Neutral Citation No: [2024] NICA 2 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* KEE12381 *ICOS No:* 22/007065/06/A01 *Delivered:* 08/01/2024

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION

Between:

EDMUND SINCLAIR

Appellant

and

FIONA JANE SINCLAIR

Respondent

The Appellant appeared as a Litigant in Person
Ms Ramsey KC with Ms Downey (instructed by Kristina Murray Solicitors) for the Respondent
Mr Maxwell for the Law Society of Northern Ireland (Notice party)

Before: Keegan LCJ and McFarland J

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] This is an appeal from a decision of Madam Justice McBride ("the judge") delivered on 13 November 2023 wherein she granted an occupation order to the respondent pursuant to Article 11 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 ("the 1998 Order"). The judge also made a non-molestation order under the same legislation which is not appealed. These orders were made during ancillary relief proceedings which are ongoing before the High Court.

[2] The appellant appeared as a litigant in person in this court and pursued his appeal against the occupation order. His grounds are contained in a notice dated 21 November 2023 as follows:

(i) The respondent has no legal entitlement to have made this application and lied while on oath to obtain same.

(ii) Senior counsel for the respondent misled the court and I wish to challenge the points of law that were submitted.

[3] The Law Society was a notice party in this appeal as it has been at first instance. That is because the Law Society has conduct of the appellant's affairs having been appointed to act as his attorney. Accordingly, the Law Society has power to deal with all of his property and in particular to execute documentation in respect of the sale of the former matrimonial home in Holywood, with which this case is concerned.

[4] We were asked to hear this case on an expedited basis given an imminent completion of sale on the former matrimonial home on 26 January 2024. As a result, directions were made on 1 December 2023 for a hearing on 8 December 2023. On 8 December the case was adjourned on application by the appellant to 15 December. On 15 December the case was again adjourned on application by the appellant to 21 December. On 21 December the court heard submissions from the appellant who again applied for an adjournment to the new year. This application was prefaced upon a short letter from Dr Gerry Loughrey, Consultant Psychiatrist which referred to the stress under which the appellant was placed. The gravamen of the letter is as follows:

> "He advises that he would like me to write a letter to the court regarding his request for an adjournment of the court proceedings until the new year. I would respectively ask that the court take into account this man's rather fragile mental health, bearing in mind that the practical steps he tells me he is taking are likely to mean that these matters will be less overwhelming and less stressful in the new year."

[5] As a result of the above correspondence and representations made from the appellant this court agreed to hear submissions but allow the appellant to file comprehensive written submissions by 4 January 2024 after which the court would give a ruling. The appellant has filed a written submission with the court as per these directions and we have considered this along with the reply from the respondent.

[6] We also record that the appellant has maintained throughout his appearances before us that he is still awaiting legal aid and that he is not well enough to deal with this appeal. We have considered these points. In terms of representation, we bear in mind that the appellant is a qualified solicitor. He also appears to have the benefit of Hunt & Co Solicitors working for him on various matters. As regards legal aid this is an ongoing issue which was clearly live at the court at first instance and remains

unresolved as it appears that the Legal Services Agency has requested an opinion on the merits of the case. That opinion has been provided but a decision on whether to grant legal aid is still outstanding.

[7] We had hoped to give our judgment in December however we have allowed additional time to the appellant and are we satisfied that we have all of the material needed to adjudicate on the case. In particular, we see that the appellant has set out in red all of his objections to the judge's judgment paragraph by paragraph. He has also set out a history of the case. He has additionally attached some correspondence from Hunt & Co Solicitors who have been acting on his behalf in some form. He has prepared a bundle of documents in relation to the proposed sale, documentation in relation to a purported oil leak and correspondence sent to the media in relation to articles published in April and June 2023 in the press in relation to "solicitor accused of harassing tenant next to his one million pounds home."

[8] We are aware of the sensitivities of this case and the issues that have been raised. However, given that the sale of the matrimonial home is due to complete on 26 January 2024 and that we are told that the only hold up to this may be this appeal we consider that balancing all of the interests at play it is appropriate for us to provide our judgment at this stage. We repeat that we have adjourned this case on two occasions and acceded to the appellant's request to have the Christmas period to file his written submissions which he has done. In all of the circumstances we are satisfied that this approach affords him a fair trial.

