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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION (BANKRUPTCY)

2015/113274

BETWEEN:

DESMOND JOHN DOHERTY

Applicant/Appellant;

-and-

BANK OF IRELAND (UK) PLC

Respondent.

BURGESS J

Structure

Introduction [1] - [4];

Financial Services Act 2000 [5] - [19]

Civil Jurisdiction & Judgments Act 1982 [20] - [24]

Rules of the Court of Judicature (Northern Ireland) 1980 [25] - [26]

Discussion [27] - [34]

Conclusion [35] - [36]

INTRODUCTION

[1] This is an appeal against the decision of the Master dated 22 February 2017 in which she refused to set aside a statutory demand in the sum of £427,524.30 served by the Bank of Ireland (UK) Plc (“the Bank”) on Mr Desmond John Doherty (“Mr Doherty”). The amount claimed is made up of the sum of £612,524.30, being monies due and owing by Mr Doherty to the Bank on foot of various accounts he

held with the Bank, less the value of security held by the Bank. The relevant security was property situated at 7 Clarendon Street, Londonderry, from which Mr Doherty conducted his legal practice.

[2] Prior to my hearing this appeal I indicated that I knew Mr Doherty some decades ago and that I banked with the Bank. Whilst the original hearing involved determination of evidence relating to discussions between Mr Doherty and the Bank, which could have involved the determination of the credibility of the parties, that aspect of the matter is not pursued in this appeal. Accordingly the issue with which this court has to deal is a legal matter, and in those circumstances the parties agreed that I could hear the appeal, and I am satisfied that my position is such that I do not require to recuse myself.

[3] While issues arose regarding whether the debt was due or not, that ground of dispute is no longer argued. There is therefore no dispute that Mr Doherty received the borrowings; that on 9 September 2014 the Bank demanded repayment of the loans; that Mr Doherty has not repaid those borrowings; and as such he is in breach of that demand having failed to make repayment.

[4] What is now in dispute is whether the Bank is the correct entity to present the Statutory Demand. This point arises from the Business Banking Transfer Scheme ("the Scheme") carried out in or about November 2010 between the Governor and Company of the Bank of Ireland ("Gov Co") and the Bank, the latter being a wholly owned subsidiary of the former, incorporated in England. The purpose and effect of the Scheme was to transfer the retail and banking business conducted from various establishments in the United Kingdom from Gov Co to the Bank.

FINANCIAL SERVICES AND MARKETS ACT 2000

[5] Section 107 of the Financial Services and Markets Act ("the Act") makes express provision for such a scheme to be sanctioned by the court. Section 111 sets out the conditions which must be satisfied before a court makes an order sanctioning a scheme.

[6] There is no dispute that Gov Co and the Bank jointly made an application to the court for sanction under section 107 of the Act. The relevant provisions under the Act are:

- (a) Section 107 is headed "Application for order sanctioning transfer scheme" and provides:

"107.-(1) An application may be made to the court for an order sanctioning (my emphasis) ... a banking business transfer scheme ...:

- (2) An application may be made by –
 - (a) the transferor concerned;
 - (b) the transferee; or
 - (c) both.
- (3) The application must be made –
 - (a) if the transferor concerned and the transferee are registered or have their head offices in the same jurisdiction, to the court in that jurisdiction;
 - (b) if the transferor concerned and the transferee are registered or have their head offices in different jurisdiction, to the court in either jurisdiction;
 - (c) if the transferee is not registered in the United Kingdom and does not have his head office there, to the court which has jurisdiction in relation to the transferor concerned.
- (4) ‘Court’ means –
 - (a) the High Court; or
 - (b) in Scotland, the Court of Session.”

[7] Section 111 is headed “Sanction of the Court for Business Transfer Schemes”. It provides:

“111(1) This section sets out the conditions which must be satisfied before the court may make an order under this section sanctioning ... a banking business transfer scheme.

- (2) The court must be satisfied that –
 - (a) in the case of a banking business transfer scheme the appropriate certificates have been obtained (as to which see Parts I and II of Schedule 12);

- (b) the transferee has the authorisation required (if any) to enable the business, or part, which is to be transferred to be carried on in the place to which it is to be transferred (or will have it before the scheme takes effect).

