is accordingly required, with the consent of both parties, to consider and arrive at a determination in respect of the application put forward on the part of Mr Doherty namely to have Mr Gilroy permitted to act as his McKenzie Friend and that of his wife at the ultimate hearing of this matter.

[3] In its consideration and determination of this application, the Court has placed considerable reliance upon the contents of the Practice Note 3/2012 entitled McKenzie Friends [Civil and Family Courts]. This Practice Note applies inter alia to civil proceedings in the Chancery Division of the High Court of Justice in Northern Ireland, such as these current proceedings are. The 2012 Practice Note was issued as guidance by the Lord Chief Justice and was intended to remind both courts and personal litigants of the principles set out in the authorities and did not effect or seek to effect any change in the law. The Court has also had regard to the decision of the English Court of Appeal in Re O'Connell and Others [Children] Rev 2 [2005] EWCA Civ. 759.

[4] The Practice Note confirms that there is a presumption in favour of permitting a personal litigant to have reasonable assistance from a layperson, sometimes called a McKenzie Friend. Personal litigants assisted by McKenzie Friends remain litigants-in-person. McKenzie Friends have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation. McKenzie Friends are however permitted to provide moral support for personal litigants, to take notes with the permission of the judge, to help with case papers, and quietly to give advice on any aspect of the conduct of the case which is being heard.

[5] While personal litigants ordinarily have a right to receive reasonable assistance from McKenzie Friends, the Court does however retain to itself the power to refuse to permit the giving of such assistance, and the Practice Note clarifies that such a refusal may occur either upon an initial application, or at any time during the subsequent hearing. The Practice Note goes on to expressly provide that a personal litigant may be denied the assistance of a McKenzie Friend or a particular McKenzie Friend because its provision might undermine or has undermined the efficient administration of justice. Illustrations of some of the circumstances where this might arise, which are provided for in the Practice Note are where, for example the assistance is being provided for an improper purpose, or where the assistance is unreasonable in its nature or degree, or where the McKenzie Friend is subject to an order such as a civil proceedings order, or a civil restraint order, or has been declared to be a vexatious litigant by a court in Northern Ireland or in another jurisdiction of the United Kingdom. Others examples given are where, for example, the McKenzie Friend may be using the case to promote his or her own cause or

interests or those of some other person, group or organisation, and not the interests of the personal litigant, or where the McKenzie Friend is conducting the litigation himself whether directly or indirectly. The examples given in the Practice Note are expressly described as being non exhaustive.

[6] In the present case, the Plaintiffs oppose the involvement of Mr Ben Gilroy in the proceedings as McKenzie Friend for John and Mary Doherty or either of them by virtue of the conduct and behaviour on the part of Mr Gilroy which is referred to in the decision of Mr Justice Robert Haughton sitting in the Commercial Court that is part of the High Court in the Republic of Ireland in the case of Allied Irish Banks Plc –v- Seamus McQuaid, Ben Gilroy, Charles McGuinness and others [2016] No. 133 COM. The report of that decision ['the Allied Irish Banks plc litigation] was opened at length before the Court by Mr Keith Gibson retained herein on behalf of the Plaintiffs. Essentially, the submission advanced in connection with this current application is that by virtue of what appears to have been his recent conduct and behaviour in the Republic of Ireland in connection with the Allied Irish Banks plc litigation, Mr Gilroy has shown himself to be an individual whose involvement in these current proceedings is likely not to serve the best interests of justice, but on the contrary is likely to serve only to defeat or at least impede and undermine the efficient administration of justice. The O'Connor decision is a particularly recent decision, having been handed down by the Irish court as recently as 10th September 2018.

[7] It is not necessary for the Court here in this decision to set out in fulsome detail the full nature and extent of the apparent behaviour and conduct on the part of Mr Gilroy as referred to in the body of the report of the Commercial Court decision. Suffice it to say that Mr Gilroy's extended involvement in the Allied Irish Banks plc litigation, originally as a McKenzie Friend, ultimately resulted in him being found guilty of criminal contempt before the Irish court on two separate occasions, the first occasion leading to the imposition upon him of a sentence of 80 hours community service, or three months custody in default. In that the Court went on to order at a later stage that the community service must be fully completed by Mr Gilroy by 10th May 2019 at the latest, the community service order still remains live .The Irish court, at paragraph 101 of its decision was also heavily critical of what it described as '*repeatedly written abusive, disparaging and threatening correspondence*' as having emanated from Mr Gilroy which the Court stated it was satisfied had been intended to intimidate the plaintiff, its employees and legal advisors.

[8] In the Allied Irish Banks plc decision, the Irish court at paragraph 43 of its decision also made reference to a previous occasion in 2014 when in connection with his involvement in a different case Mr Gilroy had been found guilty of contempt and had been given a suspended sentence. This was recorded by McGovern J in an ex tempore decision of his delivered on 21st February 2018. That case appears to have been Mark Reynolds and Glen Cran –v- Eugene McDermott [2014] IEHC 219, and the finding of contempt was arrived at by Ryan J in April 2014.

