

Neutral Citation No: [2022] NICA 26

Ref: HUM11837

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 16/80468

Delivered: 18/05/2022

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Between:

MARK RODGERS (A PATIENT) BY HIS CONTROLLER
BERNADETTE MULHOLLAND, SOLICITOR

Plaintiff/Respondent

and

WILLIAM JAMES RODGERS

Defendant/Appellant

and

BARBARA RODGERS
LINDA RODGERS

Notice Parties

Julie Ellison (instructed by Bernadette Mulholland, Solicitor) for the
Plaintiff/Respondent

The Defendant/Appellant appeared in person

Before: Maguire LJ and Humphreys J

HUMPHREYS J (*delivering the judgment of the court*)

Introduction

[1] The appellant and the respondent have been involved in a partnership dispute and proceedings were commenced in August 2016. On 6 October 2016 Horner J made an order dissolving the partnership and remitting the winding up of the partnership affairs to the Master to conduct accounts and enquiries.

[2] As part of that exercise, Master Hardstaff made an order on 3 August 2018 appointing Bernadette Mulholland, the solicitor who had already been appointed as controller of the respondent's affairs, as receiver of the property of the former partnership. He also ordered that a suitable surveyor/valuer be appointed to provide valuation and sales advice in relation to lands and property adjacent to the main farm lands. The five parcels of land in question were specifically referred to in the order.

[3] The appellant appealed against this order and on 8 February 2021 Huddleston J varied the order of the Master as follows:

- "1. Bernadette Mulholland be appointed Receiver of the property of the former partnership;
2. The Receiver is to complete the outstanding sale to Mr and Mrs Fulton of the lands previously agreed subject to the terms of the existing contract for sale and discharge of all related costs from the net proceeds of sale;
3. The Receiver is to sell on the open market the property at 94 Ballywatermoy Road, Ballymena comprising of a dwelling house and 13 acres of land and from the net proceeds of sale to discharge the charge in favour of Acenden;
4. The Receiver is to sell on the open market the property comprising of a site at 70m east of Ballywatermoy Road, Ballymena but beforehand is to take professional advice in relation to the sale and the fact that the planning permission which exists in relation to that site is due to expire on 22 February 2021;
5. The Receiver is to sell on the open market the property comprising 10.05 acres of mixed agricultural land located across the railway track off the Ballywatermoy Road, Ballymena to the Northern Ireland Transport Holding Company for the agreed price of £84,999;
6. The costs of sale of each of the properties to be met from the sale of each property respectively and subject to that the net proceeds are to be applied to discharge the liabilities of the Partnership to

include the redemption of all fixed charges and mortgages;

7. The tax liabilities which are outstanding at the date of this Order are to be apportioned between the parties on the basis upon which trading profits and losses were shared between them in the relevant periods;
8. Subject to that and to the prior payment of all outstanding liabilities the net proceeds of sale of each of the above properties is to be treated as capital profits of the partnership and allocated between the partners on a 50:50 basis. Each partner to be responsible for his own tax liability in relation to the disposals;
9. Upon sale of the properties above, the matter to be returned to court for further consideration and in any event the matter is to be listed for review in the first week of September 2021 or earlier as may be required on the application of either party;
10. For the avoidance of doubt, even if a partner's account is in credit there shall be no distribution made to either party until the final disposal of this matter;
11. A schedule detailing all transactions made and all other outstanding costs and liabilities is to be prepared in advance of the next hearing of the matter;
12. Liberty to apply."

[4] As is apparent therefrom, the order made by Huddleston J was interlocutory in nature and therefore leave was required to appeal to this court by virtue of section 35(2)(g) of the Judicature (Northern Ireland) Act 1978.

[5] On 18 November 2021 Huddleston J granted leave to appeal against his order, limited to two issues arising out of the fairness of the hearing. These were:

- (i) The fact the hearing was conducted remotely via Sightlink; and
- (ii) The fact that the appellant's McKenzie Friend was unable to connect to the remote hearing.

The Grounds of Appeal

[6] In his skeleton argument, the appellant asserts that:

- (i) He was denied equality of arms;
- (ii) He has limited knowledge of computer technology and could not therefore present his case as intended; and
- (iii) He was denied the assistance of his McKenzie Friend Eamonn Scullion due to the fact of him having poor internet connection at the start of the hearing on 8 February 2021.

[7] The issue in relation to the refusal of a grant of right of audience to the appellant's McKenzie Friend was not pursued.

