Neutral Citation No: [2018] NICA 15 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **STE10622** *Delivered:* **18/04/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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PAUL MURPHY

Appellant:

-and-

BRIAN MURPHY

Respondent:

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Before: Stephens LJ and Treacy LJ

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] This is an application by John Paul Murphy ("the appellant") pursuant to Article 61(6) of the County Courts Order (Northern Ireland) 1980 ("the 1980 Order") for an order directing HHJ McReynolds ("the Judge") to state a case for the opinion of the Court of Appeal as to the jurisdiction of the County Court to order particulars in relation to appellate proceedings from the Domestic Proceedings Court under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ("the 1998 Order"). The proceedings involve an application by the appellant for a non-molestation order against his brother, Brian Murphy.

[2] The appellant appeared in person. Mr Lannon appeared on behalf of Brian Murphy.

Factual Background

[3] The appellant and his brother Brian Murphy have been involved in a family dispute. On 16 June 2015 the appellant obtained an ex parte interim non-molestation order against his brother, Brian Murphy in the Domestic Proceedings Court. The duration of that order was initially until 24 July 2015 but it was extended on a number of occasions. On 25 September 2015 Brian Murphy obtained an ex parte interim non-molestation order against the appellant in the same court. Again the

duration of that order was initially limited but it was extended on a number of occasions. On 22 April 2016 both of the interim non-molestation orders were discharged *on consent*. The discharge of those orders came about when the appellant informed the court that he would consent to his order not being extended if Brian Murphy reciprocated in respect of his order. Brian Murphy did reciprocate and both interim non-molestation orders were discharged. The consequence is that for a period of some two years there has been no non-molestation order in place. On 24 March 2017 after a hearing of both of the substantive applications they were dismissed on their merits at Armagh Domestic Proceedings Court by District Judge Holmes. Brian Murphy did not, but the appellant did appeal to the County Court.

[4] In the County Court by a notice dated 8 June 2017 the appellant sought to require Brian Murphy pursuant to Order 5 Rule 3(2) of the County Court Rules (Northern Ireland) 1981 to:

> "provide further particulars of any defence and/or *counterclaim* to include any/all *evidence* that he intends to rely upon to substantiate (prove) the many extremely serious statements and claims/allegations he made in his *written statement* submitted to the *Court* dated September 16th 2015, which he repeated and relied upon in his later (related) testimony in the Magistrates Court on March 24th 2017." (emphasis added)

After that introductory paragraph the technique adopted by the appellant was to extract 54 allegations made by Brian Murphy in his statement dated 16 September 2015 setting out all of those allegations in the notice. Instances of those allegations are:

(a) "My brother (Paul) has a serious mental health problem."

(b) Another brother Eugene "also suffers from mental health difficulties."

(c) "He (Paul) has no compunction about telling lies or doing anything else to get his way."

The notice then concludes with the following paragraph:

> "For each of the 54 specific statements and claims/allegations listed above, I require the respondent to provide *evidence* (documents, photographs, maps or other) to substantiate/justify (*prove*) each specific statement and claim/allegation made and to

identify/confirm the source of that *evidence*." (emphasis added).

[6] There are a number of immediate comments which we make in relation to the notice as follows:

(a) Brian Murphy has not brought any *counterclaim* and indeed there is no provision enabling him to do so.

(b) If particulars are to be given by Brian Murphy of his defence then those particulars are restricted to a statement in summary form of the material facts on which he relies for his defence, but not the *evidence* by which those facts are to be proved. On that basis even if the Judge had jurisdiction to order particulars that jurisdiction did not extend to ordering Brian Murphy to set out the evidence upon which he relied.

(c) The written statement dated 16 September 2015 was the statement in support of Brian Murphy's application for a non-molestation order against the appellant in the Domestic Proceedings Court. On 24 March 2017 Brian Murphy's application was dismissed and he did not appeal from the Domestic Proceedings Court to the County Court. The proceedings brought by Brian Murphy have concluded. Furthermore, the statement was not filed in the Domestic Proceedings Court in opposition to the application for a non-molestation order made by the appellant and the statement does not form part of the documents in relation to the appellant's appeal to the county court. Accordingly it is not a document which has been filed or submitted by Brian Murphy either in the Domestic Proceedings Court or in the County Court in opposition to or in defence of the application by the appellant for a non-molestation order. However the appellant contends that whatever the procedural position is Brian Murphy contests his application for a non-molestation order on the basis set out in the statement which is that the appellant is a manipulative liar who is in fact molesting Brian Murphy. On that basis the appellant contends that the statement is relevant to his application for a non-molestation order.

