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

Delivered: 26/02/13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE COUNTY COURT DIVISION OF FERMANAGH AND TYRONE

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BETWEEN:

JOSEPH FERRIS

Appellant

-and-

PATRICIA MONGOMERY

Respondent

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MAGUIRE J

Introduction

[1] The court has before it two appeals in which Mr Joseph Ferris is the appellant. I will refer to these as "the first appeal" and "the second appeal".

[2] The first appeal relates to a decision of His Honour Judge Babington made on 27 September 2012 when he was sitting in the County Court Division of Fermanagh and Tyrone. The decision was made in respect of an equity civil bill between the appellant and Mrs Patricia Montgomery, as Registrar of Titles, as respondent ("the Registrar"). The civil bill bears the date stamp 9 March 2012 and the court will refer to it hereinafter as "the 2012 civil bill".

[3] The 2012 civil bill gives notice that the appellant "shall reapply to the County Court … when application will be made to the court under Section 69 of the Land Registration Act (Northern Ireland) 1970 in respect of Folio 2974 County Tyrone". By way of particulars the 2012 civil bill refers to the appellant requesting the

registration aforesaid to be "set aside" on the basis of "fraudulent practice". Reference is made to the appellant's father having not consented to the registration (see paragraph 1). Various other matters are then referred to in seven further numbered paragraphs. The generality of these matters raise issues which relate to historical events which go back to many years before. While there are references to various events said to have occurred in 2006, 2007 and 2009, these do not alter the historical nature of the appellant's application.

[4] The word "reapply" in the formulation of the endorsement to the 2012 civil bill is not explained in the body of 2012 civil bill itself but it is clear that it is a reference to an earlier equity civil bill between essentially the same parties in respect of the same folio. This civil bill is dated 5 December 2003 and, like the 2012 civil bill, it refers to an application under section 69 of the 1970 Act for the setting aside of the aforesaid registration as being invalid. While there were two plaintiffs in the 2003 civil bill, the appellant and his father, Charles Ferris, by the date of the 2012 civil bill the appellant's father had died so that the sole moving party is the appellant. The court will hereinafter refer to the earlier civil bill as "the 2003 civil bill". The 2003 civil bill should be read with a statement of evidence on behalf of the plaintiffs dated 9 January 2006. This provides a more detailed statement of the then plaintiffs' case. From these sources it can be seen that the issues in the 2003 litigation involve the same central elements as those more recently found in the 2012 civil bill.

[5] The 2003 civil bill, it appears, came before the court presided over by His Honour Judge McFarland on 25 May 2006. On that date the then plaintiffs were represented by counsel and solicitor. The court issued an ordinary dismiss together with a provision in respect of costs in the following terms:

> "It is further ordered and decreed that the defendant do recover against the plaintiff (sic) their costs. Costs to the defendant to be taxed in default of agreement."

[6] On receipt of the 2012 civil bill the legal representatives of the Registrar, having entered an appearance, gave notice to the appellant of a motion to strike out or stay the proceedings. The motion was grounded on the affidavit of Mary McDevitt, a solicitor in the Departmental Solicitor's Office. That affidavit, having set out the events relating to the dismiss of the 2003 civil bill, made the point that the 2012 civil bill was an attempt to re-litigate the validity of the registration in respect of Folio 2974 in circumstances where the appellant's claim in this regard, made in the 2003 civil bill, had been dismissed. The case, it was suggested, was one of res judicata and abuse of process, the latter being allegedly inspired as a result of the Registrar's attempt to recover from the appellant the costs to which she says she was entitled as a result of His Honour Judge McFarland's costs order of 25 May 2006.

[7] His Honour Judge Babington on 27 September 2012 provided a written judgment in respect of the Registrar's motion following a hearing before him. His decision was to grant the Registrar's application. As he put it at paragraph [18]:

> "I am satisfied that both grounds put forward by the respondent are approved (sic) namely that the matters are res judicata, in other words, issue estoppel and secondly that the civil bill should be stayed on the wider ground of public policy."

