Neutral Citation No: [2024] NICA 40	*Ref:* **McC12468**
	ICOS No: **21/100046/02&03**
Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **19/03/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

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DOROTHY MOFFATT

v

ANGELA HAMILL

_____

Before: McCloskey LJ and Horner LJ

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The Appellant appeared as Litigant in Person
Mr Mark McEwen (instructed by Holmes & Moffitt Solicitors) for the Respondent

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McCLOSKEY LJ (*delivering the judgment of the court*)

Introduction

[1] The seemingly interminable litigation activities of Dorothy Moffatt (the "appellant") continue. The latest episode in this saga formally requires this court to determine an application for security for costs against the appellant. However, as will become apparent, there is a more fundamental issue to be confronted.

Litigation History

[2] It is neither necessary for the purpose of determining this discrete application nor an appropriate investment of finite judicial resources to undertake a recitation of the litigation history in extenso. The briefest outline will suffice.

[3] The appellant has been involved in litigation since 2011. The materials which the parties have placed before this court include (a) six judgments of the Chancery Division of the High Court and the Court of Appeal and (b) multiple orders of both courts. Without attempting an exhaustive inventory and bearing in mind that there have been occasions when the appellant has enjoyed a modest measure of success in her litigation activities, whether as plaintiff or defendant, we observe only that costs orders have been made against the appellant on several occasions. In particular, and inexhaustively:

(a) By order of the Court of Appeal ("COA") dated 6 October 2015.

(b) By order of the Chancery Court dated 22 December 2016.

(c) By further order of the Chancery Court dated 6 April 2017.

(d) By further order of the Chancery Court dated 30 April 2021.

(e) By order of the COA dated 10 February 2023.

(f) Most recently, by order of the Chancery Court dated 10 February 2023.

It is common case that the appellant has discharged none of these orders (see infra).

[4] In essence, the appellant has been litigating for some thirteen years in a protracted inheritance dispute relating to the estate of her deceased father. The other parties have included the representatives of the estates of the deceased and the appellant's deceased mother, Angela Hamill (a solicitor), the Woodland Trust, Outdoor Recreation NI and R Robinson and Sons Limited. Most of these parties are recorded in the earlier decision of this court at [2023] NICA 6 [MCC 12045].

This Appeal and Application

[5] By her Notice of Appeal dated 13 October 2023 the appellant evidently seeks to challenge the Orders of Huddleston J in the Chancery Court dated 9 October 2023 whereby her applications were refused on the ground that they were an illegitimate attempt at re-litigation (see further para [20] infra). On behalf of the sole respondent, Angela Hamill (the solicitor identified above), an application requiring the appellant to make security for the costs of this appeal has materialised, by summons dated 30 November 2023. The first ensuing case management measure of this court entailed in particular a direction that this application be listed for hearing and determination on 17 January 2024. The court conducted a further case management review, inter-partes, on 15 December 2023, generating a further order affirming this listing arrangement and making certain other directions.

[6] The hearing of the respondent's action proceeded, as scheduled, on 17 January 2024. The appellant was self-representing. The respondent was represented by solicitor and junior counsel.

[7] This hearing was characterised by the now familiar spectacle of repeated interruptions and unremitting refusals to co-operate with the court by the appellant. In this respect it is appropriate to recall para [10] of the ex tempore judgment of this court delivered on 26 January 2023:

> "[10] This court attempted to remind the appellant of the purpose for which the case had been listed namely, as recorded unambiguously in the earlier case management

> order, to "deal with the extension of time" issue and "the legal grounds for appeal." During the exchanges which followed the appellant treated the court with egregious discourtesy. In particular, when the court attempted to articulate its ruling and further directions the appellant repeatedly interrupted, ignoring the court's numerous exhortations to conduct herself with the necessary decorum. During this phase of the hearing two persons with security responsibilities, unprompted by the judicial panel, considered it necessary to physically approach the appellant three times. Furthermore, the court found it necessary to remind the appellant that it would continue and complete its ruling in her absence if necessary. All in all, a lamentable spectacle."

