Neutral Citation No: [2020] NICh 5 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HUM11225** *Delivered:* **12/03/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (BANKRUPTCY)

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BETWEEN:

MARY BERNADETTE MAGILL

Applicant/Appellant

AND

ULSTER INDEPENDENT CLINIC
BELFAST HEALTH AND SOCIAL CARE TRUST
(AS SUCCESSOR IN TITLE TO THE ROYAL GROUP OF HOSPITALS AND DENTAL HOSPITAL HEALTH AND SOCIAL SERVICES TRUST)
JOHN COLLINS
THOMAS DIAMOND
ROY A.J. SPENCE

Respondents

_____

HUMPHREYS J

Introduction

[1] This is an appeal from the decision of Master Kelly dated 4 October 2017 whereby she dismissed the application to set aside the statutory demand served by the respondents on 22 November 2016.

[2] The statutory demand was in the sum of £786,981.01 and arises out of orders for costs made in favour of the respondents at the conclusion of medical negligence actions which had been brought by the appellant against the respondents.

[3] The actions in question arose out of the death of the appellant's husband, Brian Magill. He sadly died on 30 December 1999 at the age of 66. The appellant brought claims, both as the personal representative of her husband's estate and also in her own right, which were heard by Gillen J (as he then was) over some 45 days. Ultimately, in a detailed judgment delivered on 28 January 2010, the learned Judge

dismissed all the claims and entered judgment for the respondents. On 10 February 2010 he made an order that the appellant pay the respondents' costs to be taxed in default of agreement.

[4] The appellant sought to appeal this decision but did so out of time and in a judgment dated 30 September 2010, the Court of Appeal refused to extend the time to serve a notice of appeal.

[5] A Certificate of Taxation was issued by Master McGivern on 18 August 2016 in the sum of £786,981.01.

[6] In 2019, the appellant made an application to the Court of Appeal to set aside the judgment of Gillen J or, more accurately, to pursue a fresh appeal. This was on two grounds: firstly, that the judgment was infected by apparent bias and secondly, that there was fresh evidence which would have had an important influence on the outcome of the case.

[7] On 10 June 2019 the Court of Appeal rejected both of these contentions and dismissed the application.

[8] In determining this appeal, I have had the benefit of detailed written and oral submissions from the appellant, acting in person, and from Mr. Millar B.L. on behalf of the Respondents. I am grateful to both for their assistance in navigating the complex background to the various court hearings.

The Application to Set Aside the Statutory Demand

[9] The instant application was brought pursuant to Rule 6.004 of the Insolvency Rules (Northern Ireland) 1991 ('the 1991 Rules'). Rule 6.005 of the 1991 Rules states:

> *"(3) On the hearing of the application, the court shall consider the evidence then available to it, and may either summarily determine the application or adjourn it, giving such directions as it thinks appropriate.*
>
> *(4) The court may grant the application if –*
>
> *(a) the debtor appears to have a counter claim, set off or cross demand which equals or exceeds the amount of the debt or debts specified in the statutory demand; or*
>
> *(b) the debt is disputed on grounds which appear to the court to be substantial; or*
>
> *(c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either*

Rule 6.1001 (6) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the court is satisfied, on other grounds, that the demand ought to be set aside."

[10] The appellant relied upon grounds *(b)* and *(d)*; neither *(a)* nor *(c)* had any relevance to this application. In *Allen v Burke Construction* [2010] NICh 9 Deeny J (as he then was) held that the Court's power under Rule 6.005(4)(b) was analogous to the jurisdiction to set aside a judgment or grant leave to defend in a summary judgment application. He stated:

> *"The court is not holding a full trial of the matter; it must only decide if the grounds appear to be substantial. They must be genuine. The grounds of dispute must not consist of some ingenious pretext invented to deprive a creditor of his just entitlement. It must not be a mere quibble"*

[11] In *Re A Debtor (Lancaster no 1 of 1987)* [1989] 1 WLR 271, the Court of Appeal in England & Wales held that the category of 'other grounds' in Rule 6.005(4)(d) must be of the same degree of substance as those set out in *(a)*, *(b)* and *(c)*.