(3) The court must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme.”

[8] Section 112 is headed “Effective Order Sanctioning Business Transfer Scheme”. This provides:

“112(1) If the court makes an order under section 111(1), it may by that or any subsequent order make such provision (if any) as it thinks fit –

- (a) for the transfer to the transferee of the whole or any part of the undertaking concerned and of any property or liabilities of the authorised person concerned;
- (b) for the allotment or appropriation by the transferee of any shares, debentures, policies or other similar interests in the transferee which under the scheme are to be allotted or appropriated to or for any other person;
- (c) for the continuation by (or against) the transferee of any pending legal proceedings by (or against) the transferor concerned;
- (d) with respect to such incidental, consequential and supplementary matters as are, in its opinion, necessary to secure that the scheme is fully and effectively carried out.

(2) An order under subsection (1)(a) may –

- (a) transfer property or liabilities whether or not the transferor concerned otherwise has the capacity to effect the transfer in question;
- (b) make provision in relation to property which was held by the transferor concerned as trustee;
- (c) make provision as to future or contingent rights or liabilities of the transferor concerned, including provision as to the construction of instruments (including wills) under which such rights or liabilities may arise;
- (d) make provision as to the consequences of the transfer in relation to any occupational pension scheme (within the meaning of section 150(5) of the Finance Act 2004) operated by or on behalf of the transferor concerned.

(2A) Subsection (2)(a) is to be taken to include power to make provision in an order –

- (a) For the transfer of property or liabilities which would not otherwise be capable of being transferred or assigned;
- (b) For a transfer of property or liabilities to take effect as if there were –
 - (i) No such requirement to obtain a person's consent or concurrence, and
 - (ii) No such contravention, liability or interference with any interest or right,

as there would otherwise be (in the case of a transfer apart from this section) by reason of any provision falling within sub-section (2B).

(2B) A provision falls within this subsection to the extent that it has effect (whether under an enactment or agreement or otherwise) in relation to the terms on which the transferor concerned is entitled to the property or subject to the liabilities in question.

(2C) Nothing in sub-section (2A) or (2B) is to be read as limiting the scope of sub-section (1).

(3) If an order under subsection (1) makes provision for the transfer of property or liabilities –

(a) the property is transferred to and vests in; and

(b) the liabilities are transferred to and become liabilities of,

the transferee as a result of the order.

(4) But if any property or liability included in the order is governed by the law of any country or territory outside the United Kingdom, the order may require the transferor concerned, if the transferee so requires, to take all necessary steps for securing that the transfer to the transferee of the property or liability is fully effective under the law of that country or territory.

(5) Property transferred as the result of an order under sub-section (1) may, if the court so directs, vest in the transferee free from any charge which is (as a result of the scheme) to cease to have effect.

(6) An order under sub-section (1) which makes provision for the transfer of property is to be treated as an instrument of transfer for the purposes of section 770(1) of the Companies Act 2006 and any other enactment requiring the delivery of an instrument of transfer for the registration of property.

...

(8) If the court makes an order under section 111(1) in relation to an insurance business transfer scheme, it may by that or any subsequent order make such provision (if any) as it thinks fit –

- (a) for dealing with the interests of any person who, within such time and in such manner as the court may direct, objects to the scheme;
- (b) for the dissolution, without winding up, of the authorised person concerned;
- (c) for the reduction, on such terms and subject to such conditions (if any) as it thinks fit, of the benefits payable under –
 - (i) any description of policy, or
 - (ii) policies generally,

entered into by the transferor concerned and transferred as a result of the scheme.

...

(12) 'Property' includes property, rights and powers of any description.

(13) 'Liabilities' includes duties.

(14) 'Shares' and 'debentures' have the same meaning as in the Companies Acts (see sections 540 and 738 of the Companies Act 2006).

(15) 'Charge' includes a mortgage (or, in Scotland, a security over property)."

[9] Section 112(10) requires the transferee of a banking business transfer scheme which has been sanctioned by the court, to deposit two office copies of the Order made under sub-section (1) with the appropriate regulator within 10 days of the Order – with power on the part of the regulator under sub-section (11) to extend that period.

