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Judgment: approved by the Court for handing down | *Delivered:* **16/5/2016**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

OFFICIAL RECEIVER

-v-

JOHN McDAID

15/60367/A01 and 15/60367/A02

Before: Gillen LJ, Weatherup LJ and Weir LJ

GILLEN LJ (delivering the judgment of the court)

[1] Let me say at the outset of this judgment that we are grateful to Mr McDaid for having put his thoughts in writing which has been of great help to us. We have had an opportunity during the hearing to rise and read those, and then he then read them out in some detail. But we are grateful for that assistance and also to counsel Mr Sheil on behalf of the respondent who also had provided a very helpful skeleton argument together with a number of authorities all of which we had looked at.

[2] The Official Receiver as trustee in bankruptcy of Marion McDaid wife of the appellant had instituted proceedings in this matter in respect of properties at 4 Dundrum Park, Derry and 33 Francis Street, Derry. In summary the present proceedings before the court relate to the respondent's application seeking orders for possession and sale of premises at 33 Francis Street which premises vested in the respondent as trustee in the bankruptcy. The Francis Street premises vested in the respondent following a successful application by the respondent in November 2014 to have previous transfers of the premises set aside as transactions at an undervalue. Those transfers had been made in and around November 2005 and then again in January 2012.

[3] The thrust of the appeal in this case by the appellant is that he, nor indeed the second-named respondent, were notified of the hearing date on 18 November 2014 when the substantive application had been heard concerning the transfers. On foot of that assertion subsequently he has filed in the court a document entitled Notice of Void Order and he asserts with the assistance of a number of authorities that in

essence that decision of Master Kelly is void ad infinitum void ab initio. It is common case that the appellant had not been notified of the hearing in November 2014. Mr McDaid spend a great deal of this appeal as submitting that this was a result of malafide, bad faith on the part of counsel, solicitor for the respondent and indeed he went so far as to suggest collusion between the Master and Mr Sheil. It is not the first time that Mr McDaid has made such unfounded allegations as was evidenced in the judgments in certain other cases surrounding these matters including before the Court of Appeal. Once again we find not a scintilla of evidence to sustain these allegations and we reject completely the suggestions of malafide, fraud, and collusion.

[4] Mr McDaid has steadfastly chosen not to appeal to extend time in order to further his appeal against the decision of Master Kelly. His reasoning before us, that in a previous unrelated hearing, he had been refused leave to extend time before Mr Justice Deeny is risible and reflects a mode of thinking that deliberately eschews taking the obvious efficient and timely method of securing the remedy for his concerns by simply appealing the decision of Master Kelly. He has ignored exhortations by various judges to take this course during the course of a number of reviews and hearings in this matter. Instead he has fixedly concentrated on asserting that the proceedings before Master Kelly constituted a nullity.

[5] Before Mr Justice Horner he dealt with the proceedings in two parts. He delivered judgment on, I think it was 14 December 2015 dismissing the point raised by the appellant that the order of Master Kelly on 18 November was a nullity. He held that any alleged defects were cured by virtue of being within the provisions contained in Order 2 Rule 1 of the Rules of the Court of Judicature 1980 or that they constituted an irregularity. Secondly, he delivered a further judgment on the substance of the respondent's application namely orders for possession and sale of Francis Street on, I believe, 13 January 2016 granting the respondent that relief and it is against those two decisions that this present appeal has essentially been brought. I pause at this stage to outline the contents of Order 2 Rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980 which is headed Non-Compliance with Rules and 1(1) says:

> "Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in conjunction on with any proceedings, there has by reason of anything done or left and done been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings."

[6] Valentine dealing with this matter in his Commentary on the Law of Northern Ireland, states that Order 2 Rule 1 is thus capable of curing any breach of these rules however great.

[7] Mr Justice Horner, as I have indicated, said that the issue before him was such that he could not make an order for possession and sale if Master Kelly's decision was a nullity and that was the point was made before him and that was quite obviously why he made a determination on that matter. Mr McDaid seemed to think that this echoed some confusion in the mind of Mr Justice Horner. On the contrary it was the only possible approach that Mr Justice Horner could have taken until he was satisfied about the question of nullity on Master Kelly's decision otherwise he could not have proceeded to deal with the second part of the claim namely, the application for possession and sale. We have come to the conclusion that the decision of Mr Justice Horner on the question of nullity was correct and we are satisfied that the decision of Master Kelly was not a nullity. Strictly speaking Order 2 Rule 1 does not apply in this case because failure to notify of a hearing is not a breach of rules under the Rules of the Court of Judicature simply because that eventuality, namely somebody not being told about a particular hearing does not fall within its remit. However, Order 2 Rule 1 does provide a valuable analogy to the present position in considering whether or not the decision of Master Kelly constitutes an irregularity or a nullity. The fact of the matter is that if under Order 2 Rule 1 failure to serve proceedings does not constitute a nullity or as Valentine has said in his commentary that any breach however great would not constitute a nullity. Then we fail to see how in this instance failure to ensure that the appellant was aware of the hearing could possibly constitute a nullity.