The passage quoted may be extended fully to the hearing on 17 January 2024, with the minor modification that there was just one member of security personnel in attendance, a person who on his own initiative, reacting to the appellant's incessant in civil, obstructive and discourteous behaviour, saw fit to intervene but was dissuaded from doing so by a gesture from the bench.

[8] This court, in the exercise of its case management discretion, made equal allocations of time to both parties for the purpose of oral submissions. The appellant was permitted to exceed her time allocation and presented her submissions without any intervention by the judicial panel.

[9] At an early stage of the submissions of counsel for the respondent, the appellant began to interrupt. Repeated exhortations from both members of the judicial panel were to no avail. The panel, having made repeatedly clear that it would terminate the hearing prematurely if considered necessary, was obliged to follow this course. Having done so, the panel determined to afford the appellant one final opportunity.

[10] The hearing recommenced accordingly. The appellant's unacceptable behaviour continued unabated. Again, exhortations from both members of the panel were to no avail. Before the completion of submissions by the respondent's counsel the appellant abruptly announced that she was leaving the court room and proceeded to do so. The panel, following a further adjournment, satisfied itself that the appellant had been given every opportunity to participate in the hearing and had absented herself by choice and without justification. The panel addressed a series of questions to respondent's counsel and, taking into account the responses made, found it necessary to compile a further case management order, dated 17 January 2024, which is reproduced at Appendix 1 hereto.

[11] The further materials directed by the court to be provided by the respondent were received. As appears from the order, the appellant was afforded an opportunity to respond with such further representations as she desired. Nothing of any relevance materialised, although the customary deluge of emails from the appellant continued.

[12] Next, by its further order dated 6 February 2024 the court required the appellant to show cause in writing, within 14 days, why her appeal should not be dismissed on the ground that it is a misuse of the process of the court having regard to the terms of the two orders under appeal. Further emails received from the appellant confirm that this order was served on her. However, she has made no substantive response to it. This further order is annexed at Appendix 2.

Legal Framework

[13] Order 59, rule 10(5) RCJ provides:

> "The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."

It is well established practice that the impecuniosity of an appellant may constitute "special circumstances." This is noted in para [59/10/33] of The Supreme Court Practice (Vol 1) and articulated by Carswell LCJ in *Re SOS (NI) Limited* [2002] NIJB 252 at para [8] in these terms:

> "RSC (NI) Order 59, rule 10(5), in accordance with the authority conferred by section 38(1)(h) of the Judicature (Northern Ireland) Act 1978, provides:
>
> > 'The Court of Appeal may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just.'
>
> It has long been the practice of the Court of Appeal to order that security for costs be furnished if the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal: see, eg, *Hall v Snowden, Hubbard & Co* [1899] 1 QB 593 at 594, per AL Smith LJ. The jurisdiction is in this respect wider than that exercised under Order 23, when impecuniosity alone will not generally suffice to ground an order for security (except in the case of a limited company, which is governed by Article 674 of the Companies (Northern Ireland) Order 1986)."

[14] In *McAteer v Guram* [2010] NICA 16 Girvan LJ, having cited the immediately preceding passage, continued at para [6]:

> "The court will consider all the relevant circumstances including the merits of the appeal or the lack of them, the timing of the application for security, the balance of hardship (eg the appellant cannot afford security and would be barred from an appeal even though the outcome of the appeal will make or destroy him and the extent to which the appellant's impecuniosity is the result of the

> respondent's alleged wrongdoing. The principles which govern the award of security for costs at the Court of Appeal stage are wider and stricter than those applicable in relation to security for costs in a first instance trial. The court takes into account the fact that the appellant has already had a full trial in the court below and it is prima facie an injustice to a respondent to allow an appeal to the Court of Appeal to proceed without security for costs where the respondent will be unable to enforce against the appellant any order for costs. The court however retains a discretion. Obviously if the appellant shows real grounds for questioning the correctness of the lower court's decision it may well be unjust to impose a security for costs which may have the consequence of depriving him of a real prospect of a successful appeal."

