

THE HIGH COURT

2008 8054 P

BETWEEN

ADRIAN DALY, DECLAN GUING AND FRANK LAWLOR

PLAINTIFFS

AND

GERARD KILLALLY AND RICHARD CONNORS

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on 27th day of March, 2009

Introduction

The first defendant (Mr. Killally) seeks the discharge or variation of a Mareva type injunction granted against him on 20th February, 2009. It restrained him and his co-defendant from disposing of assets so as to reduce their value to a sum below €8m. Mr. Killally's co-defendant has since had that order varied so as to permit him to utilise funds in two bank accounts and his salary as a national school teacher.

The Proceedings

These proceedings arise from four partnerships of which Mr. Killally was allegedly a member. The plaintiffs allege that in breach of his obligations as a partner he made secret profits and thus unjustly enriched himself at the expense of the plaintiffs. In response to interrogatories, Mr. Killally admitted that he did indeed make secret profits in respect of two of those partnerships. A like admission was made by his co-defendant.

As the making of a secret profit is wholly inconsistent with the notion of partnership, the plaintiffs succeeded in obtaining judgment against the defendants for breach of their partnership obligations. Mr. Connors did not object to judgment being entered whilst Mr. Killally did so but unsuccessfully. Damages in respect of such breaches will be assessed at a later date.

Variation

The courts have long recognised that a Mareva injunction has the ability to cause considerable hardship. Thus, it is well settled that a court may vary such an injunction in order to allow access to funds to discharge ordinary living expenses and legal costs.

I had to consider such jurisdiction in the case of *Director of Public Prosecutions v. E.H.* (Unreported, ex tempore, 22nd April, 1997). There I followed the approach of Robert Goff J. (as he then was) in *A. & Anor v. C. & Ors* [1981] 2 AER 126. That judge held that:-

"Although the court had jurisdiction to qualify a Mareva injunction where the defendant satisfied the court that assets subject to the injunction were required for a purpose which did not conflict with the policy underlying the Mareva jurisdiction, in order to satisfy that burden the defendant had to go further than merely to state that he owed money to someone and had to show that he did not have any other assets available out of which the debt would be paid. Since the defendants had failed to adduce evidence to show that they had no other assets out of which they could pay the legal costs, their application was dismissed."

The plaintiffs contend that Mr. Killally has not reached the appropriate threshold of proof in this case and that accordingly his application to vary the injunction should be dismissed.

Before considering that I ought to point out that the initial approach of Mr. Killally is to ask the court to lift the injunction in its entirety and instead to substitute a series of undertakings which he proffered in lieu of it. The plaintiffs are not happy to accept such undertakings and indeed neither am I. There are two principal reasons for that.

First, whilst an undertaking to the court binds Mr. Killally as if it were a court order it is not binding on any third parties who might have notice of it. From the evidence that I have heard from Mr. Killally, there are many financial institutions to whom he is indebted who would not be bound by any undertaking which he might proffer. It is desirable that they should be bound. Second, the making of a secret profit by a partner involves furtive behaviour of a dishonest hue. It is therefore not surprising that the plaintiffs are sceptical about any undertaking which Mr. Killally might proffer.

The Evidence

Mr. Killally swore an affidavit in support of this application. The plaintiffs sought and were granted leave to cross examine him upon it. Mr. Killally's evidence bears out the accuracy of a comment made by his counsel to the effect that he *"enjoyed the good life when times were better"*.

He resides in a family home of some 7,000 – 8,000 sq ft with nine bedrooms. He contends that he has a monthly household expenditure of €15,767. He has invested in large numbers of properties, details of which I will turn to in a moment.

He does not appear to have acted wisely in relation to his fiscal affairs. To take a small example, midway through 2008 and despite the fact that he had closed his auctioneering offices at Tullamore and Portlaoise because of lack of business, he purchased a new Audi Q7 jeep.

His current position is that he has borrowing liabilities of some €10.7m. Judgment for €2.6m has already been entered against him by the Bank of Ireland. Thus, even without the complication of these proceedings, he has enormous debts in respect of numerous property investments.

These are not the only proceedings in which he is involved. He has a number of other actions pending or threatened against him.

Mr. Killally told me that his auctioneering business is effectively at an end. He is deriving no income from it and only one of his four offices remains open.

He has said on oath that he now has a single source of income namely an annual €17,038.64 gross which he earns as a county councillor.

To support a lifestyle which is now far beyond his means he has had assistance from his own family and from his wife's family. He has had of the order of €40,000 from his own family and between €60,000 and €80,000 from his wife's family.

Quite apart from these proceedings and the problems they present, it is clear that Mr. Killally will have to make a radical alteration to his lifestyle.

His Wife's Assets

On the evidence before me, his wife is the owner of nine cottages at Clara Road, Tullamore. These cottages produce an income of between €800 and €900 per month each. Two of them have become unoccupied in recent times.