[9] Furthermore, between paragraphs 68 and 69 of its decision in the O'Connor case, the Irish court referred to what it described as a non-exhaustive list of 12 other cases, including the Mark Reynolds and Glen Cran –v- Eugene McDermott case as referred to above, in which Mr Gilroy had had an involvement, and having done so made reference to Mr Gilroy's actions and behaviour in connection with those eases before the Irish courts

[10] Ultimately by means of its decision in the Allied Irish Banks plc case, the Irish Court joined Mr Gilroy as a party to those proceedings, and having done so then made a number of orders in respect of him, in particular inter alia:

(a) A permanent injunction restraining Mr Gilroy whether alone or in concert with any other person from advising, participating in, assisting or otherwise engaging in litigation in any court in the State in a representative capacity on behalf of others, whether in the capacity of 'McKenzie Friend' or otherwise; and

(b) An injunction restraining Mr Gilroy alone or in concert with any other person from advising, participating in, assisting or otherwise engaging in the… proceedings or any related litigation in a representative capacity…….whether in the capacity of 'McKenzie Friend' or otherwise.

[11] This Court understands that in the Republic of Ireland, the type of order which restricts a repeat litigant from issuing or pursuing further civil proceedings save and except with the leave of the Court is now generically referred to as an 'Isaac Wunder Order'. Whilst the order referred to at [a] above does not appear precisely to take the form of an Isaac Wunder order in the strict sense of the term, it is clear that the broad scope of the order does nevertheless significantly restrict Mr Gilroy from acting as a McKenzie Friend in any litigation in any court in the Republic of Ireland where Mr Gilroy purports to act in a representative capacity on behalf of others, whether in the capacity of a 'McKenzie Friend' or otherwise.

[12] Mr Gibson for the Plaintiffs made it clear from the outset that his clients were not remotely seeking to prevent or impede either Mr or Mrs Doherty from ultimately seeking to enlist the assistance of a McKenzie Friend to support them in the conduct of their defence to these current proceedings. Counsel for the Plaintiffs also made it clear that the only objection to be raised or relied upon by the Plaintiffs was as to the identity of the particular McKenzie Friend whom the Doherty family had indicated they intended to involve, namely Mr Ben Gilroy. The essence of the Plaintiffs' objection to Mr Gilroy was on the basis that, as it was contended, his conduct and behaviour in a range of other cases before a variety of different courts and judges in the Republic of Ireland, as demonstrated by the contents of the Allied Irish Banks plc decision, was such as to demonstrate that if Mr Gilroy were to become involved in the current proceedings as a McKenzie Friend on behalf of Mr and Mrs Doherty, such involvement might be unlikely to either serve or promote the interests of justice, and on the contrary would pose a significant risk that the efficient

administration of justice would be undermined. In support of this, Mr Gibson submitted that there was no material before the Court to indicate or suggest that if ultimately permitted by the Court to act on behalf of the Dohertys as their McKenzie Friend in the defence of these proceedings, Mr Gilroy would or would be likely to conduct himself or behave in a manner significantly different to that which he had adopted recently in connection with other litigation in the Republic of Ireland.

[13] Mr Doherty in reply informed the Court that Mr Gilroy's involvement in his case went back as much as 6 or 7 years, and was not of recent origin. It is certainly clear that Mr Gilroy did previously have an involvement in related proceedings initiated by Mr and Mrs Doherty, and in connection with which Mr Gilroy not only acted as a McKenzie Friend, but in which Mr Gilroy was somewhat exceptionally permitted to act as a lay advocate on behalf of the Dohertys. The history to these related proceedings is outlined in the decision of the Court of Appeal in John Doherty and Mary Doherty –v- James Perrett, Matthew Hunt and Rachel Fowle of Touchstone Lender Services [2015] NICA 52.

[14] The history of the matter appears to be that in December 2008, having charged a dwelling house purchased by them as a buy to let property with a mortgage, the Dohertys fell on hard financial times and defaulted on their mortgage repayments. The mortgagees of the property then purported in reliance upon conditions contained within their mortgage to appoint a number of individuals with an involvement in Touchstone Lender Services as receivers. By means of a Notice of Motion dated 9th January 2014, ['the 2014 proceedings'] Mr and Mrs Doherty applied to set aside the appointment of the receivers. A hearing in respect of that application appears to have been held before Deeny J, as he then was, and Mr Gilroy appears to have been permitted to act not only as a McKenzie Friend for Mr and Mrs Doherty in connection with that application but also to appear as a lay advocate on their behalf. The application however was unsuccessful before Deeny J at first instance. The matter was then appealed by Mr and Mrs Doherty to the Court of Appeal, and whilst the Court of Appeal rejected both of the original grounds of appeal relied upon, it nevertheless remitted to the Chancery Court a third issue raised in the skeleton argument namely as to whether the purported appointer of the receiver was duly authorised to make that appointment. This issue appears to have come on for hearing before Deeny J again on 13th November 2014, and on that date the Court made an order dismissing the application, and awarding costs in favour of the receivers. Thereafter, by means of a further ex parte Order of the Court dated 25th July 2016 the previous Order dated 13th November 2014 was re-affirmed, and the latter Order confirmed that the issue as to whether the purported appointment of the receiver was duly authorised was resolved in favour of the receivers. Subsequently, the ex parte order dated 25th July 2016 was itself set aside by the Court, and the issue of appointing receivers as remitted by the Court of Appeal was again listed for hearing on 9th March 2017. The Court was informed that on that date Mr Doherty did not attend, and the matter was further adjourned sine die. Mr Doherty informed the Court that he did not receive notification of the hearing date of 9th March 2017.

