Neutral Citation No: [2023] NICh 1	*Ref:* **HUM12029**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **11/01/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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IN THE MATTER OF THE ESTATE OF TERENCE BENEDICT McQUAID (DECEASED)

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Between:

CONRAD McQUAID

Plaintiff

and

BRIEGE McQUAID AND PATRICK MALLON AS EXECUTORS OF THE ESTATE OF TERENCE BENEDICT McQUAID DECEASED

Defendants

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The plaintiff appeared in person
Patrick Lyttle KC and Rory McNamee (instructed by Mallon & Mallon) for the defendants

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HUMPHREYS J

Introduction

[1] I gave judgment on 23 November 2022 dismissing the plaintiff's claims in relation to the validity of the Will executed by the deceased on 17 July 2018 and admitting it to proof in solemn form.

[2] I invited submissions from the parties on two outstanding issues, namely:

(i) Costs; and

(ii) The plaintiff's outstanding claim under the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order 1979 ("the 1979 Order").

Background

[3] Having heard the evidence of both expert witnesses and witnesses of fact, the court found that the deceased had the requisite capacity to make the disputed Will and that there was not a shred of evidence to support the claim of undue influence.

[4] The chronology of events reveals that Mr Mallon, solicitor, wrote to each of the deceased's children in October 2018 outlining the terms of their late father's Will. The plaintiff raised concerns in relation to testamentary capacity in March and May 2019 which were answered by Mr Mallon. The plaintiff entered a caveat on 6 November 2019 which was warned by the defendants some two weeks later. On 6 February 2020 a summons for directions was issued by the executors, grounded on an affidavit from Mr Mallon which exhibited a copy of his attendance note of 17 July 2018. Ultimately proceedings were issued on 6 March 2020 following the making of an unless order by the Master.

[5] The statement of claim was not served in time and the Master made a further unless order in this regard. Due to the plaintiff's failure to set the matter down, the defendants were compelled to do so. The case was first fixed for hearing on 10 January 2022 but the plaintiff's solicitors came off record on 5 January, the case was taken out of the list and the plaintiff ordered to pay the costs thrown away.

Costs – The principles

[6] I gratefully adopt the analysis of the relevant principles set out by McBride J at paragraph [3] of *McGarry v Murphy* [2021] NICh 21. Costs in probate actions are in the discretion of the court, with the general rule being that costs should follow the event. This is subject to two important exceptions:

(i) If the testator or persons interested have been the cause of the litigation, costs may be ordered to come out of the estate; and

(ii) Where the circumstances reasonably lead to an investigation of the matter, which is a merits- based assessment carried out by the trial judge.

[7] The learned judge also referred to a non-exhaustive list of other factors which may be taken into account by the judge on the issue of costs, including partial success, offers of settlement and the impact of *Larke -v- Nugus* correspondence.

Consideration

[8] The plaintiff makes the following points in support of his claim that no order as to costs should be made between the parties:

(i) No response was received to *Larke v Nugus* correspondence sent by the plaintiff's former solicitors;

(ii) There are ongoing proceedings under the 1979 Order which could only be adjudicated upon once the issue of capacity had been addressed;

(iii) Separate proceedings are being issued regarding a trust allegedly settled by the deceased;

(iv) Mr Mallon intermeddled in the estate by removing a bingo licence from the estate and by accepting rental payments from Mr McAteer; and

(v) Further, Mr Mallon has denied that a trust is in existence when he previously accepted it was, and these issues caused the plaintiff to question the credibility of Mr Mallon on the issue of capacity.

[9] In relation to (i), it is apparent that no formal *Larke v Nugus* correspondence was ever sent, but Mr Mallon did respond to all pre action letters and the plaintiff was in receipt of the attendance note prior to the issue of proceedings. I therefore find that this point does not assist the plaintiff.

[10] The fact that there may be other existing or contemplated proceedings as referenced at (ii) and (iii) does not speak to the issue of the liability for costs in respect of proceedings which related to capacity and undue influence. There was no requirement whatsoever for these matters to be litigated in advance of other claims. The plaintiff could simply have withdrawn his caveat, allowed the Will to be admitted to probate and pursued whichever other matters he saw fit. Rather he chose to compel the defendants to prove the Will in solemn form and thereby put the estate to considerable expense.