[10] In or about 2010, for regulatory and business reasons, the Bank of Ireland decided to carry out a scheme, whereby all of the Bank of Ireland's retail and banking business carried on from its establishment in the United Kingdom (which included all business carried on through establishments in Northern Ireland) were transferred from the Republic of Ireland parent company, Gov Co, to its wholly owned English-operated subsidiary, Bank of Ireland UK Plc. This included all current and loan accounts originating in branches in Northern Ireland.

[11] The Scheme was sanctioned by an Order dated 20 October 2010 of the Companies Court, Chancery Division of the High Court in London. The effective date of the banking business transfer was 1 November 2010. The Order is annexed hereto as Appendix A, and in turn the Scheme is annexed to the Order, and is contained in Appendix B hereto. The Order uses the definition set out in the Scheme. At the outset the Order states:

"This court hereby sanctions, pursuant to section 111 of the Act, the scheme as set out in the schedule hereto."

It then proceeds to set out under some 47 sub-paragraphs the effect of that sanction. At paragraph (a) it states that the Business (as defined in the Scheme) "shall, by virtue of this Order, be transferred to and be vested in the Transferee, in accordance with and subject to the terms of the Scheme."

At paragraph (b) it orders that each Transferred Asset (as defined in the Scheme) and all of the rights, benefits, powers, obligations and interests of the Transferor in the Transferred Asset "shall, by virtue of this Order and without any further act or instrument, be transferred to and be vested in the Transferee and the Transferee shall succeed to each Transfer Asset as if in all respects it were the same person in law as the Transferor, subject to all Encumbrances (if any) affecting such Transferred Asset and in accordance with and subject to the terms of the Scheme."

Sub-paragraph (c) then provides that "each Residual Asset (as defined in the Scheme) ... and all of the rights benefits powers occupations and interests of the Transferor in each such Residual Asset" shall, by virtue of this Order without further act or instrument, be transferred to and be vested in the Transferee and the Transferee shall succeed to each such Residual Asset as if in all respects it were the same person in law as the Transferor, subject to all Encumbrances (if any) affecting each Residual Asset and in accordance with and subject to the terms of the Scheme.

[12] A number of sub-paragraphs then address the question of transfers of Transferred Liabilities (as defined in the Scheme) which have no relevance to this particular case but at sub-paragraph (h) it provides that the transfer of any Transfer Asset or Residual Asset to the Transferee "shall have effect notwithstanding any

provision (express or implied) to the contrary in any contract or arrangement with any customer or any other person.

[13] The next relevant sub-paragraph is (k) which states that any judicial, quasi-judicial, administrative or other proceedings ... which are pending, threatened or current immediately before the Effective Date in respect of which the Transferor is a party (including, without limitation, as the plaintiff, claimant or applicant) in relation to the Business or the Transfer Assets shall be continued by the Transferee, and the Transferee shall be entitled to all claims and any other rights that would have been available to the Transferor in relation to the Business, and the Transferred Assets and such proceedings or applications.

[14] At sub-paragraph (s) it provides that every existing contract relating to the Business, which would include, for the avoidance of doubt, the contracts with customers, were to be construed and have effect as if the Transferee had been a party thereto instead of the Transferor, such that the contract would continue in force as between the Transferee and the other party, and that any reference to the Transferor in any of the contracts would proceed as if the Transferee were substituted for the Transferor.

[15] At sub-paragraph (aa) provisions is made that all payments attributable or referable to the Business (including the Transferred Loans, Transferred Mortgages or Deposit Accounts) (as defined in the Scheme) shall on or after the relevant date be payable to the Transferee and be receivable by the Transferee.

[16] The effect of these particular sub-paragraphs, supplemented by the provisions of the other sub-paragraphs operate to put the Transferee (in this case the Bank) in substitution for the Transferor (Gov Co) without any further documents or transfers. A copy of the Order is sufficient to show that the Transferee enjoys all of the rights, and obligations, of the Transferor without more.