The governing principles are unchanged and are routinely applied by this court.

[15] The first issue to be addressed is that of the appellant's ability to pay the respondent's costs in the event that her appeal fails. In considering this issue we bear in mind what was stated by Chadwick LJ in *Perotti v Watson* [1998] Lexis citation 2956:

> "It is for the applicant for security to show impecuniosity; but where the evidence raises an inference of inability to pay it is for the appellant to displace that inference … if the appellant has the means to pay the costs nothing is easier than for him to show that that is so."

We adopt this approach without qualification.

[16] The following considerations are material. First, there is an uncontroverted averment in the affidavit of the respondent's solicitor grounding this application that at a case management listing of this appeal on 15 November 2023 the appellant stated to the court that "… she did not have a penny to her name." Second, there is a further uncontroverted averment that the appellant has discharged none of the various costs orders against her, including those which have given rise to taxation, noted in para [3] above. Third, while it would appear that the appellant was previously the owner of the house in which she continues to reside, there is a further uncontroverted averment that she has disposed of her legal interest in this asset to her children. Probing this issue, this court directed that the relevant instrument be provided. In response, the respondent's solicitors have furnished a copy of an assignment dated 31 October 2021 whereby the appellant assigned the entirety of her interest in the premises to three named persons, the appellant being identified as "their mother."

[17] On the other side of the notional scales there is nothing. In particular, the appellant has provided no evidence of income or assets. All of the assembled evidence points inexorably to the conclusion that the appellant is a person of insufficient means to satisfy

the respondent's costs in the event of this appeal being dismissed and that insofar as she previously had any assets of substance she has transferred her interest to others.

[18] It follows that there are ample grounds for making the order sought. Bearing in mind that the power to make the order is discretionary, the court has sought to ascertain whether there are any facts or factors of a counter-balancing nature. Having done our best to construe the written materials provided by the appellant and her oral presentation at the hearing we have been unable to identify anything of this nature. Accordingly, we propose to exercise our discretion by acceding to the application.

[19] We have considered carefully the draft bill of costs which is in the amount of £7446 inclusive of the professional fees of solicitor and counsel, outlays and VAT. Bearing in mind the appellant's unrepresented status and the absence of any submission from her relating to this computation we have subjected it to appropriate scrutiny. While this court does not exercise a taxation function, we are nonetheless satisfied that the draft bill of costs is on its face reasonable. Having regard to what we consider to be the normal practice, in the exercise of our discretion we consider that the amount to be paid should be approximately one third of the aforementioned figure, namely £2500. Thus, the respondent's application for a security for costs order succeeds, but this is subject to what follows in the remainder of this judgment.

Recusal

[20] Prior to the hearing on 17 January 2024 the appellant, in an electronic communication to the court office, expressed herself in terms which this court considered to constitute an application that the author of this judgment recuse himself. At the outset of the hearing the court provided a reasoned ruling whereby it refused this application on the basis that it was manifestly devoid of merit. While this ruling will be available for transcription if required, regrettably this would require some judicial editing in view of the appellant's loud interruptions while the ruling was being provided.

Abuse of Process?

[21] This court will, of its own motion, consider whether this appeal is an abuse of process on the ground that it represents an attempt to appeal against the order of McBride J dismissing the appellant's applications in ICOS nos 21/100046 and 21/100046/01 [NCB 11863-16/06/2022], which were dismissed, in circumstances where:

(i) this court, differently constituted, by its judgment dated 26 January 2023 and consequential order dismissed the appellant's application for an order extending time to appeal against the aforementioned order of McBride J; and

(ii) the appeal to this court will be interpreted, generously to the appellant, as a purported challenge to the orders of Huddleston J in the Chancery Division, each dated 9 October 2023, in cases 21/100046/02 and 21/100046/03 which are in the following terms:

> "UPON THE APPLICATION of the Plaintiff by summons filed 15 September 2023,
>
> AND UPON READING the documents recorded on the Court file as having been read,
>
> AND UPON HEARING from the Plaintiff as a litigant in person and from Counsel for the Defendant,
>
> AND the court being satisfied that the issues raised by the Plaintiff having already been determined by a court of competent jurisdiction and/or the Plaintiff having failed to demonstrate locus standi in relation to the matter the subject of the summons
>
> ORDERED that the said application filed 15 September 2023 be dismissed, with costs awarded to the Defendant."

