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Judgment: approved by the Court for handing down | *Delivered:* **31/01/2017**
*(subject to editorial corrections)**

IN HER 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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BETWEEN:

PETER MacMAHON and YVONNE MacMAHON

Plaintiffs/Appellants

-v-

BANK OF NEW ZEALAND

Defendant

_____

Weatherup LJ and Horner J

_____

WEATHERUP LJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Madam Justice McBride of 23 November 2016 refusing an application for leave to serve notice of a Writ of Summons out of the jurisdiction under Order 11 Rule 1(1)(b) of the Rules of the Court of Judicature, which rule relates to claims for an injunction. The appellants appeared in person and the defendant was not represented.

[2] Two Writs of Summons were issued by the plaintiffs against the defendant. An Order for consolidation of the proceedings was made on 8 November 2016. The proceedings sought injunctions against the defendant. The injunctions claimed by the appellants and considered at first instance related to, first of all, the Cross Border Insolvency Regulations (Northern Ireland) 2007, secondly bankruptcy proceedings in New Zealand and thirdly the service of a New Zealand bankruptcy petition in Northern Ireland.

[3] The Court at first instance invited the service of a draft Statement of Claim and that was produced. For the purposes of this appeal an amended draft Statement of Claim was produced. That amended draft added a claim against the defendant in tort, pleading abuse of process. By this amendment the appellants sought to add to the application for service out of the jurisdiction a claim under Order 11 Rule 1(1)(f) which is concerned with a claim in tort.

[4] The injunctions claimed under the amended draft Statement of Claim may be summarised as follows. The appellants seek an anti-suit injunction in relation to a New Zealand judgment against the appellants and an anti suit injunction in relation to New Zealand bankruptcy proceedings against the appellants. Then there are three specific injunctions sought, being first, against the enforcement of the New Zealand judgment, secondly against trespass on the sovereignty of Northern Ireland and thirdly against manipulation of insolvency proceedings in New Zealand, depriving the appellants of due process in Northern Ireland and breach of Article 6 of the European Convention on the right to a fair trial.

[5] New Zealand bankruptcy petitions have now been served on both appellants, in the case of the first appellant in the Republic of Ireland and in the case of the second appellant in Northern Ireland.

[6] The appellants have lodged Notices of Objections in the bankruptcy proceedings in New Zealand and the Court understands that a hearing has been arranged for February 2017. This appeal has been brought on for an expedited hearing in order to reach a conclusion on the appellants' application prior to the bankruptcy matter coming on for hearing in New Zealand.

[7] The background appears from the affidavits of the first appellant. He indicates that since January 2012 his wife and he have been domiciled in Northern Ireland. From 2009 to 2012, he was engaged as a veterinary surgeon in the UK and in April 2012 he opened a clinic in Dublin. He commutes to work from his home in Northern Ireland and his wife is a stay-at-home mother and the primary guardian of their 12 year old son who is home schooled. He was personally served with the Bankruptcy Notice at his clinic in Dublin.

[8] In April 2009, the defendant provided to the appellants a loan facility of NZ$1.296 million to be invested in property in New Zealand. However, earthquakes in New Zealand and financial issues led the appellants to fall into arrears on the mortgage and the defendant obtained possession of the mortgaged property, placed it on the market and sold it by auction.

[9] The property in New Zealand was sold for NZ$921,888 which the appellants say was below market value. On 10 July 2014 the defendant issued proceedings against the appellants in New Zealand for the balance due on the loan. The

appellants say they were not resident in New Zealand, were not visiting and did not submit to the jurisdiction of the New Zealand court. The New Zealand judgment was obtained on 1 September 2016 for the sum of NZ$619,412.

[10] The first appellant states that, as a matter of public record, he was contactable and the defendant had his trading name and his business address in Dublin. Nevertheless, the defendant in the process of obtaining possession of the New Zealand property, moved an application in New Zealand to dispense with service on him of notices under the relevant Property Law Act and later effected service of proceedings for recovery of debt by substituted service on an old email address and further served notice of a default judgment in a similar manner. Accordingly, the steps were taken in New Zealand without notice to the appellants. It is said that the defendant failed to make full and fair disclosure of the appellants' whereabouts to the New Zealand court.

