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

Ref: McB11352

ICOS No: 14/36054

Delivered: 18/12/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

Between:

LAURENCE MOFFAT

Applicant

and

DOROTHY MOFFAT

First-named Respondent

and

DAIRE MOFFAT

Second-named Respondent

and

CONALL EOIN TOLAND

Third-named Respondent

and

MEABH EMILY TOLAND

Fourth-named Respondent

Mr McEwen (instructed by Holmes & Moffitt, Solicitors) for the Applicant  
Mrs Moffat, the First respondent appeared as a Litigant in Person

McBRIDE J

**Application**

[1] Laurence Moffat (“the applicant”) seeks a declaration that the assignment (“the assignment / transfer”) by the first respondent, Dorothy Moffat (“Mrs Moffat”) to her children Daire Moffat (“second respondent”), Conall Eoin Toland (“third respondent”) and Meabh Emily Toland (“the fourth respondent”), of the dwelling

house and garden at 50 Candahar Street, Belfast, contained within Folio DN1911482L, Co Down ("the premises") on 31 October 2012 constituted:

- (a) A transaction at an undervalue within the meaning of Articles 367-369 of the Insolvency (Northern Ireland) Order 1989; and or
- (b) A transaction entered into for the purpose of either putting assets beyond the reach of the applicant or which otherwise prejudiced the interests of the applicant in relation to his claim for recovery of legal costs against Mrs Moffat arising out of earlier litigation between the applicant and Mrs Moffat.

## **Representation**

[2] The applicant was represented by Mr McEwen of counsel. Mrs Moffat acted as a litigant in person. Service was deemed good on the second, third and fourth respondents by Deeny J. The second and third respondents appeared at a number of court reviews and also entered into correspondence with the court. The fourth respondent took no part in the proceedings save that she was referred to in one of the attachments to Mrs Moffat's replying affidavit dated 23 June 2016, which was entitled "Associated documents and exhibits of second, third and fourth respondents". This exhibit then exhibited a number of documents which set out details of the views of each of the respondents in respect of the assignment and the present application.

[3] The second, third and fourth respondents did not file any sworn affidavits or skeleton arguments despite being given the opportunity to do so by the court.

[4] In light of the legal issues involved in the case the court requested and the Official Solicitor agreed to act as amicus curiae. Mr William Gowdy QC was instructed on behalf of the Official Solicitor.

[5] I am grateful to all the parties for their detailed and well-researched skeleton arguments and their cogent and concise oral submissions. The skeleton arguments and submissions were of invaluable assistance to the court in reaching its determination. I also wish to record my thanks to the instructing solicitors who compiled easily navigable trial bundles and bundles of authorities.

[6] In addition to the trial bundle there were a large number of un-paginated un-indexed papers filed by Mrs Moffat throughout the proceedings. These papers comprised the equivalent of 4 or 5 lever arch files. The papers were filed with the court office but were not served on the applicant or the Official Solicitor. I indicated to the applicant and the Official Solicitor's legal representatives that I intended to read the papers filed by Mrs Moffat and in the event I intended to rely on any particular document I would bring it to their attention to allow them to make further submissions. I further advised that I would make all the papers lodged by

Mrs Moffat available to the other parties if they wished to inspect them and I gave them the opportunity to file further submissions after such inspection of the papers. Counsel for applicant and Official Solicitor indicated that they were content with this course of action. After reading these papers the only document I have relied on is an email dated 7 October 2020. The legal representatives of the applicant and Official Solicitor were advised accordingly and written submissions were provided by the Official Solicitor.

## **Background**

[7] The applicant and Mrs Moffat are brother and sister. There has been extensive litigation between them in relation to their late mother and father's estates.

## **Legal Proceedings**

[8] In 2009 construction proceedings were brought in the High Court ("2009/130460") in respect of the parties' late father's Will. Mrs Moffat was in receipt of legal aid in respect of these proceedings until 9 September 2011 when her entitlement to legal aid was terminated.

[9] The construction proceedings were heard by Girvan LJ who declared on 12 October 2011 that upon a true construction of the Will of the late John Johnston Moffat (deceased) executed on 29 July 1983 the devise at Clause 3 included not only the agricultural land owned by the deceased but also all the buildings located on Folio 21433 Co Down. He ordered Mrs Moffat to pay the applicant's costs, such costs to be taxed in default of agreement, save that Mrs Moffat's costs attributable to the period up to 9 September 2011 were not to be enforced without further order of the court.