[8] A number of authorities have been helpfully put before us all of which we have had a chance to look at. In essence they are repetitive in many ways of the important principles and we find that in the case of Pritchard (1963) Chancery 502 the decision of Lord Justice Upjohn affords us the best guideline available in this vexed area of deciding when an irregularity occurs as opposed to when a nullity occurs. At page 523 he says as follows:

> "The authorities do establish one or two classes of nullity such as the following. There may be others though for my part I would be reluctant to see much extension of the classes.
>
> (1) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This of course does not include cases of substituted service or service by filing in default or cases where service has properly been dispensed with."

That is far removed from the present case where it is not a question of service because these proceedings had clearly been served and indeed affidavits had been filed by all the parties including the appellants, but simply a matter of the appellant not being informed of the date of hearing.

Secondly, Lord Justice Upjohn went on to say:

> "Proceedings which had never started at all owing to some fundamental defect in issuing the proceedings."

Again one could not conceive of proceedings more far removed from the instant case where of course they had been properly started and served etc.

Thirdly, Lord Upjohn said "proceedings which appear to be duly issued but fail to comply with a statutory requirement" and once again that falls outwith the instant case.

[9] One of the cases that is relied on by Mr McDaid is a case of Craig v Canson. In that case the issue was the failure of the plaintiff's summons for enforcement to be served on all the defendants thereby rendering that defendant ignorant of the entirety of the proceedings against them. As such the originating proceedings had never come to the attention of the defendant and the court set aside that as a nullity. That is easily distinguishable from the present case where as I have said the original proceedings had been duly served, evidence had indeed been submitted in form of affidavit evidence challenging the respondent's application and so on. So we believe therefore that there is clear distinction between that case as in the present.

[10] The other cases cited to us in this case as I have already mentioned do not really take the matter any further and simply reflect the principles that we have outlined in the two cases that we have heard.

[11] It is at times definitely difficult to draw a line between nullity and irregularity. It is a matter to be judged on the facts of each case. In this particular case as I have said we are satisfied that the failure to notify him of the hearing on this date amounted to an irregularity and not a nullity.

[12] Accordingly we consider that these grounds of appeal based on nullity and the attended matters of malafide and so on that were added to them are unsustainable. However, we do not believe that the matters should end there. Section 38 of the Judicature (Northern Ireland) Act 1978 provides that this court has not only got all the powers of the High Court hearing the original appeal but also this court where it is just has the power to make further orders in order to determine the core issue, or substantive issue, that arises in the case. We consider that prima facie there was an irregularity in the decision of Master Kelly in making her order revoking the transfers when she was unaware, and we believe that she was bona fide unaware, that the appellant had not been notified of the hearing. Prima facie

this irregularity in the judgment provided the basis of the order for possession and sale because without that judgment, without that order from Master Kelly the order for possession and sale probably could not have been made. The High Court of course could have chosen not to make an order for possession and sale and to take steps to have the irregularity corrected. We have decided that it is only just that we should exercise our power under section 38 of the Judicature (Northern Ireland) Act 1978 to order that the Master in this matter should be tasked with a review of her decision of November 2014 i.e. the decision concerning the transfers in light of the unchallenged evidence that the appellant was not aware of that hearing. Whilst we understand that there had been something of a history of non-appearance by this appellant in other hearings/reviews nonetheless care should have been taken by both the solicitor and counsel acting on behalf of the respondent and indeed the court itself to ensure that the appellant had been notified of the hearing. This was particularly the case in a matter where the appellant was unrepresented and was a personal litigant. Care needs to be taken to ensure that where there is a non-appearance that non-appearance is not as a result of a failure to notify the person of the hearing.

[13] Since the finding by the Master is one of the cornerstones of the finding that there should be an order for possession and sale of the properties we therefore come to the conclusion that we should grant this appeal to the extent that we set aside the order for possession and sale. That matter can of course be pursued again by the respondent in light of any order made by the Master consequent upon her review which we have directed should take place in this instance. I should indicate that if the Master decides to revoke her order of 14 November 2014 any new hearing before that new hearing should be before a different Master and if there is any appeal to that it should be before a Chancery Judge other than perhaps Mr Justice Horner or Mr Justice Deeny.

[14] In passing for the record I should note that the power of review under the Insolvency (Northern Ireland) Order 1989 is found in Article 371 which states that "the High Court may review, rescind or vary any order made by it in the exercise of the jurisdiction under this order" and that is the power of review which should be exercised by the Master in this case.

[15] Since the appeal could easily have been brought about by this appellant himself, by the means of simply asking for or seeking an extension of time to appeal, which we feel would in the circumstances have been readily granted and because he has failed on the grounds that he argued and our decision to revoke the order for possession and sale has been made of our own volition we consider that there should be no order for costs on this appeal.