[12] In this application, therefore, the question is whether the appellant has established that the debt in question is disputed on substantial grounds or that the statutory demand ought to be set aside on other grounds.

The Decision of Master Kelly

[13] The Master delivered a careful written judgment in which she considered the two contentions advanced by the appellant:

(1) That the costs liability properly falls on her late husband's estate, not on her personally; and

(2) The Attorney General had directed that a further inquest be held into the death of her late husband and the outcome of such an inquest could result in different conclusions from those reached by Gillen J in 2010.

[14] The Master identified the relevant legal tests and determined, on the evidence, that these arguments did not amount to either substantial grounds to dispute the debt or other grounds upon which the statutory demand ought to be set aside.

[15] The appellant appealed this decision by way of a notice dated 26 October 2017. However, the hearing of this appeal was deferred pending the holding of the

fresh inquest ordered by the Attorney General. The Coroner delivered his findings from this inquest on 16 October 2019. This period of delay also permitted the appellant to pursue her application to the Court of Appeal.

The Arguments on Appeal

[16] The appeal from the Master proceeded by way of a *de novo* hearing and the Court was conscious that matters had moved on since the original hearing given the completion of the fresh inquest and the dismissal of the appellant's application by the Court of Appeal.

[17] It was apparent that the appellant wished to pursue an argument in relation to fraud which was not advanced before the Master. In *Lough Neagh Exploration v Morrice* [1999] NICh 4 Girvan J (as he then was) considered the issue of whether a Court hearing an appeal from the Master should consider fresh evidence and/or new grounds:

> *"On an appeal from the Master to the judge in a case such as the present the matter comes by way of a rehearing and in the normal course of events is determined on the evidence put before the Master. Frequently the parties will seek to put before the court fresh evidence and not infrequently such further evidence is admitted either by agreement of the parties or by leave of the court in the exercise of its discretion.*
>
> *Thus:*
>
> *(i) Parties have a duty to put their case properly and fully before the Master and adduce all available evidence at that stage. This is just another aspect of the general principle that it is incumbent on parties to put their full case before the court at the material time.*
>
> *(ii) A party seeking to adduce fresh evidence before the judge in chambers on appeal should advance a sound reason for the failure to adduce that evidence before the Master.*
>
> *(iii) A party seeking to adduce such additional evidence carries the burden of establishing that the interests of justice would be better served by the admission of additional evidence rather than by refusing to admit it."*

[18] The Court was cognisant of the fact that the appellant was represented by experienced Solicitors and Counsel before the Master and no argument based on fraud was advanced by them. The appellant submitted that she had taken some time to research the law and formulate her argument. Mr. Millar did not object to the issue being dealt with on appeal and I determined that, in the particular

circumstances of this case, the interests of justice would best be served by permitting the appellant to make this new case.

[19] The appeal therefore proceeded on the basis of two contentions:

(1) The liability for costs rested with the deceased's estate, not the appellant personally; and

(2) The judgment of Gillen J was tainted by fraud and should be set aside on that basis.

The Liability for Costs

[20] Section 59(1) of the Judicature (Northern Ireland) Act 1978 provides that the costs of all proceedings in the High Court are in the discretion of the Court. Order 62 rule 6(2) of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that where a person pursues a claim in the capacity of personal representative, he or she will be entitled to payment of costs out of the fund or estate, provided the conduct of the litigation has been reasonable.

[21] However, as is explained in Halsbury's Laws at volume 103, paragraph 1276:

> *"In ordinary cases a personal representative who claims as such and fails is personally liable for the costs of the claim…but this will not preclude the personal representative from indemnifying himself out of the estate"*

[22] In this case, one of the actions which was heard and determined by Gillen J was brought by the appellant in her personal capacity. The other was as personal representative of the estate of her late husband.

[23] I have had the benefit of considering the judgment of Gillen J, the relevant Court Orders and a transcript of the hearing on the issue of costs. In light of the evidence, it is quite apparent that the Court ordered the appellant personally to pay the respondents' costs, to be taxed in default of agreement.