[11] The defendant served a Bankruptcy Notice on the first appellant in Dublin on 8 June 2016. The relevant debt was the judgment debt. The Notice provided that failure to respond to the Bankruptcy Notice within 20 working days would be an act of bankruptcy. The first appellant filed a Notice of Opposition in July 2016. The defendant sought to strike out the Notice of Opposition in July 2016. A minute from the court of a preliminary hearing in August 2016 indicated that the appellant was to make submissions regarding the filing of a counterclaim. The appellants regarded such a step as amounting to submission to the New Zealand jurisdiction.

[12] In July 2016 there was a request to the first appellant for his wife's details for service of a Bankruptcy Notice on her and such a Bankruptcy Notice was served in August 2016. A Notice of Opposition by both appellants has been lodged and the defendant has applied for the Notices to be struck out.

[13] The grounds of the appellants opposition to the New Zealand insolvency proceedings are that the default judgment obtained in New Zealand was not validly served, the default judgment was entered by mistake of fact and not validly entered, no valid debt arose to be the foundation for any Bankruptcy Notice, the judgment was obtained by mistake and fraud and collusion and that the appellants have a counterclaim which they would wish to raise in opposition to the judgment.

[14] The defendant contests those grounds of opposition on the basis that the appellants have failed to comply with the Bankruptcy Notice, have not made a cross-claim or provided particulars of any cross-claim, have been served with Bankruptcy Notices in accordance with the directions of the court and there is no defect in the process giving rise to the judgment or the Petitions.

[15] The appellants raise a number of issues with the proceeding in New Zealand. They were not entitled to challenge the debt, not involved in the sale of the property which was undertaken by the court, not in a position to challenge the concealment

by the defendant of particulars about their whereabouts and not in a position to dispute the debt arising from the forced sale of the property. The appellants say that the only matter they could raise in the Bankruptcy proceedings are losses that arose after the judgment was obtained by the defendant.

[16] The appellants seek an injunction to restrain the New Zealand insolvency proceedings, whether in New Zealand or in Northern Ireland or under the Regulations. Reliance is placed on the irregularities in New Zealand and the irregular service of proceedings. The appellants' case is that a failure to restrain the defendant, given the irregularities, in effect subverts the jurisdiction of Northern Ireland courts. This, the appellants say, is a matter of public importance and international insolvency law and the defendant is seeking to sidestep the rules by serving the notices, in the manner in which they did, in proceedings in Northern Ireland.

[17] This appeal concerns service out of the jurisdiction. The relevant provisions are Order 11 Rule 1(1)(b) dealing with a claim for an injunction to do or refrain from doing anything within the jurisdiction and Rule 1(1)(f) dealing with a claim founded in tort with the damage sustained or resulting from an act committed within the jurisdiction. Rule 4(2) requires that the court be satisfied that it is a proper case for service of proceedings out of the jurisdiction.

[18] McBride J delivered judgment on 23 November 2016 and refused the application for leave to serve out of the jurisdiction. First of all, in relation to Rule 1(1)(b), she noted that the only substantive claim made in the application was for injunctive relief. The Writ did not require the Court to determine any substantive rights between the parties. The plaintiffs were not asking the Court to adjudicate upon the merits of the bankruptcy proceedings. As the Writ did not place any claim before the court which required adjudication upon the substantive rights of the parties McBride J was satisfied that Rule 1(1)(b) did not apply.

[19] Secondly, she addressed the issue of whether the behaviour of the defendant was unconscionable and stated that it was necessary for the Court to control its own process and consider whether the actions of a party bringing foreign proceedings were an interference with the due process of the Court. It was not established that the proceedings in New Zealand were interfering with the due process of the Court.

[20] Thirdly, consideration was given to the claim for an injunction restraining the defendant from continuing with the New Zealand bankruptcy proceedings. The conclusion was that this was a freestanding injunction and it did not satisfy Rule 1(1)(b).

[21] Fourthly, consideration was given to the claim for an injunction restraining the defendant from exercising any rights as a creditor pursuant to the Cross-Border Insolvency (Northern Ireland) Regulations 2007. The conclusion was that such an

injunction may in the future be brought by the New Zealand trustee in bankruptcy but the granting of an injunction in the present circumstances would be a breach of the defendant's Article 6 rights.