(d) The notice is not legally recognisable as a notice for particulars and if drafted by a lawyer no order would be made in relation to it. However a degree of latitude should be allowed to litigants in persons dealing with the complexities of cases, see *Boylan-Toomey v Boylan-Toomey* [2008] NIFam 15 at paragraph [14]. The exact degree of latitude will depend on the circumstances of each individual case, including the judge's assessment of the capabilities of the litigant in

person. In our estimation the appellant is quite capable of drafting a notice for particulars.

[7] Brian Murphy declined to provide any answer to the notice and the appellant made an application to the judge to compel him to reply. The application came on for hearing on 19 June 2017 and the judge ruled that when "the County Court sits as an Appellate Court it has an identical jurisdiction not a wider jurisdiction than that of the court of first instance." Accordingly the Judge considered that as the Domestic Proceedings Court did not have jurisdiction to order Brian Murphy to give particulars then she did not have jurisdiction. On that basis she dismissed the appellant's application for particulars and ordered him to pay the costs of the application. In the alternative the judge did not consider (a) whether these were particulars (b) whether this was an inappropriate application to obtain evidence, (c) whether the application should be dismissed on the basis that if they were particulars they were particulars of a statement made by Brian Murphy in his own proceedings which had been dismissed and accordingly might not be relevant to the appeal, (d) whether given the purpose of the legislation which includes the need for expedition these were unnecessary particulars either at all or at this stage, (e) whether having taken into account the ability of the court to adjourn if a party was taken by surprise the particulars should or should not be ordered (f) whether the passage of a considerable period of time since the proceedings were commenced should be taken into account in exercising discretion as to what if any particulars to order or (g) whether given that the matter had proceeded in the Domestic Proceedings Court without any party being disadvantaged that particulars should not be ordered.

[8] By a requisition dated 10 July 2017 extending to some five pages the appellant applied to the Judge to state a case for the opinion of the Court of Appeal. In that notice the appellant recorded that the Judge had ruled that "when sitting as an appellate court on an appeal from an order of the Magistrates Court, the County Court power/jurisdiction was restricted to that of the lower Magistrates Court and, as such, did not have the power/jurisdiction to order discovery of particulars relevant to the case." The appellant identified the point of law as being whether "the county court does have the power and jurisdiction to order the discovery of particulars" (sic).

[9] On 18 August 2017 the Judge issued a certificate refusing the appellant's application to state a case being of the opinion that the application was frivolous. The Judge did not give any explanation or reasons for the conclusion that the application was frivolous. The word frivolous can embrace not only an application which is futile, misconceived or hopeless but also an application which is *academic*.

The test in relation to an application to state a case

[10] If the county court judge is of opinion that an application to state a case is frivolous, vexatious or unreasonable she may refuse to state a case, see Article 61(4)

of the 1980 Order. In *McClenaghan (Chief Inspector) v Maxwell* [2000] NIJB 109 this court considered what constituted a "frivolous" application. Carswell LCJ referred to the passage in the judgment of Lord Bingham LCJ in *R v Mildenhall Magistrates' Court, ex parte Forrest Heath District Council* (1997) 161 JP 401 at 408 where Lord Bingham stated that "what the expression means in this context is, in my view, that the court considers the application to be futile, misconceived, hopeless or academic." Carswell LCJ stated "the test is that of hopelessness or academic nature as set out by Lord Bingham LCJ." The question arises as to whether the word "unreasonable" should be construed applying the "same kind" rule (ejusdem generis rule) so that an unreasonable application to state a case would be of the same kind as a frivolous or vexatious application. Mr Lannon submitted that the word unreasonable should have its ordinary meaning and he relied on *Dyer v Secretary of State for Employment* [1983] [1983] Lexis Citation 1359 EAT 183/83, which involved a consideration of a rule in a different area namely employment law. We have not heard full argument in relation to what constitutes an "unreasonable" application but tend to the view that there is a kind or group in Article 61 so that an "unreasonable" application is construed as an application of the same kind as a frivolous or vexatious application. We tend to that view as a litigant would not be acting unreasonably if a judge misapprehends the law within the meaning of the other words in Article 61(4). There is no exercise of discretion in relation to the application of correct legal principles and there is no discretion to get the law wrong. A challenge to what is perceived to be an incorrect legal ruling could not be termed unreasonable unless it was futile, misconceived, hopeless or academic.

[11] An academic application to state a case in relation to the jurisdiction of the county court to order particulars in relation to appellate proceedings from the Domestic Proceedings Court the 1998 Order could embrace a situation where the Judge or this Court on hearing an application pursuant to Article 61(6) of the 1980 Order formed the view in the exercise of discretion that even if there was jurisdiction the particulars would not be ordered. In that way the question of jurisdiction would be entirely academic.