[24] There is therefore no merit in the argument that the liability for costs rests with the deceased's estate.

The Allegation of Fraud

[25] In her skeleton argument, the appellant prays in aid the decision of the Court of Appeal in *Royal Bank of Scotland v Highland Financial Partners* [2013] EWCA Civ 328. The Court in that case set out the principles underlying an application to have a judgment set aside on the ground that it was obtained by fraud. Conscious and deliberate dishonesty is required as is proof that the dishonest evidence was material

in that it was an operative cause of the decision to give judgment for the successful party.

[26} Not surprisingly, the threshold to be met by a party seeking to have a judgment set aside on this basis is high. As Langley J said in *Sphere Drake Insurance v Orion Insurance* (11.2.99, unreported):

> "*The existence of the jurisdiction will be self-defeating unless it is limited to circumstances in which it can be plainly demonstrated that the successful party has dishonestly obtained the fruits of victory*".

[27] The case advanced by the appellant is that evidence given by one of the respondents herein was untrue as it is contradicted by contemporaneous evidence in the form of the deceased's notes and records. In particular, it is claimed that the diagnosis of an inoperable tumour was based on a measurement which was not in fact carried out by the medical practitioners and was introduced in evidence to cover up the fact that the ERCP procedure was not completed.

[28] It is significant, however, that this 'measurement' issue is not new. It was addressed in evidence by a number of witnesses at trial and the learned Judge sets out his findings in relation thereto at paragraphs 108 to 117 of his judgment. Having heard both factual and expert evidence on the issue, Gillen J concluded to his *'complete satisfaction'* that the measurement of the tumour was 1 cm as asserted by the Defendants in that action.

[29] The appellant also contended that there had been perforation of her husband's bile duct caused by the migration of a stent. Her case was that there was irrefutable evidence of the presence of two stents in the body at the time of death which contradicted other evidence.

[30] Again, however, this was a matter which was fully considered by the learned trial Judge and which was the subject of detailed factual and expert evidence at the hearing. Gillen J's analysis appears at paragraphs 268 et seq. of the judgment.

[31] Under questioning, the appellant accepted that there is no 'new' evidence on either the measurement or the stent issue. The documents to which she referred were available and considered by the witnesses and the Court at the trial. She further accepted that no allegation of fraud was made either at the time she sought to pursue an appeal in September 2010 or when she applied to the Court of Appeal in June 2019. Furthermore, it remains the case that over 10 years after the original judgment was delivered, no application has ever been made to have it set aside on the grounds of fraud.

[32] It is apparent therefore that this allegation of fraud has only emerged after attempts to have the judgment set aside on the ground of bias and to have fresh

evidence admitted have failed. The appellant is also disappointed at the findings of the fresh inquest and has issued judicial review proceedings in that regard. It is not a novel point – it is a rehash of arguments already advanced at the trial. It does not appear to me that any claim based on this allegation of fraud has any realistic prospect of success.

[33] During the course of the appeal hearing, the appellant again sought to introduce the allegation of apparent bias and the fresh evidence claim which had been determined by the Court of Appeal in June 2019. Given that these matters have been considered and rejected by that Court, it could never be that these amount to either 'substantial grounds' or 'other grounds' such to entitle the appellant to have the statutory demand set aside.

Conclusion

[34] There is in existence a valid and enforceable Order of the High Court requiring the appellant to pay the respondents' costs of the unsuccessful proceedings. These costs have been taxed by the Taxing Master and a Certificate of Taxation issued pursuant to Order 62 rule 22(1)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980.

[35] Such a certificate creates a debt immediately payable and the appellant has failed to establish any basis for the claim that this debt is disputed on substantial grounds and/or that there exist other grounds upon which the statutory demand should be set aside.

[36] Accordingly, I dismiss the appeal and affirm the Order of Master Kelly whereby she refused to set aside the statutory demand.

[37] I will hear the parties on the question of costs.