[8] In respect of the latter aspect of the above finding, at paragraph [17] His Honour Judge Babington noted that it was:

> "Only after proceedings were issued to recover those costs [viz the Registrar's costs in connection with the dismiss of the 2003 civil bill] in November 2010 that the applicant sought to re-litigate this particular matter. It is hard to come to any other conclusion [than] that these proceedings have been issued in an attempt to delay or in some way frustrate the respondent's application to recover its own costs."

[9] The first appeal is an appeal to this court against the decision of His Honour Judge Babington to stay the 2012 civil bill.

[10] The second appeal, as will appear, has factual connections with the subject matter of the first appeal but comes before the court by a quite different procedural route.

[11] The parties to the second appeal are essentially the same as were involved in the 2003 civil bill above. This is because the second appeal forms parts of the aftermath to the dismissal of the 2003 civil bill by His Honour Judge McFarland in 2006. As noted above, in dismissing the appeal the court made an order for the Registrar's costs to be paid by the unsuccessful plaintiffs. Such costs were to be taxed in default of agreement.

[12] After 2006, attempts were made by the Registrar to achieve agreement over the quantum of the costs to be paid by the appellant. However, for reasons which need not be set out here, no agreement emerged. This led to the Registrar seeking from the District Judge a taxation of her costs. Such a taxation was made by the District Judge on 12 November 2010 under Order 55 Rule 5A of the County Court Rules. The taxation was then appealed by the appellant to the High Court. The appeal came on before Gillen J who allowed the appeal on the basis that the taxation had been conducted under the wrong provision in Order 55. Rule 5A had been used when it appeared that the right provision was that contained in Rule 9 of Order 55.

[13] In these circumstances the Registrar made a fresh application for taxation of her costs to the District Judge which was heard by the District Judge on 7 October 2011. On this occasion the taxation was conducted under Order 55 Rule 9 of the County Court Rules. The costs were taxed in the sum of £3,631.75.

[14] On 18th October 2011 the appellant appealed the taxation of this amount to this court.

The approach of the court

[15] For convenience the court heard the two appeals one after the other. The appellant, Mr Joseph Ferris, was not legally represented. The Registrar was represented by Nessa Fee BL. While the hearing ranged over a wide spectrum of historical matters which the appellant was keen to draw to the court's attention, the task of the court relates only to the determination of the appeals before it and, in the court's view, it is unnecessary for it to rehearse in this judgment the extensive submissions made to it by the appellant relating to disputes over the title to Folio 2974 and the litigation over many years now in respect of same. For the details of this litigation see: the written judgment of His Honour Judge McFarland in Meyler v Ferris (Unreported 30 March 2007); the written judgment of Hart J on appeal to the High Court (Unreported 8 April 2008); and the decision of the Court of Appeal in the same litigation [2009] NICA 16.

[16] While appeals from the County Court to the High Court are in the form of re-hearings, the court wishes to make it clear that it has taken into account the written judgment of His Honour Judge Babington in respect of the first appeal.

[17] The court considers that for expositional purposes it is helpful for it to deal with the second appeal first and it is to this that the court now turns.

The second appeal

[18] The circumstances in which the second appeal has arisen have already been described. There has been an assessment carried out by way of a taxation of the Registrar's costs under Order 55 Rule 9. When given the opportunity to say what was wrong with the assessment, the appellant offered no criticisms of it. Nor has he indicated to the court why or on what grounds he is appealing against it.

[19] On the face of the assessment the court has not detected anything wrong with it. It appears to be an assessment of the conventional kind in this type of case. It appears to have been carried out under the correct provision in the County Court Rules, unlike the assessment overturned by Gillen J. This is confirmed by Mr Valentine's publication "Civil Proceedings: The County Court" which at paragraph 17.66 states:

> "All costs in equity proceedings…are taxed under Order 55 Rule 9. Equity costs are itemised and must be taxed by the District Judge in default of agreement (Order 55 Rule 9(1))."

Such a taxation, as required by the rules, seems in this case to have occurred. The appellant has not disputed any of the items going to make up the figure the District Judge arrived at. It appears that Order 55 Rule 9(6) makes specific provision for a party, by notice to the District Judge, to have any item reviewed by the County Court Judge. Notably the appellant has not invoked that procedure in this case.

