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Judgment: approved by the Court for handing down | *Delivered:* **20/04/2018**
*(subject to editorial corrections)**

2014 No 50790

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)
(Power of Attorney: Rights of Audience)

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BETWEEN:

CYRIL FULTON

Appellant

-and-

AIB GROUP (UK) PLC

Respondent

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McBRIDE J

Application

[1] By Notice of Appeal dated 27 October 2016 Cyril Fulton ("CF") appealed against the decision of Master Kelly dated 24 October 2016 when she ordered that:

(i) CF's application to set aside a statutory demand dated 15 May 2014 be dismissed with an order for costs against CF; and

(ii) CF's notice of intention to oppose the making of a Bankruptcy Order was struck out with an order for costs against CF.

[2] Mr Gowdy of counsel appeared on behalf of the respondent. CF did not attend and was not legally represented.

[3] When the matter was listed for hearing on 18 January 2018, Mr Ernest Fulton ("EF") son of CF informed the court that he was representing CF as CF had granted him this right in a power of attorney. The court adjourned the hearing until 14 February 2018 to permit the parties to prepare skeleton arguments on the question whether a power of attorney was capable of granting a right of audience and if not, whether the court should grant a right of audience to EF under its inherent powers. The court made it clear that CF should attend court on 14 February

2018 and that the substantive case would proceed on that date whether or not the court granted a right of audience to EF and therefore it was incumbent upon CF to be in a position to proceed with the case on 14 February 2018.

[4] On 14 February 2018 CF did not appear at court. EF attended and informed the court that CF had received a letter from the respondent's solicitors which informed him as follows:-

> "If you fail to attend (or to secure acceptable representation for) the hearing on 14 February 2018 then the applications will be dealt with in your absence".

[5] EF informed the court that CF was not present at court because he had decided to attend a business meeting in Dublin instead.

[6] Before dealing with the substantive appeal in this case the court heard and determined the application made by EF that he either had or should be granted a right of audience to appear on behalf of CF. The court refused the application and indicated that it would give its reasons after hearing the substantive appeal.

[7] I now set out the reasons for my refusal to grant a right of audience to EF to act on behalf of CF.

Submissions of the parties

[8] EF submitted that he had a right of audience to appear on behalf of his father CF as a Power of Attorney entered into by CF dated 8 June 2017, at Clause 5 provided as follows:

> "This Power of Attorney is given solely to allow the said EF to address the court on behalf of CF, the principal in proceedings at the High Court and the Court of Appeal in Belfast Northern Ireland relating to proceedings and processes concerning the said CF".

[9] Mr Gowdy on behalf of the respondent ("the Bank") submitted:

(a) A power of attorney could not grant a right of audience as such a right lay solely within the gift of the court and not CF. In support of this proposition he relied on first principles and jurisprudence in England & Wales and Scotland.

(b) The court had power to grant a right of audience under its inherent powers but should do so only when necessary in the interests of justice

to do so. He submitted that the circumstances of the present case did not require the invocation of this power.

(c) If the court held that it should invoke its inherent powers, EF was not a suitable person to be granted a right of audience, given his conduct to date in respect of this and related court proceedings.

Consideration

[10] A right of audience is a right to appear before and address a court including the right to call and examine witnesses. At common law it has long been recognised that a party to proceedings, in his capacity as a party, has a right of audience. The Judicature (Northern Ireland) Act 1978 ("the 1978 Act") governs who has a right of audience to appear in the High Court, Court of Appeal and Crown Courts. The 1978 Act confirms that representation in these courts is normally by counsel. Section 106(4) of the 1978 Act however preserves the court's inherent jurisdiction to confer a right of audience on any person.

[11] EF's primary submission was that he had a right of audience as the power of attorney granted to him by CF enabled him to stand in CF's shoes and to exercise CF's undoubted rights as a party to the proceedings to conduct litigation.