Factual background

[9] The salient facts are set out in some detail by the judge at first instance and so we need not repeat them here. Suffice to say the parties were married on 10 September 2004. There are three children of the family who are all teenagers. The parties separated on 24 January 2021. Since separation the respondent and the children have resided at a property owned by her parents. The appellant, until the making of the occupation order, remained residing in the former matrimonial home. As a result of arrears accruing on the mortgage, the mortgagee, Bank of Scotland, obtained a repossession order on this home on 19 January 2023. This order was subject to a stay which expired in May 2023 and accordingly there is now an extant order for possession in favour of the Bank of Scotland. We were told during the course of this appeal that the arrears on the mortgage now amount to some £200,000 and continue to accrue. The parties however have now a potential sale of this home on the agenda which is at a sale price reflecting its market value.

[10] Divorce proceedings have been issued but have not been dealt with as yet and ancillary relief proceedings are ongoing. As the judge points out in her judgment in addition to the ancillary relief proceedings there are other proceedings before the court including a judicial review, applications to vary injunctions obtained by the Law Society and committal proceedings. The judgment states that the committal

proceedings stand adjourned generally and the variation of injunction application in respect of a property in Holywood, remains extant.

[11] Turning to the proceedings under the 1998 Order the chronology of these goes back some long way. It appears that on 27 January 2022 the respondent applied to Newtownards Magistrates Court for a non-molestation order. She was granted an interim non-molestation order, but the application was then withdrawn on foot of undertakings given by the appellant. On 7 June 2023 the respondent applied to Newtownards Domestic Proceedings Court for an occupation order. On 28 July 2023 the court granted an occupation order for one day to facilitate inspection of the matrimonial home by surveyors to progress with the sale. The inspection did not take place. The High Court then made an order on 25 September 2023 to facilitate inspection and inspection by the surveyors took place on that date.

[12] From the foregoing it is clear to us that there remains a high level of acrimony among the parties in this case. We are also clear that whatever assets are available or were available as matrimonial assets in this case are clearly depleting as a result of the ongoing debt being run up by the appellant and respondent (jointly and severally) to the Bank of Scotland. It will be obvious to any reader that this case is not improving with time as often happens in ancillary relief. It is also often the case that after protracted contested litigation there may be little by way of assets to share between spouses and to provide for children of the family. With these background facts recited, we move to consider how the judge dealt with this case at first instance.

The judgment at first instance

[13] In the judgment (Neutral Citation [2023] NIFam 18) the judge sets out in detail the oral evidence given by the respondent and the appellant at first instance. She then sets out the legal principles at play in this case under Article 11 of the 1998 Order. At para [43] of the judgment the judge records that it has been accepted that the applicant, who is the wife, has locus standi. That is unsurprising as she had a right to reside in the former matrimonial home. The judge then refers to Article 11(3) of the 1998 Order which provides that the court may make a variety of types of occupation orders.

[14] Article 11(6) of the 1998 Order states that in deciding whether to exercise its powers under Article 11(3), the court shall have regard to all the circumstances including:

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under paragraph (3), on the health, safety or well-being of the parties and of any relevant child; and

(d) the conduct of the parties in relation to each other and otherwise.

[15] Having recited the relevant law with which no issue is taken on this appeal the judge then sets out her findings of fact from paras [46] to [59]. It is important to recite some of the findings in this judgment as follows:

> "[46] I have listened to and carefully observed both the applicant and respondent throughout the course of the hearing as well as when they were both giving evidence. I have concluded that the applicant is an honest witness who presented to the court as a person who is overwhelmed with stress as a result of the respondent's behaviour. I accept her evidence in respect of the incidents on 24 January 2022, 25 January 2022, the running incident and the respondent's behaviour when she attended the home to collect her belongings. I also accept that he sent her abusive texts. When I observed the respondent during this case, I noticed when he was cross-examining the applicant and when he was giving evidence himself that he acted in an aggressive and controlling manner. In particular, at one point when cross-examined by senior counsel he answered the question by pointing his finger and thumping the desk. At one stage he had to restrain himself from using an expletive. I also noted the intimidating and threatening manner in which he looked at and spoke to the applicant when she was giving evidence. I further consider that his failure to engage legal representation was done deliberately so that he could intimidate the applicant further by cross-examining her in court.
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> [47] Although the respondent denied these events took place, he did not put his version of events about these incidents to the applicant so that she could respond to them and at no stage did he put forward any alternative version of events. Accordingly, I am satisfied that all these incidents took place, and I am also satisfied that he sent abusive texts to the applicant in the past.
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> [51] I am satisfied that the respondent has sought to frustrate the sale of the matrimonial home. In particular, he failed to admit the surveyors into the property to carry