[17] The "Business" as defined in the Scheme at Clause 1.1 is stated to mean that part of the business of the transferor carried on from establishment in the United Kingdom. "Business Banking" is defined as meaning the transferor's banking business in the United Kingdom, including products set out in the schedule, but also excluding others. "Commercial Finance" means the transferor's commercial finance business carried on in the United Kingdom, including the products set out in a schedule. The "Business Products" set out in the Schedule refer to different products such as personal current accounts, graduate accounts, business accounts, foreign currency accounts and a wide panoply of such products. The account of Mr Doherty falls within the definition of the relevant type of account set out in the schedule. A separate part of the Schedule refers to "UK Cards", incorporating not just the reference to the United Kingdom but to a particular card specific to Northern Ireland namely the Ulster Rugby Master Credit Card. Other contracts and other business in

different schedules refer to agreements with specific Northern Ireland customers including the University of Ulster.

[18] There therefore can be no doubt that the Scheme related to the Business, as defined, within the United Kingdom other than Excluded Business (as defined, but not relevant to the present case). The Order provided its registration in accordance with the provisions of the Act, and this has been affected.

[19] The appellant argues that the Order required to register with the High Court of Northern Ireland. For the purposes of the provisions of the Act, which is a United Kingdom Act, the “court” was the High Court of England and Wales. No provision was made in the Act for any registration of the Order in Northern Ireland by the High Court. Provision was made for registration in Scotland, reflecting the different law and the impact of that law on certain products and therefore the protection of the public that may be required to be considered by the courts of that jurisdiction.

CIVIL JURISDICTION & JUDGMENTS ACT 1982

[20] However the appellant’s submissions are based on section 18 of the Civil Jurisdiction and Judgments Act 1982 which relates to the enforcement of United Kingdom judgments in other parts of the United Kingdom. This provides:

“18- Enforcement of U.K. judgments in other parts of UK

(1) In relation to any judgment to which this section applies –

(a) Schedule 6 shall have effect for the purpose of enabling any money provisions contained in the judgment to be enforced in a part of the United Kingdom other than the part in which the judgment was given; and

(b) Schedule 7 shall have effect for the purpose of enabling any non-money provisions so contained to be so enforced.

(2) In this section ‘judgment’ means any of the following (references to the giving of a judgment being construed accordingly) –

(a) any judgment or order (by whatever name called) given or made by a court of law in the United Kingdom.”

[21] Schedule 6 deals with the enforcement of UK judgments (money provisions), with the definition of “money provision” meaning a provision for the payment of one or more sums of money. Paragraph 2 provides that any interested party who wishes to secure the enforcement in another part of the United Kingdom of any money provision contained in a judgment may apply for a certificate under Schedule 6. Paragraph 4 provides that on an application for such a certificate, the proper officer shall issue to the applicant a certificate in the prescribed form –

“stating a sum or aggregate of the sums (including the costs or expenses) payable under the money provisions contained in the judgment, the rate of interest, if any, payable thereon and the date or time from which any such interest began to accrue.”

In those circumstances the applicant or any interested person may apply within six months from the date of the issue of the certificate in the prescribed matter to the proper officer of the superior court in any other part of the United Kingdom for the certificate to be registered in that court – the superior court in Northern Ireland being the High Court.

[22] Paragraph 6 of Schedule 6 provides that:

“(1) A certificate registered under this Schedule shall, for the purposes, of its enforcement, be of the same force and effect, the registering court shall have in relation to its enforcement the same powers, and proceedings for or with respect to its enforcement may be taken, as if the certificate had been a judgment originally given in the registering court and had (where relevant) been entered.”

[23] Paragraph 8 of Schedule 6 provides:

“(1) Subject to any provision made under subparagraph (2) the debt resulting, apart from paragraph 7, from the registration of the certificate shall carry interest at the rate, if any, stated in the certificate from the date or time so stated.”

[24] Schedule 7 refers to Enforcement of UK Judgments (Non-Money Provisions), a non-money provision meaning a provision for any relief or remedy not requiring payment of a sum of money. Paragraph 2 provides that any interested party who wishes to secure the enforcement in another part of the United Kingdom of any non-money provisions contained in a judgment may apply for a certified copy of the

judgment and under Paragraph 5 any interested party may apply in the prescribed manner to the superior court in any other part of the United Kingdom for the judgment to be registered in that court – the superior court in Northern Ireland being the High Court. Paragraph 6 relates to the general effect of registration and states:

“(1) The non-money provisions contained in a judgment registered under this Schedule shall, for the purposes of their enforcement, be of the same force and effect, the registering court shall have in relation to their enforcement the same powers, and proceedings for or with respect to their enforcement may be taken, as if the judgment containing them had been originally given in the registering court and had (where relevant) been entered.”