[22] Fifthly, consideration was given to the claim for an injunction restraining the defendant from serving a New Zealand bankruptcy petition in this jurisdiction, a step which has now been completed. McBride J was satisfied that that claim by the second appellant was in reality seeking to restrain the defendant from continuing with the New Zealand bankruptcy proceedings and to permit service out of the jurisdiction was, as she put it, "allowing the tail to wag the dog". Accordingly this claim too was found not to satisfy the gateway provisions of Rule 1(1)(b).

[23] I summarise the grounds set out in the Notice of Appeal as follows.

> First, under the heading 'The Act of Service' it is contended by the appellants that service of New Zealand bankruptcy proceedings in Northern Ireland is based on invalid proceedings in New Zealand and involves a trespass on the sovereignty of Northern Ireland.
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> Secondly, under the heading 'Service offends sovereignty of Northern Ireland and Public Policy' the appellants' contention is that the Northern Ireland courts are obliged in giving effect to the appellants' rights by applying a high level of scrutiny in respect of the proceedings undertaken by the defendant in New Zealand.
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> Thirdly, under the hearing 'Engagement of Article 6 of the European Convention' the appellants contend that the actions of the defendant amount to a breach of the appellants' Article 6 right to a fair trial.

[24] The appellants' skeleton argument states the principal issues as follows -

> (a) Whether the process put in place by the defendant to enforce a foreign default judgment by service of Bankruptcy Notices on the appellants, which causes the appellants to commit acts of bankruptcy in this jurisdiction and the Republic of Ireland, devoid of any adjudicative process, can be restrained by way of permanent injunctive relief.
>
> (b) Whether McBride J was right to say that the defendant's conduct was not unconscionable.
>
> (c) Whether the refusal of relief by McBride J engages Article 6, and
>
> (d) The obligation of the courts in Northern Ireland to defend and uphold Convention rights that inure for the benefit of both appellants.

[25] A number of matters have been raised which are not applicable in this appeal. First of all, reference was made to an act of bankruptcy in Northern Ireland. A debt that is claimed as due to a creditor is payable where the creditor is based. In this case, the defendant is based in New Zealand. Default of payment of a debt due to a creditor is the act of bankruptcy. Any act of bankruptcy in this case has been committed in New Zealand and not in Northern Ireland. New Zealand is the place where the payment claimed as due to the defendant has not been made. There is not an act of bankruptcy in Northern Ireland by any default of payment demanded by the notice of bankruptcy. The default of payment amounts to an act of bankruptcy in New Zealand.

[26] Secondly, reference was made to recognition of foreign judgments. The Administration of Justice Act 1920, section 9 makes provision for the recognition of foreign judgments, in this case the judgment obtained in New Zealand. Section 9(1) provides that the judgment creditor may apply to the High Court in Northern Ireland at any time within 12 months after the date of judgment or such longer period as may be allowed by the court, to have the judgment registered in the court and the court may, if it is just and convenient, order that the judgment be so registered.

[27] Sub-section (2) provides for exemptions where no judgment shall be registered and the appellants rely of two such matters. First of all, where the original court acted without jurisdiction and secondly, where the judgment debtor, being a person who was neither carrying on business or ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court.

[28] The appellants contend that they, as the judgment debtors, were not carrying on business in New Zealand and were not ordinarily resident in New Zealand and did not voluntarily appear before the courts in New Zealand and did not submit or agree to submit to the jurisdiction of New Zealand. There may be an argument about whether or not the appellants were carrying on business in New Zealand at a relevant time. The appellants incurred the debt in order to invest in New Zealand property and defaulted at a later date and hence there may be an issue about whether the appellants were carrying on business in New Zealand and whether the exemption applies to the appellants.

[29] Section 9(5) of the 1920 Act provides that a creditor may sue on the judgment in Northern Ireland. However, the creditor in New Zealand is not seeking to sue on the judgment. Nor is the defendant seeking to register the judgment that has been obtained in New Zealand. There has been no application in this jurisdiction in relation to registration of the foreign judgment. There are no proceedings under the 1920 Act. The rules in relation to the recognition of foreign judgments do not operate in relation to the present application. The appellants' contention that the defendant is not entitled to obtain recognition in Northern Ireland for the New Zealand

judgment informs their approach to this application but the appeal does not involve an issue about the recognition of foreign judgments.

