Neutral Citation No. [2015] NICh 1

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Judgment: approved by the Court for handing down

Delivered: **09/01/2015**

*(subject to editorial corrections)**

2014/36054

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between

LAURENCE MOFFAT

Applicant

and

DOROTHY MOFFAT, DAIRE MOFFAT, CONAL EOIN TOLAND AND MEABH EMILY TOLAND

Respondents

MR JUSTICE DEENY

[1] By an Amended Summons the plaintiff herein seeks a declaration that an assignment by his sister, Dorothy Moffat to her adult children, Daire Moffat, Conal Toland and Meabh Toland, of a house and garden at [address], off the Ormeau Road, Belfast, made on or about 31 October 2012 constitutes a transaction at an under value within the meaning of Articles 367-369 of the Insolvency (Northern Ireland) Order 1989. He further seeks a declaration that this transaction was entered into for the purpose of either putting assets beyond the reach of Laurence Moffat or that it prejudiced the interest of Laurence Moffat in relation to a claim, which he was making in respect of the recovery of legal costs arising out of litigation between the first respondent Dorothy Moffat and himself.

[2] Mr Moffat was represented by Mr David McBrien of counsel. Ms Dorothy Moffat represented herself. From time to time in the proceedings she has said that she was minded to refuse service of the proceedings. Nevertheless, it is manifestly obvious throughout that service has been successfully achieved upon her. She is still living at [address], and I am satisfied she has been properly served.

[3] There was an issue about service on her children and I ruled in her favour that they were not properly served when the matter first came before me.

[4] The applicant then applied, as he was entitled to do, ex parte for an order for service out of the jurisdiction on the second, third and fourth defendants. I made an Order permitting that on 16 May 2014. The matter was listed for hearing on 17 September 2014 in the course of which service by first class post on the three addresses outside the jurisdiction was proved before me. It is convenient to say a word more about service. At the hearing before me on 19 November 2014, Ms Moffat told the court that her children moved houses and had not been properly served. She said they did not get the summons. When in a subsequent response Mr McBrien pointed out that she had therefore been in touch with her children who were obviously aware of the proceedings implicitly from what she said she disputed this. But in the course of her response she said there was a family get together in late September and she had told them then about these proceedings. I remain satisfied that they are well served pursuant to Order 10, Order 11, r.4, 6 and 9. None has entered an appearance. It would be sensible of Ms Moffat to give any changes of address to her brother's solicitors and the Chancery Office but this is not essential as the other defendants have chosen not to appear.

[5] Mr Laurence Moffat, or John Laurence Moffat to give him his full name although this has been omitted by his solicitors from the title of the proceedings, bases his application to set aside the registration of ownership of the premises in the names of the children on the basis that it was made after the Court of Appeal in Northern Ireland had dismissed his sister's appeal from the Order of Lord Justice Girvan of 12 October 2011 finding against her on the construction of the will of her late father. The Order of the Court of Appeal was 24 October 2012 and the assignment was of 31 October 2012, only a week later. Both courts have made orders for costs against her. The transfer for natural love and affection, he submitted, was clearly at a gross under value and for the sole purpose of putting the assets beyond him and the Enforcement of Judgments Office. The basis of the case therefore is the reliance on the two Orders for costs made against Dorothy Moffat.

[6] Ms Moffat's application before me today was, in effect, to refine her somewhat discursive submissions, that as a result of the judgment of the Court of Appeal following the adjourned hearing on 17 September the case should not proceed against her. It was listed for 8 and 9 January 2015.

[7] I shall deal briefly with her subordinate points. I have dealt with the issue of service. She made various references to bankruptcy proceedings against her. It appears that the statutory demand issued against her was set aside on 6 October by the Master in Bankruptcy. Mr McBrien says that his solicitor did not appear owing to a diary error. They are now seeking to rescind that setting aside. They have chosen to adopt that course.

[8] Although not said in her email of 18 November setting out her reasons for her application in oral submissions she also objected to me hearing the matter. Two key points in support of her application were as follows. Firstly, she believed that I had found that her brother was the sole beneficiary of her late father's estate. I have

made no such finding and even if I had it would not be a good ground for recusing myself. Secondly, she imagined that I had discussed the case in 2011 with Mr McBrien in Chambers in her absence. This is completely wrong and no such discussion ever took place. In the judgment, to which I turn in a moment, of the Court of Appeal references were made to her tendency to make widespread and discursive criticisms.