RULES OF THE COURT OF JUDICATURE (NORTHERN IRELAND) 1980

[25] Rule 33 of Order 71 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides for the registration of any United Kingdom judgment relating to money provisions. By Rule 33(3) the party entitled to enforce the judgment from the other part of the United Kingdom is required to file an affidavit:

- “(a) giving particulars of the judgment, stating the sum or aggregate of the sums (including any costs or expenses) payable and unsatisfied under the money provisions contained in the judgment, the rate of interest, if any, payable thereon and the date or time from which any such interest began to accrue;
- (b) verifying that the time for appealing against the judgment has expired, or that any appeal brought has been finally disposed of and that enforcement of the judgment is not stayed or suspended; and
- (c) stating to the best of the information or belief of the deponent the usual or last known address of the party entitled to enforce the judgment and of the party against whom the judgment is enforceable.”

[26] Order 71 Rule 34 relates to the enforcement of United Kingdom judgments in other parts of the United Kingdom (Non-Money Provisions). There are a number of

relevant provisions relating to the nature of any judgment or order which requires to be registered in the High Court of Northern Ireland in order to be enforceable. These are:

- (a) Rule 27(1) which provides that an order giving leave to register a judgment shall state the period within which an appeal may be made against the order for registration and shall contain a notification that no application to enforce the judgment shall be made until after the expiration of the period:
- (b) Rule 29 which states that notice of the registration of a judgment “must be served on the person against whom judgment was given by delivering it to him personally or by sending it to him at his usual or last known address or place of business or in such other manner as the Court may direct”; and that the requirements in paragraph (3) of Rule 33, set out above, shall apply with the necessary modifications to an affidavit made in application for the registration of a judgment containing any non-money provisions, namely giving particulars of the judgment, and setting out in detail all of the relevant information which, in the absence of it being expressed in money terms, would require to set out the respective impact of the provisions of any non-money issue, coupled with the requirement under Rule 29, as to the persons duly affected by the Order. (the emphasis is mine)

DISCUSSION

[27] While initially Mr Coyle on behalf of Mr Doherty suggested the Order may be purely a non-money order, he later suggested it could be either non-money order or a money order. However I believe that any reading of section 18 juxtaposed with the Rules giving effect to any registration, can only lead one to conclude that it is certainly not a money order, since it would be impossible to set out the amount due let alone calculations of interest in respect of every customer of Bank of Ireland (UK) Limited at a particular date, or the requirement to serve a copy of the Order required to be registered on every such customer. Indeed the requirement for the sanction of the High Court in England is addressed specifically, as we shall see, to ensuring and protecting the rights of any party.

[28] I also believe it is abundantly clear that the Order is not a non-money provisions order. As I have stated it would require in order to comply with section 18 and the Rules to set out all of the parties who may be affected by the Order and have each of them served with a copy of the application for registration. I believe that simply stating it in those terms would argue that it is not an order that requires to be registered in order to give it effect.

[29] So what is the nature of the Order? What was its purpose and its effect?

[30] The starting point is the decision of Gov Co to transfer a range of products and services then provided by Bank of Ireland in the United Kingdom to personal and banking customers, and some corporate accounts. Other products provided in partnership with the Post Office were also to be transferred. A new corporate vehicle was incorporated (the Bank) into which that business was to be transferred. The Bank would be a fully owned subsidiary of Gov Co. The Scheme was fundamentally an agreement between Gov Co (the entity transferring part of its existing business) and the Bank, and provided the terms and conditions of that transfer: and to give effect to the transfer of the rights to the assets and the responsibilities of the liabilities being transferred.

[31] The transfer involved business in the area of banking which is regulated to reflect the necessity, inter alia, the protection of the public and businesses. Therefore any proposed transfer such as provided for by the internal arrangement of the Bank's business involves external checks including liaising with the Financial Services Authority ("FSA") and, by statute, the approval of the High Court in England and Wales. The objective is the protection of the public and to meet FSA requirements of a balanced portfolio in the new company - through the input from FSA and to afford a customer a right to object to any provision which they may believe adversely affects them. However the role of the court is oversight of a process, to give its confirmation of the Scheme, not the determination or enforcement of rights, let alone varying the Scheme. The position is that if the court did not approve the Scheme, the transfer simply does not take place. At the end of the day however, it is the agreement contained in the Scheme, entered into by the two corporate bodies, which gives effect to the transfer of the business contained in it.