> out a valuation despite the existence of a court order. He knew that this order was made as he was present in court and despite this, on the day when the surveyors attended, he deliberately bolted the door and would not allow them to enter. This led to the need for a subsequent court order to facilitate the inspection and all of this, I find, was done to delay and frustrate the sale. I am further satisfied that he will seek to frustrate the sale by failing to give up vacant possession on the day of completion. He made it clear when he was giving his evidence when pressed about leaving the home voluntarily that the police would have to come, and I therefore conclude that he fully intends not to give up vacant possession and in this way is seeking to prevent the sale of the home.
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> [52] In all these circumstances, there is no reason why the sale should not be facilitated by the respondent. I find that he is frustrating the sale simply to harass the applicant as he knows if the sale does not occur there will be an increase in debt which will cause her upset and distress and affect her health because she is jointly and severally liable for this debt. He also knows it has the potential to damage her credit rating making it difficult for her in the future to get on the property ladder and he knows it could have a disastrous effect on her employment, as in one text he said to the applicant, "probably affect your job." I, therefore, conclude that there is no other reason for the respondent not to co-operate in the sale save to harass the applicant and I am completely satisfied that he will do everything in his power to frustrate this sale."

[16] The judge ultimately decided to exercise her powers to make an occupation order against the appellant to give up vacant procession of the matrimonial home on or before 27 November 2023 and thereafter he was prohibited from entering the home until further order of the court. In doing so, from paras [57] to [58] the judge considered the statutory questions which flow from Article 11(6).

This appeal

[17] Events after the judgment was given proceeded on a basis that was predicted by the judge. The appellant did not leave the former matrimonial home despite the order of the court. He therefore was arrested on 28 November 2023 and ended up spending 20 hours in custody before he was released. This is a very sorry state of affairs for a professional man but a state of affairs that was entirely avoidable and brought about by his own stubbornness and more startlingly his refusal to obey an

order of a court. The reality of what transpired is shocking in that a solicitor by profession should know better than to behave in this way.

[18] The appeal is founded on a number of grounds. Having considered the appellant's written submissions we note that he takes issue with all of the factual findings made by the judge which ground the occupation order. The difficulty with this line of argument is that there was an opportunity at the first instance court to challenge all of the factual assertions made by the respondent in support of her occupation order. Evidence was given by both parties. Therefore, it is hard to see how the appellant is trying to do anything other than have a rerun of the case.

[19] The jurisdiction of the Court of Appeal in dealing with factual findings is limited. This is explained in a number of authorities but, in particular, we refer to the case of *Heaney v McEvoy* [2018] NICA 4 at paras [17] to [19] which sets out the principles as follows:

> "[17] Generally an appeal is by way of rehearing. The rehearing is conducted by way of review of the trial, including any documentary evidence, and the trial testimony is not re-heard. In most appeals the hearing consists entirely of submissions by the parties and questions put to the parties by the judges. New evidence is not generally admissible unless it can be shown that it is relevant and that the evidence could not with reasonable diligence have been brought before the original trial.
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> [18] The Court of Appeal is entitled to review findings of fact as well as of law, but the burden of proof is on the appellant to show that the trial judge's decision of fact is wrong. On a review of findings made by a judge at first instance, the rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The first instance hearing on the merits should be the main event rather than a try-out on the road to an appeal.
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> [19] Even where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and contemporaneous documents without oral testimony, the first instance judgment provides a template and the assessment of the factual issues by an appellate court can be a very different exercise. Impressions formed by a judge approaching the matter for the first time may be more reliable than the concentration on the appellate challenge to factual findings. Reticence on the

> part of the appellate court, although perhaps not as strong where no oral evidence has been given, remains cogent (see *DB v Chief Constabl*e [2017] UKSC 7)."

[20] The above cited judgment continues with this important para at [20]:

> "[20] Those principles are clearly of material significance in this case. The trial judge had the advantage of hearing the oral evidence of the appellants on the Tomlin Order issue. He considered the appellants to be both unreliable historians eager to mould the facts to their objective as opposed to telling the unvarnished truth. He gave examples in respect of the Order that they said the Court of Appeal had made and the alleged admission by their former solicitor that he was guilty of misrepresentation. There is no indication that the judge did not take all the circumstances surrounding the evidence into account, that he misapprehended the evidence or that he had drawn an inference which there was no evidence to support. In light of the judge's conclusions, we see no basis upon which we could interfere with his refusal to set aside the Tomlin Order."