[11] In my judgment, I found that Mr Mallon complied fully with his professional duties and rejected any claim that he had acted inappropriately. It is noteworthy that none of the issues at (iv) and (v) were put to Mr Mallon in an attempt to impeach his credibility. I therefore find that these points cannot benefit the plaintiff.

[12] There is nothing on the facts of the instant case which would give rise to the application of the first probate exception. Having heard the evidence, I found that the claims advanced by the plaintiff were wholly without merit. In the case of capacity, they lacked any evidential foundation and no evidence was adduced at all on the question of undue influence.

[13] I therefore find that there is nothing exceptional about this case. I exercise my discretion accordingly and make an order that the plaintiff pay the defendants' costs of the proceedings relating to capacity and undue influence.

[14] The next question is whether the plaintiff should be ordered to pay these costs on the standard or indemnity basis. The defendants contend for indemnity costs. The principles behind the making of such an order were set out by Weatherup J in *Craven v Giambrone* [2013] NIQB 61, including the following:

(i) The court's discretion is wide but there must be some conduct or circumstance taking it outside the norm;

(ii) The conduct must be unreasonable to a high degree; and

(iii) The pursuit of a weak claim will not usually on its own justify an order for indemnity costs but the pursuit of a hopeless claim or a claim which the party pursuing it should have known was hopeless may well lead to such an order.

[15] In light of the medical notes and records, and the report of Dr English, I am satisfied that this was a weak case but not a hopeless one. Accordingly, I am not persuaded that I ought to diverge from the general practice and I order that the plaintiff pay the defendants' costs on the standard basis. The defendants are entitled to their costs of the action on the indemnity basis from the estate of the deceased.

The 1979 Order Claim

[16] In his writ of summons, the plaintiff has included a claim for relief under the 1979 Order alongside the claims in respect of capacity and undue influence. The defendants say this claim ought to be struck out as being an abuse of process under Order 18 rule 19(1)(d) of the Rules of the Court of Judicature (NI) 1980 ("the Rules").

[17] Order 5 rule 3(1) of the Rules states:

> "Proceedings by which an application is to be made to the High Court or a judge thereof under any statutory provision must be begun by originating summons except whereby these Rules or by or under any statutory provision the application in question is expressly required or authorised to be made by some other means."

[18] The defendants say that it is not open to the plaintiff to begin proceedings under the 1979 Order by way of a writ of summons in light of the mandatory terms of Order 5 rule 3(1).

[19] Order 2 rule 1 of the Rules provides:

> "(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply

> with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.
>
> (3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed."

[20] All the provisions of the Rules must be read in accordance with the overriding objective enshrined in Order 1 rule 1A whereby the courts should deal with cases fairly and expeditiously and in a manner which saves time and expense.

[21] The question for the court to determine therefore is whether Order 2 rule 1(3) should be invoked to allow the 1979 Order proceedings to continue despite the breach of the requirement of Order 5 rule 3(1).

[22] In *Murray v O'Reilly Stewart* (unreported, 14.10.22), McBride J considered a strike out application in respect of unfair prejudice proceedings pursuant to section 994 of the Companies Act 2006 which had been commenced by writ of summons rather than petition as mandated by the primary legislation. The learned judge held that the plaintiff could not rely upon Order 2 rule 1(3) since it relates only to the requirements of the Rules, not those imposed by primary legislation such as the Companies Act. In those circumstances, the unfair prejudice claim was fatally flawed.

[23] In *Townsley v McCay Holdings* [2001] NIJB 409, Girvan J addressed an analogous situation where proceedings had been issued under the Companies (NI) Order 1986 using the originating summons procedure when they ought, by virtue of Order 102 rule 3(c) of the Rules, to have been commenced by originating motion. The learned judge held that the courts should be reluctant to set aside proceedings on the grounds that they were not properly constituted if they can be continued in a satisfactory form. He ordered that the application be treated as if it had been brought by originating motion.

[24] In light of the width of the court's powers under Order 2 rule 1, and the requirements of the overriding objective, I decline to strike out the plaintiff's claim under the 1979 Order as an abuse of process. I will treat the application for relief under this statute as having been commenced by originating summons and will give further directions towards the determination of this issue.

[25] For the avoidance of doubt, I order that the plaintiff pay the defendants' costs of this application to be taxed, again on the standard basis.