[15] To date, the issue of the due or otherwise appointment of the receivers as initiated by Mr Doherty on foot of the Notice of Motion dated 9th January 2014 does not appear to have been further pursued by Mr Doherty, and there has to date been no determination by the Court in respect of that issue.

[16] In fairness to Mr Ben Gilroy, whenever he did come to conducted himself as a lay advocate before the Chancery Court and before the Court of Appeal back in 2014 and in 2015, his conduct and behaviour does not appear to have given rise to any cause for concern. Indeed, Mr Gilroy was apparently complimented on his approach to the matter both by the Chancery Judge, and by Weir J in the Court of Appeal at paragraph 10 of the decision, in the following terms:

> *'…….. Mr Doherty, being as we have said uneducated, was given permission to have a Mr Ben Gilroy appear as an advocate on his behalf while it was made clear that such was not to be regarded as a precedent. In his judgment Deeny J acknowledged Mr Gilroy's articulate and helpful contribution. Before us Mr Gilroy was again, exceptionally, given permission to act as advocate for Mr Doherty and again his submissions were crisply presented and to the point.*

[17] As against this however, as pointed out to the Court by Mr Gibson, such commendable behaviour and conduct on the part of Mr Gilroy dates from 2014 and 2015. Whilst a very limited amount of the involvement of Mr Gilroy as referred to by the Irish court in the Allied Irish Banks plc litigation dates from that era, the vast bulk of his less than satisfactory conduct and behaviour before the Irish courts dates from more recent indeed considerably more recent times, and on the basis of the reported decision of the Irish court such unsatisfactory conduct and behaviour before that court has persisted up to as recently as 10th September 2018 being the date upon which that decision was handed down.

[18] Perhaps regrettably, Mr Gilroy did not attend in person before the Court in connection with the hearing of this application. On the date of the hearing before me, Mr Doherty was instead accompanied by a different individual who gave him quiet assistance and support as his McKenzie Friend, and this individual certainly at all times acted entirely appropriately and courteously in so doing. Had Mr Gilroy however been in attendance, the Court would have permitted him to have acted as Mr Doherty's McKenzie Friend at least for the purpose of this application. That at least would have enabled the Court to observe how Mr Gilroy would have conducted himself before the Court. Had Mr Gilroy been in actual attendance, the Court could also have been able to seek or obtain personal assurances from him as to the need for his conduct and behaviour before the Court to be appropriate at all times in the event that he might be permitted to act, or to warn Mr Gilroy about the unacceptability and potential consequences of any unsatisfactory conduct or behaviour on his part. That of course would not have been determinative either, but depending upon what might have been said and Mr Gilroy's demeanour before the

Court generally, it could conceivably have strengthened this application. However, due to Mr Gilroy's non-attendance, that opportunity was certainly not available to the Court.

[19] Whilst Mr Gilroy appears to have been both willing and able on certainly two occasions to conduct himself appropriately before the courts of this jurisdiction back in 2014 and 2015, there is however material before the Court as outlined above to indicate that in more recent times his conduct and behaviour in a series of cases before the courts of the Republic of Ireland has been of a wholly different nature, and would appear to have been such as to tend to undermine rather than promote the best interests of justice and its efficient administration.

[20] The fact that the reprehensible behaviour and conduct on the part of Mr Gilroy as complained of appears to have taken place not in this jurisdiction but in the neighbouring jurisdiction of the Republic of Ireland is not in the assessment of the Court a matter of any significant consequence. There is no reason or basis for this Court to conclude that Mr Gilroy would be likely to habitually conduct himself and behave in one way before the courts of this jurisdiction, and yet somehow adopt an entirely different approach whenever attending before the courts of the common law jurisdiction situate immediately adjacent to this one.

[21] By reason of the matters set out above, the Court ultimately declines to afford to Mr and Mrs Doherty leave for them to retain Mr Ben Gilroy as their McKenzie Friend in connection with the defence of these current proceedings.

[22] Mr and Mrs Doherty do however retain the right to seek and obtain the assistance of a different and suitable McKenzie Friend to assist and support them in their defence of this application. Looking to the future, it would be helpful if in connection with any other potential appointee whose name they might wish to put forward if they were in due course to submit his or her name in advance to the Court indicating the identity of the proposed McKenzie Friend. Moreover, it would be helpful if the proposed McKenzie Friend could produce a short curriculum vitae or other statement setting out their relevant experience, confirming that he or she has no personal interest in the case, and confirming also that they understand the nature of the role of a McKenzie Friend.