The rental funds derived from these cottages are paid into two accounts which are in the joint names of Mr. Killally and his wife. They are account Nos 04645030 and 04645113 both of which are held with Allied Irish Bank. The properties are mortgaged in favour of National Irish Bank and I.I.B. Bank and the mortgages are serviced from these accounts. As a result of the injunction, these accounts have been frozen.

Given that these properties are not in the ownership of Mr. Killally and that if the mortgages are not serviced they may be repossessed by the financial institutions, I propose to permit the two named accounts to be utilised so as to service the mortgages in question and to allow any surplus to be used for the purpose of household expenses.

Mrs. Killally is the joint owner along with Mr. Killally of Nos 80, 81 and 82 J.K.L. Street, Edenderry, Co. Offaly. They also jointly own the back gardens to those three premises and also to 83 and 84 J.K.L. Street, Edenderry. 50% of these properties appear to be owned by Mrs. Killally and the proposal put to me is that they should be sold so as to provide for the legal expenses of Mr. Killally and to provide sums towards household expenses. Subject to certain safeguards I propose to accede to that application. Mrs. Killally has consented provided that 50% of the proceeds, which appear to be her entitlement, are paid to her.

Mr. Killally's Assets

Although not mentioned in the affidavit, he is the owner of a hotel site adjacent to the holiday cottages owned by his wife. The sum of €1.7m is owed to the Irish Nationwide Building Society in respect of that site.

He also owns property at French Church Street, Portarlinton from which a rental income in the sum of €1,000 per month is derived and is used to pay a mortgage with the Irish Permanent/Permanent TSB. Similarly, a property at 1 Dublin Road, Portlaoise is leased by an internet café at a rent in the sum of €1,500 per month. An account has been used to pay a mortgage with the Irish Permanent/Permanent TSB. I am asked to vary the injunction so as to permit the servicing of those two mortgages and associated insurance payments from account No. 01263068. I propose to accede to that application since it is in nobody's interest that these properties or the stream of income from them are jeopardised by the non-payment of a mortgage.

Mr. Killally also owns a property at 409 Longboat Quay, Dublin. That is apparently owned jointly with his wife. It produces a rental of €1,550 per month. It is subject to a mortgage with Permanent TSB and account No. 04645469 is utilised to service the mortgage. I propose to allow that mortgage to be serviced since it is not in anybody's interest that this property should be lost either.

I propose to make a similar order in respect of the properties at the Mews, Mountrath, Co. Laois and the two bedroom house at French Church Street, Portarlinton, Co. Offaly.

I propose to make a similar order in respect of the five bedroom house at Clara Road, Tullamore, Co. Offaly.

These are the properties and the accounts dealt with at paras. 13 and 14 of the affidavit. I make this order on the basis that it is not in the interest of either the defendant or the plaintiffs that assets be lost as a result of mortgages not being paid between now and the trial of this action on 30th June of this year.

Mr. Killally also appears to own a supermarket and commercial unit and two bedroom apartment at Main Street Rochford Bridge, Co. Westmeath. A rent of €2,000 per week was being paid but the tenant has now left. This property is mortgaged in favour of Ulster Bank Plc. The rental income is used to service the mortgage and if the properties are re-let, I see no reason why that should not continue.

There is also rental income of €120 per week in respect of 80 J.K.L. Street, Edenderry, Co. Offaly along with €200 per week in respect of office space rented at the same property. This property also appears to be mortgaged and I propose to take the same approach in respect of it.

From the above it is clear that I wish to insure that mortgaged property is not repossessed between now and the trial of the action by reason of a failure to discharge repayments on such property provided such repayments are derived exclusively from rental income. Thus I am freeing the accounts which service those mortgages as I have indicated.

Whilst I am permitting the sale of the premises at J.K.L. Street, Edenderry, I think it unlikely that they will be sold before this action comes to hearing on 30th June. If however they are I am directing that the proceeds of sale be paid into court in the first instance before any payment is made to Mr. and Mrs. Killally. Mr. Killally must have funds to enable him to

defend these proceedings and the proceeds of sale of those premises will be the source of such funds.

Household Expenses

From what I have heard, most of the income derived from the various properties is being used to service mortgages on them. If there is any surplus it can be used to go towards household expenses. Likewise the income derived by Mr. Killally as a county councillor amounting to €17,038.64 gross per annum may be similarly utilised.

I cannot accept that household expenses of the magnitude sought namely €15,767 per month is appropriate. Regardless of this litigation Mr. Killally must come to his senses and radically reduce his living standards to take account of his indebtedness. Between now and the trial of the action on 30th June I will vary the injunction so as to enable household monthly expenditure of €10,000. That sum should be enough to support himself, his wife (who is pregnant) and two children. Moneys can be derived from the county council income, any surplus between rental income on the properties which I have identified after the mortgage payments have been discharged and any other funds which may be available to Mr. Killally. I doubt if there are such funds and he will probably be reliant on family or friends in this regard.