[22] Huddleston J, in substance, dismissed the appellant's applications as a misuse of the process of the court. Given the foregoing, his orders are unimpeachable. The purported appeals to this court are simply an extension of the same misuse of process. They must be dismissed accordingly. While the court has acceded to the security for costs application, this is rendered moot by the foregoing conclusion and ensuing order.

[23] Finally, the appellant's two outstanding applications for discovery of documents, in addition to being totally misconceived, are swallowed up by the order noted in the immediately preceding paragraph and for the avoidance of any doubt are dismissed.

[24] The issue of the costs of this appeal and application shall be reserved in the following terms. If the appellant wishes to contend that an order requiring her to pay the respondent's costs of this application should not be made, she shall provide her representations in writing within 7 days of the date of the order.

Addendum **[21/05/24]**

The Appellant has made no further submissions. She will pay the respondent's costs, as indicated.

APPENDIX 1

HM COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Wednesday the 17th day of January 2024

THE RIGHT HONOURABLE LORD JUSTICE MCCLOSKEY

THE RIGHT HONOURABLE LORD JUSTICE HORNER

Between

DOROTHY MOFFAT

Plaintiff/Appellant

and

ANGELA HAMILL

Defendant/Respondent

UPON MOTION pursuant to notice dated the 30th day of November 2023 made to this Court this day by Counsel on behalf of the defendant/respondent for an order pursuant to Order 59 Rule 10 (5) of the Rules of the Court of Judicature (Northern Ireland) 1980 that the plaintiff/appellant do give security for the costs of this appeal to this Court from the Orders of the Honourable Mr Justice Huddleston dated 9 October 2023 in respect of cases 21/100046/02 and 21/100046/03,

AND UPON READING all pleadings, affidavits, written submissions and representations, electronic communications with the court and documents of record,

AND UPON hearing the plaintiff/appellant, self-representing, and Counsel on behalf of the defendant/respondent,

THE COURT:

1. REFUSES the plaintiff/appellant's application that Lord Justice McCloskey shall recuse himself from hearing this application,
2. ORDERS that the defendant/respondent shall lodge a booklet of documents with the Court and the plaintiff/appellant by 4.00pm on 19 January 2024 to include:-
   a. all previous costs orders in proceedings involving the plaintiff/appellant;
   b. the judgment of Madam Justice McBride in Chancery Division 14/036054;
   c. a copy of the conveyance of the subject residential property by the plaintiff/appellant into the names of her children.
3. ORDERS that the plaintiff/appellant shall reply in writing on or before 26 January 2024,
4. ORDERS that the matter do stand adjourned pending further Order of the Court.

Ian McWilliams
Proper Officer

Time Occupied: 17 January 2024 1 hour 45 mins

APPENDIX 2

HM COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF NORTHERN IRELAND, CHANCERY DIVISION

Tuesday the 6th day of February 2024

THE RIGHT HONOURABLE LORD JUSTICE MCCLOSKEY

THE RIGHT HONOURABLE LORD JUSTICE HORNER

Between

DOROTHY MOFFAT

Plaintiff/Appellant

and

ANGELA HAMILL

Defendant/Respondent

UPON the above matter being considered this day in chambers,

THE COURT ORDERS that the Appellant shall show cause in writing within 14 days of the date hereof why her appeal should not be dismissed on the ground that it is a misuse of the process of the court having regard to the terms of the two Orders under appeal.

William Ferris

Proper Officer