[20] In the above circumstances, assuming the court has jurisdiction to hear an appeal in respect of an Order 55 Rule 9 taxation of costs (a matter over which the court has reservations but in the circumstances need not decide), the court sees no reason to do other than affirm the District Judge's taxation. Accordingly the court dismisses the appellant's second appeal.

The first appeal

[21] The court will now consider the merits of the first appeal. The factual framework within which the court is considering the issues has in substance already been set out above.

[22] The doctrine of res judicata operates in the context of judicial decisions in respect of causes of action raised by the parties before the court. It provides that where a decision is pronounced which disposes once and for all of the matters decided, appeals apart, these matters cannot be re-litigated between parties bound by the judgment. In considering the application of the doctrine in a given case the court will seek to determine whether the necessary elements to trigger its operation apply. It will ask itself whether there was a judicial decision; whether it was pronounced; whether it was final; whether it determined the issues raised in the later litigation and whether the parties are the same. If all of these elements are present the doctrine operates to prevent re-litigation in the interests of finality. There is a recognised public interest in preventing the re-opening of disputes which have already been decided. As one judge, Lord Maugham LC said in New Brunswick [1939] AC 1 at pp. 19-20:

> "If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or parties claiming under them".

[23] When the above is applied to the present case, in the court's view, it is plain that the 2003 civil bill and the 2012 civil bill both relate to judicial proceedings. These are essentially the same proceedings between the same parties (by 2012 the

appellant's father had died) in respect of the same subject matter (the registration of Folio 2974) with the same purpose of having the registration set aside or rectified under the same statutory provision upon grounds which are materially similar if not the same. In the court's view, the dismissal of the 2003 civil bill by the court in 2006 was a final decision of the court which bound the parties. That dismissal carried with it an order for costs against the then plaintiffs and in favour of the Registrar. The court records from 2006 clearly show the outcome pronounced by the court. The decision arrived at for long now has stood as a final decision.

[24] In these circumstances the court sees no reason why the dismissal in 2006 of the 2003 civil bill should not be viewed as precluding the re-litigation of the same issues as now found in the 2012 civil bill. Subject to one point which the court will deal with below at paragraphs [27]-[28], there is, in the court's view, no real or practical difference between the 2003 issues and those later raised in 2012. This was the view of His Honour Judge Babington and this court shares that view.

[25] There was in the course of the hearing of the appeal a complaint made by the appellant about the disposal of the 2003 civil bill by His Honour Judge McFarland in 2006. In particular, the appellant told the court that the way in which the dismissal came about was without his or his father's authority. While the court documents from that time do not in terms disclose whether the dismissal of the 2003 civil bill was by way of settlement between the parties, this looks to be the probable position, looking at the totality of the evidence before the court. The point the appellant advances is that his legal representatives had no authority for agreeing to or announcing any such settlement. This fact, the appellant contends, is material to the decision in this appeal.

[26] It is clear that the doctrine of res judicata operates in respect of consent judgments: for examples, see Kinch v Walcott [1929] AC 482 at 493 and the Northern Ireland High Court decision in McGucken v McGucken and Another [1990] NI 1 at 11. So the fact, if it be a fact, that the dismissal in 2006 of the 2003 civil bill may have taken the form of a settlement does not alter the court's conclusion as expressed above. But, in the court's view, the allegation now made by the appellant that his legal representatives did not have authority to settle the proceedings (about which the court makes no finding) does not alter the operation of the res judicata doctrine. If that allegation is true, it seems to the court that it would be unlikely to disturb the legal finality of the decision made by the court. If matters are as stated by the appellant he may or may not have a cause of action against his legal representatives to make good any loss to him attributable to their acting without instruction but that issue belongs to a different chapter of the law to the doctrine res judicata now under discussion.

[27] In order to escape from the reasoning above, the appellant has argued that the 2012 civil bill, though seeking to achieve the same goal as the 2003 civil bill, and while relying substantially on the same evidence, does in one respect rely on evidence which is new. The new evidence is said to consist of a document in the

form of an oath sworn by Bridget Ferris and Joseph Ferris on 18 May 1994 to support their extraction of a grant of administration in the estate of Anne Ferris deceased who had died on 4 September 1925. It is said, with justification, that there is an error in this document in so far as it claimed that the deceased's children, save for her son, Charles, died without grandchild or other descendent. The appellant says he only discovered this document after the dismissal of the 2003 civil bill, even though it is a document which had been part of the probate file in respect of the estate of Anne Ferris deceased who was the owner of the land in the Folio until her death in 1925. The appellant makes the case that this document infects the lawfulness of the registration by the Registrar, who acted on an assent signed by the personal representatives of Anne Ferris. He also claims that the document was fraudulently prepared.