[30] Thirdly, reference was made to the Cross-Border Insolvency Regulations (Northern Ireland) 2007. Under the 2007 Regulations a foreign representative, in this case a New Zealand representative, may apply for recognition in Northern Ireland of foreign insolvency proceedings. There may be 'main' proceedings, which arise when the centre of main interests is based in the jurisdiction of the insolvency proceedings in New Zealand, which is not this case. The alternative is that there may be 'non-main' proceedings, that is where there is an 'establishment' in the jurisdiction of the insolvency proceedings in New Zealand, in which event there may be an application in Northern Ireland for recognition of the New Zealand insolvency proceedings.

[31] An 'establishment' is defined as 'non-transitory economic activity'. It may be arguable that the appellants had an establishment in New Zealand, that they were engaged in non-transitory economic activity in New Zealand when they invested in property in New Zealand. Be that as it may, any issue about the recognition of foreign insolvency proceedings within this jurisdiction will arise if there is an application for such recognition. The Northern Ireland courts may refuse such recognition on public policy grounds. If there were to be such recognition then it may result in assistance and co-operation by the Northern Ireland authorities with the New Zealand insolvency proceedings.

[32] Thus, if the petitions for bankruptcy against the appellants were to be granted in New Zealand, the New Zealand authorities may apply to the Northern Ireland court for recognition of such insolvency proceedings. However, that has not happened. There are no proceedings under the 2007 Regulations. The EC Council Regulation on Insolvency Proceedings (1346/2000) applies to cross border insolvency within the European Union and is not applicable to this application. The appellants' contention that the defendant is not entitled to obtain recognition for the New Zealand insolvency proceedings informs their approach to this application but the appeal does not involve an issue about the recognition of foreign insolvency proceedings.

[33] Thus there have been arguments about three matters that this case does not concern. First of all it does not concern an act of bankruptcy in Northern Ireland, secondly, it does not concern an application for recognition in Northern Ireland of a New Zealand judgment and thirdly, it does not concern an application for recognition in Northern Ireland of New Zealand insolvency proceedings.

[34] There are bankruptcy proceedings in New Zealand. Notices of those bankruptcy proceedings have been served in Ireland, North and South, against the appellants. The New Zealand bankruptcy proceedings are based on the judgment that has been obtained in New Zealand to recover a debt due to the defendant. The

appellants' contention is that the New Zealand bankruptcy proceedings are an abuse of process. They are said to be an avoidance of the scheme of the legislation for mutual recognition of judgments under the 1920 Act. They are said to involve an avoidance of arrangements for service of New Zealand proceedings. They are said to amount to an avoidance of objections which are taken by the appellants to the New Zealand proceedings in relation to the debt and the judgment obtained. The appellants have not engaged in the New Zealand proceedings to set aside the judgment either on grounds of service of notice of the debt or notice of the proceedings or in respect of the merits of the debt claimed by the defendant. Their explanation is that they have no wish to submit to the jurisdiction of the court in New Zealand. They have lodged written objections to jurisdiction in the bankruptcy proceedings.

[35] This appeal concerns an application for leave to serve proceedings out of the jurisdiction and the question arises as to whether there is an issue to be tried on any substantive issue. That substantive issue must be one that goes beyond the mere claim for the grant of an injunction and involves a substantive claim being advanced by the appellants.

[36] The substantive claim that the appellants rely on is said to be that which arises from the clash of jurisdictions between New Zealand and Northern Ireland, the alleged misuse of proceedings by the New Zealand defendant in the manner in which they have effected service, the manner in which they sold the property, the absence of a right to a fair hearing in Northern Ireland for the appellants, who it is said, are otherwise being precluded from raising these issues in any proceedings and the avoidance by the defendant of the statutory arrangements in the 1920 Act by the use of insolvency proceedings to engage the appellants by the backdoor and unfairly. All these substantive matters, say the appellants, should preclude the defendant from any step in this jurisdiction. Added to this is the appellants' new claim in tort. The tort is said to be abuse of process. The abuse of process relied on is in effect all the matters outlined above.

[37] In relation to the New Zealand debt action there are a number of issues of procedure raised by the appellants. The issues concern the steps that were taken by the defendant about which the appellants were not on notice. They concern the absence of notice of the default on the mortgage payment, the recovery of possession of the property, the sale by auction, the proceedings for the balance of the debt due upon sale of the property and the judgment.