[12] The passage in the judgment of Lord Bingham LCJ in *R v Mildenhall Magistrates' Court, ex parte Forrest Heath District Council* also provides guidance that it is helpful as to reasons being given where a judge refuses to state a case. Lord Bingham stated:

> "Where (the justices form an opinion that an application is frivolous) it would be very helpful to indicate, however briefly, why they form the opinion. A blunt and unexplained refusal, as in this case, may well leave an applicant entirely uncertain as to why the Justices regard an application as futile, misconceived, hopeless or academic. Such uncertainty is liable to lead to unnecessary litigation and expenditure on costs."

We consider that ordinarily brief reasons should be given when refusing an application to state a case for the opinion of the Court of Appeal.

Legislative and procedural framework

[13] When problems arise in close family relationships, the strength of emotions involved can cause unique reactions which may at times be irrational or obsessive. While these reactions may most commonly arise between spouses and cohabitants, they can also occur in many other close relationships which give rise to similar stresses and strains and in which the people concerned will often continue to be involved with one another. In addition concern and responsibility for a child's welfare can give rise to strong emotions and unreasonable behaviour. Accordingly it has come to be recognised in the context of family proceedings that violence and molestation within family relationships needs to be treated as a special case and hence the provisions of the 1998 Order. The fact that children can be involved and the fact of the family context often with the people continuing to be involved with each other which is a feature in all applications under the 1998 Order *requires that the procedures for adjudication are rapid*. We consider that a broad and purposive approach to the language of the 1998 Order and to the relevant rules should be adopted to ensure that the courts will have regard to the general principle that any delay in determining a question with respect to the upbringing of children is likely to prejudice the welfare of the child. That approach should apply equally even if children are not involved. There should not be two different approaches dependent on whether children are or are not involved. Furthermore delay impacts adversely on all close family relationships. This is an area which requires promptness and expedition. The anticipated speed envisaged in the rules is exemplified by the two day period between service of a summons for a non-molestation order and a hearing which period can be abridged. That two day period and the broad purposive approach to the language of the 1998 Order does not sit easily with the paraphernalia of particulars.

[14] We set out the provisions of the 1998 Order in so far as they are relevant to this case. We make it clear that in doing so we have omitted parts of the Articles to which we refer if they are not relevant on the facts of this case. We will adopt the same approach when we come to consider the relevant rules and other statutory provisions.

[15] Article 20(1) of the 1998 Order provides that a "non-molestation order" means an order containing a "provision prohibiting a person ("the respondent") from molesting another person who is associated with the respondent." Article 3(3)(d) provides that a person is associated with another person if "they are relatives." By virtue of Article 1(2) a relative includes a brother. Article 20(2) provides that the court may make a non-molestation order if an application for the order has been made by a person who is associated with the respondent. So the appellant as a

brother of Brian Murphy was associated with Brian Murphy and could make an application for a non molestation order.

[16] Article 20(5) provides that "(in) deciding whether to exercise its powers under this Article and, if so, in what manner, the court shall have regard *to all the circumstances including the need to secure the health, safety and well-being* of the applicant." The respondent contends that on 22 April 2016 when both of the interim non-molestation orders were discharged on consent that this could only have been done having regard to the need to secure the health, safety and well-being of the appellant so that at that date there was no need for a non-molestation order to protect the appellant. It is submitted that the lack of any threat was either expressly or implicitly recognised by the appellant at that time and that the continuation of the proceedings thereafter is entirely detached from *any need to secure the health, safety and well-being* of the appellant.

[17] Article 23 under the heading "Ex parte orders" provides that the court may, in any case where it considers that it is just and convenient to do so, make a non-molestation order even though the respondent has not been given such notice of the proceedings as would otherwise be required by rules of court. This court in *Wallace v Kennedy* [2003] NICA 25 at paragraph [7] considered the circumstances in which an ex parte order should be granted. In short ex parte orders should be the exception rather than the rule. For a short summary of the case law see paragraph [16] of *RH & Others v IH* [2009] NI FAM 17.

[18] Article 20 (7) provides that a "non-molestation order may be made for a specified period or until further order."

[19] Article 24 provides that a "non-molestation order may be varied or discharged by the court on an application by the respondent."

[20] On the facts of this case proceedings under the 1998 Order are allocated by Article 4(1) of the Family Homes and Domestic Violence (Allocation of Proceedings) Order (Northern Ireland) 1999 to the Domestic Proceedings Court which is defined in Article 3(b) as "being those courts of summary jurisdiction sitting to hear domestic proceedings in accordance with Article 89 of the Magistrates' Court (Northern Ireland) Order 1981."