[12] The question whether a right of audience can be conferred by a power of attorney has been considered by the Court of Appeal in England & Wales. In Gregory v Turner [2003] EWCA Civ 183 the applicant granted a power of attorney to her daughter to "represent me and act in my place if the need arises in any legal matters or proceedings …". The court held at paragraph [17] that a power of attorney could not be construed as granting a right of audience as such an interpretation would:

> "Drive a coach and horses through the purpose of the statute, which is to impose effective controls on rights of audience and conduct of litigation in accordance with the 'general principle'. The exception for the individual party is …a recognition of the established position before the 1990 Act, which allowed an individual to appear in his own case in any court, regardless of his qualifications. There is nothing to suggest that before the 1990 Act, that right could be exercised by an agent, other than one properly qualified for the purpose. In our view this was and is a personal right, which cannot be delegated. Were it otherwise, there would be no purpose in the careful restrictions imposed in the public interest on those who can appear as advocates in proceedings."

[13] A similar position has been adopted in Scotland. In Re Patricia Anderson [2008] SCLR 59 the Outer House heard an application by the applicant's son that he had a right to represent his mother on foot of a power of attorney granted by his mother to him. The court held at paragraph [26]:

> "To allow an exception to the normal rules with rights of audience whenever a party is granted a power of attorney in favour of another would indeed drive a coach and horses through those rules".

[14] Turning to first principles, a power of attorney is a deed authorising another person to act as agent and confers upon that agent a power to execute deeds on behalf of the principal. In principle, therefore, a grant of a power of attorney is no more than a grant of a form of agency. The fact someone is an agent does not per se confer on that person a right of audience. For example, as Mr Gowdy illustrated, a solicitor is an agent of his client. Whilst this allows the solicitor to carry out certain acts on his client's behalf the mere fact of agency is not sufficient to thereby confer on the solicitor a right of audience in the supreme courts. It patently does not.

[15] I am satisfied that a right of audience cannot be granted by a power of attorney. In light of first principles and the persuasive authority of the cases cited I am satisfied that CF's undoubted right to act as a litigant in person is a right which is personal to him and therefore it cannot be delegated or assigned by him. Consequently, a power of attorney cannot confer a right of audience upon its recipient to act and appear on behalf of the principal. Whether a person had a right of audience in the High Court is governed by the 1978 Act, subject to the common law rule that a party to proceedings has a right to appear and act on his own behalf. In accordance with the 1978 Act, generally only counsel has a right of audience in the higher courts in Northern Ireland. Otherwise the grant of a right of audience lies at the discretion of the court in the exercise of its inherent jurisdiction.

[16] I therefore reject EF's claim that the power of attorney gives him a right of audience. To hold otherwise I find would fly in the face of the clear intention of parliament as expressed in the 1978 Act.

[17] Given my finding that the Power of Attorney did not give EF a right of audience I now consider whether I should grant him a right of audience to appear and act for CF in the exercise of my inherent jurisdiction.

[18] The circumstances in which the court will exercise its inherent jurisdiction to grant a right of audience to a person other than a barrister or solicitor was considered by Treacy J in Re Thompson (Ciara)'s Application for Judicial Review [2010] NIQB 120. At paragraphs [18] to [19] he stated as follows:-

> "[18] The Court should be slow to overturn the specific statutory regime for rights of audience set out

> in section 106 by the use of the inherent jurisdiction unless it is clearly apparent that the interests of justice require that to be done. I accept that in order to be satisfied that one lay person should be given rights of audience to represent another lay person before the Court of Judicature the Court would require very compelling evidence that this was necessary. …
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> [19] The interests of justice … did not extend to permit the solicitor to appear in a criminal case before the Court of Judicature on his client's behalf. It might be thought somewhat incongruous if the inherent power of the Court was exercised to confer rights of audience upon a *lay* person. Whilst one cannot discount some exceptional case which, in the interests of justice might require such an outcome, it will ordinarily not be permissible. This is because it would not be consistent with the intention of Parliament expressed in the restrictions enshrined in section 106 and also because it would undermine the longstanding system regarding rights of audience which have served so well for so long."