[38] These are issues than could and should be addressed in the New Zealand proceedings. The appellants do not propose to make a challenge in the New Zealand proceedings beyond lodging their Notice of Objection in the insolvency proceedings. They choose this course of action because they would otherwise feel they are submitting to the jurisdiction of the New Zealand court. Further, they have stated that they cannot afford the legal fees that would be

involved in a defence of the proceedings in New Zealand. However, the issue of submission to jurisdiction in New Zealand is a key aspect of their approach.

[39] First of all, New Zealand is the jurisdiction to determine liability for the debt. If there is a defence and a counterclaim, that is initially a matter for the court in New Zealand to consider. Secondly, New Zealand is the jurisdiction to determine any bankruptcy based on the New Zealand judgment. If there are grounds for objection to the bankruptcy proceedings, that is initially for New Zealand to determine. Thirdly, the defendant may seek recognition abroad for the judgment obtained in New Zealand. In that event, the Northern Ireland rules in relation to such recognition will apply but there has been no such application for recognition. Fourthly, the inability to enforce the judgment in Northern Ireland under the 1920 Act, if that be the case, does not preclude the bankruptcy proceedings being undertaken in New Zealand. Fifthly, New Zealand may seek recognition in Northern Ireland of the bankruptcy proceedings, should a Bankruptcy Order be made in New Zealand. In that event, the Northern Ireland rules will apply in relation to such recognition but there has been no such application for recognition.

[40] The proceedings issued by the appellants are aimed at restraining the defendant from taking steps in Northern Ireland in furtherance of the bankruptcy proceedings in New Zealand. The basis of this intervention concerns the alleged irregularities in the background proceedings in New Zealand. Whether the steps that have been taken by the defendant amount to such irregularities as would affect the validity of the New Zealand proceedings is, at least initially, a matter to be determined in New Zealand according to their procedures. We do not accept that the defendant is precluded from taking steps to effect service in this jurisdiction, or elsewhere on residents of this jurisdiction, in connection with New Zealand bankruptcy proceedings, by reason of the operation of the 1920 Act. If and when an application is made under the 1920 Act the matter will be considered by the courts in this jurisdiction. Similarly we do not accept that the defendant is precluded from taking steps to effect service in this jurisdiction, or elsewhere on residents of this jurisdiction, in connection with New Zealand bankruptcy proceedings, by reason of the operation of the 2007 Regulations. If and when an application is made under the 2007 Regulations the matter will be considered by the courts in this jurisdiction.

[41] In the meantime the appellants seek to restrain the defendant from engaging the appellants in the bankruptcy proceedings in New Zealand. To obtain leave to serve notice of a Writ of Summons out of the jurisdiction it is necessary to identify a claim for breach of a substantive right. As stated above we have not identified any such substantive right of the appellants based on the many objections made by the appellants to the various steps taken in New Zealand. However, the appellants also claim breaches of substantive rights in this jurisdiction. These include the right to prevent an abuse of process by the defendant in this jurisdiction by avoidance of international obligations, the right to a fair trial of the issues for the appellants in this jurisdiction and the right to be protected from oppressive conduct against the

appellants in this jurisdiction and the failure of the defendant and the courts in New Zealand to recognise the sovereignty of the courts in Northern Ireland.

[42] We are satisfied that no such substantive rights of the appellant are applicable in the present application. There is a clear division of jurisdiction in operation. The debt proceedings in New Zealand are a matter for the New Zealand courts. The insolvency proceedings in New Zealand are a matter for the New Zealand courts. The arrangements for service of notice outside New Zealand of steps in the New Zealand proceedings are a matter for the New Zealand courts. The recognition of the judgment or bankruptcy will be a matter for the Northern Ireland courts if and when any applications are made for that purpose. In the meantime the Northern Ireland courts will not restrain the arrangements for service of notice in this jurisdiction of steps in the New Zealand proceedings. The actions of the defendant in the circumstances cannot be regarded as unconscionable.

[43] Accordingly, on the application for leave to serve out of the jurisdiction under Rule (1)(1)(b) in connection with the injunctions and under Rule (1)(1)(f) in relation to tort, we are satisfied that neither gateway applies. The appellants do not have a good cause of action in Northern Ireland in respect of the matters that they have raised. We are satisfied that this is not a proper case to permit service out of the jurisdiction.

[44] The appeal against the decision of Madam Justice McBride is dismissed.