[32] This approach is supported by the decision in Re London Life Association Limited (21 February 1989, unreported) quoted with approval by Evans-Lombe J in Re Axa Equity and Law Life Assurance Society Plc and Re Axa Sun Life Plc [2001] 2 BCLC 447 at 452. Each of these involved a different statutory requirement for approval but are framed in the same way as in the Act namely where the court has been given the role of sanctioning scheme. Hutton J stated:

"Although the statutory discretion is unfettered, it must be exercised according to principles which give due recognition to the commercial judgment entrusted by the company's constitution to its Board. The court in my judgment is concerned in the first place with whether a policyholder, employee or other person would be 'adversely affected' by the scheme in the sense that it appears likely to leave him worse off than if there had been no scheme. It does not however follow that any scheme which leaves someone adversely affected must be rejected.

For example, as we shall see, one scheme which might have been adopted in this case would have adversely affected many of the London Life's employees because they would become redundant. But such a scheme might nevertheless have been confirmed by the court. In the end the question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected. But the court does not have to be satisfied that no better scheme could have been devised. A Board might have a choice of several possible schemes, none of which, taken as a whole, could be regarded as unfair. Some policyholders might prefer one scheme and some might think they would be better off with another. But the choice is in my judgment a matter for the Board. (my emphasis) Of course one could imagine an extreme case in which the choice made by the Board was so irrational that a court could only conclude that it had been actuated by some improper motive and therefore abused its fiduciary powers. In such a case a member would be entitled to restrain the Board from proceeding. But that would be an exercise of the court's ordinary jurisdiction to restrain breaches of fiduciary duties: not an exercise of the statutory jurisdiction under section 49 of the Insurance Companies Act 1982.

What is true of choices as between different schemes is also true of the details within a scheme. There are no doubt few schemes which could not in some respect be improved. But the terms of the scheme are a matter of negotiation between transferor and transferee companies and will to a greater or less extent, depending on their respective bargaining strengths involve concessions on both sides. Under the 1982 Act, the court cannot, any more than under the Act of 1870 sanction the scheme subject to the making of amendments. It must be either confirmed or rejected, although no doubt the court in rejecting a scheme could indicate that it thought the vice lay in some particular term and that a fresh scheme without that term was likely to be acceptable. I am therefore not concerned with whether, by future negotiation the scheme might be improved, but whether, taken as a whole, the scheme before the

court is unfair to any person or class of persons affected.”

[33] And to copper bottom that role the Order itself specifically states that the court is sanctioning the Scheme as presented to it.

[34] Mr Coyle BL argued that the absence of the registration of the Order in accordance with section 18 of the Act constitutes grounds for disputing the debt owed by the debtor under the Statutory Demand, and that the court should be satisfied that there is a substantial argument for the court to investigate during the course of litigation. He has referred me to the decisions in Moore v Commissioners of Inland Revenue [2002] NI 26: Allen v Burke Construction Limited [2010] NICh 9: and Sheridan Millennium Limited v Odyssey Property Company [2003] NI. The test I believe as addressed in those cases is encompassed in the decision of the Master in Logue and Moffitt v Bank of Ireland (UK) Plc [2012] NI Master 10, where at paragraph [7] she states:

“Applying those principles, in order for the Applicants to succeed in this case, they must demonstrate that they have an arguable case or a potentially viable defence requiring investigation. Conversely, the Respondent must demonstrate that the Applicants have no arguable case or potentially viable defence requiring investigation: or, alternatively, that the Applicants ground for dispute amount to nothing more than an ingenious pretext or mere quibble.”

CONCLUSION

[35] For the reasons which I have set out above I am satisfied that Mr Doherty does not have an arguable case or a potentially viable defence to the Statutory Demand requiring investigation based on the non-registration of the Order in the High Court of Northern Ireland.

[36] I therefore dismiss the appeal and will hear any argument as to costs.