[10] On 24 November 2011 Mrs Moffat filed a Notice of Appeal against this decision.

[11] On 10 January 2012 Mrs Moffat issued an originating summons against the applicant seeking an inventory, accounts and enquiry in relation to her father's estate. On 7 November 2012 Master Ellison made an order regarding the taking of accounts and an inventory. He made no order as to costs.

[12] On 14 May 2012 the Court of Appeal heard the appeal against the decision of Girvan LJ in respect of the construction application. On 24 October 2012 the Court of Appeal dismissed the appeal and ordered Mrs Moffat to pay the applicant's costs of appeal.

[13] On 12 December 2012 Mrs Moffat issued an originating summons No: 2012/142597 against the applicant making a claim on her late parents' estates under the Inheritance (Provision for Family and Dependents) (Northern Ireland)

1979 Order and further claimed an interest in assets on the basis of a constructive trust.

[14] On 16 November 2013 the applicant served a statutory demand on Mrs Moffat based on the legal costs owed by her in respect of the construction summons hearing and the appeal to the Court of Appeal from the decision of Girvan LJ. The statutory demand was set aside by the Master and the applicant took no further steps in bankruptcy.

[15] On 10 December 2013 the Taxing Master taxed costs in respect of the construction summons which was heard by Girvan LJ No: 09/130460 in the sum of £11,749.98 and taxed the appeal costs from the decision of Girvan LJ in the sum of £10,951.45.

[16] On 28 February 2014 the applicant brought the instant proceedings. On 9 January 2015 Deeny J deemed service good on the second, third and fourth respondents. Mrs Moffat appealed the decision deeming service good. On 17 September 2015 the Court of Appeal dismissed the appeal and again condemned her in costs.

[17] On 23 November 2016 Horner J dismissed the 1979 Order claim on a preliminary point and made an order for costs against Mrs Moffat. He further dismissed the constructive trust claim and again made a costs order against Mrs Moffat in favour of the applicant.

[18] The costs' orders made by Horner J and the Court of Appeal on 17 September 2015 have not yet been taxed.

### **The Assignment**

[19] On 16 December 2011 Mrs Moffat instructed Harte Coyle Collins, Solicitors, to transfer the premises to her three children. On 19 December 2011 her solicitors advised her that as there was a mortgage on the premises the mortgagee, Halifax, would have to agree to the transfer to the children and that the children would need to be joined to the mortgage. In the alternative they advised the mortgage could be "cleared off". Mrs Moffat said she would contact them after speaking to the mortgagee.

[20] On 31 January 2012 the mortgage was paid off in full by the third respondent. On 7 February 2012 Mrs Moffat advised her solicitors that the mortgage was now cleared and instructed them to transfer the premises to her three children in equal shares as tenants in common. On 19 April 2012 she left the title deeds of the premises in the solicitor's office.

[21] On 31 May 2012 the assignment was sent to the second respondent for signature. On 31 October 2012 Mrs Moffat then brought the signed assignment to her solicitors.

[22] By the assignment dated 31 October 2012 Mrs Moffat assigned all her share and interest in the premises to her three children, the second, third and fourth respondents, in equal shares in consideration of “ natural love and affection”, subject to a right of residence for her to reside at the premises for her lifetime. The second, third and fourth respondents covenanted to pay the ground rent and to indemnify Mrs Moffat in respect of any breach of the covenants contained in the lease.

[23] The transfer was lodged in the Land Registry on 30 January 2013 and thereafter registered on 18 September 2013.

### **The relevant legislation**

[24] The relevant provisions of the Insolvency (Northern Ireland) Order 1989 (“the Insolvency Order”) are Articles 367-369 which provide as follows:

“Transactions defrauding creditors

367. –(1) This Article relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if –

- (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;**
- (b) he enters into a transaction with the other in consideration of marriage ...; or**
- (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.**

(2) Where a person has entered into such a transaction, the High Court may, if satisfied as mentioned in paragraph (3), make such order as it thinks fit for –

- (a) restoring the position to what it would have been if the transaction had not been entered into, and**
- (b) protecting the interests of persons who are victims of the transaction.**

(3) In the case of a person entering into such a transaction, an order shall only be made if the High Court is satisfied that it was entered into by him for the purpose –

- (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
- (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

(4) In relation to a transaction at an undervalue, references in this Article and Article 368 to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it ...”