[9] However, it seems to me that she does have a point of substance although the court had to be proactive in locating it. The executor of the estate was confronted with other proceedings brought by Ms Moffat pursuant to Article 3 of the Inheritance (Provision for Family and Dependents) (NI) Order 1979. This matter was not tried before me. One might have thought that there was a preliminary issue as to whether such an application was out of time as it is meant to be brought within six months of the grant of administration of the estate in question which, here, must have been many years ago. In any event it appears that Mr Moffat rather chose to bring an application to stay proceedings under the inherent jurisdiction of the court until such time as Mr Moffat's costs awarded against Ms Moffat (who has reverted to her maiden name after her marriage to a Mr Toland) were paid but he amended that summons to take the time point on 3 July 2013. This matter was heard by Burgess J as a Chancery Judge and concluded by him on 10 January 2014 when he granted a stay on the basis that the costs should be paid first before the estate had to bear the further costs of defending these proceedings. He refers to the time point at paragraph 21 thereof in the context of the stay but does not expressly rule on it.

[10] The matter came before the Court of Appeal who delivered judgment in the matter on 25 September 2014 per Gillen LJ. The court upheld Ms Dorothy Moffat's appeal. They found that the Learned Judge at first instance had applied the wrong test in deciding the matter before him i.e. that he was putting the onus on Ms Moffat to show that there were exceptional circumstances to justify the case proceeding. They addressed the issue of these Orders for costs. The court noted that Mr Moffat had obtained certificates of taxation in respect of these costs. But he and his advisers had then, as I have mentioned, proceeded to serve a statutory demand on Ms Moffat, the necessary precursor of seeking to have a bankruptcy order made against her. The court then found as follows:

> "[27] The first difficulty however that confronted Mr McBrien when invoking the inherent jurisdiction in this instance to order a stay pending the payment of the relevant costs was that although they had been taxed and certified, these costs were still the subject of a dispute on foot of the statutory demand. The respondent had chosen not to complete the enforcement process of the statutory demand in the wake of the appellant's application to have it set aside.

> [28] Burgess J had not been apprised of this fact. We are not persuaded that had he known of this, he would have invoked the inherent jurisdiction of the court to order the current proceedings be stayed until costs, which were still a matter of legal dispute, were paid. To do so would be to oblige the appellant to pay costs which she is legally entitled to dispute and which were part of an ongoing, but incomplete, legal process."

[11] It seems that in response to the statutory demand Ms Moffat had asserted that she was unaware of the Taxing Master's procedures concerning enforcement of judgment against her and she had not been served with any taxation certificates. I am not in a position to comment on this. What is the position is that the Court of Appeal in Northern Ireland has stated that she is legally entitled to dispute the order for costs previously made by that court itself and before that by Girvan LJ, despite the certificates of taxation that have been issued. It may be that that conclusion has been arrived at because of the decision of the executor and his advisers to pursue several remedies in parallel but that is a decision with which they must live.

[12] The application before me under the Insolvency Order is clearly grounded on the debt consisting of the two orders for costs not having been paid and motivating this transaction of transfer to the children. I am bound by the decision of the Court of Appeal that she is still legally entitled to dispute those orders for costs. In the circumstances it would not be right to hear the application to set aside the transfer of [address], until the legal status of the two certificates has been finally resolved.

[13] As counsel for Mr Moffat tells me they are still seeking to rely on the statutory demand it may be that it has to be exhausted through that process. But it is not for me to give directions to the parties.

[14] I had indicated on 19 November that the case was not proceeding in January in any event as this is what Ms Moffat desired and, it transpired, it was the application also of Mr Moffat. The modest cash value of this estate has been exhausted by these proceedings. He is a pensioner and without other assets, I was told, by which I think is meant liquid assets, and he is now applying for legal aid.

[15] As Mr McBrien, for Mr Moffat, had only sight of the basis for Ms Moffat's application to stay these proceedings before me on the day on which I heard her, 19 November, and as even then the point to which I have adverted in the preceding paragraphs was not clear I thought it only fair that he should be given an opportunity to make further submissions. I received further written submissions from him shortly after 8 December 2014. I have taken these into account but they do not alter the view I have expressed above. I also received submissions from Ms Moffat, dated 2 December 2014. For completeness I observe that it might have been argued that I should proceed with this case about setting aside the transfer of property on the basis that it was enough that Ms Moffat <u>believed</u> that she was liable

for the two orders for costs at the time she made the assignment on 31 October 2012. But as the case she is apparently making before the Master and before the Court of Appeal is that she was in some way unaware of the procedures and had not been served with the taxation certificates it is best if that point is not left unresolved before I decide on whether this is a transaction which ought to be set aside pursuant to Article 367 to 369 of the Insolvency Order 1989.

[16] For the assistance of the parties I indicate that I am willing to hear the case previously heard by Mr Justice Burgess under the Inheritance Order when both parties have had an opportunity of completing their applications for legal aid. It can be seen that I do not wish to hear the application to set aside the transfer of the house at [address] while the proceedings relating to the statutory demand are still outstanding.

[17] For completeness I am not minded, contrary to Mr McBrien's final written submission, to bundle together different causes of action. These proceedings have already been the subject of sufficient confusion. I would be apprehensive that trying to hear combined hearings with an unrepresented litigant would add to the confusion.