[28] The court does not consider that the "discovery" of this document by the appellant in 2006 has the consequence that the 2012 civil bill should not be stayed. The court reaches this conclusion for the following reasons:

(i) The court does not consider that the apparent error in this document is germane to the issue of the validity of the registration which the appellant attacks. The appellant's object is to show that the terms of the split ownership as recorded in the registration are incorrect and this document has nothing to say about this issue. Another way of putting this is to say that this document does not assist in demonstrating that what had been registered in the Land Registry requires rectification in terms of the powers of the court under section 69 of the Land Registration (Northern Ireland) Act 1970. The judgment of Kerr LCJ in the appeal of Meyler v Ferris [2009] *supra* rejects any suggestion that the error in this document – which was before the Court of Appeal in a related context in 2009 – affected the registration and the former Lord Chief Justice also decided that there was no fraud or any deficiency which sounded on the lawfulness of the split ownership in respect of the lands contained in the Folio: see paragraphs [19]-[20]. In so holding the Lord Chief Justice was affirming the approach taken by both His Honour Judge McFarland and Hart J, both of whom had dealt with the matter at some length: see, in particular, paragraph [12] of the former's judgment and paragraph [22] of the latter's.

(ii) In any event, the court, even if it was wrong about the point above, is of the view that there was no reason why the document in question could not have been located and used in the proceedings in respect of the 2003 civil bill. The document was at all times available to be discovered as it was contained in the files of the probate office and there has been no explanation why it was not found until after the dismissal of the 2003 civil bill. An exception to the normal rules of res judicata may be made where with due diligence the discovery and

> deployment of new evidence in the earlier proceedings could not have occurred. But, in this court's view, that is not the case here given that reasonable inquiries into the title would have led to the probate file in which the document was found. This is especially so as at the material time the appellant was legally represented by counsel and solicitor. The court sees no reason why steps in this regard were not taken. It also notes that there is in the papers a letter from the appellant to the probate office of 13 April 2006 and a reply to this on 17 May 2006. The latter expressly makes the point that it was possible to search through the probate records to confirm who in 1994 was administering the estate. As far as the court is aware, this invitation was not attended to by either the appellant or his legal representatives until December 2006 when the document referred to above was located.

[29] Separate from the issue of res judicata, His Honour Judge Babington held that the proceedings in any event were an abuse of process in that the reason why they had been taken was not genuinely to have the point at issue in the proceedings determined but was, as he put it at paragraph [17] "to delay or in some way frustrate the respondent's application to recover its own costs".

[30] In this court the appellant accepted that had it not been for the respondent seeking to pursue the issue of the costs order made in 2006 by His Honour Judge McFarland, the 2012 civil bill would not have been issued. In these circumstances this court concludes that the 2012 civil bill is motivated by a desire to harass the respondent into making some form of concession in respect of the 2006 costs order. For this reason the court concludes that the process of the court is being abused by the appellant for an ulterior motive. As has been pointed out by Lord Diplock in Hunter v Chief Constable of West Midlands Police [1982] AC 529 at 536 the jurisdiction to strike out an action as an abuse of process is:

> "[An] inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of the procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people…".

Commenting on this quotation recently, Sharp J in El Diwany v Hansen and Anor [2011] EWHC 2077 (QB) said at paragraph [65]:

> "Mere relitigation in circumstances not giving rise to cause of action estoppel or issue estoppel does not necessarily give rise to abuse of process. Some additional element is required such as collateral

> attack on a previous decision, or unjust harassment or oppression of the other party".

In the Court's view the necessary additional element is present in this appeal. This is another reason why the court rejects the appellant's first appeal and affirms the order of the County Court judge in respect of it.

Conclusion

[31] The court dismisses both appeals for the reasons given.