Article 368 provides as follows:

**“Those who may apply for an order under Article 367**

368. –(1) An application for an order under Article 367 shall not be made in relation to a transaction except –

- (a) in a case where the debtor has been adjudged bankrupt or is a body corporate which is being wound up ...;
- (b) in a case where a victim of the transaction is bound by a voluntary arrangement ...; or
- (c) in any other case, by a victim of the transaction.

...”

Article 369 provides:

**“Provision which may be made by order under Article 367**

369. –(1) Without prejudice to the generality of Article 367, an order made under that Article with respect to a transaction may (subject as follows) –

- (a) require any property transferred as part of the transaction to be vested in any person ...;
- (b) require any property to be so vested if it represents, in any person's hands, the application either of the proceeds of sale of property so transferred or of money so transferred;
- (c) release or discharge (in whole or in part) any security given by the debtor;
- (d) require any person to pay to any other person in respect of benefits received from the debtor such sums as the High Court may direct;
- (e) provide for any surety or guarantor whose obligations to any person were released or discharged (in whole or in part) under the transaction to be under such new or revived obligations as the High Court thinks appropriate;
- (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order ..."

### Legal Issues

[25] Four questions arise from the statutory provisions:

- (i) Does Article 367 apply outside the context of an actual or threatened insolvency?
- (ii) What constitutes a transaction at an undervalue?
- (iii) What is a prescribed purpose?
- (iv) What remedies are available to the court?

### Question 1 - Applicability of Article 367

[26] Article 367 is contained within the Insolvency Order, which is part of a statutory scheme introduced to reform and update the law in Northern Ireland in respect of corporate and personal insolvency. It is accepted by all the parties that there is no formal insolvency in the present case.

[27] A statutory demand was originally issued but it was set aside as in accordance with the principle in *Trudex v Todd* [2019], an untaxed solicitor's Bill of

Costs cannot found a statutory demand. Although the solicitor's costs have now been taxed and therefore amount to a liquidated sum, it appears that it was stated on the applicant's behalf that he would not pursue his unpaid costs by way of bankruptcy. Hence, this is not a case of threatened bankruptcy.

[28] Both Mr McEwen and Mr Gowdy submitted that notwithstanding the lack of actual or threatened bankruptcy the provisions of Article 367-369 nonetheless applied.

[29] I initially expressed some reservations about the applicability of provisions in the Insolvency Order to a scenario where there was no actual or threatened insolvency. I am grateful to all counsel and in particular to Mr Gowdy who in his role as *amicus curiae*, conducted a comprehensive research in respect of this question and provided detailed submissions to the court which were of much assistance.

[30] Whilst the Insolvency Order is legislation primarily geared towards the insolvency process I nonetheless consider that the provisions set out in Articles 367-369 apply in circumstances where there is no actual or threatened insolvency. I do so for the following reasons.

[31] Firstly, the source of the Insolvency Order and the history of the predecessor of Article 367 supports the view that Article 367 applies in circumstances where there is no actual or threatened insolvency.

[32] There were several provisions in our law which pre-date the 1989 Order which were designed to prevent a debtor putting his assets beyond the reach of his creditors. One such provision was Section 11 of the Conveyancing Act (Ireland) 1634 which provided that any conveyance of property with the intent to defraud creditors was void as against any person prejudiced. In *Murphy v Abraham* [1864] 55 IR Ch R 371 and in *Re Kelleher* [1911] 2 IR 1 the court held that it was not necessary that the settler be insolvent when the settlement was made and an intention to defraud *future* and even only *possible creditors* was enough for the legislation to apply.

[33] This provision in the 1634 Act has now been replaced by Article 367 of the Insolvency Order. I am therefore satisfied that Parliament intended that Article 367 was to apply to transfers even when there was no actual or threatened insolvency.

[34] Secondly, I consider that the language used in Articles 367-369 is very broad in its scope and supports the view that it extends beyond scenarios where there is an actual or threatened insolvency. In particular, Article 367(1) refers to "transactions entered into at an undervalue" and Article 367(3) refers to transactions entered into with the purpose of putting assets beyond reach. Neither provision places any limitation on its reach to cases of actual or threatened insolvency.