The Evidence on Appeal

[8] At a review hearing on 9 March 2022 the appellant and respondent were directed to file affidavit evidence in relation to the issues arising on the appeal. The appellant did not depose to any facts or circumstances which were said to give rise to unfairness in the hearing.

[9] The court had the benefit of an affidavit from Bernadette Mulholland, solicitor and controller of the respondent's affairs. Exhibited to that are notes, taken by solicitor and counsel, of a review hearing which took place before Huddleston J on 1 February 2021, a week prior to the substantive hearing of the appeal. The note taken contemporaneously by counsel refers to medical evidence produced on behalf of the appellant and states:

“Doesn't say unfit to attend court or to pursue matter ...
Welcome to attend court - happy to dial in by videolink.
Either way matter will be proceeding next week.”

The note goes on to record the learned judge advising that cases are being done over the internet and that he was minded to proceed by a virtual hearing. The appellant is noted as asking whether his McKenzie Friend will be able to participate and the judge advised that he can dial in also and that they would be able to speak privately by telephone if he wished. It is recorded that the appellant said:

“I will take your direction on it.”

[10] This court was also provided with a detailed note taken by the solicitor in relation to the hearing of the appeal on 8 February 2021. This reveals that the hearing before Huddleston J lasted nearly three hours. Counsel for the respondent

called an accountant, Mr Paul Black, to give evidence and he was cross-examined by the appellant. The following issues were addressed:

- (i) Whether there should be a split of any net proceeds on a 60:40 or 50:50 basis;
- (ii) Credits given to the appellant's capital account by reason of the disposal of an asset and a loan from his aunt;
- (iii) The valuation of lands;
- (iv) The creation of security over lands;
- (v) The need for the appointment of a receiver;
- (vi) Whether the home farm and lands should be sold; and
- (vii) The lapse of planning permission in relation to the site.

[11] It is quite apparent that the appellant was able to make his points to the judge hearing his appeal, and to effectively cross-examine Mr Black. It is most notable that at no stage during the hearing did the appellant claim that he was in any way disadvantaged, whether by the hearing proceeding on a remote basis, or by any issue which had arisen in relation to his McKenzie Friend. In fact, the order made by Huddleston J at the conclusion of the hearing reveals that the appellant was partially successful in persuading the court on the issues of the split of net proceeds and the sale of the farm.

[12] The only evidence before this court therefore does not begin to suggest that the hearing before Huddleston J was infected by any unfairness.

[13] Section 57 and Schedule 27 to the Coronavirus Act 2020 made provision for the use of live links in courts in Northern Ireland. Paragraph 2 of the Schedule states that a court may make a direction permitting a person to participate in court proceedings via a live link and:

“(4) A court or tribunal may not give a direction under this paragraph unless the court or tribunal is satisfied that it is in the interests of justice to do so.

(5) In deciding whether to give a direction under this paragraph, the court or tribunal must consider all the circumstances of the case.

(6) Those circumstances include (in particular) –

(a) the views of the person;

- (b) the views of the parties to the proceedings;
- (c) public health interests.”

[14] Such remote hearings were commonly used during the Covid-19 pandemic and to facilitate same, the then Lord Chief Justice introduced Practice Direction No.1 of 2020. Its first overarching principle reads:

“Every remote hearing will be planned and conducted in a manner designed to secure every party’s right to a fair hearing.”

[15] The decision to hold this hearing remotely was therefore a matter of case management, within the broad discretion afforded to the judge. There is no basis for this court to intervene in relation to such a decision particularly in circumstances where the parties agreed to proceed on the basis of a remote hearing. The evidence which the court has considered demonstrates that the hearing was conducted entirely fairly and the appellant was afforded every opportunity to cross-examine the witness and to make his case. The right to a fair hearing was clearly preserved.

[16] At no stage was the appellant excluded from or restricted in having a McKenzie Friend to assist him in the litigation. Whilst it is now asserted, without any evidential basis, that the McKenzie Friend suffered from some technological issue which prevented him from remaining connected to the hearing, two fundamental points arise:

- (i) This was never suggested to the judge at the time of the actual hearing; and
- (ii) No case has been made as to how the lack of the McKenzie Friend adversely affected the appellant’s ability to present his case.

Conclusion

[17] For the reasons set out the appeal is hereby dismissed and the order of Huddleston J affirmed. We will hear the parties on the question of costs.