In Re Thompson Treacy J refused the application which was based on the applicant's contention that she would be unable to speak for herself as she was shy and tongue-tied.

[19] In Belkovic v DGS International plc and Anor [2014] NIQB 139, Gillen LJ permitted the plaintiff's brother to act as a McKenzie Friend with an accompanying right to represent and present the plaintiff's case. In that case the plaintiff was a Slovakian national who was recovering from operative treatment and confined to bed and who did not speak English. The judge concluded that there were exceptional circumstances which pointed to it being in the interests of justice for such a right of audience to be granted. These circumstances included:

> "My perception of the plaintiff's state of health was that it would be difficult for him to conduct the case on his own even with the help of a conventional McKenzie Friend approach -
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> - the McKenzie Friend, who was the brother of the plaintiff, had largely conducted the case to date,
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> - solicitors in the past had been found to be unacceptable to the plaintiff,

- the McKenzie Friend had indicated that he would not be giving evidence and thus was not a witness in the case - the plaintiff's language difficulties and lack of understanding and court procedures were such that even with the assistance of interpreters I decided that the case would be subject to excessive delay and procedural difficulty without the invocation of a McKenzie Friend to represent him." (Paragraph 2)

[20] EF informed the court that his father was in his 60's and so far as he was aware was in good health and did not suffer from any ill-health or medical condition or disability. EF also informed the court that CF was not in attendance as he had travelled to Dublin to attend a business meeting.

[21] There is therefore no evidence before the court that CF suffers from any ill-health or incapacity or disability. The available evidence points to the fact he is capable of travel outside the jurisdiction and is capable of participating in a business meeting. CF has no language barriers. EF is a lay person who has no more knowledge of the substantive legal and procedural issues than CF.

[22] Taking into account all the circumstances of the case I am satisfied that the interests of justice do not require EF to be granted a right of audience. CF is not under any disability arising as a result of ill health, language or intellectual ability. There is also no evidence that granting EF a right of audience would thereby reduce delay caused by the lack of knowledge that CF may have of procedural matters because it is clear that EF is no better apprised of such matters.

[23] I note that the Court of Appeal in respect of CF's appeal against my decision refusing discovery granted EF a right of audience to represent CF. I further note that the Bank did not object to such a right being granted. Mr Gowdy advised the Court that this approach was taken because any objection may have led to the case being adjourned. I am satisfied that each application for a right of audience must be considered on its own merits and in light of all the circumstances prevailing at the time. The circumstances existing at the time the Court of Appeal granted EF a right of audience were different to those existing at the present time. Further, the Court of Appeal, when granting the right did not consider the merits of the application but rather acceded to it on the basis that the Bank did not object.

[24] If am wrong in finding this court should not invoke its inherent powers to grant a right of audience, I am satisfied that EF would not in any event, be a suitable person to be granted such a right.

[25] The court's duty is to ensure that there is a fair trial. This includes ensuring that the court process is not obstructed by, for example, granting a right of audience to a person who will exercise it in a manner which is likely to impede the administration of justice and/or to bring the process into disrepute by making

baseless applications or inappropriate conduct. Mr Gowdy on behalf of the Bank pointed to what he submitted was inappropriate conduct by EF. He referred the court to comments made by the Court of Appeal in respect of troubling exchanges between EF and the court staff. The Court of Appeal in Ryan Fulton, Ernest Fulton & Cyril Fulton v AIB Group (UK) Plc GIL 10346 unreported, held at paragraphs [38] and [39] as follows:

> "In closing we note with concern some troubling correspondence that has been passing between Mr Fulton and the court staff and, indeed, the other side. Phrases such as, "this is nonsense" are not helpful in the legal context and we would strongly encourage any further exchanges emanating from the Fulton's to the opposition's solicitors to be completed with the politeness and courtesy which was a distinguishing feature of that well-known firm when it was in business.
>
> [39] Secondly, and perhaps even more importantly, we found troubling the tenor of the exchanges with the court staff. Court staff are hardworking people who are not lawyers, who do not have representation and they do not merit impolite or strongly worded criticisms of them. It does not help the case, it simply serves to create an atmosphere which is wholly unsuitable for litigation at this time. We, therefore, strongly exhort the appellants in this case to bear this mind in future correspondence with the court staff."

[26] Despite the cautionary warnings of the Court of Appeal EF has throughout the course of these proceedings engaged in correspondence with the court and the Bank's solicitors which is rude, offensive, abusive and which contains serious allegations of misconduct which are completely unsupported by evidence. A number of examples suffice to illustrate this. In an affidavit dated 4 July 2017, EF made serious allegations against Sir John Gillen without providing any evidential basis for same. In correspondence dated 25 September 2017 he accused the Court of Appeal of turning a blind eye to criminality and in another email dated 2 October 2017 addressed to the Court of Appeal he stated:-

> "The content of your email below was noted albeit I find it regrettable that the Lord Chief Justice is not willing to answer for the lack of respect on the part of the Northern Ireland Judiciary over which he presides and for whom he is responsible. In the circumstances I am sending a copy of this note to the Supreme Court I ask that it bring same to the attention of the President of that court Lady Hale so that she and the Supreme Court are aware of the

> lack of frankness on the part of the Lord Chief Justice in the quite outrageous circumstances to which citizens of Northern Ireland like my family and I are subjected when it comes to being denied our entitlement under Article 6 of the European Convention on Human Rights".

[27] In correspondence to the Supreme Court EF repeatedly alleges that the judiciary in Northern Ireland have turned a blind eye to criminality, are inept, are in breach of their respective judicial oaths and have flouted respect for Article 6 of the European Convention of Human Rights *inter alia* because they have failed to recuse themselves.

[28] EF has also engaged in correspondence with the solicitors for the Bank accusing them in an email dated 5 October 2017 of a:

> "Blind eye approach to date in complicity with your client when it comes to failing to disclose documentation relative to the illegal dealings in respect of my family's former trading premises at Balmoral Parade, Boucher Road, Belfast being stark and for which you will be held accountable".

[29] EF has also engaged in correspondence addressed to me as the trial judge. By letter dated 11 January 2018 he stated his view that I was biased and that I had shown a lack of respect for his Article 6 rights. In reaching my judgment he asked me to, "… demonstrate obedience to (my) judicial oath sworn on the Holy Bible".

[30] At the hearing of this matter I asked EF if he would in the future temper his correspondence with the court and the Bank's solicitors. He stated that he had no regrets in relation to the correspondence he had sent. In light of this, it is clear to me that EF will continue to engage in correspondence in a similar vein in the future.

[31] I consider that the approach taken by EF, as demonstrated by the correspondence, is not conducive to the overriding objective. I therefore find that granting him a right of audience would cause prejudice to the Bank. This is because given the attitude of EF it is likely that he will continue to engage in correspondence which the Bank will have to respond to thereby leading to unnecessary stress and expense.

[32] In addition I find that EF is not a suitable person to be granted a right of audience as he has a personal interest in these proceedings. He is involved in related proceedings against the bank. Given his own personal grievances against the Bank I find that he would be unable to give independent and dispassionate advice and assistance to CF as he is likely to allow his personal grievances to influence both the advice he gives and the way in which he may exercise any right of audience given to

him. In view of this I find that the granting of a right of audience to EF would not assist the administration of justice and is not in the overall interests of justice.

[33] In the exercise of my inherent jurisdiction I therefore refuse to grant a right of audience to EF.

[34] I dismiss the application by EF to be granted a right of audience.