[35] Whilst this in and of itself is of limited weight given that these provisions are found within insolvency legislation nonetheless I consider the width of the



provisions is supportive of the conclusion that they apply outside insolvency situations.

[36] Thirdly, I find that the structure of the Insolvency Order supports the view that Article 369 extends beyond insolvency situations. The Insolvency Order contains within its body bespoke anti-avoidance provisions which permit transactions at an undervalue to be set aside if they occurred within a certain time period without the need to prove intention. In contrast Articles 367 to 369 are contained within the Miscellaneous section of the Order. I consider the fact that Parliament put other anti-avoidance provisions within the Insolvency Order must therefore mean that Article 367 has a broader scope than these other bespoke provisions.

[37] Fourthly, there are dicta in a number of English Court of Appeal decisions that the absence of actual or threatened insolvency is not a bar to the Court's jurisdiction. In *BTI 2014 LLC v Sequana SA* [2019] 2 All ER 784 at [29] the court held:

“Section 423 (the English equivalent to Article 367) ... is a wide-ranging provision designed to protect actual and potential creditors where a debtor takes steps falling within the section for the purpose of putting assets beyond their reach or otherwise prejudicing their interests. Unlike other provisions of the Insolvency Act 1986, proceedings under it are not confined to formal insolvency proceedings but may be brought at any time by any actual or potential creditor who claims to have been prejudiced. ... Although enacted in a new form in the Insolvency Act, the cause of action has a venerable history, going back to the *actio pauliana* in Roman law (see *The Institutes of Justinian* IV.VI.6) and to the Statute of Elizabeth 1571 in English law. It was re-enacted in section 172 of the Law of Property Act 1925 before being replaced by section 423.”

[38] Further, in *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981 the Court of Appeal held at paragraph [22]:

“Section 423 plays an important role in insolvency law. It can moreover apply even though the debtor is not in a formal insolvency.”

[39] Similarly, in *B v IB* [2013] EWCA 3755 Parker J held at paragraph [50]:

“The remedy is meant to be a wide-ranging anti-avoidance remedy. ... it is not the existence of

insolvency but the existence of debt which triggers the remedy.”

[40] I am therefore satisfied that Article 367 is a freestanding remedy and is applicable even though there is no actual or threatened insolvency.

[41] Initially I had some concerns regarding the reach of Article 367, but as noted by Arden LJ in *Hashmi* at paragraph 22, this provision is a carefully calibrated section which contains significant checks and balances. In particular it requires that the transaction must be at an “undervalue” and that it must be for a “prescribed purpose”. Further, the provision affords the court a discretion in relation to what order, if any, it can make. I consider that these checks and balances significantly temper the otherwise very wide reach of this provision.

### **Question 2 - What is a transaction at an undervalue?**

[42] Article 367 provides that a person enters into a transaction with another person at an undervalue if:

- “(a) the transaction is one for no consideration;
- (b) the transaction is in consideration of marriage/civil partnership; or
- (c) the consideration provided by the counterparty is significantly less than the value of this consideration provided by the debtor.”

[43] In assessing “consideration” the court can in appropriate cases consider a number of transactions as a single composite transaction. In *Feakins v DEFRA* [2005] EWCA Civ 1513 the court held at paragraph [78] that:

“In some cases it may be appropriate to treat a single step in a series of linked dealings as the relevant 'transaction'; in others it may not.”

The burden of proof rests upon the applicant to prove that the transfer was at an undervalue.

### **Question 3 - What is a prescribed purpose?**

[44] Article 367(3) provides that the court must be satisfied that the transaction was entered into by the person for the purpose:

- “(a) of putting assets beyond the reach of a person who is making, or may at some time, make a claim against him; or
- (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.”

[45] In determining the purpose of a person entering into a transaction the court looks at his subjective intention, that is, what he aimed to achieve rather than simply the result of the transaction.

[46] In *Hashmi*, Arden LJ acknowledged that a debtor can have more than one purpose in carrying out a transaction and in such circumstances, as Simon Brown LJ pithily stated at paragraph [39]:

“The question the court has to ask is “can the court be satisfied that a substantial purpose of the debtor’s transaction was (putting it in shorthand) to escape his liabilities?”