[21] The relevant rules are the Magistrates' Courts (Domestic Proceedings) Rules (Northern Ireland) 1996 as amended by Magistrates' Courts (Domestic Proceedings) (Amendment) Rules (Northern Ireland) 1999 ("the Domestic Proceedings Rules").

[22] Rule 1(3) of the Domestic Proceedings Rules provides that the "Magistrates' Courts Rules (Northern Ireland) 1984 ("the Magistrates' Courts Rules") are to have effect subject to the provisions of the Domestic Proceedings Rules."

[23] Rule 10(1) of the Domestic Proceedings Rules make provision for "an application by way of *complaint* to … clerk of petty session for … a non-molestation order" under the 1998 Order (emphasis added). The application by way of complaint shall be made in writing in Form 1 which form is to be supported by a statement which is signed and is declared to be true or with the leave of the court, by oral evidence. Form F1 describes the person applying for the non-molestation order as the "applicant" and the person against whom the order is sought as the "respondent." Rule 10(3) then provides that any summons issued in consequence of such an application shall be prepared in triplicate in Form F2 and a copy shall be served together with a copy of the written application and any supporting statement on the respondent not less than two days prior to the date fixed for hearing. The period of two days can be abridged under Rule 10(4). It can be seen that the proceedings are by way of *complaint* supported by Form F1 and ordinarily by a statement leading to the issue of a summons which is to be served on a respondent with the respondent having only two days' notice of the hearing but with a power to shorten that period of time. The purpose of the legislation which is to provide a summary remedy in a short timescale to protect vulnerable individuals is reflected in these Rules.

[24] An application to discharge a non-molestation order is made in accordance with Rule 13 of the Domestic Proceedings Rules which requires that an application by way of complaint to a clerk of petty sessions for the discharge of a non-molestation order shall be made in writing in Form F8. That Form requires the person applying for the discharge of the order to state briefly their reasons for applying. It can be seen that the reasons the respondent is required to state are brief. Again this is a reflection of the summary nature of the proceedings.

[25] We consider that there is no power for the District Judge in the Domestic Proceedings Court to compel particulars of the applicant's statement nor is there any power to compel the respondent to make a statement setting out his defence let alone to compel the respondent to give particulars of any defence. That is not to exclude a District Judge from encouraging the mutual exchange of statements or particulars but the structure of the rules is that the application is made supported by a statement with the ability for oral evidence to be called. It is a summary procedure and we consider that the purpose of the legislation would be defeated if the procedures were complicated by interlocutory applications for particulars. If the statement or the evidence of the applicant or the respondent lacks detail then that may lead to the evidence being rejected. The lack of any jurisdiction to order particulars is to be seen in the context that the Domestic Proceedings Court, as with any other court, has the ability to adjourn a hearing if an applicant or respondent is taken by surprise and if an adjournment is considered necessary in order to meet any case that is being made. Furthermore, if evidence subsequently becomes available to a respondent he has the ability to apply to the Domestic Proceedings Court to discharge any non-molestation order that has been made.

[26] We are content that the Domestic Proceedings Court does not have jurisdiction to order particulars but the question remains as to whether an application to compel the Judge to state a case as to whether the County Court on an appeal from the Domestic Proceedings Court under the 1998 Order has jurisdiction to do so, is either hopeless or on the facts of this case academic. We do not consider it appropriate to analyse the issue as to whether it is hopeless to contend that the County Court on an appeal from the Domestic Proceedings Court has jurisdiction to order particulars as we have not heard full argument and given our settled conclusion that in any event this application to state a case is entirely academic and therefore frivolous.

Discussion

[27] We consider that even if, contrary to the view expressed by the Judge, there was a power to require particulars (and as we have stated we have not analysed that legal issue), we consider that, on the facts of the present case, it would not have been open to her to so order. As set out at paragraph [6] what the appellant sought was an order requiring the respondent to provide "evidence (documents, photographs, maps or other …". As pointed out at paragraph [6] (b) even if she had jurisdiction to order particulars that jurisdiction did not extend to ordering the respondent to set out the evidence upon which he relied. The notice is not legally recognisable as a notice for particulars. Even if it was legally recognisable as a notice for particulars the discretionary factors, which we have set out at paragraph [7](d)-(g) would inevitably have resulted in the Judge declining to order any particulars. Accordingly, we hold that on the facts of this case the Judge's ruling that the application to state a case is frivolous in the sense that it was academic was entirely correct.

Conclusion

[28] We dismiss the application to compel the Judge to state a case for the opinion of the Court of Appeal.

[29] We will hear the parties in relation to the costs of this application.

[30] The substantive appeal from the Domestic Proceedings Court to the County Court is outstanding and it is imperative that it is heard and determined promptly given that those proceedings commenced in June 2015.