[21] In this case the judge at first instance has clearly listened carefully to evidence from both parties, allowed cross examination, and observed both parties during the hearing. As we have said the appellant had the opportunity to put his own case but did not do that. The appellant had the opportunity to file evidence but did not do that either. He cannot be permitted to simply have a rerun on appeal in these circumstances. In addition, the judge has made a very clear assessment of the witnesses in this case and found the appellant to be someone who was aggressive and controlling. Against that she found that the respondent was an honest witness. We could not contemplate interfering with such an assessment by a judge who has seen and heard the witnesses and heard evidence and taken time thereafter to craft a comprehensive judgment.

[22] In terms of the statutory requirements in Article 11 of the 1998 Order, we note, as the judge did, that the appellant has housing needs which are proving difficult having been removed from the matrimonial home. However, we cannot accept the appellant's analysis of the Article 11(6) tests. The judge did accept that both the appellant and the respondent have housing needs and housing resources. The judge did accept that there would be an effect on the health, safety and wellbeing of the respondent if the order were not made. We consider that she was entitled to do so because she found that due to the existence of the repossession order the matrimonial home will be sold at some point and therefore each party will need to secure alternative accommodation. We think it was entirely proper of the judge to reflect that the level of debt needs to be kept to a minimum to ensure that

permanent accommodation for the respondent and children can be achieved in the future. It is plain that this would be best secured by ensuring the sale of the matrimonial home is not frustrated.

[23] The judge found that each party has similar needs and resources but on the basis of all of the criteria set out in Article 11(6) essentially to allow the house sale to proceed she considered that she should exercise her powers to make an occupation order. We consider that this approach is unimpeachable. In fact, the additional documentation provided by the appellant indicates that he does agree to a sale of the house in principle. The difficulty appears to be the terms upon which that sale would proceed. Issues are raised about the purchaser, oil leaks and the position of the Bank of Scotland. These are neither here nor there to the issue of vacant possession which is required to allow a sale to proceed.

[24] It seems clear to us that the appellant's arguments are a last desperate attempt to try and delay proceedings. They are totally unconscionable in circumstances where the appellant has stayed in the matrimonial home since the separation in January 2021 and not paid the mortgage for a considerable period.

[25] The other ancillary matters raised by the appellant about tenants and such like are not material to this appeal. The point made in relation to the alleged inadequacy of the respondent's evidence at first instance is totally misconceived given that a statement of evidence is one of the requirements of the relevant rules, as Ms Ramsey has pointed out in her written submissions. In addition, we agree with the respondent's reply to each of the paragraphs in the judgment that the appellant disputes for the reasons previously stated. The appellant's request would amount to a rerun of the case with the need for consideration of fresh evidence when the appellant had every opportunity to cross examine and put a case at first instance. There is, therefore, no basis for simply asserting that the respondent wife lied and indeed no basis for saying that Ms Ramsey misled the court. In truth the respondent wife presented enough cogent evidence to satisfy the judge and meet the legal requirements for an occupation order. It is impermissible to go over old ground and interrogate each and every factual dispute in this appeal.

[26] Of course it is not for the appellant to conduct affairs in relation to the property, that is for the Law Society. Therefore, any issues that are raised about negotiations with the Bank of Scotland are only material so far as the Law Society take those up. We have no reason to believe having heard from Mr Maxwell that there are negotiations with the Bank of Scotland which might result in a delay of this sale.

[27] The bottom line in this case is that the sale of this house needs to proceed as soon as possible. The parties will therefore have the benefit of some finality in relation to the former matrimonial home and should thereafter be able to resolve or have a court resolve the ancillary relief. The longer this case goes on the worse it gets in terms of acrimony.

[28] We are quite clear that this appeal is without any merit whatsoever and is another illustration of the appellant's failure to deal with the outworking of the divorce. He needs to change his approach for the benefit of his own mental health and also for the mental health of his former wife and children.

[29] In conclusion, we also point out that the appellant has a right to apply to the High Court in the ancillary relief proceedings to discharge any of the orders made or vary them should circumstances change. It seems strange to us that he does not engage in those proceedings purposefully to try and bring some finality to the breakdown of this marriage and the financial consequences that flow.

[30] Accordingly, we dismiss this appeal. We will hear the parties as to costs.