[47] In non-insolvency cases the authorities show that the court applies a strict interpretation of intention. In *Re Kelleher* for example where the writ was issued after the voluntary transfer was executed the Lord Chancellor held:

“This was an absolutely imaginary action. To suggest that it could have been in the mind of the bankrupt and his wife to defeat such an action is absurd. They never dreamt of any intended action ...”

[48] In that case, where there was no bankruptcy or threat of bankruptcy the court refused to imply a fraud.

#### **Question 4 - What orders can the court make?**

[49] Article 367(2) states that the court “may” make such order as it thinks fit for:

- (a) restoring the position to what it would have been if the transaction had not been entered into; and
- (b) protecting the interests of persons who are victims of the transaction.

[50] Article 369 sets out the types of orders the court can make.

[51] Article 367(2) is couched in discretionary terms. Therefore the court has a discretion in relation to what order it makes. Further I consider that the court has a

discretion to make no order even in circumstances where the requirements of Article 367 are made out. In *Re Brown* [2008] Ch 357 the court held that in the context of setting aside a transaction at an undervalue after insolvency the court would only refuse to set aside the transaction when the requirements were made out in exceptional circumstances where justice so required. In *Re Brown* the relevant provision provided that the court “shall make such order as it sees fit.” Article 367(2) however is couched in more discretionary terms as it refers to “may” make such order as it thinks fit. Accordingly, I consider that the court’s discretion to make no order is not limited to exceptional cases where justice so requires. Rather I consider the court has a discretion to make no order if it considers the debtor has made out grounds of substance which justify the making of no order.

### **The Evidence**

[52] The application was grounded on the affidavit of the applicant sworn on 28 February 2014. The applicant refers to the assignment, the court orders awarding him costs against Mrs Moffat and the orders for taxation of his costs. The applicant submits that the requirements of Article 367 are made out as the assignment of the premises was for nil consideration and it was executed after the appeal was dismissed by the Court of Appeal. In such circumstances the applicant submits that the court should draw the inference that the assignment was carried out for the sole purpose of putting assets beyond his reach.

[53] Mrs Moffat filed replying affidavits on 26 March 2014 and 23 June 2016. In addition she filed a large bundle of papers with the court. On 30 January 2020 Mrs Moffat made a number of oral submissions to the court in response to the applicant’s case. She was invited to give this evidence on oath but refused to do so after being given appropriate warnings about the weight the court would attach to such unsworn evidence.

[54] In her affidavit dated 26 March 2014 she exhibited a document in which she described the third respondent’s payment of £10,000 mortgage as a Christmas gift given to enable her to have a mortgage free retirement.

[55] In her affidavit sworn on 23 June 2016 Mrs Moffat stated that the background to the assignment of the premises to her children was five years of harassment from two property developers which culminated in a number of legal disputes including an application for a civil injunction in 2011. On 16 December 2011 Mrs Moffat attended her solicitors and instructed them to transfer the premises into the names of her children. After this initial attendance the third respondent gifted her the sum of £10,000 which enabled her to pay off the existing mortgage on the premises. Thereafter, Mrs Moffat left the title deeds with her solicitor and they drafted the necessary transfer. It took some time for this to be executed by her children as they all lived outside the jurisdiction. After the assignment was duly executed it was delivered by her to her solicitors on 31 October 2012 and was registered thereafter. Mrs Moffat avers in her affidavit that she transferred the premises to benefit herself

and her family and that she had a right to do so in terms of her right to family and private life.

[56] In a document dated 27 June 2016 referred to as “Associated documents and exhibits of second, third and fourth respondents”, the second, third and fourth respondents state that the third respondent contributed to household expenses in respect of the premises from 2007 to 2012. In addition, the fourth respondent applied for a renovation grant and she and third respondent paid the associated fees. The second and third respondents also dealt with the rectification of title and had dealings with the Land and Property Services in this regard.

[57] In her unsworn evidence to the court Mrs Moffat stated that she transferred the premises to her children as the house needed renovation. In 2006 Belfast City Council advised that the house was not fit for human habitation. Mrs Moffat stated she was on low income and her family supported her financially. When her mother died in 2007 she believed she would get money which would enable her to carry out the necessary works of repair to the premises. When her claim on her mother’s estate was unsuccessful she had no money to carry out the necessary works of repair and renovation. At this stage her daughter, Meabh, the fourth respondent did all the paperwork to obtain a Housing Executive grant and dealt with the developers with whom Mrs Moffat had been in dispute. Mrs Moffat’s evidence in summary was that she decided to transfer the premises to her children because she wanted to benefit her children; she was not able financially to carry out the necessary works of repair to the house; she wished to retire and live in the house; she was being harassed by developers; she wanted her children to come back to the family home and she therefore wished to give them an interest in the family property.

[58] Mrs Moffat repeatedly advised the court that she was not a “debtor” and had not lost the case against her brother and that she had no liability to him. In an email to the court dated 7 October 2020 she stated:

“The judge also made a comment about the case in my mother and father’s farm that I was not successful and that case is now not relevant. I was successful as I explained on 30 January ... I can legally dispute those costs because the judge said that there had been illegality.”

[59] In addition to the affidavits and her unsworn evidence and submissions to the court Mrs Moffat filed a large volume of papers with the court over the course of the proceedings. After considering these papers I find that they contain a large number of historical documents. The voluminous correspondence and statements filed focus on a number of irrelevant matters. Consequently the additional papers do not contain any additional information which I consider advances Mrs Moffat’s case or which are of assistance to the applicant in prosecuting his application. Accordingly,

I do not intend to rely on any of the additional documents in reaching my determination save the email dated 7 October 2020.

## **Consideration**

### **Question 1 - Was the assignment a transaction at an undervalue?**

[60] The applicant must establish that the consideration is nil or significantly less than its true value. The assignment was made in consideration of “natural love and affection”. This is not valuable consideration.

[61] Prior to the assignment being effected however the third respondent separately paid off the mortgage of £10,000 on the premises. The court must therefore determine whether the repayment of the mortgage was a separate and discreet transaction or whether it was a step in the larger transaction of the assignment of the premises.

[62] I find that the repayment of the mortgage was a step in the single composite transaction of the assignment of the premises. I do so because of the chronology of events. As appears from the chronology provided by her solicitors, Mrs Moffat attended their offices on 16 December 2011 requesting an appointment in relation to the transfer of the premises into her children’s names. On 19 December 2011 she told her solicitor that there was a mortgage on the premises. The solicitor advised that the mortgage would have to be “cleared off” otherwise the children would need to be joined to the mortgage deed. On 7 February 2012 she confirmed with her solicitor that the mortgage was now paid off. I am satisfied the mortgage was redeemed so that the transfer could be effected without joining the children to the mortgage and therefore I consider that the redemption of the mortgage was the initial step taken to effect the assignment of the premises. Consequently I find that the redemption of the mortgage formed part of one single composite transaction, namely the assignment of the premises. Accordingly I am satisfied that there was consideration of £10,000 for the assignment.

[63] In these circumstances the second question which arises for determination is whether the transfer was for a consideration significantly less than the true value of the premises.

[64] The only evidence of valuation before the court was a valuation handed in under the Civil Evidence Order which was a “drive-by” valuation of £112,000 as of 2012. When Mrs Moffat transferred her interest in the premises to her children she reserved a right of residence for herself. The valuation provided to the court makes no deduction for the existence of a right of residence. I consider that the value of the premises with the reservation of a right of residence would be less than full value as the owner of such premises is restricted in his ability to sell, lease or mortgage the premises. Notwithstanding the lack of a valuation which takes account of the right of residence and being cognisant of the fact that the burden of proof is on the

applicant to prove that the consideration is significantly less than its true value, I nonetheless consider that the consideration of £10,000 is so significantly less than the full value of the premises, that I am satisfied that this was a transaction at an undervalue.

## **Question 2 - Was the assignment entered into for a prescribed purpose?**

[65] The burden of proof rests on the applicant to prove that Mrs Moffat had the subjective intention of putting assets beyond his reach or otherwise prejudicing his interests.

[66] Whilst the test of intention is subjective the court needs to carefully consider all the evidence and make appropriate inferences from the objective facts. As the Lord Chancellor stated in *Re Kelleher*:

“I admit that it is the law if there be existing creditors whose debts are due and a voluntary conveyance is made by the debtor which does not leave him the means of paying them, the law will presume an intent to defeat and delay them ...”

[67] Mr McEwen submitted that all the key actions taken by Mrs Moffat in respect of the assignment were carried out by her at a time when she had lost the case and knew that she had to pay costs. Further, he indicated that the transaction took place after the Court of Appeal had heard the case. Accordingly, he submitted that she executed the assignment at a time when she knew that she was liable for costs and that the assignment would leave her without the means to pay the litigation costs and accordingly the court should infer that she did so with the intent to put assets beyond the reach of her creditors. He further submitted that it was only in her later affidavit that Mrs Moffat sought to set out reasons establishing a purpose other than one of defrauding creditors.

[68] In her evidence Mrs Moffat set out a number of reasons why she transferred the premises to her children. In particular, she stated her purpose was to benefit her children as she wanted them to be able to return to the family home in the future. The transfer also benefited her in a number of ways. She was relieved of the cost and burden of carrying out necessary works of repairs to the premises; applying for grants and working with builders. As she was no longer the owner of the premises it also meant that she could be protected from harassment by developers. At the same time the transfer provided her with the benefit of a right of residence in the premises and therefore she could enjoy a mortgage free retirement in premises which were now fit for human habitation.

[69] Mrs Moffat presented as very combative. She frequently shouted in court and at times was disrespectful to the court and made abusive comments about the court

and counsel. As a result on a number of occasions she had to be asked to leave the court. Nonetheless, taking into account and making allowances for her emotional involvement in the case; the fact that she was a personal litigant and the fact this case involved her home, I considered her to be an honest, albeit at times an irrational witness.

[70] I reject Mr McEwen's submission that I should infer Mrs Moffat's intention was to defraud creditors. I do so because I find, even though the effect of the assignment was to prejudice the applicant's interests, this was not the subjective intention of Mrs Moffat when she effected the assignment.

[71] I accept Mrs Moffat's evidence that she had a number of purposes in transferring the premises to her children. I accept that one purpose was to ensure that the premises were repaired which would thereby enable her to remain in the premises for her life and in the future would mean that the children could return to live in the family home. In addition, I accept her evidence that another purpose in carrying out the transfer was to relieve her from the stress of dealing with builders and harassment from developers, as she was no longer the owner of the home.

[72] I am further satisfied that the signed transfer was executed at a time when there was no insolvency or even threatened insolvency. Mrs Moffat has been successful in setting aside the applicant's statutory demand in respect of costs and had been advised that the applicant was not pursuing the costs in bankruptcy proceedings. In these circumstances I am satisfied that she genuinely believed that she had no creditors and therefore when she carried out the assignment she was not seeking to put her assets beyond the reach of the applicant. Further, I am satisfied that the transfer was carried out at a time when the appeal was pending. Liability therefore remained very much in dispute. I also find that Mrs Moffat believed that she was not liable for costs of the litigation and that she had been successful in her case. This was something which she repeatedly and persistently stated in court; in her submissions and correspondence as typified by the email dated 7 October 2020. Even if this belief was irrational I find that it was genuinely held by Mrs Moffat and in these circumstances there is no basis for an inference that she entered into the assignment to defraud or prejudice the applicant even though this was the consequence of the assignment. I am therefore satisfied that her intention in transferring the property was not to put assets beyond the reach of the applicant. Accordingly, I am satisfied that she did not have the necessary prescribed purpose.

[73] If I am wrong in this finding and Mrs Moffat did have the prescribed purpose in executing the assignment I would make no order for the following reasons:

- (a) This is a case which is far removed from one of insolvency or threatened insolvency. Mrs Moffat had succeeded in setting aside the statutory demand which related to the litigation costs and she had been assured that the applicant was not pursuing her by way of bankruptcy. In such circumstances



I am quite satisfied that it did not enter into her mind when she was transferring the premises that she was thereby defrauding creditors.

- (b) I consider that it is just not to make an order in this case because of the age, health and personal circumstances of Mrs Moffat and also because the assignment dealt with her home rather than investment property.

[72] Accordingly, I would have been satisfied that there are grounds of substance which would have justified making no order in this case in any event.

### **Conclusion**

[73] For the reasons set out above I dismiss the application. I will hear the parties on the issue of costs.